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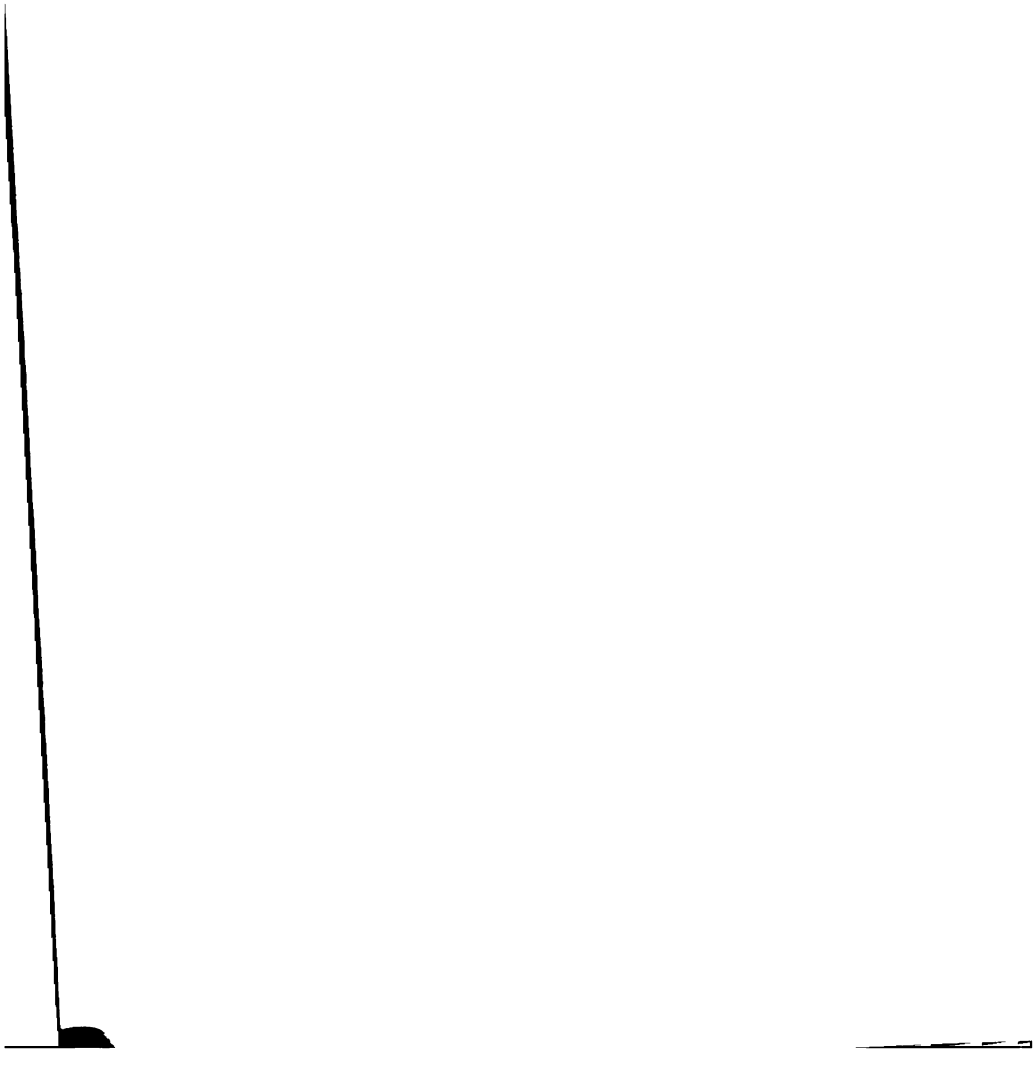
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NEW SERIES
BOOK 4

BURDETT A. RICH, HENRY P. FARNHAM,
EDITORS

1906

ROCHESTER, N. Y.
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
1906

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LAWYERS REPORTS

ANNOTATED.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

THE KENILWORTH.

HENRY A. ST. CLAIR, Master,
v.
CHARLES KRELLY, Libellant, Appt.

(C. C. A. —, 144 Fed. 376.)

Ship—injured seaman—treatment.

1. The owner of a vessel is not liable for the result of improper treatment of a sailor's fractured leg if the master concluded, in the exercise of his best judgment, that no fracture existed, which conclusion, under the circumstances, was not unreasonable, and the treatment afforded would have been neither negligent nor improper had the conclusion been correct.

Same—voluntary assistance.

2. The owner of a vessel is not liable to an injured seaman for expenditures made by others on his behalf which he is under no obligation to reimburse, in endeavoring to obviate the result of erroneous treatment by the master, after the cure had been effected, so far as the ordinary medical means extended.

(March 5, 1906.)

APPEAL by libellant from a decree of the District Court of the United States for the Eastern District of Pennsylvania in a proceeding to hold a vessel liable for injuries alleged to have resulted to libellant because of improper treatment afforded him by those in charge of the vessel. Affirmed.

The facts are stated in the opinion.

Argued before Acheson, Dallas, and Gray, Circuit Judges.

Mr. **J. H. Brinton** for appellant.

Mr. **Henry R. Edmunds**, for appellee:

A mere error of judgment on the part of the captain, although it may be a grave one, is not equivalent to negligence.

Petersen v. Swan, 21 Jones & S. 151; The Shenandoah, 134 Fed. 304.

Even if the master had discovered the

Subject Note.—Master's duty to provide medical assistance for his servant.

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1. Generally.

a. Slaves.

In a case decided while slavery existed in the United States we find a general in-

fracture, there is no evidence that the result would have been any different.

Peterson v. The Chandos, 4 Fed. 645.

The master was not guilty of negligence in not putting into port for medical assistance.

The Erskine M. Phelps, 65 C. C. A. 239, 131 Fed. 1; The Iroquois, 55 C. C. A. 497, 118 Fed. 1003; The Shenandoah and Peterson v. The Chandos, *supra*.

The appellant was treated on the vessel and at the hospitals without any expense whatever to himself, and since his discharge is able to move about and walk as well as he ever did. This puts an end to any liability on the part of the vessel or its owners.

The Osceola, 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483; The City of Alexandria, 17 Fed. 390; The Atlantic, Abb. Adm. 451, Fed. Cas. No. 620; Nevitt v. Clarke, Olcott, 316, Fed. Cas. No. 10,138; The Ben Flint, 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299.

Dallas, Circuit Judge, delivered the opinion of the court:

This is an appeal from a decree of the district court for the eastern district of Pennsylvania, dismissing a libel in admiralty which was filed by the appellant. 137 Fed. 1003, 139 Fed. 59. The libellant was employed as a seaman on the bark Kenilworth, when she shipped a heavy sea which knocked him down and broke his right leg above the knee. The libel alleged

struction to the effect that a master was bound to defray the medical expenses of his slave. Sweet Water Mfg. Co. v. Glover (1859) 29 Ga. 399. In this connection it is interesting to note that by § 217 of the old Babylonian Code of Hammurabi it was provided that the owner of a slave should give two shekels of silver to the physician who operated on him for a severe wound.

But in another case the obligation was stated in a qualified form. "If medical aid or other assistance be rendered to a slave in a case of necessity which does not admit of a previous application to the master, the person so rendering the assistance would probably be entitled to compensation from the master; and the law would raise an implied assumpsit on the ground that the master was legally bound to make the requisite provision for his slave." Dunbar v. Williams (1813) 10 Johns. 249.

b. Apprentices.

According to an American decision it is a duty of the master, resulting from the relation of master and apprentice, to provide his apprentice with medical attendance. Easley v. Craddock (1826) 4 Rand. (Va.) 423 (holding that the father of an apprentice was not liable for medical services, unless they had been rendered at his instance).

This doctrine is in accord with the ruling of Patteson, J., in an English nisi prius case, to the effect that, during the illness of an apprentice, his master is bound to provide him with proper medicines. Reg. v. Smith (1837) 8 Car. & P. 153. There the defendant was indicted for manslaughter for failing to provide his deceased apprentice with sufficient meat and drink, and the jury were told that they must render a verdict of acquittal if they thought the death was caused by want of proper medicines, inasmuch as there was no charge to that effect in the indictment.

But there is authority for saying that, in the absence of a special contract, the master is not liable for the medical expenses of an apprentice, except when they are incurred under the master's roof. Percival v. Nevill (1819) 1 Nott & M'C. 452 (Gantt, J., dissenting). In this case the court relied upon the English cases, which deny that a master is liable for the medical expenses of ordinary servants, and also upon the consideration that, as the contract embraced no stipulation that the master was subject to such liability, the rule, *Expressio unius est exclusio alterius*, was controlling. Neither of these grounds seems to be quite satisfactory. The relation of the master to an apprentice is so essentially different from that of a master to an ordinary servant that it is unsafe, if not absolutely improper, to use the decisions in regard to the latter relation as precedents indicative of the nature of the duties incident to the former relation. On the other hand, the maxim referred to would plainly be irrelevant if the duty asserted to exist is one which arises out of the relation itself.

c. Ordinary servants.

In some of the older reports we find statements which, if taken literally, might seem to imply that a master was subject to the duty of defraying the medical expenses of all classes of servants. But in the cases referred to, the master's liability to a third person who had attended or supplied medicines to a servant was not involved.

In King v. Hales-Owen (1718) 11 Mod. 278, where Pratt, Ch. J., remarked that "the master is to keep the servant in sickness and in health," the point actually decided was that the fact that an apprentice was suffering from a serious disease (scrofula) did not warrant the justice in dissolving the contract of apprenticeship.

In the three following cases the question was merely whether the service had been continuous for an entire year, so as to give the servant a right to a settlement.

"If the servant is taken ill, by the visitation of God, it is a condition incident to humanity, and is implied in all contracts. Therefore the master is bound to provide for and take care of the servant so taken

that her master and officers failed to give him due care and attention, and that, by reason of their failure to do so, the fractured ends of the bone overlapped each other and thus became knitted together, with the result that his right leg has been permanently shortened by about 2 inches; and that, if the master had afforded him reasonable and proper care in setting the fractured bone, his injuries would have been comparatively slight and of a temporary character. It further alleged that "the master, however, refused to believe that the bone was fractured, and therefore refused attention to the libellant, and also refused to put into the nearest port for medical attention;" and it averred that, "by reason of the premises, . . . he has been injured in a sum exceeding $5,000 for unnecessary pain and suffering endured, and to the endured expenses incident to proper medical attention and permanent lameness, all of which would have been avoided by the exercise of proper care and attention by the master."

Legal responsibility for negligence does not exist in the absence of a duty of care, and upon the scope of the correlative duty in any case the extent of the liability for negligence depends. In this case the duties which it is asserted were not discharged may be stated, in general terms, to be that of the shipowners to provide proper medical treatment and attendants for seamen suffering injury in the service of the ship, and that of the master, where a serious acci-

ill in his service." Rex v. Christchurch (1760) Burrow, Sett. Cas. 494.

"The master is bound to take care of his servant during illness, if the latter insist upon it." Grose, J., in King v. Sutton (1794) 5 T. R. 657.

If a farm servant is taken ill after the service has begun, the master is bound to support him, and cannot turn him away on that account. Rex v. Wintersett (1783) Cald. 298.

But the cases referred to involved merely the right of the servant to a settlement under the poor laws, and the liability of the master to third persons was not in question. It is apparent from other cases decided during the same century that the language quoted below cannot be regarded as indicative of the acceptance of the broad doctrine that a master is subject, by virtue of the relation created by a contract of hiring, to the obligation to provide medical assistance for his servant. All that the authorities which bear directly on the subject can fairly be said to show is that there was at one time a strong judicial tendency to adopt the rule that a master might be held liable for the medical expenses of a menial servant, but not for those of other servants.

In Newby v. Wiltshire (1785) 2 Esp. 739, Cald. 527, 4 Dougl. K. B. 284 (farm-servant injured by a fall from a wagon), Lord Mansfield said: In general, from humanity and kindness, a master should take care of his servants, but the question now is, What is the law? He decided that there was, in point of law, no action against the master to compel him to repay the parish for the cure of his servant.

The distinction between menial and other servants was not specifically referred to in the above case; but in Scarman v. Castell (1795) 1 Esp. 270, in which an action for medicine supplied to and medical attendance upon the defendant's servant was held to be maintainable, Lord Kenyon adopted the view of plaintiff's counsel, that the earlier case merely defined the extent of a master's obligations in respect to a servant in husbandry. He expressed the opinion that a master was obliged to provide for his servant in sickness and in health, and that, therefore, he was liable for medicine furnished to a servant while in his service. The servant was not at liberty to go abroad and contract debts for medicines; but while he was under the master's roof the master was under a legal as well as a moral obligation to provide the necessary medicines. In his argument at the bar, in Wennall v. Adney (1802) 3 Bos. & P. 247, Sergeant Bayley sought to cut down the effect of this decision by pointing out that the medical man, though not expressly employed by the defendant, might reasonably infer, from the circumstance of his being sent for to the defendant's house, that he was to be paid by the defendant. But this theory of a contract implied from the particular circumstances does not harmonize with the very general language of Lord Kenyon.

The doctrine applied in Scarman v. Castell, *supra*, was recognized in Simmons v. Wilmott (1800) 3 Esp. 93, where Lord Eldon laid it down in a charge to a jury that, if the servant had been one who lived under the roof of his master, his master would have been liable for his medical expenses.

But soon after commencement of the nineteenth century it was definitely laid down, as a rule applicable to all descriptions of servants except apprentices, that a general obligation to provide medical attendance is not an implied incident of a contract of hiring, and that the master is not bound to defray the expenses of such attendance upon a servant who falls sick or receives personal injuries in the course of the employment, unless he has expressly or impliedly agreed to do so.

In Wennall v. Adney, *supra*, it was laid down broadly that the effect of the case, as stated in the headnote, is that a master is not liable upon an implied assumpsit to pay for medical attendance on a servant who has met with an accident in his service. Lord Alvanley, Ch. J., said: "In this kind of question much may depend upon the nature of the contract entered into between the master and the servant. Sometimes a master engages to supply his servant with nec-

dent occurs, to exercise a reasonable judgment as to putting into the nearest available port; but whether or not these duties have in any instance been adequately discharged is to be determined with reference to the peculiar facts of the particular case. The Iroquois, 194 U. S. 240, 48 L. ed. 955, 24 Sup. Ct. Rep. 640.

It is not claimed that the Kenilworth was a vessel upon which a physician or surgeon should have been employed, and the fact that the master did not perceive that Krelly's leg was broken is of primary and controlling importance; for, if it had not been, neither the treatment which the master administered nor his omission to put into port could have been reasonably complained of. That he was mistaken as to the true nature of the injury is now perfectly plain, but we concur in the finding of the court below that the opinion upon which he acted, though erroneous, was honestly entertained by him. The surgeons who were called by the respective parties differed as to whether, by the exercise of proper care, he might not have discovered the fracture, but attentive examination of the record has fully satisfied us that the learned judge was right in holding, upon all the evidence, that he was "careful according to his light, and that his judgment upon what he saw found plenty of support, both at the time and afterward."

In considering whether he was or was not duly careful, we are bound, so far as

essary victuals, and it may undoubtedly be argued that necessary victuals mean such victuals as may suit the state of health or infirmity in which the servant happens to be; as, if a servant be in need of wine or victuals of that description, which are given by way of medicine. It is sufficient, however, to observe that previous to the case of Scarman v. Castell there is no authority in the law of England to be found which warrants the position contended for on the part of the plaintiff. I have no doubt whatever that parish officers are bound to assist where such accidents as these take place; and that the law will so far raise an implied contract against them as to enable any person who affords that immediate assistance which the necessity of the case usually requires to recover against them the amount of money expended." Heath, J., said: "I believe that the humanity of Lord Kenyon misled him when he adopted the doctrine upon which he decided the case of Scarman v. Castell. Probably at the moment it occurred to him that, if the master was not bound to provide medical assistance for his servant, the latter would be left wholly destitute: but I am perfectly sure it is more for the advantage of servants that the legal claim for such assistance should be against the parish officers, rather than against their masters; for the situation of many masters who are obliged to keep servants is not such as to enable them to afford sufficient assistance in cases of serious illness." Rooke, J., said: "The contract on the part of the servant is merely to serve; but on the part of the master it is varied by numberless stipulations, according to the inclinations of the contracting parties. I cannot think, however, that, without any stipulation to that effect, the master is liable to furnish his servant with medicine. . . . If the general principle contended for by the plaintiff were to be adopted as a rule of law, many persons who are obliged for the purposes of their trade to keep a number of servants would be unable to fulfil the duty imposed upon them by the law. It must be left to the humanity of every master to decide whether he will assist his servant according to his capacity or not." Chambre, J., said: "The obligation of the master to provide medical assistance for his servant, if any, must arise from contract. It cannot be contended that a master impliedly contracts to furnish his servant with all necessaries; for in some cases he neither engages to furnish clothes nor victuals; and if not, he is not bound to provide either. What has passed at nisi prius upon this subject has been somewhat hasty; and I think the rule there laid down would be very disadvantageous to the servants themselves, if it were adopted."

Under the English poor laws the medical expenses of a pauper servant are a charge upon the parish. See cases cited in the reporter's notes to Newby v. Wiltshire (1785) 4 Dougl. K. B. 284, and Watling v. Walters (1823) 1 Car. & P. 132.

It has been held that a partial emancipation of a daughter fourteen years of age by permitting her for three years thereafter to reside thirty miles away, controlling and using her own wages, without furnishing her with any money or means of support, will not exempt the father from liability for necessary services of a physician employed by her in sickness, where it does not appear that he intended to waive the right to exercise parental authority over her. Porter v. Powell (1890) 79 Iowa, 151, 7 L.R.A. 176, 18 Am. St. Rep. 353, 44 N. W. 295.

By nearly all the American courts the English doctrine has been adopted without any qualifications.

That a master is not, in the absence of some stipulation, under any legal obligation to furnish medical attendance for a servant who falls sick or is injured while engaged in his duties, is explicitly recognized in the following cases: Davis v. Forbes (1898) 171 Mass. 548, 47 L.R.A. 170, 51 N. E. 20; Sevier v. Birmingham, S. & T. River R. Co. (1890) 92 Ala. 258, 9 So. 405; Denver & R. G. R. Co. v. Iles (1898) 25 Colo. 19, 53 Pac. 222; Sweet Water Mfg. Co. v. Glover (1859) 29 Ga. 399; Toledo, W. & W. R. Co. v. Rodrigues (1868) 47 Ill. 188, 95 Am. Dec. 484; Vorass v. Rosenberry (1899) 85 Ill. App. 623; Pittsburgh C. C. &

possible, to put ourselves in his place. He was not required to have the skill or discernment of a surgeon, and the opinion which he formed if viewed in no clearer light than was afforded by such limited knowledge as may be justly attributed to him, does not appear to have been an unreasonable one, and the treatment which he adopted, when considered in connection and conformity with that opinion, was neither negligent nor improper. Nor was the injury, as it appeared to the master, of so serious a character as should have induced him, in the exercise of a reasonable judgment, to put into any of the intermediate ports to which counsel has suggested he might have resorted, but to none of which he could have taken his vessel without considerably delaying her voyage, and thereby injuriously affecting the interests of her owners. The Iroquois, *supra*.

The libel was amended as follows: "The libellant, in addition to that set forth in the libel, claims to recover for expenses which he has already incurred and may hereafter be obliged to incur in endeavoring to effect a cure, and for board and lodging during that time."

Upon its allowance of this amendment, the court permitted further testimony to be taken concerning the new matter which it introduced, and after the libellant had availed himself of this permission the learned judge reached the conclusion that the claim set up by the amendment should not be sustained. We think this conclu-

St. L. R. Co. v. Sullivan (1895) 141 Ind. 83, 27 L.R.A. 840, 50 Am. St. Rep. 313, 40 N. E. 138; Atlantic & P. R. Co. v. Reisner (1877) 18 Kan. 458; Union P.R. Co. v. Beatty (1886) 35 Kan. 265, 57 Am. Rep. 160, 10 Pac. 845; Clark v. Missouri P. R. Co. (1892) 48 Kan. 654, 29 Pac. 1138; Lithgow Mfg. Co. v. Samuel (1903) 24 Ky. L. Rep. 1590, 71 S. W. 906; Malone v. Robinson (1893; Miss.) 12 So. 709; Spelman v. Gold Coin Min. & Mill. Co. (1901) 26 Mont. 76, 55 L.R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597.

In Holmes v. Hutchinson (1833) Gilpin, 447, Fed. Cas. No. 6, 639, the court, in comparing the condition of seamen with other laborers, remarked that the latter are not only obliged, in case of sickness, accident, or other disability to maintain themselves and pay all the expense of nursing, medicine, and medical attendance, but that their wages, their only source of revenue, the only means by which they can provide for such expenditure, are stopped.

In South Carolina it is the duty of a railroad company, under Gen. Stat. § 1525, to notify the physician most accessible to the place of an accident occurring on its road by which employees are injured. Adkins v. Atlanta & C. Airline R. Co. (1887) 27 S. C. 71, 2 S. E. 849.

In Baltimore & O. R. Co. v. State (1874) 41 Md. 268, it was held that where a railway servant who, under the rules of the company, had no right to claim compensation "when disabled by sickness or other cause," had been injured in the course of his duties, the duty of the company to take care of him in his capacity as a servant ceased when he had been conveyed to the nearest place where medical attendance was procurable, and there left in charge of a physician. In respect to his subsequent transportation to a more distant point, his relation to the company was declared to be that of a stranger in a like condition, and his rights to be determinable with reference to the rule that no obligation rests upon railway companies to furnish physicians, nurses, or other attendants for sick and disabled persons who may choose to travel in their conveyances, the duty to carry safely being no greater in the case of such persons than in the case of those who are in good health.

But in Indiana the doctrine has been propounded that, although in ordinary cases a railway company is not subject to the obligation to furnish medical assistance to its servants, unless it has agreed to do so, such an obligation should rest upon it "as extraordinary cases, where immediate medical or surgical assistance is imperatively required to save life or avoid further serious bodily injury." Ohio & M. R. Co. v. Early (1894) 141 Ind. 73, 28 L.R.A. 546, 40 N. E. 257. Similar language had been used in Terre Haute & I. R. Co. v. McMurray (1884) 98 Ind. 358, 49 Am. Rep. 752.

The rule imposing this obligation is justified by the consideration that where an "employee has, by unforeseen accident to him, while engaged in the line of his duty as such employee, been rendered helpless, the dictates of humanity, duty, and fair dealing would seem to demand that it should furnish medical assistance." Ohio & M. R. Co. v. Early, *supra*. There it was held that the conscious and deliberate choice of an injured employee while in possession of his mental faculties, of the time when, place where, and person by whom he will be treated, relieves the master of any liability for failure to provide other treatment, and that no liability on the part of a railroad company for failure to provide for an injured brakeman is established where the best medical treatment that could be obtained at the little town where he was injured was procured, and he was removed as soon as possible, with his intelligent and conscious consent, without any objection of the physicians who had attended him thus far, to another town where a place was provided for him and competent surgeons were awaiting him, but he insisted on being taken still further, to the town where he lived, but died soon after reaching the place, from loss of blood on the way. In this case the court remarked that the obligation is one which "arises out of strict necessity and urgent exigency, where immediate attention thereto is de-

sion was correct. In the case of The Osceola, 189 U. S. 175, 47 L. ed. 760, 23 Sup. Ct. Rep. 483, it was held that the vessel and her owners are liable, in case a seaman is wounded in the service of the ship, "to the extent of his maintenance and cure and to his wages, at least, so long as the voyage is continued." But, if it be assumed that the liability in this instance continued after the completion of the voyage, yet the claim in question, as shown by the proofs, is not, as was alleged, for expenses which the libellant had incurred and might incur "in endeavoring to effect a cure, and for board and lodging during that time," but is for expenditures made by others on his behalf, which he is under no obligation to reimburse, and which were made when the cure had been completed, at least so far as the ordinary medical means extend. As was said by Mr. Justice Story in Reed v. Canfield, 1 Sumn. 202, Fed. Cas. No. 11,641: "The seaman is to be cured at the expense of the ship of the sickness or injury sustained in the ship's service. It must be sustained by the party while in the ship's service; and he is not to receive any compensation or allowance for the effects of the injury. But so far, and so far only, as expenses are incurred in the cure, whether they are of a medical or other nature, for diet, lodging, nursing, or

manded in order to save life or prevent great injury. [It] the duty arises with the emergency and with it expires."

To the same general effect see Louisville, N. A. & C. R. Co. v. Smith (1889) 121 Ind. 353, 6 L.R.A. 320, 22 N. E. 775.

The standpoint of this court is also indicated by the following extract from the judgment delivered in Terre Haute & I. R. Co. v. McMurray, *supra*, where the company's liability was thus discussed: "Assuming, as we may justly do, that there are occasions when the exigency is so great and the necessity so pressing that the conductor stands temporarily as the representative of the company, with authority adequate to the urgent and immediate demands of the occasion, we inquire, What is such an emergency as will clothe him with this authority and put him in the position designated? Suppose that a locomotive is overturned upon its engineer, and he is in immediate danger of great bodily harm, would it not be competent for the conductor to hire a derrick, or a lifting apparatus, if one were near at hand, to lift the locomotive from the body of the engineer? Surely someone owes a duty to a man imperiled as an engineer would be in the case supposed, to release him from peril, and is there anyone upon whom this duty can be so justly put as upon his employer? The man must, in the case supposed, have assistance, and do not the plainest principles of justice require that the primary duty of yielding assistance should devolve upon the employer, rather than on strangers? An employer does not stand to his servants as a stranger; he owes them a duty. The cases all agree that some duty is owing from the master to the servant, but no case that we have been able to find defines the limits of this duty. Granting the existence of this general duty,—and no one will deny that such a duty does exist,—the inquiry is as to its character and extent. Suppose the axle of a car to break because of a defect, and a brakeman's leg to be mangled by the derailment consequent upon the breaking of the axle, and that he is in imminent danger of bleeding to death unless surgical aid is summoned at once; and suppose the accident to occur at a point where there is no station and when no officer superior to the conductor is present,—would not the conductor have authority to call a surgeon? Is there not a duty to the mangled man that someone must discharge? And if there be such a duty, who owes it, the employer, or a stranger? Humanity and justice unite in affirming that someone owes him this duty, since to assert the contrary is to affirm that upon no one rests the duty of calling aid that may save life. If we concede the existence of this general duty, then the further search is for the one who in justice owes the duty; and surely where the question comes between the employer and a stranger, the just rule must be, it rests upon the former."

The doctrine thus formulated has been strictly confined in its application to railway companies, which are regarded as occupying "a peculiar position with reference to such matters, exercising quasi-public functions, clothed with extraordinary privileges, carrying their employees necessarily to places remote from their homes, subjecting them to unusual hazards and dangers." Chaplin v. Freeland (1893) 7 Ind. App. 676, 34 N. E. 1008. In the preceding year the court of appeals had declined to determine whether or not the rule applied to private employers. Toledo, St. L. & K. C. R. Co. v. Mylott (1892) 6 Ind. App. 438, 33 N. E. 135.

At first sight it might appear that the adoption of this doctrine indicates a departure from the doctrine laid down in an earlier case, in which it was said that "railroads are under precisely the same obligation in respect to procuring medical and surgical aid for their employees as other employers under like circumstances, and the authority of a railroad employee is not different in that respect from the authority of one employed by any other corporation or person when placed in a like situation." Terre Haute & I. R. Co. v. Brown (1886) 107 Ind. 336, 8 N. E. 218. But in this passage the court was merely formulating a general rule applicable to ordinary cases, and not to those in which there is an emergency.

As the effect of this doctrine is that railway companies have not merely the power

other assistance, they are a charge on, and to be borne by, the ship. The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least, so far as the ordinary medical means extend, the owners are freed from all further liability. They are not, in any just sense, liable for consequential damages. The question, then, in all such cases, is what expenses have been virtually incurred for the cure, not what might, under other circumstances, be incurred. The owner is not to respond for charity actually administered by others, but for expenses. He is not to pay what may remunerate the sufferer for his losses, or what, in compassion or humanity, he might demand; but what the law has measured out as the limit of justice."

The decree of the District Court is affirmed.

Petition for writ of certiorari denied by Supreme Court of United States April 30, 1906.

to provide medical attendance in cases of emergency, it places the servant in a somewhat more favorable position than the more generally received doctrine which is discussed in *infra*, V. e.

The mere fact that the physical state of the servant which necessitates the medical expenses in question has been produced by conditions or occurrences betokening negligence on the master's part is not regarded as a sufficient reason for imposing on him larger obligations than he would have been subject to if the case had not involved that element. Davis v. Forbes (1898) 171 Mass. 548, 47 L.R.A. 170, 51 N. E. 20.

In cases where the master is liable to an action, although he "must answer to the servant in damages for all loss proximately resulting, including physicians' and surgeons' charges, yet the law does not require him to engage their services, or to pay them for performing the services; he may, if he chooses, employ physicians, surgeons, and nurses, and promise to pay them, and, of course, he would then be liable directly to those employed." Spelman v. Gold Coin Min. & Mill. Co. (1901) 26 Mont. 76, 55 L. R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597.

Similarly, in Chicago, B. & Q. R. Co. v. Howard (1895) 45 Neb. 570, 63 N. W. 872, the court seems to have based its decision that the defendant company was not liable for more than a judicious selection of the physician summoned by it upon the theory that, as the company had not been guilty of any negligence which contributed to the servant's injury, the employment of the physician was voluntary.

But a different theory was propounded in Lithgow Mfg. Co. v. Samuel (1903) 24 Ky. L. Rep. 1590, 71 S. W. 906, the effect of which is stated in *infra*, III. c, 1, (b).

But the question whether the injury was or was not due to the master's negligence has sometimes been regarded as an important element in determining the extent of an agent's authority to provide medical assistance. See *infra*, III. c, 1, (a).

II. Specific agreements to provide medical assistance.

The question whether the master has in a given case undertaken to provide medical assistance for a particular servant is one of fact, to be determined from a consideration of the whole evidence in the case. From the English decisions it would appear that the intention on the master's part to become responsible for the medical expenses of a menial servant may with propriety always be inferred by a jury where it is shown that he himself has called in his own physician to treat the servant.

In one nisi prius case it has been held that, if a menial servant falls ill, and a master calls in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there is a special contract between master and servant that he shall do so. Sellen v. Norman (1829) 4 Car. & P. 80, per Gaselee, J.

His representative in the management of his household had, without raising any objections, allowed the doctor, after he had in the first instance been called in by a member of the household, to go on treating the patient. Cooper v. Phillips (1831) 4 Car. & P. 581, per Taunton, J.

In that case, a nisi prius action, it was held that, where the father of a family lived at a distance from the place at which his children were, and put them under the protection of servants, the establishment being visited at frequent intervals by his wife, who was apparently intrusted with the general superintendence of the household, he might properly be found liable for the fees of a doctor called in by one of the servants to treat a wet nurse for an illness which resulted from suckling one of defendant's children, where the evidence showed that his wife knew of the surgeon's attendance, and expressed no disapprobation. The mere fact that he afterwards sent his own surgeon would not, under such circumstances, release him from liability.

On the other hand, it was held in the same case that where a servant who hurt her foot in getting over a gate called in a surgeon who was not the regular medical attendant of the family, without the knowledge of her master or mistress, the master was not liable to pay the surgeon's bill.

Those decisions seem to embody a doctrine somewhat more favorable to the medical attendant than that which has been applied in some American cases.

In one of these—Clark v. Waterman (1835) 7 Vt. 76, 29 Am. Dec. 150—it was held that a master was not necessarily liable, on an implied assumpsit, for medical attendance on a servant, even when he himself summoned the doctor, and that in order to warrant recovery against him it must be shown that there was a request by him in his own name, upon the credit of which the services were rendered, or else some subsequent act on his part from which it appears that he expected to pay for the services. The circumstances which were held to import liability on the master's part, and the extent to which the court intended to go in imposing such liability, will be apparent from the following passage from its opinion: "The employment or request to attend upon the patient was made and often repeated by the defendant, in person. Complaints of the inefficient practice of one of the plaintiffs, and an exchange for the other, like a man acting in his own business, and at last a virtual admission that it was his expectation to pay, by calling for the bill to lay before the town, 'to see if they would not assist him —this appears like an original employment by the defendant, and the plaintiffs making the charges directly against him is evidence that they so understood it. If these facts were such as it would have been proper, in action of assumpsit, to have left to the jury, then they were sufficient for the auditors to act upon. The other circumstances in the case, that the patient had been brought up by the defendant, and, although she had been three years out of her time, yet continued most of the time in his family, and 'in his employ, without contract or accounting,' renders it not improbable that he was willing to render her all needful aid in time of sickness, and that his intention was really such as his conduct naturally indicated. . . . We do not mean by this determination to intimate that a man who, by himself or another, happens to go for a doctor to attend a hired man, or maid, or sister, or friend in his house, is of course liable to pay the bill. In many, and perhaps most of these cases, the person going or sending might be regarded as a mere medium of intelligence that a physician was wanted; but where the proof in the case is sufficient, as we think it was in this case, to authorize the triers to find that the defendant intended, and gave the plaintiffs so to understand, that he was himself the employer, then the original credit was given to him; then he is liable upon general principles, and, it not being the debt of another, is not affected by the statute of frauds."

In another American case it was laid down broadly that there is no such duty resting on a railway company to care for an injured employee that any person without authority from the company may render the service and compel payment. To bind the company there must be an express and explicit request from a person who is empowered to act for it. Toledo, W. & W. R. Co. v. Rodrigues (1868) 47 Ill. 188, 95 Am. Dec. 484.

In another case it was denied that a mere request by a father of a physician to attend a child of full age who is sick at the father's house, but for whom he is not bound to provide, raised an implied promise on the father's part to pay the physician for his services. Rankin v. Beale (1897) 68 Mo. App. 325.

By the English truck act (1 & 2 Wm. IV. chap. 37, § 25) it is provided that a master may make deductions from a servant's wages in respect to medicines or medical attendance which he has agreed to supply.

A similar power is constantly exercised, without any express statutory authorization, and without any questions being raised as to its legality, by the employers who adopt regulations under which a small portion of the wages of their employees is withheld for the purpose of keeping it, in whole or in part, as a fund devoted to the maintenance of free hospitals at central points, and to the payment of the fees of such medical men as may be retained at other places. If an employer has undertaken to make arrangements upon this footing for the treatment of his injured servants, he is liable for any damages which are the proximate result of his refusal or negligent failure to perform his engagements. American Tin-Plate Co. v. Guy (1900) 25 Ind. App. 588, 58 N. E. 738. In this case the complaint, which alleged that the company's physician, although notified of the injury, failed to give the injured person the necessary treatment, was held to state a cause of action.

Where each employee of a railroad company on a certain division employed as much as four days in a month was required by the company to contribute to the maintenance and support of a hospital, and the employees making the payments had no voice in the management or control of the hospital except that superior employees gave to subordinates certificates of admission when they were sick or injured, plaintiff—an employee who was injured after being employed more than four days—was held to be entitled to admission to the hospital. The company therefore was pronounced liable for injury resulting from refusal of his foreman to give him a certificate entitling him to transportation and entrance to the hospital. Illinois C. R. Co. v. Gheen (1902) 112 Ky. 695, 66 S. W. 639, rehearing denied 68 S. W. 1087. It was laid down that, if plaintiff was entitled to admission to the hospital, he was entitled to the skilled surgical treatment and accommodations he would have received there, and also to board and transportation, and if the company refused to furnish these things it was liable for the cost thereof.

In a suit by an employee for breach of a contract by which, in consideration of fees deducted monthly from his wages, he was to have free medical treatment at a hospital, he was held to be entitled to dam-

ages for increased suffering due to the refusal of defendant's foreman to telegraph for a free pass to the hospital, as the evidence showed that it was his duty to have wired for it. Gulf, C. & S. F. R. Co. v. Harney (1899; Tex. Civ. App.) 54 S. W. 791.

In an action for breach of contract to furnish a railroad employee medical and hospital attention, plaintiff was held entitled to recover for both physical and mental suffering; but damages caused by his having walked from the place where he was taken sick to his home, by reason of his lack of funds to pay railroad fare and defendant's refusal to transport him, were held too remote to be recovered. Galveston, H. & S. A. R. Co. v. Rubio (1901; Tex. Civ. App.) 65 S. W. 1126.

As to the liability of an employer for the negligence of physicians and surgeons whom he engages, see *infra*, IV.

III. Power of employers to defray the medical expenses of their injured servants.

a. Generally.

In cases where the employer is an individual *sui juris*, and competent to enter into a valid contract of hiring, there is obviously no possible ground upon which his right to defray the medical expenses of his servant can be disputed. But the question whether a corporation—an artificial legal entity, organized and subsisting for certain definite objects—should be regarded as having an implied power to devote its funds to such a purpose, is less simple.

In England this question has not been directly determined. But as the doctrine has been distinctly recognized that, under some circumstances, certain agents of railway companies are invested with an implied authority to bind their principals by contracts for medical attendance on injured servants (Walker v. Great Western R. Co. [1867] L. R. 2 Exch. 228 [see *infra*, III. c. 1, (a)]; Langan v. Great Western R. Co. [1873] 30 L. T. N. S. 173 [see *infra*, III. c. 2, (a)]), and, as the plea that this use of the corporate property was entirely *ultra vires* was not put forward in the cases referred to, it may be assumed that in that country an expenditure of money for this purpose is conceded to be within the general powers of such companies.

In the United States, as will presently be shown, numerous decisions have been rendered which would justify a similar assumption for similar reasons. But the legality of such expenditures of money has also been categorically affirmed in cases in which it has been held that an express provision in the charter of a railway company is not necessary to enable it to incur expenses for medical attendance on its injured servants. Toledo, W. & W. R. Co. v. Rodrigues (1868) 47 Ill. 188, 95 Am. Dec. 484; Toledo, W. & W. R. Co. v. Prince (1869) 50 Ill. 26.

In one case the somewhat restricted rule was propounded, that the employment of a surgeon by a railway company in advance to render his services to employees in case of injury in the course of their employment, without salary or compensation other than the value of his services actually rendered, is not *ultra vires*. Bedford Belt R. Co. v. McDonald (1897) 17 Ind. App. 492, 50 Am. St. Rep. 172, 46 N. E. 1022. But it can scarcely be supposed that the court intended to suggest that there is a difference, as regards the extent of a railway company's powers, between cases where a medical man is employed before the need for his services arises, and those in which he is engaged after an accident.

The implication of authority in some railway agents to bind the company by contracts for medical attendance upon injured servants is declared in some cases to be justified by the consideration that "humanity, however, imposes upon the company engaged in such hazardous business a moral obligation, when a person in its employment, without fault on his part, is injured while rendering service, to provide such assistance as may be necessary to prevent loss of life or irreparable injury. This much is demanded by humanity, fair dealing, and the conservation of the interests of the company." Sevier v. Birmingham, S. & T. River R. Co. (1890) 92 Ala. 258, 9 So. 405.

The precise effect which is here attributed to the two elements by which "humanity," which at first is alone relied upon, is supplemented in the concluding sentence of this passage, is somewhat obscure. If the court intended to suggest that the "interests" of the company require "fair dealing" and "humanity," the standpoint is not a very lofty one.

The conception that the implied power of a railway company in this regard rests upon the existence of a moral obligation is also adverted to in Toledo, W. & W. R. Co. v. Rodrigues, *supra*, where it was laid down that, in order to bind a railway company, "there should at least be a request to perform the service. It is not such a duty resting on the company that any person, without authority from the company, may render the service and compel payment. The request should be express and explicit, and from a person empowered to act for the company." The fact that an employee had been disabled while in the employ of a railroad company, and in the discharge of his hazardous duties, was there held to be a sufficient consideration to support a promise by its authorized agent to pay for the nursing and medical attendance necessary to his cure.

In other cases an additional reason for assuming the existence of such a power has been found in the fact that the financial interests of the company may often be subserved by defraying the medical expenses of an employee.

In Atlantic & P. R. Co. v. Reisner (1877) 18 Kan. 458, the court said: "It is not unfrequent for railroad companies and other corporations to furnish board and medical attendance to employees disabled in the service of such companies, even when

the injuries are not the result of the negligence of the corporation. Such action, whether resulting from humane or selfish motives, is certainly to be commended; and no court would hold the contract of a railroad company duly entered into for such an object as *ultra vires* and incapable of being enforced."

In the later case of Union P. R. Co. v. Beatty (1886) 35 Kan. 265, 57 Am. Rep. 160, 10 Pac. 845, the same court reasoned as follows: "There is no legal obligation resting upon the company to provide medical or surgical care for those who have been injured in its service, but the grounds upon which the authority of the superintendent to make such contracts is inferred is that it is a reasonable thing for the company to provide for the care and cure of persons who are engaged in the hazardous employment of railroading. This risk is incurred by them while they are devoting their energies and labor to promote the interest of the company, and they are generally dependent upon the daily labor thus given for the support of themselves and families. Again, they are skilled in the particular branch of the service in which they are engaged, and their injury, to some extent, interferes with the business of the company, and retards the operation of the road. The company is therefore interested in the speedy cure of employees who have been disabled, and in their early resumption of the duties for which they have been specially trained."

See also Sevier v. Birmingham, S & T. River R. Co. *supra*.

The element of "interest" is viewed from a different standpoint in the cases cited *infra*, III. c, 1, (a).

The grounds upon which the implied power of a railway company to defray the medical expenses of its servants has in the cases so far cited been assumed to rest are manifestly inapplicable where it is a question of the legality of its undertaking, for profit, the business of furnishing and operating hospitals and supplying medical attendance to its servants. Such a business is undoubtedly beyond its chartered powers. Union P. R. Co. v. Artist (1894) 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365, per Sanborn, J., *arguendo*.

b. Exercise of this power by agents of individual employers.

On principle there appears to be no adequate reason why the powers which the general manager of the business of an individual may be presumed to possess in respect to binding his employer by a contract to pay for medical attendance on his subordinates should not be determined upon precisely the same footing as the powers of a similar functionary under a corporation. But in the only reported decision which bears upon the subject, a doctrine seems to be embodied which is less favorable to the medical attendant than that which is applied in the cases cited in the next section.

It has been held that the owner of a plantation was not liable for medical services rendered on the plantation under a contract with his manager, in the absence of authority on the latter's part, although he had in some instances furnished medical attendance for the hands on the plantation, and although he saw the physician while rendering such services, and did not object. Malone v. Robinson (1893; Miss.) 12 So. 709.

The theory that the powers of agents of individual employers in respect to providing medical attendance for injured servants are enlarged whenever a pressing emergency arises seems to have been rejected in the only relevant decision which the present writer has been able to find. Holmes v. McAllister (1900) 123 Mich. 493, 48 L. R. A. 396, 82 N. W. 220. Here the employer was held not liable for the services of a physician summoned by his foreman to attend an employee who had been injured by an accident in a laundry during the employer's absence. The cases relating to railway companies were distinguished by the court.

There is much difficulty, however, in accepting a doctrine the effect of which would be to exclude the servants of such an employer from the benefits of a principle which has, on grounds apparently quite satisfactory, been admitted as a controlling element in cases relating to railway companies. It is far from being manifest that the considerations which such cases have put forward as the foundation of that principle are not to be regarded as equally potent where the liability of an individual employer is in question. Humanity, fair dealing, the interests of the employer, the serious character of the dangers incident to the employment, the occasional impossibility of communicating with the employer promptly enough to procure his consent to arrangements which it may be necessary to make without delay, if the sufferer is to be saved from death or permanent physical disability,—to all these factors, so far as can be seen, the same weight should be ascribed whether the employer is a natural person or an artificial legal entity.

c. Exercise of this power by agents of corporations.

1. In cases where there is no special emergency.

(a) Railway companies.

It is unnecessary to cite authorities to show that, if the power to defray the medical expenses of a servant is conceded to any given company, the validity of a contract which involves the exercise of that power cannot be questioned if it has been made in due form by the directors acting in their official capacity. It is also indisputable that any contract relating to the medical care of a servant, which is not so improper and unreasonable that it mani-

fatly transcends the limits of any authority which can be fairly imputed to him, is binding upon the company, where it is made by an agent employed to supervise a department which is constituted for the very purpose of attending to such matters.

An employee who is managing the claim department, and who has control of the doctors on the line, to the extent of appointing them and giving them general directions as to the disposal and treatment of injured employees, has been declared to have authority to empower one of those doctors to hire a nurse for an injured servant. Bigham v. Chicago, M. & St. P. R. Co. (1890) 79 Iowa, 534, 44 N. W. 805.

But the extent to which such a contract should be deemed obligatory when entered into by an agent whose ostensible functions are primarily concerned with the operation of the road, or with the conduct of other portions of the company's commercial or financial affairs, is less easily determined. It seems permissible to lay it down that, if any agents at all to whom this description is applicable are to be regarded as possessing an implied power to provide medical attendance for servants, the power must necessarily be lodged in all agents who wield a large discretionary authority as respects the manner in which the whole business of the company, or an extensive department thereof, shall be carried on from day to day. It is apparently with reference to some such assumed principle as this that the courts have declared the company to be liable for the value of medical services rendered at the request of its president, vice president, secretary, and treasurer. Bedford Belt R. Co. v. McDonald (1897) 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022. It may be questioned however, whether this ruling, so far as it relates to the secretary and treasurer, is correct.

That a solicitor has no power to bind a railway company by a contract for medical attendance on a passenger was held in St. Louis, A. & T. R. Co. v. Hoover (1890) 53 Ark. 377, 13 S. W. 1092.

Walker v. Great Western R. Co. (1867) L. R. 2 Exch. 228, lays down the broad rule that a general manager has, as incident to his employment, authority to bind the company to pay for surgical attendance bestowed at his request on a servant of the company injured by an accident on its railway.

Louisville, E. & St. L. R. Co. v. McVay (1884) 98 Ind. 391, 49 Am. Rep. 770, holds that the courts will presume from the ordinary meaning of the term "general manager" that such an officer has the general direction and control of the affairs of the corporation, and authority to bind it by contracts for nursing, etc., of persons injured on the line of the railway.

Where an employee was described by a witness whose evidence was not refuted, as a "general agent," this term was deemed to be synonymous with "general manager," and as importing sufficient authority to enable him to bind the company by a contract for medical attendance upon an injured servant. Atlantic & P. R. Co. v. Reisner (1877) 18 Kan. 458.

In that case the court considered that a medical attendant "was not compelled to institute inquiry as to the moral or legal liability of the railroad company to take care of a disabled employee before receiving him into his hotel, after the general agent of the company had agreed that the company would pay for the board and service;" and a recovery was permitted where the agent's act had been confirmed by the company's general superintendent. Toledo, W. & W. R. Co. v. Rodrigues (1868) 47 Ill. 188, 95 Am. Dec. 484.

Sevier v. Birmingham, S. & T. River R. Co. (1890) 92 Ala. 258, 9 So. 405, applied the principle that, in the absence of specific evidence, the extent of the power of an officer or agent to bind a railway company by contracts of this kind may be inferred from the nature and scope of his usual duties and functions, which in this instance had reference to the supervision of the general management and operation of the road.

The doctrine established by the decisions in Indiana is declared to be that an officer of such high rank as the general superintendent of a railway is presumed to possess authority to employ surgeons and nurses to render service to persons injured by the trains. Cincinnati, I. St. L. & C. R. Co. v. Davis (1890) 126 Ind. 99, 9 L.R.A. 503, 25 N. E. 878 (rule laid down in passenger case).

Pacific R. Co. v. Thomas (1877) 19 Kan. 256, laid it down that presumptively the general superintendent of a railroad company would have authority to employ a surgeon to attend on an employee of the company who had been injured while in the employ of the company; but that this presumption might be rebutted by evidence showing that he had no such authority.

In Marquette & O. R. Co. v. Taft (1873) 28 Mich. 289, the court was equally divided upon the question whether, in the absence of evidence of an express delegation of the appropriate authority, or of some usage of the defendant company, or of circumstances tending to show the nature or scope of his power and duties, it was permissible to infer that an agent described as a "superintendent" had power to bind the company by a contract for medical attendance on an injured servant. Cooley, J., one of the judges who held that no evidence to prove a special authorization was requisite, reasoned thus: "The nature of the powers of a railway superintendent is indicated by the title to his office. He has the general superintendence of the business of the corporation, and is the immediate representative of the corporation in all business transactions with the public. This is the general fact, though there are undoubtedly cases where these general powers are, in part at least, conferred upon the president or some other officer. There is no evidence

that this case was exceptional, and we must consequently assume that this superintendent had the usual powers of general supervision. In all that pertains to the general management and operation of the road he speaks and acts for the company, and he must decide for it, and may make contracts on its behalf in the emergencies which unexpectedly arise, connected with, or growing out of, the running of their trains, the transportation of persons or property, and the management and control of servants."

In Kansas it has been held that a telegram from the general superintendent of a railroad to the foreman of a gang of laborers, directing him to employ a physician and do all he could to save the foot of one of the laborers who had been injured, and make him comfortable, authorized said foreman to contract for the board and care of said laborer while suffering from his injury. Atchison & N. R. Co. v. Reecher (1880) 24 Kan. 228.

It was, however, laid down in a case decided by the superior court of New York city, that the company was not liable on a contract made by an agent of a railroad company who stated that the title of his office was superintendent, and that, as such, he had a general supervisory control over the whole line of the road, everything connected with the running of the road being under his supervision and control, and that he paid money to drivers, conductors, and other persons employed by him as superintendent, but had no direction over the treasury. Stephenson v. New York & H. R. Co. (1853) 2 Duer, 341. The court argued as follows: "The only inference deducible from his description of his powers is that they relate solely to making provision that trains are run as prescribed by the company, that means and men are supplied for the purpose, and other things are provided which are essential or proper to effectuate this general result. His description of his powers, or of the business which he transacts, does not justify the inference that he is authorized, by his office, to arrange and liquidate claims made against the company for the negligence of its servants in running its trains, or to contract with third persons, as its agent, to repair or remedy the consequences of such negligence." This case was not carried to a higher court, and has never, so far as the writer can find, been overruled in New York.

In Pacific R. Co. v. Thomas, *supra*, the court laid it down that presumptively a division superintendent possesses, in respect to matters happening within his jurisdiction, the same authority as the general superintendent, but that this presumption might be rebutted by evidence showing that he had no such authority. Prima facie, therefore, his contracts for medical attendance on an injured servant would bind the company.

That a division superintendent has power to hire a physician or surgeon to attend on an injured servant was declared, arguendo in Union P. R. Co. v. Beatty (1886) 35 Kan. 265, 57 Am. Rep. 160, 10 Pac. 845. The actual point decided in this case was that, as a railway company has no interest in a passenger, and therefore has no such concern for his health and soundness as it has for its employees who may be injured while in its service, neither a general nor a division superintendent has any implied power to provide medical care and treatment for passengers unavoidably injured. If this was formulated as a rule of general application, not to be qualified even in case of emergency, the doctrine of this court clearly conflicts with that of the English judges who decided Langan v. Great Western R. Co. (1873) 30 L. T. N. S. 173. The Kansas court relied upon Cox v. Midland Counties R. Co. (1849) 3 Exch. 268. But the *ratio decidendi* in that case was the subordinate rank of the agent, not the fact that a passenger was the injured person. See fifth paragraph below. It was also suggested in the Beatty Case that "if the injury to the passengers resulted from the negligence of the carrier, other considerations would enter into the case which might warrant the implication of authority in the superintendent or some general agent of the company to provide medical attendance and entertainment for them." But the analogy of the most authoritative of the cases is against ascribing any differentiating significance to this element.

The authority of a division superintendent to employ a surgeon to attend on an injured servant was again asserted in Union P. R. Co. v. Winterbotham (1893) 52 Kan. 433, 34 Pac. 1052.

In Missouri it has been laid down that no recovery can be had against a railroad company for drugs furnished, on the order of a division superintendent, to a traveler who has been hurt by the company's locomotive, unless it is shown that he was authorized to give the order. The courts cannot take judicial notice of the duties of such an officer. Brown v. Missouri, K. & T. R. Co. (1877) 67 Mo. 122. But possibly so strict a rule of evidence would not be applied by all courts.

In Chicago, P. & M. R. Co. v. Kane (1896) 65 Ill. App. 276, the defendant company was held to be bound by a contract for nursing made by a train master who was apparently clothed with authority. But the evidence upon which this apparent authority was predicated is not specified in the report. It may be doubted whether a train master would have such authority by virtue merely of his official position.

On the other hand, supervising agents of lower rank, as station masters or road masters, have no implied authority to make contracts of this description.

In an English case it was held that it is not incident to the employment of a station master or other servants of a railway company, that they should bind the company by contracts for surgical attendance on injured passengers, and that the

company is therefore not liable for such attendance, without evidence of express authority to the servant to employ the surgeon. Cox v. Midland Counties R. Co. *supra*. That the doctrine here laid down is regarded by English judges as being equally applicable in a case in which a servant is the injured person may fairly be inferred from the fact that in Walker v. Great Western R. Co. (1867) L. R. 2 Exch. 228 (see *supra*), which was a case of that description, the earlier decision was distinguished solely on the ground of "the station master's want of authority to make a contract binding his employers to pay for medical attendance,—a matter entirely beyond the scope of his employment,"—and that no stress whatever was laid upon the fact that in the one case the injured person was, and in the other was not, a servant of the defendant. The comments made upon the Cox Case in Langan v. Great Western R. Co. (1873) 30 L. T. N. S. 173, have impaired its authority so far as it may be regarded as embodying the theory that, under no circumstances whatever, can a subordinate officer like a station master bind his employers by contracts for surgical attendance. But there is nothing in those comments to show that the court was prepared to concede to such an officer the powers to make contracts of this kind in any cases except those which involved a necessity for prompt action.

That a station agent has no presumptive authority arising out of his position to employ a physician was also laid down in Cooper v. New York C. & H. R. R. Co. (1875) 6 Hun, 276. There an employee of the defendant had been injured, and one S., an engineer of a gravel train, telegraphed to M., the station agent at P., to "have Dr. Cooper (plaintiff) at depot, on arrival of No. 1—a man injured." M. handed the telegram to a hackman, with directions to give it to plaintiff. No other communication was shown between M. or S. and the plaintiff; nor was it shown that either of them had ever undertaken to employ the plaintiff on behalf of the company on any previous occasion. Held, that the plaintiff could not recover from the company for services rendered to the employee, on the ground that no employment by the company was shown. Plaintiff offered to prove that he had previously attended persons injured on the defendant's road, and been paid therefor by the company, but did not offer to show that, in such cases, he had been employed by either S. or M. But it was held that the evidence had been properly rejected, under the rule laid down in 2 Redfield, Railways, 114, to the effect that evidence that the company had ratified similar contracts made by some particular agent might be evidence tending to show that it had given him authority to make similar contracts, but was not competent to prove that it had given authority to all its servants to do so.

Other cases in which the authority of a station master to make contracts of this class was denied are Atlantic & P. R. Co. v. Reisner (1877) 18 Kan. 458; Tucker v. St. Louis, K. C. & N. R. Co. (1873) 54 Mo. 177; St. Louis, A. & T. R. Co. v. Hoover (1890) 53 Ark. 377, 13 S. W. 1092.

The supreme court of Indiana has held that, in the absence of specific evidence as to the duties and powers of a road master, other than his title indicates, a court cannot judicially know or presume that he has authority to bind the corporation by a contract with a third party for nursing a person injured upon the line of the railway. Louisville, E. & St. L. R. Co. v. McVay (1884) 98 Ind. 391, 49 Am. Rep. 770.

So, conductors have no implied authority to make such contracts. Sevier v. Birmingham, S. & T. River R. Co. (1890) 92 Ala. 258, 9 So. 405; Terre Haute & I. R. Co. v. Brown (1886) 107 Ind. 336, 8 N. E. 218; St. Louis, A. & T. R. Co. v. Hoover, *supra* (passenger hurt).

Nor have yard masters. Sevier v. Birmingham, S. & T. kiver R. Co. *supra;* Marquette & O. R. Co. v. Taft (1873) 28 Mich. 289.

Except under the circumstances discussed in the following subdivision, the company is not liable on contracts made by these and other subordinate employees, unless their action has been ratified by a superior agent who is himself competent to make the contracts. Louisville, E. & St. L. R. Co. v. McVay, *supra* (contract of road master ratified by general manager).

Whether there has been such a ratification is a question of fact to be determined from the evidence, considered with reference to familiar principles of the law of agency.

Upon receiving notice of the injury and the employment of a physician by a subordinate, the superior agent, if he desires to repudiate responsibility, should dissent, and notify the physician that the company will not be responsible. But this duty does not arise, and there can be no ratification, unless the superior is informed of the circumstances connected with the employment. Where there is no evidence that he had any notice of these circumstances until after the services were rendered, the company is not liable. Sevier v. Birmingham, S. & T. River R. Co. *supra*. Compare the language of the court in Toledo, W. & W. R. Co. v. Prince (1869) 50 Ill. 26, as quoted in the next paragraph.

The fact that a railway company may, as respects servants who have been injured in the performance of their duties,—especially those whose means are small,—be regarded as subject to a moral obligation to furnish medical attendance, seems to be viewed by some courts as affording a sufficient reason for gauging the propriety of a verdict in favor of the plaintiff by standards less rigorous and severe than those which would be applicable in cases where the injured person is a stranger. In Toledo, W. & W. R. Co. v. Prince (1869) 50 Ill. 26, the court argued thus: "Although a railway company is under no legal obligation

to provide medical attendance for persons injured in its service, yet this would be so reasonable a thing to do, where the wounded employee is dependent upon his daily labor for support, that a jury will generally find, even upon somewhat slight evidence, that the act of the station agent in employing the surgical skill necessary to save human life was ratified by his superiors. In this case, however, the station agent reported the case to the general superintendent a few days after the accident, and he testifies that he heard no complaint in regard to his action until he afterwards presented the bills for payment. If the superintendent desired to save the company from being held responsible, he should, on receiving the report of the case, have dissented from the action of the station agent, and directed him to apprise the surgeon of such dissent, instead of allowing the latter to continue his services under the belief that he was in the employment of the company."

In another case the same court laid down the principle that "where a day laborer has, by an unforeseen accident, been rendered helpless when laboring to advance the prosperity and the success of the company, honesty and fair dealing would seem to demand that it should furnish medical assistance. . . . Slight acts of ratification by the company will ordinarily satisfy a jury that the employment was the act of the company."

A ratification by the general superintendent of the employment of a surgeon by a station agent was held to have been properly inferred from evidence tending to show that, the day after the employee was injured, the superintendent inquired of the station agent how the man was getting along; that, while he had had information in regard to the character of the injury and the treatment by the surgeon, no objection whatever was interposed or complaint made by him in reference to the act of the station agent; and that, a few weeks subsequently, in a conversation with the surgeon, the superintendent informed him that the pay would be all right. Cairo & St. L. R. Co. v. Mahoney (1876) 82 Ill. 73, 25 Am. Rep. 299.

Presumptively, and in the absence of anything to the contrary, where an officer or agent of the company has the power in the first instance to employ a physician and surgeon and make the company responsible for his services, such officer or agent would also have the power to ratify a previous unauthorized employment of such physician and surgeon, and thereby make the company responsible for his services. Pacific R. Co. v. Thomas (1877) 19 Kan. 256.

A physician or surgeon employed by a railway company to attend an injured servant cannot bind it by contracts for the payment of the various miscellaneous expenses which may be incurred while the patient is being treated; as for his board. St. Louis, A. & T. R. Co. v. Hoover (1890) 53 Ark. 377, 13 S. W. 1092.

In Chicago & E. R. Co. v. Behrens (1894) 9 Ind. App. 575, 37 N. E. 26, it was held that no recovery could be had for certain services rendered to an injured servant who required immediate attention, and who had been brought to appellee's house by one of the appellant's regular physicians, in whose charge the servant had been placed by a conductor. The ground upon which the decision was put was that the special verdict on which the claim was based did not find that the servant was injured while in the performance of his duty, nor that the physician had any authority to bind appellant by any agreement, nor that he said or did anything indicating an intention on his part to bind appellant for the payment of any part of the services performed or articles furnished by appellee.

If a physician or surgeon is empowered to make one particular contract of this nature, the special authority thus granted will not be extended by implication.

From the fact that a physician in the service of a railway company is authorized to buy medicines on its credit it will not be implied that he had power to bind the company by a contract for board, lodging, attendance, and nursing of a servant injured on the company's road Mayberry v. Chicago, R. I. & P. R. Co. (1882) 75 Mo. 492.

(b) Other companies.

In Chaplin v. Freeland (1893) 7 Ind. App. 676, 34 N. E. 1007, the court refused to hold, as a matter of law, that the employment of a physician or surgeon for injured employees comes ordinarily within the scope of the duties of a general manager of an ordinary manufacturing business.

In another case the somewhat narrower doctrine was enunciated with respect to a mining company, that, inasmuch as the injury in question was not due to any negligence on its part, its general manager was not invested, by virtue of his official position alone, with an implied power to bind it by a contract of this character. Spelman v. Gold Coin Min. & Mill. Co. (1901) 26 Mont. 76, 55 L.R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597. The court said: "He [i. e. the manager] cannot, however, bind his principal by a contract to confer a gratuity or bestow a charity, however strong the promptings of humanity may be. He acts for and is virtually the company itself in those matters only which have to do with its ordinary business, and are within the scope of the duties delegated to him for performance. Unless the limits of his authority are shown to have been enlarged, the duties of the general manager are confined to the transaction of the business of the corporation, as distinguished from its mere ethical duties, and consequent imperfect obligations or supposed charities. The fact that a certain person is general manager of a mining company does not, in and of itself, imply authority in him to bind

the company in matters other than those of business affairs. It may not be said, as matter of law, or declared as a fact judicially known, that general managers of mining corporations are usually clothed with such authority as that assumed by Loomis. So to hold would be to affirm that every general manager may contract with physicians and surgeons in behalf of the mining company for which he is agent, irrespective of the rights of the company and without regard to whether it was at fault. If he has such authority by virtue of his office, then he may bind the company to pay for the services and expenses of surgeons, physicians, nurses, and others, rendered to and paid out for men who, through their own gross negligence, have suffered injuries in his company's mines, and his promise in the name of the company to pay any price that might be agreed upon by him and those employed would (in the absence of fraud) bind the corporation." The court deemed it unnecessary to determine whether the contract would have been enforceable if it had been shown that the injured person had a valid claim for damages. It was remarked that, if the manager had the power to enter into a contract under such circumstances, it must "rest upon the assumption or theory that in appointing a general manager the company impliedly delegates to him authority to lessen the extent of the injuries inflicted by the principal's wrong, and thereby diminish the amount of damages for which the latter would otherwise be liable."

This question was also left open by another decision, the effect of which is that the authority of the business manager of a manufacturing company to make a similar contract cannot be inferred from evidence that he had reasonable ground to believe that the company was liable for negligence, that he employed the claimant to save the company from pecuniary loss or damage on account of the injury, and that the employment involved an expenditure of only a small amount. Swazey v. Union Mfg. Co. (1875) 42 Conn. 556, holding that an instruction to the opposite effect was erroneous. In this case the plaintiff did not attempt to prove by specific evidence that the injury was the result of the defendant's negligence, or that the general manager had been authorized to pledge the defendant's credit for the payment of the plaintiff's bill, but relied simply upon the legal inference to be drawn from the fact that he was the defendant's business manager. The conclusions of the court were thus stated: "Upon this record there remained a question of fact as to the extent of Mr. Tuck's authority to bind the corporation by his agreement that it should pay the plaintiff for medical services to Middleton, which should have been submitted to the jury, for the name given in the motion to the office held by Tuck, to wit, general agent or general business manager, does not furnish a fixed legal standard by which his powers can be measured; it does not put any definite limitations upon them; he did not hold an office known to the law, with duties prescribed with such certainty as that the court can assume judicial knowledge of them; nor does the reasonableness of his belief that the defendant was liable for negligence furnish the true test by which his powers are to be determined. He was a servant of the defendant, appointed by its directors. The extent of his power to bind the corporation depends in part upon its by-laws, if any such there be, touching his office; in part upon the language of the vote of the directors appointing him, if any such appears of record; in part upon their knowledge and approval of, or the acquiescence of the corporation in, acts performed by him; and in part upon usages which may be shown to exist, controlling the matter. Nor is there any rule of law by which the question as to his power to bind the corporation by his agreement in this case is made to turn upon the magnitude or the insignificance of the sum involved; no principle can be made to rest upon such an unstable foundation."

But one court has explicitly taken the position that the rule by which an employer is exempted from any legal obligation to pay for medical attendance on a servant is subject to an exception in a case where the servant's condition is due to the negligence of his master, and that under such circumstances a general manager has the power to hire, or authorize the hiring of, a physician or surgeon. Lithgow Mfg. Co. v. Samuel (1903) 24 Ky. L. Rep. 1590, 71 S. W. 906.

If all the decisions referred to in this and the preceding subdivision of the note are to stand together, it will apparently be necessary to treat the implied powers of the managing agents of railway companies as being more extensive than those of other companies. The present writer confesses that he is unable to see upon what grounds such a distinction can reasonably be rested. But, as three of the decisions cited in this subdivision emanate from courts which have not as yet expressed their views as to the powers of agents of the former class, it cannot be affirmed with certainty that, if the question were actually presented, those courts would attribute to such agents a larger authority than that which has been conceded to agents of the latter class.

2. In cases where there is a special emergency.

(a) Railway companies.

By some courts the doctrine has been applied, that certain subordinate employees of a railway company, who, under ordinary circumstances, are not empowered to bind it by contracts for medical attendance on its servants or passengers, have an implied authority to make such contracts in its behalf in cases where there is an urgent necessity for the immediate employment of

a physician or surgeon to attend to servants or passengers who have been injured by conditions or occurrences incident to the operation of the road.

In several Indiana decisions it has been held that a conductor possesses this temporary authority, whenever he is the highest agent of the company who is present at the spot where an accident occurs. Terre Haute & I. R. Co. v. McMurray (1884) 98 Ind. 358, 49 Am. Rep. 752; Louisville, N. A. & C. R. Co. v. Smith (1889) 121 Ind. 353, 6 L.R.A. 320, 22 N. E. 775; Toledo, St. L. & K. C. R. Co. v. Mylott (1893) 6 Ind. App. 438, 33 N. E. 135; Evansville & R. R. Co. v. Freeland (1892) 4 Ind. App. 207, 30 N. E. 803.

In Alabama also it has been stated, *arguendo*, that a contract made by such an employee would be binding, provided that "exceptional circumstances justified it, and prevented communication with higher officials." Sevier v. Birmingham, S. & T. River R. Co. (1890) 92 Ala. 258, 9 So. 405.

The principle that the existence of an emergency amplifies the ordinary powers of railway agents with regard to the making of contracts for medical attendance is recognized, *arguendo*, in Holmes v. McAllister (1900) 123 Mich. 493, 48 L.R.A. 396, 82 N. W. 220.

It would also seem to be the highest doctrine that, under similar circumstances, a subinspector of railway police for the district within which an accident occurs, whose duty it is to attend at the scene of that accident, is to regarded as the representative of his employers. This inference may reasonably be drawn from a case which, although it does not relate to the employment of a physician, involves facts which are so closely analogous to those which usually accompany the making of such a contract that it may with propriety be cited in the present connection. Langan v. Great Western R. Co. (1873) 30 L. T. N. S. 173. There certain passengers injured by a collision on the defendant's line of railway were carried into plaintiff's inn, partly by the help of the station master of the station where the collision took place. The subinspector ordered some brandy to be given to one of the injured persons, and, in reply to a question by plaintiff as to who would pay for the maintenance of the injured persons, replied, "Don't trouble yourself about that; we'll see that all is right." Plaintiff having brought an action against the railway company for board, lodging, necessaries, and goods supplied to the injured persons, it was held (affirming the judgment of the court of Queen's bench) that there was sufficient evidence to go to the jury in support of the plaintiff's claim, and to prove the authority of the subinspector to pledge the credit of the company for the board, etc., supplied to the persons injured. The reasons on which the decision was based are stated in the seventh paragraph below.

In cases of this class the complaint is insufficient unless it shows that the services were rendered for workmen of defendant injured in the performance of duty, or for persons injured by its trains. Bedford Belt R. Co. v. McDonald (1895) 12 Ind. App. 620, 40 N. E. 821.

"The liability arises with the emergency, and with it expires." Ibid. Statement reiterated in 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022.

A surgeon who, at the direction of the conductor, amputates the leg of an employee injured in an accident to a construction train by which a large number are injured, there being only one surgeon of the company present, who is unable to attend to all the wounded, is entitled to compensation therefor, but not for services rendered after the emergency ceases. Evansville & R. R. Co. v. Freeland (1892) 4 Ind. App. 207, 30 N. E. 803 (damages measured on the basis thus indicated).

Discussing the facts in Louisville, N. A. & C. R. Co. v. Smith (1889) 121 Ind. 353, 6 L.R.A. 320, 22 N. E. 775, the court said: "The conductor . . . had authority to do what the emergency demanded, in order to preserve his injured fellow employee from serious harm, but he had no authority to do more. When the company had procured the services of a competent surgeon, it did all that it was morally or legally bound to do, and the conductor could not impose upon it any greater obligation. We hold that the conductor did have authority to at once employ the surgical aid demanded by the urgency of the occasion; but we hold, also, that his authority did not extend beyond this limit. . . . It is immaterial whether Dr. Judah [the surgeon first employed] was called by a brakeman or by the conductor in person; for if he was called by the direction, express or implied, of the conductor, or if the conductor confirmed what had been done, he could not subsequently employ another surgeon. It is possible that Dr. Smith [the second surgeon called in] may be entitled to compensation for one visit, that made in obedience to the telegram, for it may be that he had a right to act upon it at once; but when he found the injured man attended by a competent surgeon he had no right to continue to give the case attention, and charge the company. He was bound to know that when the agent, who possessed limited special authority, had procured the services of a competent surgeon, his authority was exhausted, and if, with this knowledge, he continued to give the injured man attention, he did it at the expense of some other person than the agent's principal."

It has been held that the temporary powers possessed by a conductor in an emergency do not enable him to authorize a surgeon to employ assistance at the company's expense, and that, if the surgeon first employed finds it necessary or convenient to call in other assistants, in order to accomplish that which he has been employed to do, the assistants must look to him for compensation. Terre Haute & I. R. Co. v. Brown (1886) 107 Ind. 336, 8 N. E. 218.

In one case the rationale of the doctrine is declared to be the fact that it is to the interest of the company that, when an accident happens on its line, the mischief resulting therefrom shall be the smallest possible, if it is eventually proved to be liable to the injured person,—a contingency which must always be taken into account until the absence of fault is established; and that in cases where the injury is serious there is, in this point of view, a necessity for what may be called instantaneous action.

This aspect of the matter is relied upon in Langan v. Great Western R. Co. (1873) 30 L. T. N. S. 173. The person injured was a passenger: but the reasoning of the judges is quite general, and equally applicable to cases where servants have been injured. Discussing the facts already stated (seventh paragraph above). Bramwell, B., said: "Surely it is reasonable to say that the person who is chief in office where the accident takes place should have authority to do those things which must be done at once, and which are presumably for the benefit of the company. Take the case of a number of bystanding laborers who are asked to clear the line; that is not a matter of absolute necessity, but it is presumably for the benefit of the company. Take the case of a person in a state of collapse, to whom a glass of brandy may be of vital importance, could there not be authority to pledge the company's credit for that? and here the question of quantum is not raised. If at the outset Locke [the subinspector of police] had said that he was going to pledge the company's credit for six or seven weeks' maintenance of the sufferers, it may be that he would thereby have exceeded his authority. If it were his duty to report what he had done, the company might repudiate any further liability, and tell the plaintiff that if she continued to keep the persons injured beyond a certain time she must do so at her own expense. I do not determine, therefore, whether the question of quantum, if it were raised, would be determined for or against the railway company. I go on the ground that under the circumstances of the case there was a necessity for immediate action, and there was no one to direct what should be done but Locke."

In the same case Denman, J., said: "I think he [the inspector] had authority to do what was reasonable in the case of injured persons, and, *ex necessitate rei*, to take them to a place of security, and there have them properly attended to till the arrival of a doctor. I do not say that it necessarily follows that he would have authority to give orders for the supply of every possible thing that might be comfortable to persons under these circumstances. It depends very much, I think, on the condition of the persons taken in."

Cleasby, B., viewed the circumstances from a different standpoint, remarking that the fact of the company's having allowed the plaintiff to continue the performance of the services after the inspector had made his report was evidence of his having been originally invested with authority to make the contract.

In England the effect of this decision has been to destroy the authority of the earlier case of Cox v. Midland Counties R. Co. (1849) 3 Exch. 268, so far as regards its rejection of the theory that the existence of an emergency may be treated as a differentiating element. But having regard to the fact that only a small number of the American courts have as yet pronounced in favor of that theory, it may be well to give some extract from the judgment, which Parke, B., delivered for the court: Referring to the argument of plaintiff's counsel that, considering the nature of the railway traffic, each of the servants in question had, as incidental to his employment, an authority, in case anything occurred which would be prejudicial to the interests of the company, to do what was reasonably fit to be done under the circumstances to remedy or diminish the damage done, the learned judge said: "It was contended, therefore, that if one of these servants happened to be near at the time of the slip of an embankment which, for the purpose of securing the safe and speedy traffic along the railroad, ought to be immediately removed, he would have an implied authority, when fresh laborers were required, to bind the company by a contract to pay them; and that, in like manner, any servant who was near, or at all events the head servant of the nearest station, would be authorized, if a passenger received personal damage requiring immediate surgical attendance, to contract with a surgeon, and to bind the company by that contract to pay what was reasonably due to him, such authority being an incident to his employment, considering its peculiar nature, and it being for the benefit of the company that the damage and consequent loss to them from any occurrence for which they were responsible should be as much mitigated as possible. . . . We are all of opinion that the power to enter into this contract was not incident either to the employment of the guard or the superintendent. The simple employment of servants by a corporation carrying on a business cannot give them, as incident to that employment, a larger authority than if the same appointment were made by a partnership of as many individuals as the shareholders of the company; nor does it appear to us to make any difference that it is carried on by fewer members, or even by a single individual. . . . Could it be maintained that a coachman from whose carriage a passenger had fallen and broken his arm, or by which another person had been run over, or a horsekeeper who happened to be near, or the bookkeeper, could bind his master by a contract with a surgeon to cure the injured person, and oblige his master to pay the bill? We are of opinion that he could not. Though it might be a benefit to the master to have the damage diminished by a speedy cure, if he was

really liable for that damage, it would be a prejudice to him to be bound to pay if he was not; and is the servant to decide whether his master is liable or not,—a man whom he has not appointed with any view to the exercise of such a discretion? We think the servant has clearly no such power."

These considerations seem to afford an entirely adequate and satisfactory basis for the doctrine. But in Indiana, as we have seen, the extraordinary authority imputed to inferior agents in cases of emergency is referred, so far as servants are concerned, to the conception that the company is actually under a species of legal duty to furnish them with medical assistance. See *supra*, I. c.

One of the lower courts of New York has rejected (in a case where the injured person was a passenger) the doctrine that the emergency of the situation and the benefit resulting to the defendant from the employment of the plaintiff warranted the defendant's agents in employing him, and that, as the contract had been made in good faith, it was binding on the defendant. Stephenson v. New York & H. R. Co. (1853) 2 Duer, 341. The court reasoned as follows: "No emergency arose, which but for this employment would have interrupted or prevented the running of defendant's cars. If the injury was not caused by the negligence of its servants, contracting to pay for expenses to which they could not be subjected by law would be no benefit to the company. If caused by such negligence, this employment would not exonerate them from any liability which would otherwise have attached. The principle sought to be invoked has no application to the facts of this case." But the case cited is in conflict with so many later decisions, both English and American, that the doctrine which it embodies may not improbably be condemned, if the point should again be presented.

(b.) Other companies.

One of the intermediate courts of appeal in the United States seems to be of the opinion that the doctrine reviewed in the preceding subdivision is not applicable except in those instances where an injury has been received on a railway. In Meisenbach v. Southern Cooperage Co. (1891) 45 Mo. App. 232, the defendant's liability for the fees of a surgeon called in by its superintendent was denied on the ground that no specific evidence was given that he had been previously authorized to summon a medical man in cases of emergency.

By another of those courts the question was left open in a case where its determination was unnecessary.

In Chaplin v. Freeland (1893) 7 Ind. App. 676, 34 N. E. 1007, the question arose as to whether or not the foreman of a manufacturing company had power to employ a physician for an injured employee, and the court held that, except perhaps in an extreme case, there was no duty resting on the employer to furnish medical or surgical aid, and that therefore the authority of the foreman to employ such aid would not be presumed.

It is difficult to see any satisfactory ground upon which to base a distinction in this regard between railway and other companies. A theory which would restrict to one class of companies the doctrine respecting the enlargement of the powers of inferior employees in cases of emergency is open to objections similar to those which have been adverted to in discussing the propriety of exempting individual employers from the operation of that doctrine. see *supra*, III. b.

IV. Liability of master for negligence of practitioner employed to attend on a servant.

The general rule is that a master cannot be held liable for the defaults of a physician or surgeon whom he employs to treat a sick or injured servant, unless he has himself been guilty of negligence in respect to the selection of such physician or surgeon. This doctrine is applicable to cases in which cost of the medical attendance is defrayed out of a fund derived, in whole or in part, from sums regularly deducted for this purpose from the wages of all servants. Union P. R. Co. v. Artist (1894) 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; Maine v. Chicago, B. & Q. R. Co. (1897) 109 Iowa, 260, 70 N. W. 630, Affirmed on Rehearing in 80 N. W. 315; Atchison, T. & S. F. R. Co. v. Zeiler (1894) 54 Kan. 340, 38 Pac. 282; Southern P. Co. v. Mauldin (1898) 19 Tex. Civ. App. 166, 46 S. W. 650, Writ of Error Dismissed in (1898) 92 Tex. 267, 47 S. W. 964.

In Richardson v. Carbon Hill Coal Co. (1895) 10 Wash. 648, 39 Pac. 95, it was held to be error to nonsuit a plaintiff where the evidence raised a presumption that the physician had been selected without due care. On the first appeal of this case (1893) 6 Wash. 52, 20 L.R.A. 338, 32 Pac. 1012, it had been laid down that for negligence in employing a surgeon at a hospital maintained by an employer for the benefit of employees, from whose wages a small sum was deducted monthly to create a fund for that purpose, the employer was liable, if by reason of the surgeon's unfitness an employee sustained damages, although he was treated, not at the hospital, but at the home of friends, where the surgeon was allowed to attend him. Two judges, however, dissented on the ground that the only contract between the parties was that the servants, if injured, should become entitled to the privilege of the hospital supported by their compulsory contributions.

In Wabash R. Co. v. Kelley (1898) 153 Ind. 119, 52 N. E. 152, Rehearing Denied in 54 N. E. 752 (malpractice resulting from incompetency due to excessive use of intoxicants and narcotics), it was held that a railway company could not escape liability to a servant, on the ground that the deduc-

tion from his wages was made without his written consent, in contravention of the provisions of §§ 2300, 2301, Burns's Rev. Stat. 1894. The court said: "Such undertaking to provide surgical and medical care is not, by the statute, made void as a part of the contract of service. The provision of the statute is that it shall be unlawful for a railroad company 'to exact from its employees, without first obtaining written consent thereto in each and every instance, any portion of their wages for the maintenance of any hospital, reading room, library, gymnasium, or restaurant.' If the appellant did, indeed, exact any such contributions without the written consent of appellee,—which does not appear from the complaint,—that was not a wrong for which appellee can be held liable. It was the act of appellant; and it is a familar principle that one cannot take advantage of his own wrong."

The doctrine is also applicable to cases where such attendance is furnished by the master at his own expense. South Florida R. Co. v. Price (1893) 32 Fla. 46, 13 So. 638; Cummings v. Chicago & N. W. R. Co. (1900) 89 Ill. App. 199, Writ of Error Dismissed (1901) 189 Ill. 608, 60 N. E. 51 (only a point of local practice discussed by supreme court); Pittsburgh, C. C. & St. L. R. Co. v. Sullivan (1895) 141 Ind. 83, 27 L.R.A. 840, 50 Am. St. Rep. 313, 40 N. E. 138; York v. Chicago, M. & St. P. R. Co. (1896) 98 Iowa, 544, 67 N. W. 574; Clark v. Missouri P. R. Co. (1892) 48 Kan. 654, 29 Pac. 1136 (servant attended first by a local surgeon, and afterwards by one regularly retained by the defendant); Quinn v. Kansas City, M. & B. R. Co. (1895) 94 Tenn. 713, 28 L.R.A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036.

In Eighmy v. Union P. R. Co. (1895) 93 Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056, the court observed: "It does not appear that the defendant was under any obligation by contract to furnish surgical and hospital accomodations for its injured employees, and, so far as is shown, its doing so was wholly voluntary. Its employees were under no obligation to avail themselves of the facilities for treatment offered, and paid nothing for them when accepted. That the defendant maintained its medical department for its own advantage, and not for charitable purposes only, may be presumed; but that does not alter what appears to be the fact, that it was not maintained to discharge any statutory or contractual obligations."

So far as the last sentence of the above extract may be taken to imply an adoption by the court of the doctrine that the defendant would have been liable if the hospital had been maintained in pursuance of a contractual obligation, the case seems to be in conflict with those which involve the element of a deduction from the wages of the servants. It is submitted that a contract by an employer to provide medical attendance binds him prima facie merely to use reasonable care in selecting practitioners.

In Chicago, B. & Q. R. Co. v. Howard (1895) 45 Neb. 570, 63 N. W. 872, where it was conceded that the selection had been a judicious one, the court said that the plaintiff in error was not responsible for the manner in which the knowledge and skill of the surgeon were employed, "in the absence, on its part, of any express limitations or directions to their surgeons, and of the possession of such knowledge as would lead a reasonable, careful person to suspect that there would probably be negligence or malpractice."

One of the considerations to which the nonliability of the master has been referred is that persons engaged in business enterprises cannot be supposed to possess the technical skill required for the proper treatment of the sick and injured, and must perforce rely on practitioners who possess the appropriate qualifications.

In Atchison, T. & S. F. R. Co. v. Zeiler (1894) 54 Kan. 340, 38 Pac. 282 (company maintained hospital system supported by assessments on the servants), the court reasoned thus: "The care of persons suffering from wounds, bruises, or illness is a matter altogether distinct from the transportation of persons and property. To provide for the needs of such, we have the learned profession of physicians and surgeons. The law requires that those who assume to practice medicine and surgery shall possess certain qualifications of skill, shall have received education and training fitting them for their calling. Can a railroad company, then, be held liable for the mistakes of physicians whom it may call to care for its passengers? In the treatment of an injured brakeman, should the managers of the railroad comply with the directions of the surgeons who are called to attend him, or should they assume superior knowledge with reference to his proper treatment, and act in accordance with their own judgment?"

Compare also the following passage in the opinion of the court in Chicago, B. & Q. R. Co. v. Howard (1895) 45 Neb. 570, 63 N. W. 872: "It would be absurd to insist that not only this selection should be prudent, but that the company should guarantee that the surgeons selected would make no mistake and be guilty of no negligence. The very fact that there was required of the surgeons, in the line of their duties, the possession of a superior degree of skill and of knowledge of medicine, precludes the possibility that the officers or employees of the railroad company should have exercised a supervisory control and direction of the time when and the mode in which the necessary surgical operation should be performed."

The consideration that employers who maintain a hospital system must, *ex necessitate rei*, "leave the treatment of the patients to the superior knowledge and skill of the physicians" was also adverted to in Union P. R. Co. v. Artist (1894) 23 L.R.A.

581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; and Cummings v. Chicago & N. W. R. Co. (1900) 89 Ill. App. 199.

But it is manifest that, unless the practitioners retained by a master are independent contractors, the mere fact that the work required was such as to demand the exercise of special skill would not necessarily involve, as a corollary, the master's exemption from liability for their negligence. In this point of view, therefore, it would seem to be preferable to rely directly upon the primary conception, and treat the exemption as an appropriate result of the fact that, as has been categorically laid down in one case, the relation of master and servant does not exist between a master and a physician or surgeon engaged by him to attend on his servants. Quinn v. Kansas City, M. & B. R. Co. (1895) 94 Tenn. 713, 28 L.R.A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036.

The master's freedom from responsibility may also be regarded as a special application of the rule "that those who furnish hospital accommodations and medical attendance, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ, but are responsible only for their own want of ordinary care in selecting them."

In Union P. R. Co. v. Artist (1894) 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365, where the hospital was supported partly by the voluntary contributions of the employer the court said: "Under the evidence in this case, the medical department and hospitals of the Union Pacific Railway Company fall fairly within this rule, and the reasons that support the rule apply to this case with all their force. The test which determines whether such an enterprise is charitable or otherwise is its purpose. If its purpose is to make profit, it is not a charitable enterprise. If it is to heal the sick and relieve the suffering, without hope or purpose of getting gain from its operation, it is charitable. Tried by this test, the hospitals and medical department of this company are a great public charity. . . . If it be urged that this gift may have been prompted by an ulterior and selfish motive,—that the company may have thought that the operation of its medical department would protect it from excessive claims for injuries resulting to its servants,—the answer is that the true test of a public charity is not the motive of the donor, but the purpose to which the money given is to be applied."

It has been held that a fund devoted to the medical treatment of servants cannot be regarded as having been created for charitable purposes, where it is formed by a compulsory reduction from the wages of the servants, and no rebate is allowed to them in case the entire fund is not required. Texas & P. Coal Co. v. Connaughten (1899) 20 Tex. Civ. App. 642, 50 S. W. 173.

Admitting this view to be correct, however, it does not necessarily involve the consequence deduced by the court, that the master would be liable for the negligence of a physician paid out of the fund. Prima facie such a physician would be an independent contractor.

V. Duty to provide medical aid for seamen.

a. General rule.

The general rule of maritime law is that a seaman who has contracted a sickness or received an injury while in the service of his ship is entitled to be cured at the expense of the ship and the shipowner. Lord Mansfield in Paul v. Eden (1785), an unreported case cited in Abbott on Shipping, page 619; Chandler v. Grieves (1792) 2 H. Bl. 606, note a; Hart v. The Littlejohn (1800) 1 Pet. Adm. 115, Fed. Cas. No. 6,153; The Nimrod (1822) 1 Ware, 9, Fed. Cas. No. 10,267; Holmes v. Hutchinson (1833) Gilpin, 447, Fed. Cas. No. 6,639; Brunent v. Taber (1854) Sprague, 243, Fed. Cas. No. 2,054; Croucher v. Oakman (1861) 3 Allen, 185; Somerville v. The Francisco (1870) 1 Sawy. 390, Fed. Cas. No. 13,171; Brown v. The D. S. Cage (1872) 1 Woods, 405, Fed. Cas. No. 2,002; The North America (1872) 5 Ben. 486, Fed. Cas. No. 10,314; Brown v. The Bradish Johnson (1873) 1 Woods, 301, Fed. Cas. No. 1,992; Longstreet v. The R. R. Springer (1880) 4 Fed. 671; The Explorer (1884) 20 Fed. 135; The W. L. White (1885) 25 Fed. 503; The Neptuno (1887) 30 Fed. 925.

The expenses which are deemed to be a charge upon the ship include medical advice, as well as medicine, diet, lodging, and attendance. The William Harris (1837) 1 Ware, 367, Fed. Cas. No. 17,695.

In Harden v. Gordon (1823) 2 Mason, 541, Fed. Cas. No. 6,047, Story, J., stated that his researches into the maritime laws of foreign countries had not disclosed a single instance in which they threw the expenses of sick or injured seamen upon themselves. His summary of the effect of those laws may be usefully quoted: "I am not satisfied that Spain forms an exception. Her marine ordinances have not been within my reach. And the language cited by Cleirac from the Laberinto del Commercio contains a denial only of wages during sickness. Cleirac Us et Cout. Commentaire sur Hanseat, Ord. art. 45, p. 104. On the contrary, the positive ordinances of the principal maritime nations expressly made these expenses a charge upon the ship. This is certainly the law of France, Denmark, Sweden, the Hanse Towns, Prussia, Holland, and probably of the Italian states. Code de Commerce, b. 2, title 5, arts. 262, 263; Ord. de la Marine, lib. 3, title 4, art. 11, 1 Valin, 721; 1 Emerigon, chap. 12, art. 15, § 41, p. 633; Cleirac, Jugemens d'Oleron, arts. 6 and 7, p. 16; Old Hanseat. Ord. (1591) arts. 39, 45; New Hanseat.

Ord. title 14. art. 2, and Kuricke Jus. Marit. Hanseat, pp. 678 and 821; Parga. Pond. chap. 17, § 16, chap. 85, § 7, Jacobsen, Sea Laws, b. 3, chap. 2, p. 144 [Frick's translation]; Pothier, Louage de Matelots, n. 189 [Cushing's translation, p. 114]; Ord. Rotterdam, 1721, arts. 224, 246, 2 Magens, 115, 118. The same principle is recognized in the ancient laws of Wisbuy (Laws of Wisbuy, art. 19), and in those of Oleron, which have been held in peculiar respect by England, and have been in some measure incorporated into her maritime jurisprudence. Laws of Oleron, arts. 6, 7; 1 Bl. Com. 419; 4 Bl. Com. 423. Walton v. The Neptune (1800) 1 Pet. Adm. 144, Fed. Cas. No. 17,135. . . . The Consolato del Mare does not speak particularly on this point; but from the provisions of this venerable collection of maritime usages in cases nearly allied, there is every reason to infer that a similar rule then prevailed in the Mediterranean. Consolato del Mare, chaps. 124, 125; Boucher, Consulat de la Mer, chaps. 127, 128. Molloy evidently adopts it as a general doctrine of maritime law. Molloy, De Jure Maritimo at Navali, b. 2, chap. 3, § 5, p. 243." The maritime laws of Oleron, Wisbuy, and the Hanse Towns are printed at length in 1 Pet. Adm. III. Appx. See also the Commentary of Pardessus, I. 474, II. 521, 556 IV. 366.

By § 4552 of U. S. Rev. Stat. (U. S. Comp. Stat. 1901, p. 3089), it is declared that a discharge by a shipping commissioner at the end of the voyage "shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto on account of wages, in respect of the past voyage or engagement." By the Dingley act of 1884 (23 Stat. at L. 54, § 3, chap. 121, U. S. Comp. Stat. 1901, p. 3109), "whenever a seaman is discharged by a consular officer in consequence of any hurt or injury received in the service of the vessel, such consular officer shall require the payment by the master of one month's wages . . . over and above the wages due at the time of the discharge." It has been held that neither of these provisions can be construed as absolving the vessel from liability for the expenses of the seaman's medical treatment for a hurt received before the discharge. The W. L. White, *supra*. The court was also of the opinion that the ship's liability was not diminished by U. S. Rev. Stat. § 4581 (U. S. Comp. Stat. 1901, p. 3107), as amended by § 7 of the Dingley act of 1884, which provides that "if any seaman, after his discharge, shall have incurred any expense for board or other necessaries at the place of his discharge, before shipping again, or for transportation to the United States, such expense shall be paid out of the arrears of wages and extra wages received by the consular officer, which shall be retained for that purpose, and the balance only paid over to such seaman."

In a recent case it was held that an American court of admiralty will entertain jurisdiction of a suit by a seaman against a foreign ship to recover damages for the gross negligence or misconduct of the master in failing to give the libellant proper care, nursing, and medical attention after his accidental injury in the service of the ship, by reason of which he has endured great suffering and is permanently disabled, where the circumstances are such that he would otherwise be without any effective remedy. The Troop (1902) 118 Fed. 769.

Whether a suit *in personam* for the recovery of such expenses should be brought against the owner of a chartered ship, or against the charterer, must be determined with reference to the same principles which determine the proper incidence of liability in case of contracts made or torts committed by the members of the crew of such a ship.

In Walton v. The Neptune (1800) 1 Pet. Adm. 142, Fed. Cas. No. 17,135, it seems to be laid down that a seaman who, without any misconduct on his part, is accidentally disabled while in the service of the ship, is to be cured at his own charge. By all the other authorities, however, cases of injury and sickness are assimilated.

The right conferred by the rule constitutes "a part of the contract for wages, and is a material ingredient in the compensation for the labor and services of the seaman." Harden v. Gordon (1823) 2 Mason, 541, Fed. Cas. No. 6,047, where Story, J., held that a claim of this sort was one in the nature of additional wages during the period of sickness, and was just as proper to be enforced in a court of admiralty as a claim for additional pay. He considered that it stood upon the same analogy as the compensation allowed by the laws of the United States, by which it was provided that, in cases of short allowance of provisions and water, the amount should be recoverable in the same manner as wages. Act July 20, 1790, chap. 29, § 9.

In this case Story, J., approved the view of Judge Peters, that the words "deducting charges, etc.," in the 7th article of the Laws of Wisbuy refer to extra charges for more delicate diet than usual. Walton v. The Neptune, *supra*.

That wrongfully withholding suitable medicines from a seaman, and wrongfully setting him ashore in a foreign country, are violations of a contract of hiring, was laid down in Crapo v. Allen (1849) 1 Sprague, 184, Fed. Cas. No. 3,360.

The fact that a seaman's disease is of a malignant and infectious variety will not justify the master in putting him ashore without any provisions for his subsistence or proper medical attendance. Tomlinson v. Hewett (1872) 2 Sawy. 278, Fed. Cas. No. 14,087.

The right conferred by the rule may be enforced by an award of additional wages. The Ben Flint (1867) 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299.

The general rule is applicable, although the sickness or injury of the seaman was not due to the fault of the shipowner or his agents. But damages in the nature of extra wages cannot be recovered unless

there was some fault on their part. Brown v. The Bradish Johnson (1873) 1 Woods, 301, Fed. Cas. No. 1,992.

That a seaman who is injured in the service of the ship without any fault on his part is not entitled to receive any compensation or allowance for the effects of the injury was laid down in The Lizzie Frank (1887) 31 Fed. 477.

Where the seaman's injury was not caused by any negligence on the part of the shipowner or his agents, his hospital expenses cannot be recovered under a declaration which merely claims damages for the injury. Wyman v. The Duart Castle (1899) 6 Can. Exch. 387.

In an English case it has been held the general authority which the master of a ship possesses to pledge the owner's credit for "such matters as are necessary for the due prosecution of the voyage" does not empower him to bind the owner by a contract for a supply of medicines and provisions to a sailor who is left behind to be cured of an injury received at the port of departure. Organ v. Brodie (1854) 10 Exch. 449. There several sailors who had met with a serious accident in weighing the anchor at the port of departure were taken on shore by the captain and left at the house of the plaintiff, who was told by the captain that the owner of the vessel would pay for what the sailors had. The captain immediately afterwards hired some fresh hands, and proceeded on the voyage. At the time the sailors were intrusted to the care of the plaintiff, there was no probability that they would be able to resume their duties for that voyage, and they remained at his house for several weeks. An action against the owner of the vessel for food and medicine supplied to the sailors was held not to be maintainable. Parke, B., said: "The facts show that it was not necessary that these seamen should be cured in order that the vessel might proceed on her voyage. If that had appeared to be the case, the owner would have been responsible for all necessary supplies of medicine ordered by the captain, and perhaps even for provisions. But as there is no ground for saying that these matters were necessaries in that sense, the captain had no authority to pledge the owner's credit."

Unless the fact that the injury in this instance was received at the port of departure is to be regarded as a differentiating element, it is difficult to reconcile this decision with the rule of maritime law which is stated at the commencement of this section. That the master of a ship should be deemed to have an implied power to make the medical expenses of a seaman a charge upon the ship, and to pledge the shipowner's credit for their payment, seems to be a necessary consequence of treating the ship and the shipowner as ultimately liable for those expenses. That this is one of the implied powers of the master is a doctrine that was recognized by an American court of admiralty in The Laura Madsen (1901) 112 Fed. 72. There, however, the actual point decided was that the master of a ship has no authority to pledge the credit of the ship for the expenses of the medical treatment of a stowaway whom he has compelled to sign articles. The legal position of a stowaway under such circumstances is merely that of one who is voluntarily and wrongfully on board the ship.

And the doctrine is strongly sustained by the analogy of another case, in which it was held that a sick or injured seaman is entitled to be reimbursed for any outlay which he himself may have made, and to be indemnified against any personal responsibility which he may have incurred, in respect to his own medical expenses. The Atlantic (1849) Abb. Adm. 478, Fed. Cas. No. 620.

Similarly, it has been conceded that, under some circumstances, a shipowner will be bound to recoup the consignee of the ship at a foreign port, who has paid the expenses of the sickness and funeral of the master. Winthrop v. Carleton (1815) 12 Mass. 4. Here the decision was put upon the ground that the owner is presumed to authorize everything to be done by the consignee which the custom of the place where the vessel is shall require to be done.

b. What persons are within the scope of the rule.

The general rule stated in the last subdivision, which was originally restricted in its application to the crews of sea-going vessels, has been extended in the United States so as to cover persons employed on the Great Lakes and navigable rivers. The Ben Flint (1867) 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299; The J. F. Card (1890) 43 Fed. 92; Longstreet v. The R. R. Springer (1880) 4 Fed. 671 (a fireman on the trip between Cincinnati and New Orleans); Moseley v. Scott (1866) 5 Am. L. Reg. N. S. 599, cited in The Ben Flint, *supra* (cabin boy on steamboat plying on the Ohio river).

But its operation in respect to such waters is limited to cases in which the contract of employment relates to a definite voyage of some length.

It does not apply to the case of an employee hired for a couple of hours to assist in moving a barge a short distance along a river. Hanson v. The John B. Lyon (1887) 33 Fed. 184. The court said: "This ship was not bound upon a voyage, within the meaning of the cases in which this rule has been applied, or of the circumstances out of which the rule originated. . . . It was not a case where it was expected to earn freight, or in any way engage in commerce. No shipping articles were signed; no special employment as seaman was given to the libellant. The barge, as the libellant must have known, was proceeding from one location in the harbor to another by the aid of tugs, and the main burden of handling the barge was upon the tugs. As a matter of special precaution, the captain secured the services of these few men,

. . . and the libellant was directed to take his place in the wheelhouse. This did not make him a seaman, or put him in such a relation to this vessel as to entitle him to all the rights of a seaman who had been duly shipped for a voyage. He was merely in the position of an employee rightfully on board of the vessel, and if, while there, he had been injured by reason of the fault or negligence of the officers of the barge, he might have had his action either at law, or his libel in admiralty, to recover damages for such injury."

The rule embraces the officers of the ship, and all the members of the crew who have been employed in the ordinary manner, whether their duties pertain to navigation or not. Babcock v. Terry (1866) 1 Low. Dec. 66, Fed. Cas. No. 702 (chief officer); Harden v. Gordon (1823) 2 Mason, 541, Fed. Cas. No. 6,047 (chief officer); The George (1832) 1 Sumn. 151, Fed. Cas. No. 5,329 (mate); Callon v. Williams (1871) 2 Low. Dec. 1, Fed. Cas. No. 2,324 (mate); The Atlantic (1849) Abb. Adm. 457, Fed. Cas. No. 620 (carpenter's mate); Holt v. Cummings (1883) 102 Pa. 212, 48 Am. Rep. 199 (engineer of a steamer); The North America (1872) 5 Ben. 486, Fed. Cas. No. 10,314 (fireman of a steamer).

And whether they are compensated by wages of a specific amount, or by a share of the earnings of the vessel. The Atlantic (1849) Abb. Adm. 452, Fed. Cas. No. 620; Knight v. Parsons (1855) 1 Sprague, 279, Fed. Cas. No. 7,886 (fishermen on a fishing schooner paid according to their catch).

But there is no obligation to furnish medical aid to a stowaway. The Laura Madsen (1901) 112 Fed. 72.

c. Limits of the shipowner's obligation under the general maritime law.

The shipowner's obligation to provide medical attendance for an injured seaman is predicated only with respect to cases in which the injury was received while he was in the service of the ship.

In a standard treatise it is stated that the effect of the marine ordinances is that a seaman is not entitled to be cured at the expense of the ship, where he receives an injury in the pursuit of his own private concerns. Abbott, Shipping, 11th ed. p. 167; Laws of Oleron, art. 6; Laws of Wisbuy, art. 18: Laws of the Hanse Towns, art. 39; 2 Pet. Adm. XIV., LXXIV., CV. Appx. In Reed v. Canfield (1832) 1 Sumn. 195, Fed. Cas. No. 11,641, Story, J., expressed the opinion that this statement of the law is fully borne out by the authorities relied on.

An injury inflicted by an officer in punishing a seaman in an improper manner was held to have been received "in the service of the ship," this phrase not being confined in its application to acts done for the benefit of the ship or in the actual performance of duty. Ringold v. Crocker (1848) Abb. Adm. 344, Fed. Cas. No. 11,843.

The ship is chargeable with the medical expenses incurred by a seaman on shore, if no proper means for treating him on board were available. Babcock v. Terry (1866) 1 Low. Dec. 66, Fed. Cas. No. 702.

Or, irrespective of that question, where he left the ship with the consent of the officers. In The North America (1872) 5 Ben. 486, Fed. Cas. No. 10,314, a fireman was held to be entitled to his wages for the whole voyage, although he had gone to a hospital at the place where the ship touched on the outward voyage, and the expenses of treatment exceeded the amount of his wages, the proof being that he had gone to the hospital upon the judgment of the officers of the ship, as well as upon his own, and for the convenience of the ship. In this case it was conceded that the seaman would have had no claim against the ship if he had gone into a hospital against the expressed judgment of the officers.

See also Harden v. Gordon (1823) 2 Mason, 541, Fed. Cas. No. 6,047, and The George (1832) 1 Sumn. 151, Fed. Cas. No. 5,329, the effect of which is stated *infra*, V. d, 2. In the former of these cases, Story, J., states that the various marine ordinances, which are evidence of the general maritime law, declare that a sick seaman, when he is put ashore, is entitled to receive suitable sustenance and attendance from the ship and crew during his illness. By article 7 of the Laws of Oleron it is declared: "If it happens that sickness seizes on any one of the mariners while in the service of the ship, the master ought to set him ashore, . . . and also to spare him one of the ship's boys, or hire a woman to attend him, and likewise to afford him such diet as is usual in the ship." [1 Pet. Adm. XVI. Appx.] Other provisions to the same effect are article 19 of the laws of Wisbuy, and article 45 of the Hanseatic ordinance.

The fact that the seaman, upon being given his choice between remaining on board the ship and being sent on shore to a hospital, chooses the latter, will not exempt the ship from liability from expense while there. Johnson v. Doubty (1827) 1 Ashm. (Pa.) 165.

No allowance will be made to an injured seaman for medical attendance, if he was sent to a hospital at the expense of the ship (The Centennial [1881] 4 Woods, 50, 10 Fed. 397); or if he was treated at a hospital gratuitously (Davis v. The Erie [1840] Fed. Cas. No. 3,632a).

On the other hand, a seaman who, instead of accepting the master's offer of assistance, abandons the service of the vessel and seeks medical aid on shore, forfeits his right to be cured at the ship's expense. The Combridge (1877) 4 Sawy. 252, Fed. Cas. No. 2,335 (abandonment of service was treated as a renunciation by the seaman of any further claim upon the ship for the expenses of his cure).

A shipowner is not liable for the medical expenses of a seaman whose gross negligence or wilful misconduct was a contributory cause of his sickness or injury. The

City of Alexandria (1883) 17 Fed. 330 (exception to general rule, recognized by the court *arguendo*).

In The Ben Flint (1867) 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299, it was laid down that, to produce a forfeiture of the claim, the disability or sickness of the seaman must be owing to vicious or unjustifiable conduct; such as gross negligence operating in the nature of a fraud upon the owners, wilful disobedience to orders, or persistent neglect of duty.

The rule, as laid down in Walton v. The Neptune (1800) 1 Pet. Adm. 142, Fed. Cas. No. 17,135, is that if the sickness, disability, or death of a seaman was due to "vicious or unjustifiable conduct," he or his heirs must bear the loss.

In Johnson v. Huckins (1843) 1 Sprague, 67, Fed. Cas. No. 7,390, it was held that in case of sickness produced by the seaman's own fault he would be charged with the expenses of subsistence; and, while there is no express ruling on the question of medical attendance, some expressions of the court would seem to imply that subsistence was regarded as including medicine.

That the vessel is not chargeable with the expenses of the cure of a seaman who contracts disease by his own vices or faults, and in defiance of the counsel and command of his superior officers, was held in Pierce v. Patton (1833) Gilpin, 435, Fed. Cas. No. 11,145.

Similarly, it has been laid down that a sailor is not entitled to be treated at the expense of the ship, or to wages, while disabled by disease brought on by his own vices, nor when, being in a diseased state unknown to the master and owners, he ships as an able man. Chandler v. The Annie Buckman (1853) Fed. Cas. No. 2,591a.

A seaman who disregards the advice of his physician, and uses a wounded foot, cannot recover from the ship for its subsequent care and cure. Richardson v. The Juillette (1842) 2 N. Y. Legal Obs. 23, Fed. Cas. No. 11,784.

The expenses of curing himself of any illness or injury occasioned by his own improper conduct are thrown upon the seaman by the Laws of Oleron, art. 6; Ord. of Wisbuy, art. 20; French Ord. Mar. liv. 3, F. 4, art. 12; Code de Commerce, art. 264.

But a seaman's claim is not barred by evidence which merely goes to show that he was guilty of ordinary carelessness. Reed v. Canfield (1832) 1 Sumn. 195, Fed. Cas. No. 11,641; The Chandos (1880) 6 Sawy. 544, 4 Fed. 645; The Ben Flint (1867) 1 Biss. 562, 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299; The City of Carlisle (1889) 5 L.R.A. 52, 14 Sawy. 179, 39 Fed. 807 (ship liable where seaman's injury resulted from his failure to notice that a clew iron was hanging loose); The City of St. Louis (1893) 56 Fed. 720 (ignorance of methods of the boat, contributing to the injury of a deck hand on a steamboat, held not to constitute a fault of such character as to debar him from recovering his expenses).

Where the negligence of a seaman contributes to the injury, while the ship will not be mulcted in damages, it will be held responsible for its negligence contributing to the injury, to the extent of paying for the direct care, attention, medical services, and expenses required for the injured person. The Wanderer (1884) 20 Fed. 140.

It has been held that, where the expenses in question were incurred in the treatment of a sickness, it is not necessary to show, as a prerequisite to recovery, that it originated while the seaman was actually in the service of the ship, but merely that it existed during that period, and that it was not due to any fault or misconduct on his part. Neilson v. The Laura (1872) 2 Sawy. 242, Fed. Cas. No. 10,092.

Whether a similar rule prevails where the conditions which demanded the treatment were the result of a bodily injury received before the time when the seaman entered the service is a point which apparently has not been decided. But it is apprehended that the obligation of the shipowner would extend to such a case also.

A freighting vessel is not bound to provide a physician or nurses for sick seamen on the voyage. The care and attention of the master are all that the crew have a right to demand. The Wensleydale (1890) 41 Fed. 602.

In cases where the condition of a seaman injured during the voyage was such as to indicate the urgent necessity for treatment by an expert surgeon, and such treatment could not be procured on board, the question whether the failure of the master of the ship to make for a port constitutes a breach of duty is one which must be determined with reference to all the evidence. As is shown by the decisions cited below, there is sometimes no little difficulty in arriving at a conclusion which shall be in keeping with the dictates of humanity, and yet shall not be suggestive of a standard of duty which sometimes could not be satisfied without inflicting serious damage upon the financial interests of the shipowner.

If upon the ship's arrival at a port the necessity of immediate surgical attention to an injured sailor is ascertained, the owner of the vessel will be liable for injuries caused to him by the master's sailing away without procuring for him the required attention. Scarff v. Metcalf (1887) 107 N. Y. 211, 1 Am. St. Rep. 807, 13 N. E. 796.

Damages will be allowed for neglecting, in a case where it was necessary, to send an injured seaman to a marine hospital for treatment at the expense of the ship, for an unreasonable period (here twelve days) after her arrival in port. The Chandos, *supra*. If the voyage has only just been commenced when a seaman receives an injury so severe that it manifestly cannot be properly treated except by an expert, there is doubtless a peremptory obligation on the part of the master to put back for the purpose of placing the seaman under the care of a surgeon. In The Troop (1902) 118

Fed. 769, damages to the amount of $4,000 were awarded against a ship for the gross inhumanity of the master to a seaman who had received a severe injury when the ship was only 6 miles from the port of departure, where there was a hospital, but was kept on board for the remainder of a voyage of thirty-six days, under circumstances which were quite unsuitable for a person in his condition, and which caused him intense suffering and permanent physical disability.

So, also, it is clearly the duty of the master to procure medical attendance that may be available at ports where the vessel touches, for the benefit of seamen injured, where there is reasonable evidence of a necessity for it. The Vigilant (1887) 30 Fed. 288.

A like rule is applicable where the ship's course is such as to bring it within sight of a place where a surgeon can be procured. Brown v. Overton (1859) 1 Sprague, 462, Fed. Cas. No. 2,024 (seaman broke both legs twenty-five days before land was sighted).

But where an accident happens in mid-ocean, the failure of the master to make a considerable deviation from his course, for the purpose of placing an injured seaman under the care of a surgeon, does not necessarily imply a breach of duty. Whether the deviation is obligatory will depend upon the circumstances of the case; such as the nature of the injury, the means available for treating it on board, and the probability of being able to reach a port in time for his relief. But the authorities show that if the injury is such that a person of ordinary judgment would know that, unless it were treated by a surgeon, it might cause the death or permanent disability of the seaman, it is the imperative duty of the master to make even a deviation of several hundred miles to reach the nearest port where the services of a surgeon can be obtained, and that the loss of time and possible risk to the cargo are matters which will not be permitted to outweigh this duty. In The Iroquois (1902) 113 Fed. 964, Affirmed in (1902) 55 C. C. A. 497, 118 Fed. 1003, where a seaman sustained a simple fracture of one of his legs, it was held that the master should have put back to a port which could have been reached in two or three days, although, owing to head winds, it would have required four or five weeks to regain the place where the accident occurred. The master, it was said, must be presumed to have known that the injury was so serious as to need scientific treatment; and his omission of the duty to put into port, regardless of the loss of time and the expense incident to such deviation, was not excused by the fact that the seaman made no demand to be taken on shore. In this case ten weeks were spent in reaching the ship's destination, and the master's unskilful treatment of the leg rendered amputation ultimately necessary.

In Whitney v. Olsen (1901) 47 C. C. A. 331, 108 Fed. 292, where, at a point 500 miles distant from a port a sailor's leg was broken in two places, and the master, although the wind was favorable, refused to comply with his request to be taken there, and continued the voyage for more than two weeks longer, the consequence being that his injury was rendered permanent, it was held that the master's failure to proceed to the nearest available port was a breach of duty.

These cases seem to impose a stricter obligation upon the master than one in which a seaman sustained a fracture of the thigh bone, which was so unskilfully treated by the master that the leg was ultimately shortened 3 inches, and it was held that, if the ship could have made a port in five or six days, it would have been the duty of the master to have gone there and obtained aid, but that, if this could not have been done in less than two weeks, he was not bound to make the deviation. The Chandos (1880) 6 Sawy. 544, 4 Fed. 645.

d. Under statutes.

1. England.

In England the liability of shipowners for the medical expenses of seamen has been defined in a series of statutes, the most recent of which is the merchant shipping act of 1894. The provisions contained in these statutes are of two different kinds, *viz.*, (1) those which are simply declaratory of the general maritime law, and (2) those which formulate rules which experience has shown to be necessary for the purpose of effectuating fully the beneficial objects of that law.

The provisions of § 207 of this act are as follows:

Subs. (1). If the master of, or a seaman or apprentice belonging to, a ship receives any hurt or injury in the service of the ship, the expense of providing the necessary surgical and medical advice and attendance and medicine, and also the expenses of the maintenance of the master, seaman, or apprentice until he is cured, or dies, or is brought back, if shipped in the United Kingdom to a port of the United Kingdom, or, if shipped in a British possession, to a port of that possession, and of his conveyance to the port, and, in case of death, the expense (if any) of his burial, shall be defrayed by the owner of the ship, without any deduction on that account from his wages. (A re-enactment almost verbatim of the merchant shipping act of 1854, § 228, subs. 1.)

Subs. (2). If the master or a seaman or apprentice is, on account of any illness, temporarily removed from his ship for the purpose of preventing infection, or otherwise for the convenience of the ship, and subsequently returns to his duty, the expense of the removal and of providing the necessary advice and attendance and medicine and of his maintenance while away from the ship shall be defrayed in like manner. (The same provision is found in § 228, subs. 2, of the act of 1854.)

Subs. (3). The expense of all medicines, surgical and medical advice, and attendance given to a master, seaman, or apprentice whilst on board his ship shall be defrayed in like manner. (Corresponding to § 228, subs. 3, of the act of 1854.)

Subs. (4). If a seaman or apprentice is ill, and has, through the neglect of the master or owner of the ship, not been provided with proper provisions and water according to his agreement, or with such medicines, medical stores, anti-scorbutics, or accommodations as are required by this act, then the owner or master, unless it can be proved that the illness has been produced by other causes, shall be liable to pay all expenses (not exceeding on the whole three months' wages) properly and necessarily incurred by reason of the illness, either by the seaman himself, or by the Crown or any parochial or local authority on his behalf; and those expenses may be recovered as if they were wages duly earned; but this provision shall not affect any further liability of the master or owner for the neglect, or any other remedies possessed by the seaman or apprentice. (This provision is substantially a re-enactment of § 7 of the amending act of 1867.)

Subs. (5). In all other cases any reasonable expenses duly incurred by the owner for any seaman in respect of illness, and also any reasonable expenses duly incurred by the owner in respect of the burial of any seaman or apprentice who dies whilst on service, shall, if duly proved, be deducted from the wages of the seaman or apprentice. (Corresponding to § 228, subs. 4, of the act of 1854.)

By § 208 it is provided that, if any expenses which the owner is required to bear in respect to the illness or injury of a seaman are paid by a consul or other person in behalf of the Crown, such expenses may be recovered from the owner. A similar provision is found in § 229 of the act of 1854.

The words "hurt or injury in the service of a ship" have been held to apply not only to any hurt sustained by a casualty, but to any illness brought on a seaman, while doing his duty in the service of the ship,—as here by bad provisions. Board of Trade v. Sundholm (1879) 41 L. T. N. S. 469.

The words of the statute were said to have been intended to distinguish such an injury as that which was under review from one received by a seaman while on shore for his own pleasure.

Where a vessel is shipwrecked, the seamen are not deemed to be discharged until it is finally abandoned. Up to that time the master is entitled to command their services, and the liability of the shipowner to them still subsists. Accordingly, where the same occurrence which converted the ship into a wreck injured several of the crew, it was held that their injuries were received "in the service of the ship" within the meaning of these acts. Lord Advocate v. Grant (1874) 1 S. C. Sess. Cas. 4th series, 447.

Where a seaman is injured in the service of the ship, his right to recover expenses under § 207 is limited to expenses incurred for necessary surgical and medical advice and attendance. He cannot recover the amount charged for a private room in a hospital, where there is nothing to show that he could not have been treated in the public ward without any additional expense. Wyman v. The Duart Castle (1899) 6 Can. Exch. 387.

In The Magna Charta (1872) 2 Low. Dec. 136, Fed. Cas. No. 8,953, Lowell, J., said that he understood the effect of §§ 228 and 229 of the English merchant shipping act of 1854 to be that the ship was liable for the expenses of seamen who were hurt, but not for their wages. Yet it is expressly stated that the medical expenses shall be paid "without any deduction from his wages."

In The Troop (1902) 118 Fed. 769, the opinion was expressed that the English merchant shipping acts do not take away the right which a seaman had under the maritime law to maintain a suit *in rem* against the ship to recover damages caused by the failure of the master to furnish him with proper care, treatment, and supplies after he has received an accidental injury in the service of the ship.

By §§ 200 and 204 of the act of 1894, the owner of every ship navigating between the United Kingdom and any place out of the same is declared liable to a penalty if he fails to provide a supply of medicine in accordance with a scale to be published from time to time by the board of trade. The owners of all foreign-going ships (with certain exceptions) are also required to provide a sufficient quantity of anti-scorbutics. These provisions supersede those contained in §§ 4 and 6 of the amending act of 1867, which had replaced § 224 of the act of 1854.

It has been held that a seaman who has received a personal injury from the breach of these provisions is entitled to maintain an action to recover damages. Couch v. Steel (1854) 3 El. & Bl. 402 (decided with reference to the statute 7 & 8 Vict. chap. 112, § 18, an enactment having the same general object as those mentioned above). But since the criticisms on this case in Atkinson v. Newcastle & G. Waterworks Co. (1877) L. R. 2 Exch. Div. 441, it is somewhat questionable how far this case can be regarded as a correct exposition of the law in England.

In Massachusetts the doctrine of the civil liability of shipowners for a breach of the requirements of this English statute has been accepted. Baxter v. Doe (1886) 142 Mass. 558, 8 N. E. 415, decided with the reference to the act of 30 & 31 Vict. chap. 104, which was incorporated in the act of 1894.

2. United States.

Several statutes relating to the medical treatment of seamen have been enacted by Congress.

The navigation acts of July 20, 1790 (1

Stat. at L. 134, chap. 29, § 8), provided that American vessels of a certain burden and crew, bound on foreign voyages, "shall be provided with a chest of medicines, . . . accompanied by directions for administering the same; . . . and, in default of having such medicine chest so provided and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians as any of the crew shall stand in need of, in case of sickness, at every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner." By the act of March 2, 1805, chap. 88, this provision was extended to vessels of a smaller burden and crew, engaged in the West India trade.

The more recent provisions on the same subject are that vessels belonging to certain specified classes shall be provided with a medicine chest, and with a sufficient quantity of anti-scorbutics, to be served out daily to the crew. Act of Congress of June, 1872, chap. 322, §§ 36, 37; U. S. Rev. Stat. §§ 4569, 4570 (U. S. Comp. Stat. 1901, p. 3,100).

It is no excuse for not serving out lime juice to the crew daily, that the seamen preferred to receive coffee instead of lime juice. When no lime juice is served, and the crew are attacked with scurvy, the ship is liable for the damage the seamen sustain on account of the disease, in the absence of any proof that they contracted scurvy before the voyage began. The Rence (1890) 46 Fed. 805.

The construction put upon the acts of 1790 was that they had modified the general maritime law to the extent of relieving a ship whose owner complied with their provisions from the charge of medical advice, but had left intact the liability imposed by that law, so far as the other expenses of treating seamen were concerned.

In the case of Walton v. The Neptune (1800) 1 Pet. Adm. 152, Fed. Cas. No. 17,135, it was admitted that according to the weight of authority the proper construction of these statutes was that the ship was bound to furnish medicines or pay the physician's bill; but that the sailor, when the ship is so furnished, must pay for surgical or medical advice and assistance.

In the elaborate judgment which he delivered in Harden v. Gordon (1823) 2 Mason, 541, Fed. Cas. No. 6,047, Story, J., used the following language: "The acts under consideration do indeed make a new provision; for, independently of them, there does not seem to exist any obligation on the part of the owner to provide a medicine chest for the use of the ship during the voyage; and it is obvious that, unless medicines are so provided, seamen taken sick at sea will be without any means of obtaining suitable remedies. In this view the provision is auxiliary to that of the maritime law, and is a substantial benefit to seamen by enlarging the means of recovery. In any other view it is a serious diminution of their antecedent rights, giving them medicine, but charging them for medical advice, and thus abridging their most important permanent interests. It cannot readily be believed that Congress, which has on so many occasions manifested a solicitude to guard the interests and secure the safety of this invaluable, though improvident, class of men, can have intended to increase their burdens, narrow their privileges, or expose them to the danger of still harder sufferings. . . . Assuming, then, that medicines and medical advice are not a charge on the ship, where a proper medicine chest is on board, it does not follow that other charges of sickness are entitled to the same exemption. That would be carrying the doctrine of constructive repeals far beyond what courts of justice have hitherto thought it reasonable to assert. In the next place, the clause itself applies in terms only to the expenses of advice, medicine, and attendance of physicians. It considers the medicine chest and medical directions (very erroneously, as experience has shown) to be equivalent to the regular administration of medical advice. They may be, as has been already hinted, of great utility at sea; but when the aid of a physician, as well as medicines suited to the particular case, may be obtained in port, it is almost trifling with life to intrust the management of diseases to the unskilfulness or rashness of a ship's crew." The conclusion of the learned judge was that there was nothing in the statutes that affected charges for board, lodging, and nursing sick seamen when on shore, and that these expenses accordingly remained a charge upon the ship, and were to be borne by the owner, upon the principles of maritime law.

In Holmes v. Hutchinson (1833) Gilpin, 447, Fed. Cas. No. 6,639, the court said: "It must now be taken to be the law of the United States, under our act of Congress, that in the case of an ordinary sickness, not infectious or dangerous to the crew, so as to render a removal from the ship prudent or necessary, and when no such removal is made, and the ship is provided with a medicine chest according to the directions of the act of Congress, the medical advice of the sick seaman is not chargeable to the ship." The circumstances noted in this case as a foundation for the judgment were as follows: (1) The sickness was not produced by the fault of the seaman, nor contracted previous to his shipment. (2) It was not produced by any accident while engaged in service on board of the brig and in the discharge of his duty. (3) It was not an endemic disease of the climate to which the seaman was exposed. (4) It was not a contagious disease, dangerous to the crew, which made it necessary, for their safety, to remove the man from the vessel, thereby incurring extraordinary expenses. (5) It was an ordinary disease which the man might have had anywhere, in any other place or employment. The court said that there was no precedent

for charging the ship, in such a case, with the physician's bill for advice and attendance.

"It seems to be well settled that the general obligation of the law merchant remains in force unless the medicine chest is provided with medicines and means of medical treatment which the particular case requires, and there is sufficient skill on board to make a proper use of those medicines." 2 Parsons, Shipping & Admiralty, pp. 81, 82.

This doctrine is possibly subject to an exception in cases where dangerous diseases require and compel extraordinary remedies and assistance. But on this point there is a conflict of authority.

That such an exception should be made was asserted by Peters, J., in a note to Swift v. The Happy Return (1799) 1 Pet. Adm. 253, Fed. Cas. No. 13,697.

This was merely an extrajudicial expression of opinion. But the acceptance of this doctrine seems to be indicated by the language quoted *supra*, from the opinion of the court in Holmes v. Hutchinson.

On the other hand, in Pray v. Stinson (1842) 21 Me. 402, it was laid down that the rule which requires the bill of the physician for attendance upon a seaman sick on board at a port, to be paid by the seaman, is the same whatever may be the nature of the disease, even if it be a violent and dangerous one, as the yellow fever, and that the desire of the seaman to be removed on shore cannot change the rights and the relations of the parties. His judgment, in such case, must necessarily be subjected to that of those who are by law intrusted with the prudential concerns of the vessel and crew for the common good of all. The court remarked: "Although learned judges have expressed their doubts whether the act ought to have received such a construction, their reasons have never been deemed sufficient to authorize a change; and this has been admitted to be the general and well established construction, subject to certain exceptions. And if such were not the original intention, there has been ample time for legislative interposition to effect a change and correct the error. The fact that there has been no such interference in this commercial country for so long a course of years tends strongly to establish the accuracy of the construction made by the judicial tribunals."

In order to entitle himself to the benefit of this partial exemption, the shipowner must prove that a medicine chest was on board, furnished with suitable medicines. In the absence of specific evidence, the fact of compliance with the statutory condition will not be presumed. The Nimrod (1822) 1 Ware, 20, Fed. Cas. No. 10,267; The William Harris (1837) 1 Ware, 373, Fed. Cas. No. 17,695.

In Pray v. Stinson, *supra*, it was held that if the vessel had on board the requisite medicine chest it was not liable for physician's bills, although the physician was called without request from the seaman, because the danger was such that the law of the place, as well as the feelings of humanity, required that he should be called.

It has also been laid down that these provisions are intended to apply only to cases in which the seaman is on board, or in a position to avail himself of the medicines and the directions for their use, and that if he is removed ashore for the convenience of the ship, whether with his own consent or without it, and does not draw his medicines from the chest, he is entitled to an allowance equal to his expenditure for medicines. Harden v. Gordon (1823) 2 Mason, 541, Fed. Cas. No. 6,047, per Story, J., who observed that, under such circumstances, "the nonexistence of the medicine chest, and the incapacity to obtain the use of it, are precisely equivalent."

This doctrine was reiterated by the learned judge in The George (1832) 1 Sumn. 151, Fed. Cas. No. 5,329, where the mate, being sick, went on shore for his own relief, for the safety of the crew, and for the interest of all concerned, and it was decided that all the expenses of the cure including medical advice and attendance, were a charge upon the vessel, although she was provided with a chest of medicines, as the act required.

In The Forest (1837) 1 Ware, 420. Fed. Cas. No. 4,936, the court considered that the act could exempt the owners from the charge for medical advice and attendance only "when the seaman can have the benefit of the medicine administered, under the printed directions for its use, by the master or some other person fit to be intrusted with so delicate a duty." It was accordingly held that as the master, mate, and four seamen were sick and unable to administer the medicines, the vessel was chargeable for medical advice and attendance upon the seamen on board, although properly provided with a chest of medicines.

But the sickness and absence of the master on shore is immaterial. The law devolves his duties, during such absence, upon the mate, who, in the absence of evidence to the contrary, it presumes is able to perform them properly. Pray v. Stinson, *supra*.

But where a seaman is taken on shore at his own request, from a vessel properly provided with a chest of medicines, and there receives medical attendance and advice, the expenses thereof are to be deducted from his wages. Pierce v. Patton (1833) Gilpin, 435, Fed. Cas. No. 11,145.

A stipulation in the shipping articles that the seaman shall pay for medical advice and medicines, without any condition that there shall be a medicine chest on board the vessel, is void as being contrary to the policy of the act of Congress. Harden v. Gordon (1823) 2 Mason, 541, Fed. Cas. No. 6,047.

In line with this decision are two others to the effect that a stipulation in the shipping articles that seamen shall pay for their own medicines beyond what may be furnished from the medicine chest is void.

(The Sarah Jane [1833] Blatchf. & H. 411, Fed. Cas. No. 12,348); and that an express promise made by a sick seaman to the master to pay the physician's bill is without consideration and also void (Freeman v. Baker [1833] Blatchf. & H. 372, Fed. Cas. No. 5,084).

In the United States, marine hospitals are now regulated by U. S. Rev. Stat. §§ 4801 *et seq.* (U. S. Comp. Stat. 1901, pp. 3321 *et seq.*), which provide for collecting from vessels fifty cents per month for each seaman, in order to form a fund for the relief of sick and disabled seamen. The dates of the various acts relating to marine hospitals up to 1864 are specified in 2 Parsons, Shipping & Admiralty, p. 80, note 3.

The hospital service organized under this and the earlier enactments *in pari materia* is not intended to supersede the maritime law, which imposes the obligation on a vessel to take care of a seaman becoming injured in its service. The Chandos (1880) 6 Sawy. 544, 4 Fed. 645.

A seaman, therefore, is not obliged to accept an offer of treatment in such hospitals. Holt v. Cummings (1883) 102 Pa. 212, 48 Am. Rep. 199, where it is stated that this view of the effect of the legislation is adopted in 2 Parsons, Shipping & Admiralty, p. 80.

But a seaman who has declined an offer of the master to procure a physician for his treatment on board ship, and has afterwards been discharged, at his own request, from a marine hospital, cannot make claim for medical expense thereafter in some other hospital. Raymond v. The Ella S. Thayer (1887) 40 Fed. 902.

Nor is the ship responsible for the treatment received by an injured seaman at a marine hospital to which he has been taken with his own consent. Campbell v. The Frank Gilmore (1890) 43 Fed. 318.

e. Duration of the obligation.

1. Where no fault on the part of the shipowner or his agents is shown.

It is agreed that, except in cases where the seaman's sickness or injury is the result of his own wilful misconduct, the duty of the shipowner to furnish him with medical or surgical attendance continues at least up to the time when the voyage is ended and he is discharged from service. The City of Carlisle (1889) 5 L.R.A. 52, 14 Sawy. 179, 39 Fed. 807; The W. L. White (1885) 25 Fed. 503; Harris v. Capen (1857) Fed. Cas. No. 6,118 (seaman injured during a voyage, and left sick in a foreign port, held to be entitled to wages during such sickness and up to his arrival home, together with medical expenses, deducting wages actually earned on the return voyage).

The same doctrine was also taken for granted in many of the decisions cited in the preceding subdivisions.

In Reed v. Canfield (1832) 1 Sumn. 195, Fed. Cas. No. 11,641, where a seaman had his feet frozen in the home port before he was discharged, Story, J., thus disposed of the contention that the maritime law applies only to sickness and accidents and injuries occurring in the ship's service during the voyage abroad, and not when she is in the home port, either at the commencement or termination of her voyage: "I know of no such qualification ingrafted upon the rule of the maritime law. It embraces all sickness and all injuries sustained in the service of the ship and while the party constitutes one of her crew, without in the slightest manner alluding to any difference between their occurring in a home or in a foreign port, upon the ocean, or upon tide waters. . . . The voyage of the ship must, so far as the seamen are concerned, be deemed to commence when they are to perform service on board, and to terminate when they are discharged from further service. The title to be cured at the expense of the ship is coextensive with the service in the ship. The seaman is to be cured for injuries and sickness occurring while he is in the ship's service. It is the benefit from the service which constitutes the groundwork of the claim. And I am wholly unable to perceive any principle upon which a distinction can be maintained between a service in a foreign and a home port."

In a Pennsylvania case it has been held that if a seaman is injured at the home port, and the captain of the ship summons a physician who attends the man on board the boat and subsequently, after his removal to his home, the ship will be liable for the whole amount of the bill. Holt v. Cummings (1883) 102 Pa. 212, 48 Am. Rep. 199.

In The Atlantic (1849) Abb. Adm. 451, Fed. Cas. No. 620, the court mentions that, according to the Commentary of Pardessus, the French maritime law limits the obligation of the master, in case of a seaman left sick abroad, to providing for the charge of his sickness, and for the expense necessary to place him in a condition to return home. 1 Pardessus, § 688; 1 Boulay Paty, 202; Hart v. The Littlejohn (1800) 1 Pet. Adm. 117, Fed. Cas. No. 6,153.

Nor is it disputed that the liability of a shipowner for the medical expenses of a seaman whose sickness or injury was not the result of the shipowner's tortious acts terminates with the cure of the seaman. Lord Advocate v. Grant (1874) 1 Sc. Sess. Cas. 4th series, 44.

But under the authorities as they stand, it seems to be a matter of considerable uncertainty whether the shipowner's liability for medical expenses is to be considered as one which is coextensive in point of duration with the contract of employment, and ceases to subsist when the seaman is discharged, or whether in some circumstances the shipowner remains subject to that liability for a further period. An examination of the decisions bearing on these points shows that they may be arranged under the following heads:

(1) Those in which the language used is such as seems on its face to indicate the adoption of an absolute rule to the effect that the obligation does not extend beyond the time when the seaman's contract has been fully performed. The J. F. Card (1890) 43 Fed. 92 (obligation of vessel navigating Great Lakes held not to extend beyond the time when seaman returns to his home port or to a marine hospital); Sullivan v. Neptuno (1887) 30 Fed. 925; The Tammerlane (1891) 47 Fed. 822.

In Nevitt v. Clarke (1846) Olcott, 316, Fed. Cas. No. 10,138, the court referring to the language used by Story, J., in Reed v. Canfield (1832) 1 Sumn. 202, Fed. Cas. No. 11,641, said that the unqualified terms in which the doctrine was there stated seemed to involve the corollary "that the owner remains chargeable with the expenses sustained by a seaman in employing medical means to effect a cure, so long as the necessity for such expenses abides;" and then proceeded to point out some of the inconvenient consequences of adopting such a rule: "It is manifest that a construction of this law which should charge owners of vessels with the support of sick crews without limitation of time would be most oppressive in its consequences, if it did not also tend to impair to a serious degree the maintenance and prosperity of a merchant marine, and thus become a public evil. The ship and owner would be rendered liable for the support of sick seamen out of each successive crew and voyage, who would be made pensioners upon the owner so long as their infirmities remain uncured. . . . A liability so hazardous would be oppressive and disastrous to navigation and trade." It was accordingly held that the right of the libellant to wages, and his right to support or medical treatment at the expense of the respondents, supposing his cure not then completed, ended on his arrival at the home port. The reasoning in this case, it will be observed, is quite unsatisfactory in this respect, that it assumes the only two possible alternatives to be the absolute denial of any liability on the shipowner's part after the shipping contract is terminated, or the admission of a liability unlimited in point of time. It will be seen below that this view of the logical situation is by no means accepted by all the authorities.

Doubts as to the correctness of the doctrine laid down by Story, J., were also expressed in The J. F. Card, *supra*.

(2) Those which embody the doctrine that, under ordinary circumstances, the obligation ceases when the seaman's contract is dissolved, but that there may be a few exceptional instances in which his medical expenses will continue to be a charge on the ship after that time.

In The Ben Flint (1867) 1 Biss. 562, 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299, the conclusion reached after a review of the American cases was that, "in the absence of misconduct or neglect on the part of the officers, the obligation of the vessel to provide for a disabled or sick seaman should only be coextensive in duration to that of the seaman to the vessel. The privileges and liabilities of the parties are, in contemplation of law, measured by the shipping articles. Interests of commerce do not require that the privileges and duties of shipowners and seamen should be extended beyond the reason, nature, and terms of the shipping contract, unless for fault, misconduct, or neglect on the part of officers of vessels toward their seamen; or, perhaps, when the removal of a sick or disabled seaman from the vessel, or a change of treatment then being practised, might prejudice his recovery within a reasonable time. Humanity and equity might require indulgence in extreme cases."

In The Lizzie Frank (1887) 31 Fed. 477, the court disapproved the above exposition of doctrine in so far as it may have been intended to embody the rule that the ship is in no case liable for a seaman's medical expenses after his discharge.

In The Atlantic (1849) Abb. Adm. 452, Fed. Cas. No. 620, the subject was thus discussed: "The expression often employed in the various ordinances and in the decisions is that mariners are entitled to be cured of sickness and wounds received in service of the ship. This statement is clearly not to be taken in an absolute sense. That would involve impossibilities. Diseases and injuries so incurred are frequently, in their nature and in their direct consequences, incurable. An exposure to unusual labor or privations on the voyage may induce maladies permanent or irremediable in their character. Thus, broken limbs, or bodily debility resulting from services in the ship, are very often the sailor's heritage for the residue of his life. . . . The term, 'cure' was probably employed originally in the sense of 'taken charge or care of' the disabled seaman, and not in that of positive healing. The obligation of the ship to the mariner would then be coextensive in duration to that of the mariner to the ship. Natural reason would seem to point to that limitation, it being the one consonant to the relation in which the law places the parties to each other, and by which it measures their privileges and liabilities under a shipping contract. This rule may undoubtedly be subject to variations. When a course of medical treatment, necessary and appropriate to the cure of the seaman, has been commenced and is in a course of favorable termination, there would be an impressive propriety in holding the ship chargeable with its completion, at least for a reasonable time after the voyage is ended or the mariner is at home. So, also, in case due attention to his necessities has been unjustly omitted by the ship abroad, or his case has been improperly treated, the courts may properly enforce against the ship this great duty towards disabled mariners, even after her contracts are terminated, upon the ground of a failure to perform towards them the obligation in the shipping contract. These

particulars, however, are not stated as ingredients in the present case, but are referred to in illustration of the doctrine involved in some of the authorities, and to show they are not inconsistent with the general principle that a seaman has no claim upon the ship or her owner for the cure of his sickness or disabilities after his contract has terminated and he is returned to his port of shipment or discharge, or has been furnished with means to do so."

(3) Those in which it is declared, without any qualifying words, that a seaman injured in the service of the ship is entitled to be "cured at the expense of the ship," or that he is entitled to be taken care of until the end of the voyage, or longer, if necessary to effect a cure. In many of the cases in which the quoted phraseology is found, the court was simply laying down the general rule, and the circumstances were not such as to direct its attention to the question of the duration of the shipowner's obligation. The Chandos (1880) 6 Sawy. 544, 4 Fed. 645.

That a ship is liable for the expenses of a seaman at a quarantine hospital until he is cured, and not merely until he is able to sit up, and could leave the hospital if he had a place to go and friends to take care of him, was declared in The Wensleydale (1890) 41 Fed. 829.

But in spite of the generality of the language used in such cases as these, it can scarcely be supposed that the court did really intend to stand sponsor for the broad principle that the shipowner's obligation invariably continues until the seaman's cure is complete, whatever the length of the period which may be requisite to restore him to his normal physical condition. It may, at all events, be asserted with some confidence that such a principle cannot reasonably be read into the ancient rule of maritime law to which these unqualified statements have reference, and that, if purely rational considerations are to control the matter, the arguments set forth in the passages quoted above are amply sufficient to discredit the theory of an obligation subsisting for an indefinite time.

(4) Those in which the position is taken that a "temporary or permanent disability" occasioned by the sickness or injury is not a ground for indemnity from the owners; that "they are liable only for expenses necessarily incurred for the cure;" that, "when the cure is completed, at least so far as the ordinary medical means extend," they are freed from all further liability; and that they are "not in any just sense liable for consequential damages."

This is the doctrine enunciated by Story, J., in Reed v. Canfield (1832) 1 Sumn. 195, Fed. Cas. No. 11,641: It has been asked, said the learned judge, if, "in a claim of this sort, the expenses of cure are to be paid by the ship, what are the limits of the allowance? May they be extended over years or for life? Are they to be like the pensions allowed by some of the marine ordinances in cases of wounds and other injuries received by seamen in defending the ship from the attacks of pirates? My answer to suggestions of this sort is that the law embodies, in its very formulary, the limits of the liability. The seaman is to be cured, at the expense of the ship, of the sickness or injury sustained in the ship's service. It must be sustained by the party while in the ship's service; and he is not to receive any compensation or allowance for the effects of the injury. But so far, and so far only, as expenses are incurred in the cure, whether they are of a medical or other nature, for diet, lodging, nursing, or other assistance, they are a charge on, and to be borne by, the ship."

In The Lizzie Frank (1887) 31 Fed. 477, the court, while conceding that, by the maritime law, a seaman who is injured or disabled in the service of the ship is entitled to be healed at its expense, and that this liability continues after the voyage is ended and the seaman is discharged, recognizes the limitation that a seaman is not entitled to receive any allowance for the permanent effects of his injury, and that when the cure is complete, as far as ordinary medical means extend, the ship and owner are freed from liability.

This fourth theory of the duration of the shipowner's liability is similar to that which is propounded in the last paragraph, with the important qualification indicated by the concluding words of the statement. The particular conception implied in those words also renders it necessary to segregate the doctrine which they limit from the one which is adverted to in the next paragraph.

(5) Those in which the court adopts the doctrine that the shipowner's liability does not necessarily cease when the seaman is discharged at the home port, and at the same time qualifies its statement by language which distinctly shows that the liability is not viewed as being unlimited in point of time,—as, where it is laid down that the seaman is entitled to the expenses of his cure "as far as possible." The W. L. White (1885) 25 Fed. 503; Whitney v. Olsen (1901) 47 C. C. A. 331, 108 Fed. 292.

(6) Those in which it is stated that the expenses incurred in treating and curing a seaman "within a reasonable time" after his discharge at the end of the voyage must be paid by the ship, or that the ship is not bound to defray for an indefinite period the expenses of medical attendance, where the seaman is suffering from a chronic disease. The W. L. White, *supra;* Raymond v. The Ella S. Thayer (1887) 40 Fed. 902.

The duration of the shipowner's liability under the English merchant shipping acts referred to *supra*, V. d, 1, does not seem to have been judicially discussed. But the phraseology used is perhaps suggestive of the meaning that in no case is the liability to extend beyond the time when the seaman reaches the port where he is to be discharged. In The Atlantic (1849) Abb. Adm. 451, Fed. Cas. No. 620, this construction was put by the court upon an earlier Eng-

lish act in which the language used was essentially similar.

2. Where the shipowner or his agents have been in fault.

The books contain several decisions which proceed upon the theory that, where the sickness or other physical disability of the seaman is caused or aggravated by the neglect or misconduct of one of the officers of the ship, he may be entitled to an allowance for the expenses of his case, even after the termination of the voyage. In The Ben Flint (1867) 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299, the court referred with approval to an Ohio decision, Moseley v. Scott (1866) 5 Am. L. Reg. N. S. 599, in which a cabin boy on a river steamer contracted smallpox, and while in bed was so neglected by the officers that his feet were frozen and ultimately amputated in a hospital, to which he was confined for several months. It was held that the shipowner was liable for the expenses of his treatment in the hospital.

In Myers v. The Lizzie Hopkins (1871) 1 Woods, 170, Fed. Cas. No. 9,993, where an injury was received by an employee on a river steamer while in the discharge of his duty, owing to the negligence of the officers, the boat was held to be liable for the expense of his keeping and medical attendance until he was restored.

In The Centennial (1881) 4 Woods, 50, 10 Fed. 397, where an employee on a river steamer running between St. Louis and New Orleans was injured by a defective gangway, and left disabled at an intermediate port, the court charged his hospital expenses for six months on the ship, and apparently proceeded on the theory that the liability continued until he had completely recovered from his injury.

In Croucher v. Oakman (1861) 3 Allen, 185 (sailor had been shot at and wounded by his captain at a foreign port), it was held that the trial judge had correctly instructed the jury that, if the plaintiff was prevented from performing the voyage by the unlawful act of the master, and the injury rendered his removal on shore necessary to receive proper medical treatment, he was entitled to recover wages, deducting such as had been paid to him by the owners or consul, without reference to the termination of the voyage, up to the time when he was sufficiently recovered to sail for home, and to such further time as was reasonable for obtaining a passage and making a voyage to the United States, and also to recover for the expenses of his board, nursing, medicines, and medical attendance until he had so recovered, and for his passage home.

In Petersen v. Swan (1884) 18 Jones & S. 46, the seaman's claim for damages was based partly on the fact that an injured arm was negligently and improperly treated by the master of the ship.

But it is perhaps open to question whether, in a case of this sort, the obligation of the shipowner to indemnify the seaman can properly be regarded as one which is referable to the general maritime law, and based upon an implied contract. Any sum which is ordered to be paid under such circumstances would seem to be rather in the nature of damages recovered *ex delicto*.

C. B. L.

VIRGINIA SUPREME COURT OF APPEALS.

LEE PANNILL, Admr., etc., of Bernard Lee Walker, Deceased, Plff. in Err.,
v.
POTOMAC, FREDERICKSBURG, & PIEDMONT RAILROAD COMPANY.

(— Va. —, 53 S. E. 113.)

Turntable—duty to protect.

A railroad company owes no duty to children trespassing on its property to keep its turntable in such condition that they cannot be injured by playing on it.

(March 22, 1906.)

Case Note.—Liability of railroad companies for injury to children playing on turntables.—The question of the liability of a railroad company maintaining a turntable on its premises for injuries to young children, received while playing on the turntable, is only one phase of the broader question as to the duty of a landowner maintaining on his premises any dangerous thing likely to attract children, to take measures to protect them from the results of their childish curiosity and sportive instincts. The consideration of this question of "attractive nuisances" is fraught with so much difficulty that the hopeless conflict which exists among the authorities is not surprising. Arguments of weight may be adduced to sustain both sides of the problem. The question must necessarily resolve itself into one of expediency,—whether the good to the community to be derived from the protection of its youthful members from the results of their own irresponsibility, by requiring landowners to safeguard dangerous attractions placed by them on their premises, is sufficient to overbalance the inconvenience and expense which must result to the landowner from this partial restriction of his dominion over his own property. If the question be resolved in favor of the children, and the duty of the landowner to guard his dangerous attractions be declared, still further difficulties arise from the practical application of the rule. And since it is impossible to foretell what may or may not prove attractive to the restless spirit and inquiring mind of the small boy, there might seem to be some injustice in requiring a landowner to use reasonable care to safeguard everything placed on his premises which would be likely to attract young children into danger.

ERROR to the Circuit Court for Orange County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Morton & Shackleford and Meredith & Cocke**, for plaintiff in error:

The company was guilty of negligence.

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745; Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; Baltimore & P. R. Co. v. Cumberland, 176 U. S. 232, 44 L. ed. 447, 20 Sup. Ct. Rep. 380; Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393; O'Malley v. St. Paul, M. & M. R. Co. 43 Minn. 289, 45 N. W. 440; Stendal v. Boyd, 67 Minn. 279, 69 N. W. 899; Alabama G. S. R. Co. v. Crocker, 131 Ala. 584, 31 So. 561; Barrett v. Southern P. Co. 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666; Callahan v. Eel River & E. R. Co. 92 Cal. 89, 28 Pac. 104; Ferguson v. Columbus & R. R. Co. 77 Ga. 102; Savannah, F. & W. R. Co. v. Beavers, 113 Ga. 398, 54 L. R. A. 314, 39 S. E. 82; Indianapolis, P. & C. R. Co. v. Pitzer, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70; Kansas C. R. Co. v. Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203; Price v. Atchison Water Co. 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450; Brinkley Car Works & Mfg. Co. v.

Turntables, however, might seem to be fairly distinguishable from other kinds of dangerous attractions, and almost to stand in a class by themselves. The machine itself, being somewhat in the nature of a merry-go-round, is such as to render it peculiarly attractive to children, and, although on the private property of the railroad company, is usually located in a more or less public place, where the presence of children might naturally be expected, unenclosed and unguarded, and with no barriers to prevent their entrance upon the property. This fact has been strongly emphasized by many of the cases. And, however, burdensome a general rule requiring all manner of dangerous attractions to be safeguarded might be, there would seem to be but little hardship in requiring railroad companies to use reasonable care to lock or otherwise so secure their turntables as to render them harmless to trespassing children, since the expense and inconvenience caused by the locking of the turntables would be small in comparison with the benefits to the public resulting therefrom. But whatever the justice or reasonableness of imposing this rule of liability on the railroad companies, it is certainly supported by the great weight of authority, the courts of Alabama, California, Georgia, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, South Carolina, Texas, and Washington, as well as the Supreme Court of the United States, having declared in favor of it, while the courts of Massachusetts, New Hampshire, New Jersey, New York, Tennessee, and Virginia have declared against it.

The first of the series of "Turntable Cases" was Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745, which refused to nonsuit plaintiff, and left the question of the negligence of the company to the jury, declaring that the fact that the child was a trespasser did not relieve the company from the obligation to exercise reasonable care for its safety. Since the decision in that case, the question has been frequently before the courts for consideration, and two opposing and irreconcilable lines of decisions have developed. The text-books, as well as the decisions, are at variance on the question. Thus, the rule imposing liability on the railroad companies is approved in 1 Thomp. Neg. §§ 1036–1040, and 2 Wood, Railway Law, § 321, p. 1286, while it is disappoved in Elliott, Railroads, § 1259, p. 1973, and Baldwin, Am. Railroad Law, p. 234. The doctrine of the Federal Supreme Court has been followed in Alabama G. S. R. Co. v. Crocker, 131 Ala. 584, 31 So. 561; Barrett v. Southern P. Co. 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666; Callahan v. Eel River, & E. R. Co. 92 Cal. 89, 28 Pac. 104; Ferguson v. Columbus & R. R. Co. 77 Ga. 102; Chicago & E. R. Co. v. Fox (Ind. App.) 70 N. E. 81; Edgington v. Burlington, C. R. & N. R. Co. 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95; Kansas C. R. Co. v. Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203; Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393; Nagel v. Missouri P. R. Co. 75 Mo. 653, 42 Am. Rep. 418; Chicago, B. & Q. R. Co. v. Krayenbuhl, 65 Neb. 889, 59 L.R.A. 920, 91 N. W. 880; Atchison & N. R. Co. v. Bailey, 11 Neb. 336, 9 N. W. 50; Bridger v. Asheville & S. R. Co. 25 S. C. 24; Ft. Worth & D. C. R. Co. v. Robertson (Tex.) 14 L.R.A. 781, 16 S. W. 1093; San Antonio & A. P. R. Co. v. Skidmore, 27 Tex. Civ. App. 329, 65 S. W. 215; Evansich v. Gulf, C. & S. F. R. Co. 57 Tex. 126, 44 Am. Rep. 586; Houston & T. C. R. Co. v. Simpson, 60 Tex. 103; Gulf, C. & S. F. R. Co. v. McWhirter, 77 Tex. 356, 19 Am. St. Rep. 755, 14 S. W. 26; Ilwaco R. & Nav. Co. v. Hedrick, 1 Wash. 446, 22 Am. St. Rep. 169, 25 Pac. 335.

So in O'Malley v. St. Paul, M. & M. R. Co. 43 Minn. 289, 45 N. W. 440, it is held that, although a railroad company is not obliged to fasten its turntable so securely that it is impossible for children to remove the fastenings, the fastenings must be such that an ordinarily prudent person would deem them sufficient to render it improbable that young children would remove them.

Cooper, 60 Ark. 545, 46 Am. St. Rep. 216, 31 S. W. 154; Mackey v. Vicksburg, 64 Miss. 777, 2 So. 178; Nagel v. Missouri P. R. Co. 75 Mo. 653, 42 Am. Rep. 418; Witte v. Stifel, 126 Mo. 295, 47 Am. St. Rep. 668, 28 S. W. 891; Townley v. Chicago, M. & St. P. R. Co. 53 Wis. 626, 11 N. W. 55; Pekin v. McMahon, 154 Ill. 141, 27 L. R. A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; Siddall v. Jansen, 168 Ill. 43, 39 L. R. A. 112, 48 N. E. 191; Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; Ann Arbor R. Co. v. Kinz, 68 Ohio St. 210, 67 N. E. 479; Bransom v. Labrot, 81 Ky. 638, 50 Am. Rep. 193; East Tennessee & W. N. C. R. Co. v. Cargille, 105 Tenn. 628, 59 S. W. 141; Bridger v. Asheville & S. R. Co. 25 S. C. 24; Westerfield v. Levis Bros. 43 La. Ann. 63, 9 So. 52; Daley v. Norwich & W. R. Co. 26 Conn. 591, 68 Am. Dec. 413; Tully v. Philadelphia, W. & B. R. Co. 2 Penn. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019; San Antonio & A. P. R. Co. v. Skidmore, 27 Tex. Civ. App. 329, 65 S. W. 215; Kopplekom v. Colorado Cement Pipe Co. 16 Colo. App. 274, 54 L. R. A. 284, 64 Pac. 1047; Hydraulic Works Co. v. Orr, 83 Pa. 332; 2 Wood, Railroads, § 321; Norfolk & P. R. Co. v. Ormsby, 27 Gratt. 455; Baltimore & O. R. Co. v. McKenzie, 81 Va. 71; Standard Oil Co. v. Wakefield, 102 Va. 824, 66 L. R. A. 792, 47 S. E. 830; Lynchburg Teleph. Co. v. Booker, 103 Va. 594, 50 S. E. 148; Newport News v. Scott, 103 Va. 794, 50 S. E. 266; 2 Thomp. Neg. § 1827.

Messrs. St. George R. Fitzhugh and John G. Williams, for defendant in error:

A railroad company does not owe to trespassers or to bare licensees the duty of pro-

So, the fact that it was the custom of other railway companies to leave their turntables unlocked is held to be immaterial. Koons v. St. Louis & I. M. R. Co. 65 Mo. 592; Ilwaco R. & Nav. Co. v. Hedrick, *supra*.

And a request to charge that the degree of care to be required of a railroad company maintaining a turntable is only such care as well-regulated railroads exercise over their turntables was held to be properly refused. Bridger v. Asheville & S. R. Co. *supra*.

And while it is competent, on the issue of due care, for the defendant railroad company to prove that it fastened the turntable and the wheels in the way customary among railroad companies, such evidence, although proper for the jury to consider on that issue, is not of itself conclusive, since the common sense of the jury may inform them that the means ordinarily used for such purposes are not adequate to guard against the dangers to be avoided. Kolsti v. Minneapolis & St. L. R. Co. 32 Minn. 133, 19 N. W. 655; O'Malley v. St. Paul, M. & M. R. Co. *supra*.

So, the liability of the railroad company for injury to a child playing on an unlocked turntable is held not to be affected by the fact that the table was set in motion by the negligent act of other boys. Barrett v. Southern P. Co., Nagel v. Missouri P. R. Co., Gulf, C. & S. F. R. Co. v. McWhirter, Edgington v. Burlington, C. R. & N. R. Co., and Callahan v. Eel River & E. R. Co., *supra*.

On the other hand, this doctrine, that reasonable care must be used to protect children playing on turntables, has been repudiated, and the railroad company declared to be under no duty, as to a child who is a mere trespasser, to keep its turntable in safe condition, in Daniels v. New York & N. E. R. Co. 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 28 N. E. 283; Frost v. Eastern R. Co. 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; Turess v. New York, S. & W. R. Co. 61 N. J. L. 320, 40 Atl. 614; Delaware, L. & W. R. Co. v. Reich, 61 N. J. L. 635, 41 L.R.A. 831, 68 Am. St. Rep. 727, 40 Atl. 682; and Walsh v. Fitchburg R. Co. 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068, Reversing 78 Hun, 1, 28 N. Y. Supp. 1097.

In view of the isolated position of the turntable, the liability of the railroad company was also denied in St. Louis, V. & T. H. R. Co. v. Bell, 81 Ill. 76, 25 Am. Rep. 269.

And, in Bates v. Nashville, C. & St. L. R. Co. 90 Tenn. 36, 25 Am. St. Rep. 665, 15 S. W. 1069, it is held that a railroad company maintaining a turntable away from the public road, but near a place frequented by boys and others for recreation and sport, is only required so to fasten it as to keep it securely in place, and is not bound so to secure it that small boys cannot displace the fastenings and set the table in motion.

So, while the court, in Twist v. Winona & St. P. R. Co. 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402, approves in general the doctrine which places upon the railroad company the burden of using reasonable care to protect young children from injury on its turntables, it expresses the opinion that some of the cases have gone too far, and that, by adopting an extreme or extraordinary standard of duty on the part of the landowner on the one side, and, on the other side, by attributing the conduct of all children to their childish instincts, so as to exempt them from the charge of contributory negligence, such cases have made the rule sustaining the liability of the railroad company capable of indefinite and unbounded applicability; and in this case recovety was denied, on the ground that the child, who was ten and a half years old, was guilty of contributory negligence.

viding reasonably safe appliances, and such a party cannot complain though the appliances are ever so unsafe.

Hortenstein v. Virginia-Carolina R. Co. 102 Va. 914, 47 S. E. 996; Norfolk & W. R. Co. v. Wood, 99 Va. 159, 37 S. E. 846.

Courts may not rightly create a new principle, unknown to the common law, nor abrogate a known one.

Connelly v. Western U. Teleg. Co. 100 Va. 59, 56 L.R.A. 663, 93 Am. St. Rep. 919, 40 S. E. 618.

Children who play upon a turntable are naked trespassers.

Burchell v. Norfolk & W. R. Co. 9 Va. Law Reg. 734; Humphreys v. Valley R. Co. 100 Va. 749, 42 S. E. 882; Beach, Contrib. Neg. 3d ed. § 51; Hargreaves v. Deacon, 25 Mich. 1; Walsh v. Fitchburg R. Co. 145 N. Y. 303, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068.

The doctrine of the Stout Case has been very generally disapproved as to everything except a turntable.

Dobbins v. Missouri, K. & T. R. Co. 91 Tex. 60, 38 L. R. A. 573, 66 Am. St. Rep. 856, 41 S. W. 62; Savannah, F. & W. R. Co. v. Beavers, 113 Ga. 398, 54 L. R. A. 314, 39 S. E. 82; Busse v. Rogers, 120 Wis. 443, 64 L. R. A. 188, 98 N. W. 219; Friedman v. Snare & T. Co. 71 N. J. L. 605, 70 L. R. A. 147, 61 Atl. 401; Loftus v. Dehail, 133 Cal. 217, 65 Pac. 379; George v. Los Angeles R. Co. 126 Cal. 357, 46 L. R. A. 829, 77 Am. St. Rep. 184, 58 Pac. 819; Means v. Southern California R. Co. 144 Cal. 473, 77 Pac. 1001; Driscoll v. Clark, 32 Mont. 172, 80 Pac. 1373; Union P. R. Co. v. Dunden, 37 Kan. 1, 14 Pac. 501; Stendall v. Boyd, 73 Minn. 53, 42 L. R. A. 288, 72 Am. St. Rep. 597, 75 N. W. 735.

Buchanan, J., delivered the opinion of the court:

This action was instituted by the plaintiff in error against the defendant company to recover damages for the death of his intestate, caused by the alleged negligence of the defendant.

The evidence shows that the defendant has a turntable on its own premises near Orange Courthouse, located about 220 feet from its station or depot, about 360 feet from the public road, which runs from the depot to the village of Orange Courthouse, close by a millroad, which is not public, 50 or 60 feet from what is known as the "Horse Show grounds," and about 340 feet from any inhabited house, and in an open and unoccupied field; that boys were in the habit of playing ball on the Horse Show grounds, between which and the railway and there was no fence; that boys frequently rode on the turntable; and had once been seen riding on it by the depot agent; that some years before the accident two boys had been injured in playing with the turntable, which was of the ordinary kind in use, and was neither locked nor fastened; that on the Sunday evening of the accident, the plaintiff's intestate, who was a little over twelve years of age, with two other boys of about the same age, was pushing the turntable around the track preparing to jump on it, and as he did so one of his feet was caught between the rails and mashed, causing lockjaw, from the effects of which he died.

Upon the trial of the cause, there was a verdict and judgment in favor of the defendant. To that judgment this writ of error was awarded.

The only question involved in this writ of error is whether or not, under the facts of the case, which are not disputed, the defendant was guilty of negligence in leaving the turntable in the place where it was, on its own premises, unfenced and unfastened.

The general rule is that a landowner does not owe to a trespasser (and the same is true of a bare licensee) the duty of having his land in a safe condition for a trespasser to enter upon. The latter has ordinarily no remedy for harm happening to him from the nature of the property upon which he intrudes, and he takes upon himself the risks of the condition of the land, and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant, being present, could have prevented the injury by the exercise of ordinary care after discovering the danger. Norfolk & W. R. Co. v. Wood, 99 Va. 156, 158, 159, 37 S. E. 846; Hortenstein v. Virginia-Carolina R. Co. 102 Va. 914, 918, 47 S. E. 996; Williamson v. Southern R. Co. 104 Va. 146, 11 Va. L. Reg. 289, 70 L.R.A. 1007, 51 S. E. 195; Bishop, Non-Contract Law, § 845; Cooley, Torts, 2d ed. 791–794.

It is not denied, as we understand the counsel for the plaintiff, that such is the common-law doctrine as to adult trespassers and bare licensees; but his contention is that, under certain circumstances, such as are disclosed by this record, it is not the rule as applied to children. To sustain that contention, he relies upon the case of Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745, and the cases which follow it.

While these cases, which are known as "the Turntable Cases," fully sustain the plaintiff's contention, there is a remarkable conflict of authority upon the subject. The doctrine announced in the Stout Case has been discussed in numerous cases by the appellate courts of many of the states of this country, with the result that there are

many authorities sustaining the doctrine in its broadest sense, while many utterly repudiate it, and others give it a qualified recognition, and practically limit it to railroad turntable cases. A question or problem which has given rise to such a wide divergence of opinion is not of easy solution.

As this is the first case involving this precise question which has ever come to this court, so far as the reported decisions show, we are at liberty to follow that line of decisions which, in our judgment, is more nearly in accord with settled principles of law, and is sustained by the better reason.

In order for the plaintiff to recover in this case, it must appear that the defendant company owed his intestate some duty which it failed to discharge; for where there is no duty there can be no negligence. Norfolk & W. R. Co. v. Wood and Hortenstein v. Virginia-Carolina R. Co. *supra;* Carson Lime Co. v. Rutherford, 102 Va. 252, 46 S. E. 304.

As before stated, the common law imposes no duty upon a landowner to use care to keep his premises in such condition that trespassers and bare licensees going thereon may not be injured. This is unquestionably the rule as to adults, and the weight of authority, as it seems to us, shows that it is the rule as to children.

The cases cited in the case of Sioux City & P. R. Co. v. Stout, to sustain the opposite view, do not, as it seems to us, do so. Those cases come within other rules, or within well-defined exceptions to the general rule that a landowner owes no duty to a trespasser, adult or infant, except that he must not wantonly or intentionally injure him or expose him to danger. This is clearly shown, we think, by the supreme judicial court of Massachusetts, in the case of Daniels v. New York & N. E. R. Co. 154 Mass. 349, 13 L. R. A. 248, 249, 26 Am. St. Rep. 253, 28 N. E. 283, and by Judge Peckham (now of the Supreme Court of the United States), in delivering the opinion of the court of appeals of New York, in Walsh v. Fitchburg R. Co. 145 N. Y. 301, 27 L. R. A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068.

The conclusion reached in those cases is fully sustained by the following cases (and many more might be cited), which are all "turntable cases," or cases in which the doctrine of those cases was involved: Frost v. Eastern R. Co. 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; Delaware, L. & W. R. Co. v. Reich, 61 N. J. L. 635, 41 L. R. A. 831, 68 Am. St. Rep. 727, 40 Atl. 682; Uthermohlen v. Bogg's Run Co. 50 W. Va. 457, 55 L. R. A. 911, 88 Am. St. Rep. 884, 40 S. E. 410; Ryan v. Towar, 128 Mich. 463, 55 L. R. A. 310, 92 Am. St. Rep. 481, 87 N. W. 644; Paolino v. McKendall, 24 R. 432, 60 L. R. A. 133, 96 Am. St. Rep. 73 53 Atl. 268; Dobbins v. Missouri, K. & R. Co. 91 Tex. 60, 38 L. R. A. 573, 66 A St. Rep. 856, 41 S. W. 62; Savannah, F. W. R. Co. v. Beavers, 113 Ga. 398, 54 R. A. 314, 39 S. E. 82.

The same conclusion was reached by th court in Clark v. Richmond, 83 Va. 35 5 Am. St. Rep. 281, 5 S. E. 369. The cit had made an excavation upon the land another, into which a child of six years fe and was injured. In denying the child th right to recover in that case it was sai that where the excavation is so near th highway that a traveler, by making a fals step or being affected by sudden giddines might be thrown into the excavation an injured, there would be a liability. "Bu if, in order to reach the place of danger the party injured must become an intrude or trespasser upon the premises of an other, the case will be different; for, in suc case, there is no breach of duty from whic the liability to respond in damages can re sult."

But in some of the "Turntable Cases" the right to recover is maintained upon the doctrine of constructive invitation; that is, that if a person is allured or tempted by some act of a railroad company to enter upon its lands, he is not a trespasser, and it is held that leaving a turntable unfastened or unguarded, under circumstances similar to those disclosed by this record, is such an act.

One of the cases cited and relied on to sustain this contention is the case of Bird v. Holbrook, 4 Bing. 628. The defendant in that case, for the protection of his property, some of which had been stolen, set a spring gun without notice in a walled garden some distance from his house. The plaintiff, who climbed over the wall in pursuit of a stray fowl, having been injured, it was held that the landowner was liable. The express object in setting the spring gun was to inflict injury,—to do an intentional wrong.

Another case relied on is that of Townsend v. Wathen, 9 East, 277. That was a case where a landowner had set traps on his premises near the highway, and baited them with decaying meat, so that its scent would extend not only to the highway, but beyond to the private premises of the plaintiff, whose dogs, scenting the meat, came upon the defendant's premises and were caught in a trap and thereby killed. It was held in that case that a man had no right to set traps of a dangerous description in a situation to invite, and for the very purpose of inviting, his neighbor's dogs, as it would compel them by their instinct to come

into his traps. The act of the defendant in that case was not in the prosecution of his legitimate business, but, as the court said, was a mere malicious attempt, successful in its result, to entice his neighbor's animals upon his premises.

The gravamen of both these actions was the wrongful intention of the defendants. To liken the case of a railroad company erecting a turntable on its own premises for its own necessary purposes in the regular conduct of its business, with no desire or intention to injure anyone, to the case of a landowner setting spring guns or traps on his land for the express purpose of doing an unlawful or malicious injury, is, as it seems to us, to lose sight of the difference between negligence and intentional wrongdoing. Walsh v. Fitchburg R. Co. *supra*; Dobbins v. Missouri, K. & T. R. Co. *supra*.

"The viciousness of the reasoning," said the court of appeals of New Jersey, in the case of Delaware, L. & W. R. Co. v. Reich, *supra*, in discussing this question, "which fixes liability upon the landowner because the child is attracted, lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted. As said by Mr. Justice Holmes [now a member of the Supreme Court of the United States], in Holbrook v. Aldrich, 168 Mass. 16, 36 L. R. A. 493, 60 Am. St. Rep. 364, 46 N. E. 115. 'Temptation is not always invitation; as the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen.'"

No landowner supposes for a moment that by growing fruit trees near the highway, or where boys are accustomed to play, however much they may be tempted to climb the trees and take his fruit, he is extending to them an invitation to do so, or that they would be any the less trespassers if they did go into his orchard because of the temptation. No one believes that a landowner, as a matter of fact, whether a railroad company or a private individual, who makes changes on his own land in the course of a beneficial user, which changes are reasonable and lawful, but which are attractive to children, and may expose them to danger if they should yield to the attraction, is by that act alone inviting them upon his premises.

This doctrine of constructive invitation is not sustained, as it seems to us, by the English cases cited to sustain it, and has been utterly rejected by the highest courts of New Hampshire, Massachusetts, New York, New Jersey, Rhode Island, Michigan, and West Virginia. In several other states it is limited in its operation to turntable cases. See Frost v. Eastern R. Co., Daniels v. New York & N. E. R. Co., Walsh v. Fitchburg R. Co., Delaware, L. & W. R. Co. v. Reich, Uthermohlen v. Bogg's Run Co., Ryan v. Towar, Paolino v. McKendall, Dobbins v. Missouri, K. & T. R. Co., and Savannah, F. & W. R. Co. v. Beavers, *supra*.

The maxim *Sic utere tuo ut alienum non lædas* has been quoted in some of the "Turntable Cases," and relied on as affording a decisive reason, or ground, for establishing a duty upon the railway company, and as *per se* justifying a recovery against it. There may be more, but there is one conclusive answer to the argument based on that maxim, and that is, that it refers only to acts of the landowner, the effects of which extend beyond the limits of his property.

In Deane v. Clayton, 7 Taunt. 489, Gibbs, J., said: "I know it is a rule of law that I must occupy my own so as to do no harm to others, but it is their legal rights only that I am bound not to disturb; subject to this qualification I may occupy or use my own as I please. It is the rights of others, and not their security against the consequences of [their] wrongs, that I am bound to regard."

In Knight v. Abert, 6 Pa. 472, 47 Am. Dec. 478, 479, where an effort was made to apply the maxim to sustain an action by the owner of cattle, which had trespassed upon the lands of another, and had been injured by reason of the unsafe condition of the property, Chief Justice Gibson said: "A man must use his property so as not to incommode his neighbor; but the maxim extends only to neighbors who do not [uninvited] interfere with it, or enter upon it. . . . If it were not so, a proprietor could not sink a well, or a saw pit, dig a ditch or a mill race, or open a stone quarry or a mine-hole on his own land, except at the risk of being made liable for consequential damage from it,—which would be a most unreasonable restriction." Ryan v. Towar, at page 474, 128 Mich., at page 314, 55 L. R. A., page 489, 92 Am. St. Rep. and page 648, 87 N. W. See article by Judge Smith on Landowners' Liability to Children, etc., 11 Harvard Law Review, 349–373, 434, 448, in which there is a valuable discussion of that whole subject.

Upon neither of the grounds relied on do we think that the common law makes it the duty of a landowner to have his premises in a safe condition for the uninvited entry of adults or children, nor to take affirmative

measures to keep them off of his premises or to protect them after entry; and this view is strengthened by the fact that so many of the courts which have adopted the doctrine of the "Turntable Cases" restrict it as far as possible to turntables, and refuse to follow it to its natural and logical consequences. For if it be a rule of the common law that a landowner who, in the reasonable and lawful use of his property, makes changes thereon which have the double effect of attracting young children to the land, and at the same time exposing them to serious danger, is guilty of negligence unless he exercises reasonable care for their safety, either in keeping them off the land, or in protecting them after their entry thereon, the rule would apply not only to railroad companies and their turntables, but to all landowners who, in the use of their land, maintain upon it dangerous machinery, or conditions which present a like attractiveness and temptation to children. The common law applies alike to all landowners under like conditions, and it would be an anomaly to hold that a doctrine or rule of the common law which had its origin before there was either railroads or turntables, applies only to railroad companies in the use of their lands upon which they have dangerous machinery. While the courts should and do extend the application of the common law to the new conditions of advancing civilization, they may not create a new principle or abrogate a known one. If new conditions cannot be properly met by the application of existing laws, the supplying of the needed laws is the province of the legislature, and not of the judicial department of the government. Connelly v. Western U. Teleg. Co. 100 Va. 59, 56 L. R. A. 663, 93 Am. St. Rep. 919, 40 S. E. 618. The legislature can change the common law as far as may be necessary to regulate the use of turntables and other dangerous appliances, and leave untouched the common-law rights of the ordinary landed proprietor.

The court of appeals of New Jersey, in refusing to follow the doctrine of the "Turntable Cases," said that the doctrine would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery or implement maintained by them which presented a like attractiveness and furnished a like temptation to children. "He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water; . . . he who leaves his mowing machine, or dangerous agricultural implements, in his field; he who maintains a pond in which boys may swim in summer, or on which they may skate in winter,—would seem to be amenable to this rule of duty. Climbing, playing at work, swimming, and skating are attractions almost irresistible to children, and any landowner or occupier may well believe that such attractions will lead young children into danger. Many other cases of like character might be imagined. In all of them, the doctrine of the Turntable Cases, if correct, would charge the landowner . . . with the duty of taking ordinary care to preserve young children thus tempted on his land from harm. The fact that the doctrine extends to such a variety of cases, and to cases in respect to which the idea of such a duty is novel and startling, raises a strong suspicion of the correctness of the doctrine, and leads us to question it." Turess v. New York, S. & W. R. Co. 61 N. J. L. 314, 40 Atl. 614; Delaware, L. & W. R. Co. v. Reich, 61 N. J. L. 635, 41 L. R. A. 831, 68 Am. St. Rep. 727, 40 Atl. 682; Uthermohlen v. Bogg's Run Co. 50 W. Va. 457, 55 L. R. A. 911, 88 Am. St. Rep. 884, 40 S. E. 410.

The supreme court of Minnesota, which was one of the first to give its adherence to the turntable doctrine (Keeffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393), in the subsequent case of Stendal v. Boyd, 73 Minn. 53, 42 L. R. A. 288, 72 Am. St. Rep. 597, 75 N. W. 735, through its chief justice, said: "The doctrine of the Turntable Cases is an exception to the rule of nonliability of a landowner for accidents from visible causes to trespassers on his premises. If the exception is to be extended to this case [a dangerous excavation filled with water on a city lot, in which a little boy had been drowned], then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must, at his peril, make his premises child-proof."

We will conclude this opinion with the following extract from the very able opinion of Judge Denman, speaking for the supreme court of Texas (another of the states which had followed the turntable doctrine) in the case of Dobbins v. Missouri, K. & T. R. Co. 91 Tex. 60, 38 L. R. A. 573, 66 Am. St. Rep. 856, 41 S. W. 62, as expressing our views: "The difficulty," he said, "about those cases [Turntable Cases] is that they either impose upon owners of property a duty not before imposed by law, or they leave to a jury to find legal negligence in cases where there is no legal duty to exercise care. In these cases the courts, yielding to the hardships of individual instances where owners have been guilty of moral, though not legal, wrongs in permitting attractive and dangerous turntables and water holes to remain unguarded on their premises in populous cities, to the destruction

of little children, have passed beyond the safe and ancient landmarks of the common law, and assumed legislative functions, in imposing a duty where none existed. As a police measure the lawmaking power may, and doubtless should, without unduly interfering with or burdening private ownership of land, compel the inclosure of pools, etc., situated on private property in such close proximity to thickly settled places as to be unusually attractive and dangerous, and impose criminal and civil liability, or both, for failure to comply with the requirments of such law. When such a duty is imposed the courts may properly enforce it or allow damages for its breach, but not before."

We are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

Cardwell, J., absent.

VIRGINIA SUPREME COURT OF APPEALS.

THOMAS TOWNSEND et al., Plffs. in Err.,
v.
NORFOLK RAILWAY & LIGHT COMPANY.

(— Va. —, 52 S. E. 970.)

Public-service corporation—liability for incidental injury.

1. A corporation organized for the generation of electricity under legislative authority for public service is not, in locating its power house, acting in its public capacity, so as to be absolved from liability for injuring neighboring property by the smoke, noise, and escaping electricity incident to its business.

On petition for rehearing.

Appeal—refusal of injunction.

2. Although, upon petition for writ of error or appeal, the appellate court is required to grant the writ prayed for unless the decision is clearly right, it will not overrule a decision refusing an injunction unless error is manifest.

(January 18, 1906.)

ERROR to the Circuit Court for the City of Norfolk to review a judgment in favor of defendant in an action brought to recover damages for injuries to plaintiffs' property by the operation of defendant's plant. Reversed.

The facts are stated in the opinion.

Messrs. Tazewell Taylor and Theodorick A. Williams, for plaintiffs in error:

That which is authorized by the legislature, within the scope of the power given, cannot be a public nuisance, but it may be a private nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom.

Wood, Nuisances, § 757.

The rule that that which the legislature has sanctioned cannot be a nuisance is sometimes defeated by a rigid construction of the authority claimed, and sometimes defeated by construing the harm inflicted into a taking of private property, for which compensation must be made.

Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 56 Am. Rep. 6, note, 8 N. E. 537; United States v. Fisher, 2 Cranch, 390, 2 L. ed. 314; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Com. v. Kidder, 107 Mass. 188; Tinsman v. Belvidere Delaware R. Co. 25 N. J. L. 255, 64 Am. Dec. 415; Garvey v. Long Island R. Co. 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. 57; Morton v. New York, 140 N. Y. 207, 22 L.R.A. 241, 35 N. E. 490; Pine City v. Munch, 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197; Bohan v. Port Jervis Gaslight Co. 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246; Metropolitan Asylum District v. Hill, L. R. 6 App. Cas. 193; Truman v. London, B. & S. C. R. Co. L. R. 25 Ch. Div. 423; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432.

The use by the defendant of its property so as to invade the property of the plaintiffs by smoke, soot, cinders, etc., jarring and vibrating, is not a consequential damage, but a direct invasion of the property of the plaintiffs, and is therefore a taking of property.

Stearns v. Richmond, 88 Va. 992, 29 Am. St. Rep. 758, 14 S. E. 847; Pennsylvania R. Co. v. Angel, *supra;* Trenton Water Power Co. v. Raff, 36 N. J. L. 335; McAndrews v. Collerd, 42 N. J. L. 189, 36 Am. Rep. 508.

Note.—Although the courts have had much difficulty in answering the question whether or not a corporation acting under authority of the legislature is liable to abutting property owners for the creation of a nuisance, they have practically agreed, as held in the above case, that, in order to secure absolution, the corporation must act strictly within the limits of the authority given. The authorities upon this subject are gathered in a note to Missouri, K. & T. R. Co. v. Mott, 70 L.R.A. 579, and there is a strong trend of authority in the direction of the rule that the legislature has no constitutional authority to grant absolution. The authorities upon this phase of the question and a full discussion of the principles involved will be found in a note to Louisville & N. Terminal Co. v. Lellvett, 1 L.R.A.(N.S.) 49.

The terms of the statutes giving authority to the defendant, not being imperative, but permissive, it is conclusive that the legislature intended the discretion vested in the defendant to be exercised in strict conformity with private rights.

Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428; Sherwood v. Atlantic & D. R. Co. 94 Va. 306, 26 S. E. 943; Northern P. R. Co. v. Washington, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; State v. Hartford & N. H. R. Co. 29 Conn. 538; San Antonio Street R. Co. v. State, 90 Tex. 520, 35 L.R.A. 662, 59 Am. St. Rep. 834, 39 S. W. 926; Whiting v. Sheboygan & F. du L. R. Co. 25 Wis. 167, 3 Am. Rep. 47; Richmond R. & Electric Co. v. Brown, 97 Va. 26, 32 S. E. 775; Morton v. New York, Baltimore & P. R. Co. v. Fifth Baptist Church, Metropolitan Asylum District v. Hill, and Cogswell v. New York, N. H. & H. R. Co. *supra*.

Due care could not be taken advantage of as a defense in this case.

Bohan v. Port Jervis Gaslight Co. 122 N. Y. 18, 9 L.R.A. 715, 25 N. E. 246; Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654; Cogswell v. New York, N. H. & H. R. Co. *supra;* Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279; Pennsylvania Lead Co.'s Appeal, 96 Pa. 116, 42 Am. Rep. 538; Laflin & R. Powder Co. v. Tearney, 131 Ill. 322, 7 L.R.A. 262, 19 Am. St. Rep. 35, 23 N. E. 389; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 63 Am. St. Rep. 534, 39 Atl. 270; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Cahill v. Eastman, 18 Minn. 324, 10 Am. Rep. 184, Gil. 292; Fletcher v. Rylands, L. R. 1 Exch. 265; Terre Haute Gas Co. v. Teel, 20 Ind. 131.

The grant of power by the legislature to a private enterprise, although certain public duties are or may be performed by the recipient of the powers granted, which gives that company any extraordinary powers possessed by strictly public agencies, is a void grant.

Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; Varner v. Martin, 21 W. Va. 548; Board of Health v. Van Hoesen, 87 Mich. 533, 14 L.R.A. 114, 49 N. W. 894; Bly v. Edison Electric Illuminating Co. 172 N. Y. 1, 58 L.R.A. 500, 64 N. E. 745; Re Rhode Island Suburban R. Co. 22 R. I. 457, 52 L.R.A. 879, 48 Atl. 591; Ten Eyck v. Delaware & R. Canal Co. 18 N. J. L. 200, 37 Am. Dec. 235; Rogers v. Philadelphia Traction Co. 182 Pa. 473, 61 Am. St. Rep. 718, 38 Atl. 399; Hauck v. Tidewater Pipe Line Co. 153 Pa. 366, 20 L.R.A. 642, 34 Am. St. Rep. 710, 26 Atl. 644; Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727, 61 L.R.A. 192, 72 N. W. 954.

Messrs. **Richard B. Tunstall** and **Robert B. Tunstall**, for defendant in error:

The legislature can authorize, and in this case has authorized, the doing of any acts which do not amount to a taking of private property.

Fisher v. Seaboard Air Line R. Co. 102 Va. 363, 46 S. E. 381; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336.

The exercise of discretion as to location of plant cannot be inquired into.

Struthers v. Dunkirk, W. & P. R. Co. 87 Pa. 282; Wood, Nuisances, § 802; Brady v. Weeks, 3 Barb. 157; Laflin & R. Powder Co. v. Tearney, 131 Ill. 322, 7 L.R.A. 262, 19 Am. St. Rep. 35, 23 N. E. 389; Wier's Appeal, 74 Pa. 230; Georgia R. & Bkg. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315; London, B. & S. C. R. Co. v. Truman, L. R. 11 App. Cas. 45.

Legislative authority is a bar to damages if the work is properly carried on.

Bellinger v. New York C. R. Co. 23 N. Y. 42; Romer v. St. Paul City R. Co. 75 Minn. 211, 74 Am. St. Rep. 455, 77 N. W. 825; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; Randale v. Pacific R. Co. 65 Mo. 325; Parrot v. Cincinnati, H. & D. R. Co. 10 Ohio St. 624; Struthers v. Dunkirk, W. & P. R. Co. *supra;* Walker v. Old Colony & N. R. Co. 103 Mass. 10, 4 Am. Rep. 509; Garrett v. Lake Roland Elev. R. Co. 79 Md. 277, 24 L.R.A. 396, 29 Atl. 830; Georgia R. & Bkg. Co. v. Maddox, *supra;* Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164; Call v. Allen, 1 Allen, 137; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27.

Mr. **W. H. Venable** also for defendant in error.

Keith, P., delivered the opinion of the court:

The plaintiffs in error brought an action of trespass against the Norfolk Railway & Light Company, and their declaration states: That they were seised and possessed, as joint owners, of a certain lot of land, with the buildings and improvements thereon, situated on the west side of Cumberland street, in the city of Norfolk, Virginia; that the Norfolk Railway & Light Company, a corporation organized under the laws of the state of Virginia, owned a certain lot in the city of Norfolk, fronting on Cove street; that the defendant had erected on this lot a power house, equipped with large and heavy machinery, consisting of boilers, engines, dynamos, condensers, and generators, for the purpose of generating electric power, and, as a part of its equipment of said power house, had erected

in connection with its buildings three or more metal stacks; that it was the duty of the defendant so to maintain and operate its power house and plant as not to injure or interfere with the comfort, use, and enjoyment by the plaintiffs of their property; but, disregarding its duty in this behalf, on the 1st day of August, 1902, and on divers other days prior thereto and continuously up to the present time, the defendant did so wrongfully and unjustly operate and conduct its plant, or power house, that large columns of smoke, dust, cinders, sparks, and soot had been emitted from the stacks of the defendant, and thrown, propelled, and hurled against, upon, and through the houses of the plaintiffs on the property aforesaid, thereby preventing its proper and useful enjoyment by the plaintiffs; that their property had been made untenantable, and that its rental and salable value had been depreciated; that the houses of the plaintiffs upon their property, as aforesaid, had been and were being greatly shaken and damaged, in such a manner as to cause the same to become and be uncomfortable, dangerous, and uninhabitable; that by reason of the premises the property of the plaintiffs had deteriorated in value, both as income-producing and as marketable property; and, further, that the defendant, by allowing the electric current from the wires and conduits, or on return circuit, to escape from its wires, or, returning by ground circuit, to run over and through the pipes of metal placed to carry water and gas to the houses of plaintiffs, has caused the metal pipes, thus acting as conductors of electricity, to be eaten up and destroyed; and that, although the defendant has been often requested by the plaintiffs to refrain and desist from the wrongful and unjust operation and management of its said plant, or power house, in the several ways hereinbefore described, yet it has refused to desist from the said wrongful and unjust operation and management of its plant as aforesaid, to the damage of the plaintiffs $2,000.

To this declaration the defendant filed a special plea, in which it sets out that, before the time of the committing of the alleged grievances in the declaration mentioned, the general assembly of Virginia had passed an act to incorporate the Virginia Electric Company, by which it was provided that it should have power to construct, lease, purchase, or acquire by consolidation with any other company or companies, and operate and maintain in the city of Norfolk, suitable works, machinery, or plants for the manufacture of electricity, and for the sale and distribution of the same; that it should have power to sell and distribute the same for public or private illumination, for heating and for power, and for any other purposes which the same might be used for; that it should have power to do such acts and things, and conduct such enterprises, as might be convenient in connection with, or incidental to the enjoyment of, the powers thereinbefore conferred, and that it might, with the consent of the proper authorities of the city of Norfolk, use the streets and roads thereof for laying its mains, pipes, wires, and erecting its poles; that by an act of the legislature, entitled "An Act to Incorporate the Old Dominion Electrical Development & Power Company" (Acts 1897, 1898, chap. 989, p. 1020), it was provided that the said Old Dominion Electrical Development & Power Company should have power to erect, maintain, and operate plants in this state for the generation of electricity and the supply of electric current for its own use and for sale to persons, natural or artificial, desiring to use the same for heat, light, or power, or any and all use to which the electric current might then or at any time thereafter be applicable, and might manufacture, use, and sell, distribute and furnish, the same for said purposes, and all electrical supplies of all kinds, to all and any persons and corporations, upon such terms as might be agreed upon by and between the contracting parties; that by the 7th section (page 1022) of the act last above-mentioned, it was provided that the board of directors of the Old Dominion Electrical Development & Power Company should have the power to change the name of that company and to adopt such other name as they might deem proper upon the fulfilment of certain specified conditions; that in pursuance of said power the board of directors changed the name of the Old Dominion Electrical Development & Power Company so that it became and was the Norfolk & Ocean View Railway Company; that said last-mentioned company, by virtue of the powers granted to it by its acts of incorporation, acquired the works, property, rights, privileges, and franchises of the Virginia Electric Company; and that said Norfolk & Ocean View Railway Company thereby became and was entitled, empowered, and authorized to do and perform any, all, and singular the acts referred to in the act of incorporation of the Virginia Electric Company, as well as any, all, and singular the acts requisite, necessary, or proper in connection with the powers, privileges, and rights of the said company in the matter of carrying on the business of the said company. The plea further avers that on the 2d day of November, 1899, by an agreement entitled "Agreement of

Consolidation of the Norfolk Street Railroad Company and the Norfolk & Ocean View Railway Company under the Name of the Norfolk Railway & Light Company," the said Norfolk Railway & Light Company became and was possessed, and still is possessed, of any and all and singular the rights, franchises, privileges, powers, works, properties, and all other interests of any sort whatever of the said constituent companies, the Norfolk Street Railroad Company and the Norfolk & Ocean View Railway Company, and especially and particularly the particular powers, privileges, and rights hereinbefore more fully specified as to the operation and maintenance of the plants of the said companies; that under the said consolidation agreement the defendant became and was possessed, and still is possessed, of the said plant, power house, and manufactory, which is the same plant, power house, and manufactory as are complained of in the declaration of the plaintiffs; that not only has it obtained legislative sanction and authority for the operation of the said plant, power house, and manufactory, machinery, and boilers, but that furthermore, at divers times, the defendant has obtained permission and authority from the councils of the city of Norfolk to instal the said machinery and boilers in its power house and manufactory; and further avers that, pursuant to the legislative and municipal authority had and obtained as aforesaid, it has ever since operated, and still continues to operate, its said plant, in a proper, careful, reasonable, and suitable manner; that it is necessary to the proper carrying on of defendant's business to operate and maintain the said power house, manufactory, and plant in the manner in which it has been and is being operated; and that it has done no damage and occasioned no discomfort that is not the natural, proximate, inevitable, and necessary result of such proper, careful, reasonable, and suitable operation, without this, that the said defendant is guilty of the said supposed grievances, or any of them, in manner and form as the said plaintiffs hath above thereof complained; and of this it puts itself upon the country.

The plaintiffs demurred to this special plea, and that demurrer was overruled by the court. And, the plaintiffs not withdrawing, nor desiring to withdraw, their demurrer, the court gave judgment in favor of the defendant.

Section 153, art. 12, of the Constitution [Va. Code 1904, p. ccxlix], declares that the term "'public-service corporation' shall include all transportation and transmission companies, all gas, electric light, heat, and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public."

Under the terms of this definition it is apparent the Norfolk Railway & Light Company is to be deemed a public-service corporation.

It will be observed that the declaration nowhere states that the injury of which plaintiffs complain was caused by any negligent act upon the part of the defendant. The contention of plaintiffs is that in the operation of its plant the defendant wrongfully caused smoke, dust, cinders, sparks, and soot from its chimney stacks to be thrown and propelled upon and through the houses of the plaintiffs; that by the operation of its heavy machinery it caused the houses of the plaintiffs to be greatly shaken and damaged; and that by permitting the electric current from its wires and conduits, or on return circuit, to escape from its wires, or, returning by the ground circuit, to run over and through the pipes placed to carry water and gas to the houses of plaintiffs, the pipes had been eaten up and destroyed, and the useful and proper enjoyment of the property had been impaired, it had been rendered untenantable, and its value diminished.

The defendant replies that it has operated, and continues to operate, its plant in a proper, careful, reasonable, and suitable manner, in pursuance of legislative and municipal authority conferred upon it.

The question, therefore, for us to consider, is whether or not the court erred in overruling the demurrer to this plea.

The declaration sets forth a nuisance. The defendant justifies what it has done by pleading legislative authority for its acts.

A public-service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform. It has other duties, not of a public nature, which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that, in doing that which, under the law, it may be required to do, it cannot be considered as doing an unlawful act; and, if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*.

This aspect of the case was before this court in Fisher v. Seaboard Air Line R. Co. 102 Va. 363, 46 S. E. 381, where it was said that a railroad company acting under authority of law, whose road is constructed

and operated with judgment and caution, and without negligence, is not liable to an adjacent landowner for damages resulting from noises, jarring, and shaking of buildings, or dust and smoke incident to the running of trains; for no action lies for the loss or inconvenience resulting from doing an authorized act in an authorized way. To the authorities relied on in support of this case many others may be added.

Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164, from the supreme court of New Jersey, is strikingly in point. That was a suit for damages done to the houses and lands of plaintiff by the running of defendant's trains, to which the defendant replied that it acted under franchises derived from the public grant, and that it had built its road and run its trains, carrying merchandise and freight, near to the lands of the plaintiff, doing the plaintiff no more damage than that which necessarily resulted from the transaction of such acts and business, and that for such incidental and unavoidable damage it was not responsible. The plaintiff contended that, with respect to private property, a railroad is *per se* a nuisance whenever it throws a detriment, such as would be actionable at common law, on such property. Upon this the court said: "That this proposition, on which the plaintiff's case rests, is a most momentous one, is at once apparent. If it should be sustained, an illimitable field of litigation would be opened. If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect to the plaintiff's property, so it must be as to all other property in its vicinity. It is not only those who are greatly damnified by the illegal act of another to whom the law gives redress, but its vindication extends to every person who is damnified at all, unless, indeed, the loss sustained be so small as to be unnoticeable by force of the maxim '*De minimis non curat lex.*' The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are widespreading, impairing in a sensible degree some of the usual conditions upon which depend the full enjoyment of property in their neighborhood; and consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested. Such a doctrine would make these companies, touching such landowners, general tort feasors. Their tracks run for miles through the cities of the state, and every landowner on each side of the track would be entitled to his action; and so, in the less populated districts, each proprietor of lands adjacent to the road would have a similar right, and thus the litigants would be numbered by thousands. It is questionable whether the running of railroads would be practicable if subjected to such a responsibility. Nor is this susceptibility to be sued on all sides the only, or even the worst, consequence of the theory in question; for, if these rights of action exist, it follows, necessarily, that each of the persons in whom they are vested can prevent the continuance of the wrong out of which such rights of action arise. If this plaintiff should recover two or three verdicts against the defendant because of the damage that is inseparable from the running of its trains, there is plainly no ground on which the chancellor could refuse to enjoin a continuance of the nuisance. Nor does there appear to be any relief from such a consequence. The aggrieved landowner would be the master of the situation; for there is no law by force of which the company could take his land *in invitum*, or compel him to have his damages assessed once for all. In short, the plaintiff's claim involves the assertion that he can put a stop to the business of the defendant at the point in question." In concluding his opinion, the learned judge says: "I find no embarrassment in disposing of the present subject, for I have put railroads in the category of public agents, and have regarded them as possessed of all the immunities, in the particular in question, belonging to such an office."

That railroad corporations—public-service corporations—are in many aspects to be regarded as quasi public corporations, can no longer be doubted. Upon that theory their duties are measured and their rights determined; and the control which the state asserts, the exercise of which is becoming more and more necessary with the growth and development of our transportation system, of which railroads constitute so essential a part, rests upon the public character of such corporations. A railroad, in the operation of its trains in the transportation of freight and passengers, is in the exercise of a public duty, and should be permitted to apply the same principles of construction when it pleads, for its protection, the powers conferred upon it by the legislature, as are urged when the obligations imposed by the same charter are insisted upon in the effort to compel such corporations faithfully to perform the duties which they have assumed with respect to the public.

It would be easy to multiply authorities along this line. Indeed, Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, upon

which plaintiffs in error justly rely in another aspect of this case, uses the following language:

"Undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

We shall not press this view of the case further, for counsel for plaintiffs in error state in their brief that they do not "seriously contest" the doctrine enunciated by this court in Fisher v. Seaboard Air Line R. Co. *supra*.

But was the defendant in error acting in its public capacity when it committed the grievances complained of? Every allegation in the declaration is directed against the injuries inflicted by the operation of the power house of the defendant. It is true that an electric railway cannot be operated without a power house; it is true that an engine house is a necessary adjunct to a steam railway; but they are incidents to the operation of the road, with which the public has no concern.

Pollock on Torts, at page 158 of the second edition of his work, says: "A railway company is authorized to acquire land within specified limits, and on any part of that land to erect workshops. This does not justify the company, as against a particular householder, in building workshops so situated (though within the authorized limits) that the smoke from them is a nuisance to him in the occupation of his house."

In Re Rhode Island Suburban R. Co. 22 R. I. 457, 52 L.R.A. 879, 48 Atl. 592, it is said: "A common carrier serves both the public and itself. It has its public and private functions. The public part is the exercise of its franchise for the accommodation of the public; the private part is its incidental business, with which the public is not concerned, and which the company manages for its own interests. The company carries passengers over its road as a public duty, but the generation of the power to propel cars is the private business of the company. Whatever is necessary to the exercise of the franchise is for the benefit of the public, but that which pertains simply to means of supply is the private business of the company."

To the same effect is Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727, 61 L.R.A. 192, 72 S. W. 957, where it is said: "But over and beyond this, we think this corporation, in selecting a place for its roundhouse, acted in a private capacity, and is responsible for the injurious consequences which may result from its use."

In Beseman v. Pennsylvania R. Co. *supra*, the court said: "The railroad company, in selecting a place for repair shops [and engine house] acted altogether in its private capacity. Such location was a matter of indifference to the public; and consequently, with respect to such an act, the corporation stood on the footing of an individual, and was entitled to no superior immunities."

In Baltimore & P. R. Co. v. Fifth Baptist Church, *supra*, the Baptist church claimed that its services were habitually interrupted and disturbed by the hammering noises made in the workshops of the company, the rumbling of its engines passing in and out of them, and the blowing off of steam; that these noises were at times so great as to prevent members of the congregation, sitting in parts of the church farthest from the shops, from hearing what was said; that the act of blowing off steam occupied from 5 to 15 minutes, and frequently compelled the pastor of the church to suspend his remarks. The main reliance of the railroad company to defeat the action was the authority conferred upon it by the act of Congress of February 5, 1867, to exercise the same powers, rights, and privileges in the construction of a road in the District of Columbia, the line of which was afterwards designated, which it could exercise under its charter in the construction of a road in Maryland, with some exceptions, not material here. By its charter it was empowered to make and construct all works whatever which might be necessary and expedient in order to the proper completion and maintenance of the road. In its opinion the court says: "It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expendient; that they are skilfully constructed; that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in

them will permit. In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. . . . Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion."

In Ridge v. Pennsylvania R. Co. 58 N. J. Eq. 172, 43 Atl. 276, the Beseman Case, *supra*, and Baltimore & P. R. Co. v. Fifth Baptist Church, *supra*, are considered, and the court says: "In the latter case it was denied by the Supreme Court of the United States that the railroad had been invested with the privilege of building an engine house or repair shop next to a church in the city of Washington. The court held that the grant of power did not authorize the company to place such structure wherever it might think proper in the city without reference to the property or rights of others. The doctrine of that case was approved in the opinion of Beseman v. Pennsylvania R. Co. *supra*, upon the ground that, in selecting the place for repair shops, the railroad company acted altogether in a private capacity. Such location, it was said, was a matter of indifference to the public, and consequently, with respect to such act, the corporation stood upon the footing of an individual, and was entitled to no superior immunities. What was meant was that, while the public was concerned that a railroad company should have all the appliances, including repair shops, to make its public service effective, it was immaterial to the public where such appliances were placed, so long as the service was efficient. All that concerns the public is to have an efficient service in the way of transportation of persons and freight. The company is shielded from responsibility for incidental damages resulting from acts which are necessary to bring about such service. In the Federal decision it was admitted that the company, by virtue of its franchise, had the right to build repair shops and engine houses, but, having the liberty to choose different sites for its structures, it was bound to select one where they would not inflict an injury upon the property of others."

In Rapier v. London Tramways Co. [1893] 2 Ch. 588, the syllabus of the opinion delivered by Lindley, L. J., is as follows: "The defendants were a tramway company, who were empowered by their act to lay down and construct two lines of tramway according to deposited plans, together with the works and conveniences connected therewith. The act gave no compulsory powers for taking lands, and made no special mention of building stables. The defendants constructed the lines, and built some large blocks of stables near the plaintiff's house for the horses employed in drawing the cars. The plaintiff complained of the smell caused by the stables, and brought an action for an injunction to restrain the defendants from using the stables so as to cause a nuisance. Held (affirming the decision of Kekewich, J.) that, although horses were necessary for the working of the tramways, the company were not justified by their statutory powers in using the stables so as to be a nuisance to their neighbors, and that it was no sufficient defense to say that they had taken all reasonable care to prevent it."

Other aspects of this case were discussed before us, upon which we have not deemed it necessary to touch; and without intimating any opinion upon them, except in so far as has been herein expressed, we shall content ourselves for the present with saying that we are of opinion that the Circuit Court should have sustained the demurrer to the special plea.

A petition for rehearing having been filed, the following additional opinion was handed down on February 23, 1906:

In the opinion delivered by the court when the judgment sought to be reviewed by this petition for rehearing was pronounced, it is said:

"The declaration sets forth a nuisance. The defendant justifies what it has done by pleading legislative authority for its acts.

"A public-service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform. It has other duties, not of a public nature, which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that in doing that which, under the law, it may be required to do, it cannot be considered as doing an unlawful act; and if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*."

This position is earnestly assailed in the petition for a rehearing, where it is broad-

ly asserted that no such distinction between the public and private functions of a corporation exists, and that all is lawful which the legislature authorizes to be done, although the authority conferred be not imperative, but merely permissive. It may be that, in the distribution of the duties of a public-service corporation into those of a public and those of a private nature, the classification was inaccurate and unscientific, though it has the sanction of courts of the highest respectability. By other courts the same conclusion is reached by a consideration of the language used by the legislature in the act of incorporation, and by its construction determining whether or not the lawmaking power intended to permit an act to be done, or to require its performance,— to confer a privilege, or to impose a duty.

In the case of Fisher v. Seaboard Air Line R. Co. 102 Va. 363, 46 S. E. 381, the position of this court is well stated in the syllabus: "A railroad company, acting under authority of law, whose road is constructed and operated with judgment and caution, and without negligence, is not liable to an adjacent landowner for damages resulting from the noises, jarring, and shaking of buildings, dust, and smoke, incident to the running of trains. No action lies for the loss or inconvenience resulting from doing an authorized act in an authorized way." This is to be understood, of course, in the light of the facts presented in that record, where damages were claimed for the noises, jarring, and shaking of buildings, dust, and smoke incident to the running of trains. We were of opinion that, in the absence of negligence, no damages could be recovered, for the reason that the road was obliged to run its trains, which could not be done, whatever the degree of caution exercised, without the inconveniences and injuries enumerated.

In Makely v. Southern R. Co. (unreported) complaint was made of the operation of trains of the defendant company, and of a power house maintained by it for the purpose of lighting the various buildings in its yards. There was a bill praying an injunction filed in the circuit court of Alexandria, which the learned judge of that court refused, but without prejudice to the right of plaintiff to seek her remedy at law. There was no question made as to the solvency of the railway company or its ability to respond in any damages which might be adjudged against it. We concurred with the judge of the circuit court in the opinion that, at least in the preliminary stages of the case, before the right had been established at law, it would be improper to enjoin the defendant company. And just here it may be proper to state that while, upon a petition for a writ of error or appeal, this court is required to grant the writ prayed for unless the decision called in question be plainly right, we should not overrule the decision of the lower court, and grant an injunction which it has refused, unless the error in refusing it be manifest.

We have mentioned the Fisher Case and the Makely Case, not with any view to vindicating our consistency, but because we felt that it would be well to clear up any doubt that might exist as to the attitude of this court with respect to those decisions.

Coming back to the petition for rehearing, we find the position of the petitioner thus stated: "The application of this doctrine of 'private capacity' is wholly inconsistent with the principles enunciated in the Fisher Case. We think that the fact that the doctrine is wholly erroneous can easily be demonstrated by stating it in the form of a syllogism, thus:

"The injuries done to property without negligence by a public-service corporation, for which it will be held liable, are those done by it in its private capacity.

"All injuries done to property without negligence by a public-service corporation are done by it in its private capacity; *i. e.*, by the means and methods employed.

"Therefore a public-service corporation is liable for all injuries to property done by it without negligence.

"The conclusion is manifestly incorrect, and at least one of the premises must therefore be erroneous. The second premise we think we have demonstrated to be correctly stated; that is, that injuries to property are the result of the means and methods employed, and not of the public service performed. The error lies, therefore, in the first premise.

"The vice in this premise, and the simple answer to the various illustrations which we have given above, is demonstrated by a statement of the true principle, which is that a public-service corporation acting without negligence, is not liable for injuries which are the necessary consequence of the performance of its authorized functions. And we need go no further in search for authority for this position than the Fisher Case itself, where the court, quoting from Pollock on Torts, said: 'It is settled that no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner.'"

We must again advert to the principle that all opinions are to be considered in the light of the facts to which they apply, for the transition from an authorized to an unauthorized act—from that which is lawful

to that which is unlawful—is oftentimes by easy and almost imperceptible gradations, so that, in the enunciation of a principle, the eye must always be kept upon the precise facts upon which it is to operate.

Almost all the questions upon which the law is doubtful or obscure arise at the vanishing point between contradictory and irreconcilable principles, and mark the effort "to deduce harmony from the reciprocal struggle of discordant powers." Burke.

Law is not an exact science. It has no invariable standard by which rights may be measured. It does not submit to inflexible rules of logic, nor can it, in its application to the varied affairs of men, always clothe itself in the form of a syllogism; and, while we might hesitate to go to the full length of the view expressed by the great moralist we have just quoted, it is to a large extent true that "every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter."

We should not, therefore, have been disposed to abandon our position, even though it had failed when subjected to the syllogistic test; but we are not prepared to admit that the test has been correctly applied. We do not admit the truth of the minor premise. We do not admit that all injuries done to property without negligence by public-service corporations are done by them in their private capacity.

All injuries done to property without negligence by a public-service corporation for which it will be held liable, it may perhaps be conceded, are done by it in its private capacity; but there are injuries done by it in its public capacity for which it will not be held liable, and in that distinction is to be found the very gist of this controversy.

Nor can we concur in the answer which the petitioner suggests to the illustrations which it had given. We cannot admit that a public-service corporation, acting without negligence, is, under all circumstances, irresponsible for injuries which are the necessary consequence of the performance of its authorized functions. There must be something more than authority to do the act complained of. It must be an act which the corporation is required to perform,—a duty which it owes and which has been imposed upon it by the legislative act granting the charter by which it exists,—or at least it must appear that the particular act complained of and immunity from its consequences were within the contemplation of the legislature. It is true that in Pollock on Torts, quoted in the Fisher Case, *supra*, it is said that "no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner." But Pollock also says, in his second edition, at page 158: "A railway company is authorized to acquire land within specified limits, and on any part of that land to erect workshops. This does not justify the company, as against a particular householder, in building workshops so situated (though within the authorized limits) that the smoke from them is a nuisance to him in the occupation of his house." The two statements by the same author are apparently opposed to each other, and yet may be in entire harmony as applied to varying conditions of facts.

In Metropolitan Asylum District v. Hill (1880, 1881) L. R. 6 App. Cas. 193, the metropolitan poor act, authorizing the formation of districts and district asylums for the care and cure of sick and infirm poor, created corporations for that purpose, and gave authority to the poor-law board to issue directions to these corporations, enabled them to purchase lands and erect buildings for the purposes of the act, and made the rates of parishes and unions liable for the outlay thus incurred. But it does not, by direct and imperative provisions, order these things to be done, so that if, in doing them, a nuisance is created to the injury of the health or property of persons resident in the neighborhood of the place where the land is purchased or the buildings erected, it does not afford to these acts a statutory protection. And, therefore, where such nuisance was found as a fact, it was held that the district board could not set up the statute, nor the orders of the poor-law board under it, as an answer to an action, or to prevent an injunction issuing to restrain the board from continuing the nuisance; and in continuing his opinion Lord Blackburn states this principle: "On those who seek to establish that the legislature intended to take away the private rights of individuals lies the burden of showing that such an intention appears by express words or necessary implication." And per Lord Watson it was said: "Where the terms of a statute are not imperative, but permissive, the fair inference is that the legislature intended that the discretion, as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights."

That case finely illustrates the effect of a statute merely permissive in its terms.

In London, B. & S. C. R. Co. v. Truman (1885) L. R. 11 App. Cas. 45, a railway company were authorized among other things to carry cattle, and to purchase by

agreement, in addition to the lands which they were empowered to purchase compulsorily, any lands, not exceeding in the whole 50 acres, in such places as should be deemed eligible, for the purpose of providing additional stations, yards, and other conveniences for receiving, loading, or keeping any cattle, goods, or things conveyed or intended to be conveyed by the railway, or for making convenient roads or ways thereto, or for any other purposes connected with the undertaking which the company should judge requisite. The company were also empowered to sell such additional lands and to purchase in lieu thereof other lands which they should deem more eligible for the aforesaid purposes, and so on from time to time. The act contained no provision for compensation in respect of lands so purchased by agreement. Under this power the company, some years after the expiration of the compulsory powers, bought land adjoining one of their stations, and used it as a yard or dock for their cattle traffic. To the occupiers of houses near the station the noise of the cattle and drovers was a nuisance which, but for the act, would have been actionable. There was no negligence in the mode in which the company conducted the business. Held, that the purpose for which the land was acquired being expressly authorized by the act, and being incidental and necessary to the authorized use of the railway for the cattle traffic, the company were authorized to do what they did, and were not bound to choose a site more convenient to other persons; and that the adjoining occupiers were not entitled to an injunction to restrain the company, distinguishing between the case of Metropolitan Asylum District v. Hill, just cited. Among those who delivered opinions in this case was Lord Blackburn, from whom we have just quoted, who says, in part: "I do not think there can be any doubt that if, on the true construction of a statute, it appears to be the intention of the legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighboring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of these powers, effect must be given to the intention of the legislature,"—again resting the case upon a proper construction of the act of incorporation. In this case the House of Lords reversed the decisions of the court of appeal, and of North, J., which is to be found in L. R 25 Ch. Div. 426. It undertakes to distinguish, while it does not overrule, Metropolitan Asylum District v. Hill, *supra*, and seems to rest upon the express terms of the act of Parliament under consideration. It is at most merely persuasive authority, and if it decides that a merely permissive authority from the legislature confers complete immunity from acts which constitute a nuisance, if not negligently performed, it would be irreconcilable with other English cases of high authority,—indeed, of equal authority with itself,—with the decisions of the Supreme Court of the United States, and with those of state courts, to which we shall presently advert.

In Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 56 Am. Rep. 6, note. 8 N. E. 537, the syllabus is as follows:

"Whether the legislature can authorize a railroad corporation to maintain an engine house, under circumstances which, if maintained by an individual, would, by the common law, constitute a nuisance to private property, without providing compensation, *quære*.

"But if this should be conceded, nevertheless the statutory sanction which will justify an injury by a railroad corporation to private property without making compensation therefor, and without the consent of the owner, must be express, or given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury; it may not be presumed from a general grant of authority.

"Where the terms of a statute giving authority to such a corporation are not imperative, but permissive, this does not confer license to commit nuisance, although what is contemplated by the statute cannot be done without."

In Bohan v. Port Jervis Gaslight Co. 122 N. Y. at page 18, 9 L.R.A. at page 711, 25 N. E. at page 246, it is said that:

"Although the acts complained of are inseparably connected with the carrying on of the business itself, and the resulting damages a necessary consequence, if those acts constitute a nuisance *per se*, it is not necessary to show negligence in order to sustain a recovery.

"Every person is bound to make a reasonable use of his property, having respect for his neighbor's right. A use which produces destructive vapors and noxious smells, resulting in material injury to the property and the comfort of those dwelling in the neighborhood, is not reasonable, and is a nuisance *per se*.

"As a general rule corporations authorized by statute to carry on a business, although it may be of a quasi public character, are under the same obligations to make a reasonable use of their property

and to respect the rights of others as are citizens.

"While the legislature may authorize acts which would otherwise be a nuisance, when they affect or relate to matters in which the public have an interest, or over which they have control, the statutory authority which affords immunity for such acts must be express, or a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury."

This whole subject is considered by the Supreme Court of the United States, in Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, which was decided in 1883, and has met with general approval. The Baltimore & Potomac Railroad Company was authorized by act of Congress to lay its track within the limits of the city of Washington, and to construct other works necessary and expedient to the proper completion and maintenance of its road. It erected an engine house and machine shop on a parcel of land immediately adjoining the church, and used them in such a way as to disturb, on Sundays and other days, the congregation assembled in the church, to interfere with religious exercises therein, break up its Sunday Schools, and destroy the value of the building as a place of public worship. Suit was brought against the railroad company to recover damages, and, among other defenses, the company relied upon statutory authority; and its counsel undertook to maintain that "no action will lie and no recovery can be had for doing that which the law authorizes the party to do, and that cannot be adjudged a nuisance and be held unlawful which the law declares to be lawful." Answering that contention, Mr. Justice Field says:

"The authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city. Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred.

"Undoubtedly, a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

It is said in the petition that the latter part of this quotation is a *dictum*. We hardly think so; but even if it were, it is the *dictum* of a judge whose great ability entitles his every utterance to the highest respect, and is sanctioned by the concurrence of the entire court. We may safely consider that opinion as expressing the fixed views of the Supreme Court of the United States upon the questions discussed.

The legislative authority relied upon in this case—Acts 1897, 1898, chaps. 463, 989, pp. 495, 1020, respectively—is as follows:

At § 2, p. 496, occurs the following language: "The said company shall have power to construct, lease, purchase, or acquire by consolidation with any other company or companies, and operate and maintain in the city of Norfolk, or both, and in any other city, town, or village in the said county, suitable works, machinery, and plants for the manufacture of electricity, and for the sale and distribution of the same; and it shall have power to sell and distribute the same for public and private illumination, for heating, for power, and for any other purposes which the same may be used for; and it shall have power to do such acts and things, and conduct such enterprises, as are convenient in connection with, or incidental to the enjoyment of, the powers hereinabove conferred, and may, with the consent of the proper authorities of the city of Norfolk, and of such other

city or county as are named above, use the streets and roads thereof for laying its mains, pipes, and wires and erecting its poles."

And at § 3, p. 1020, it is declared that: "The said company is authorized to promote, establish, and maintain the business of a general railway and electrical company. To erect, maintain, and operate plants in this state for the generation of electricity and the supply of electric current for its own use and for sale to persons, natural or artificial," etc.

In these quotations is found the sole authority of the defendant to permit or to require, to excuse or to justify, it in the performance of the acts complained of in this suit. The case is, therefore, plainly to be classed with Baltimore & P. R. Co. v. Fifth Baptist Church, and other cases which we have cited, in which the effect of legislative authority has been discussed. It will be seen that the language is not imperative, but permissive, and that it does not confer statutory sanction for the commission of a nuisance in any way whatever, and most assuredly cannot be said to confer it in express terms, "or by clear and unquestionable implication from the powers given," so that it cannot be fairly said that "the legislature contemplated the doing of the very act which occasioned the injury," and immunity is not to be presumed from a general grant of authority.

But it is said that the decision in this case, if permitted to stand, will "practically debar the use of many of the most important and developing features of our modern growth."

It would be a source of regret if, in the administration of justice by the establishment and enforcement of sound principles, the prosperity of our people should be hindered or checked, but it would be not only a source of regret, but of reproach, if material prosperity were stimulated and encouraged by a refusal to give to every citizen a remedy for wrongs he may sustain, even though inflicted by forces which constitute factors in out material development and growth. Courts have no policies, and cannot permit consequences to influence their judgments further than to serve as warnings and incentives to thorough investigation and careful consideration of the causes submitted to them. Those duties being faithfully performed, courts may await the result with patience, if not always with confidence, and say, with the great Lord Mansfield, "*Fiat justitia, ruat cœlum.*"

The petition to rehear is denied.

4 L.R.A.(N.S.)

IOWA SUPREME COURT.

W. T. BUTSON, Appt.,
v.
HOME SAVINGS & TRUST COMPANY et al.

(— Iowa, —, 105 N. W. 645.)

Loan association—account—net amount of loan.

1. In case of an advance by one loan association to take up a loan in another upon stock which has partly matured, the net amount of the loan is the sum still due, and not the face value of the loan, although the latter amount is charged on the books of the association, and a credit as of an advance payment thereon given for the withdrawal value of the stock in the other association.

Same—action by receiver.

2. That an action to foreclose a mortgage against a borrower from a building and loan association is brought by a receiver does not deprive the borrower of the benefit of a statute providing that, when such association seeks to enforce one of its contracts, no greater recovery can be had than the net amount of principal actually received, with interest at not to exceed a certain rate on the net amount of the loan.

Same—credits—reduction of loan.

3. The character of a payment to a building and loan association as one in reduction of the loan is not changed by the fact that, as a matter of bookkeeping, the credit is not in fact applied upon the loan, but is entered upon some other account.

(January 16, 1906.)

APPEAL by plaintiff from a decree of the District Court for Calhoun County in favor of cross petitioner in a proceeding to cancel a mortgage in which a foreclosure was sought by cross petition. Modified and affirmed.

The facts are stated in the opinion.

Case Note.—Building association; transfer of amount from another association; principal of loan.—A search for cases in which the question what is to be deemed the amount loaned by a loan association taking over a loan made by another association has disclosed only one, that of Neal v. New Orleans Loan, Bldg. & Sav. Asso. 100 Tenn. 607, 46 S. W. 755, which, in holding that a borrower from a loan association, who, at the instance of liquidators of such association, applies for membership in a new association, and for a loan of the original amount, and who receives from the new association a check for such amount, which he indorses to the liquidators, and which they transfer back to the new association, is, in settling with the new association, entitled to be credited with payments made

Messrs. **Healy Brothers & Kelleher**, for appellant:

The provisions of the statute are applicable to every foreclosure against a borrower.

Iowa Deposit & L. Co. v. Matthews, 126 Iowa, 743, 102 N. W. 817.

Messrs. **W. H. Bremner, W. A. Graham, R. A. Shular, and Frick & Crandall** for appellees.

Weaver, J., delivered the opinion of the court:

On April 18, 1896, the plaintiff was the owner and holder of five shares of stock in a building and loan association known as the "Iowa Deposit & Loan Company." Prior to the date named plaintiff had obtained a loan from said association in the sum of $300, to be paid in the usual manner by maturing the aforesaid shares of stock. The payment of the loan was further secured by a mortgage upon the plaintiff's property, and the stock at this time had been so far paid up that it had a withdrawal value of $125.51. At this point dealings between plaintiff and the defendant Home Savings & Trust Company began. This company paid for the plaintiff to the deposit and loan company the sum of $174.49, being the difference between the original loan, $300, and the withdrawal value of plaintiff's stock, $125.51. By this transaction the loan from the deposit and loan company was satisfied and the mortgage was thereupon released. The plaintiff then subscribed for five shares of stock in the Home Savings & Trust Company, and gave to said company his written obligation to it for the sum of $300, and secured the same by a pledge of the said last five shares of stock and by the mortgage now in controversy. In the papers executed between the plaintiff and defendant the only reference made to the transaction with the deposit and loan company was in the following clause, indorsed upon or attached to the certificate issued to the plaintiff: "In consideration of the transfer of five shares of stock from the Iowa Deposit & Loan Company to the Home Savings & Trust Company, Des Moines, Iowa, when forty-five monthly deposits have been made on this stock to the said Home Savings & Trust Company, this certificate shall be treated as matured and the holder thereof shall be entitled to receive its full book value in cash." While the note and mortgage in question were made and delivered upon the theory that said Home Savings & Trust Company had made to the plaintiff a loan of $300, said defendant did not, in fact, except by way of alleged credit hereinafter mentioned, lend, pay, or advance to or for plaintiff any other sum or amount than the said item of $174.49, which was required to enable the latter to take up his obligation to the deposit and loan company. Thereafter the plaintiff continued to make monthly payments to the said Home Savings & Trust Company on said five shares of stock, as well as payments of premiums and interest on the basis of a loan of $300, for the period of about thirty-nine months. The aggregate of payments thus made is $249.60, distributed as follows: Stock dues, $117; premiums, $70.20; interest, $58.50; and fines, $3.90. At the end of said period of thirty-nine months the Home Savings & Trust Company went into voluntary liquidation, the defendant W. H. Bremmer being appointed trustee to take charge of and wind up the business of the corporation. Thereupon the plaintiff made no further payments upon his said obligation, but later made to said Home Savings & Trust Company and to its said trustee a written offer and tender to pay the additional sum of $100, and demanded a surrender of his note and a cancelation of the mortgage. The tender being refused, plaintiff instituted this action on April 11, 1902, for an accounting concerning the amount due to the said corporation and to enforce

to the old association, seems in effect to reach the same conclusion as is reached in BUTSON v. HOME SAV. & T. CO. The ground of the decision, however, is different, and is thus stated by the court: "The solution of the question depends upon a proper understanding of the relations existing between the old and the new company. If the transaction with the two associations were distinct and independent of each other, then it is obvious the defendant company can only be charged with payments made to it; but if it appears the defendant assumed the place of the old company, and succeeded to all its rights, then it must be onerated with all its burdens. . . . We are constrained to view the transaction with the new company as simply a continuation of the original contract. It was simply a transfer of the loan and mortgage from the old to the new company, accomplished by the execution of the new instruments. The consideration for the new mortgage was the cancelation of the old mortgage and the extinguishment of the old note by the execution of the new note, which was effected under the substitutional arrangement between the companies."

The case in hand is also supported by such decisions as Interstate Bldg. & L. Asso. v. Holland, 65 S. C. 448, 43 S. E. 978, which holds that a nonborrowing member of a loan association who subsequently becomes a borrowing member is entitled to credit on his loan of the withdrawal value of his stock at the time of the loan.

cancelation of the mortgage, offering at the same time to pay whatever amount should be found justly due from him. Thereafter, on October 4, 1902, the insolvency of the corporation being apparent, its affairs were placed in the hands of the defendant Whisenand, as receiver, for settlement. Prior to the appointment of the receiver the corporation and its trustee filed their joint answer herein, averring that the loan to plaintiff was for $300, and that after giving due credit for the withdrawal value of the stock in the deposit and loan company, and for all payments since made, there was still due from plaintiff $174.03, for which sum by way of cross bill they asked judgment and foreclosure of the mortgage. After the appointment of the receiver he became a party defendant to this action, and filed his separate answer and cross bill. His answer repeats in substance the averments made in the answer of his codefendants, admits the payments made, admits the withdrawal value of plaintiff's stock is $296.60, but alleges that, by reason of an impairment of the capital, plaintiff has become liable to certain assessments amounting to $113.81, and that there is still due upon the debt from plaintiff the sum of $174.03, for which sum he demands foreclosure of the mortgage. Later said receiver amended his answer and cross petition, and increased his claim for recovery upon the note and mortgage to $297.03. Plaintiff's reply to the cross petition contains substantially a reaverment of the matters contained in his petition. On trial of the issues joined the district court found against the plaintiff, dismissing his bill, and in favor of the defendants upon the cross bill, assessing the amount of plaintiff's indebtedness at $300.27, and decreeing a foreclosure of the mortgage. From this decree the plaintiff has appealed. The foregoing extended statement of the history of this case is practically undisputed and renders unnecessary any discussion of fact propositions.

1. We will first inquire as to the legal effect of the original transaction between the plaintiff and the defendant Home Savings & Trust Company. Was it in fact a loan of $300, as contended by the defendant, or a loan of $174.49, as contended by the plaintiff? At that date plaintiff's deposit and loan company stock had a withdrawal value of $125.51. Had plaintiff desired to take up the loan it would have required a withdrawal or surrender of his stock and the payment of $174.49 in cash. Stated in the language of counsel for appellee: "Butson owed the Iowa Deposit & Loan Company $300. His stock in that company was worth $125.51. Therefore, to cancel the loan and his debt to the deposit a loan company, he, or someone for him, mu pay to the company the difference betwe $300, the debt, and $125.51, the value the stock. The amount thus required w $174.49." If this admirably clear stat ment were applied to a similar transactio between two individuals, one of whom is n a building and loan association, the co clusion that the debtor's obligation to th person who paid this difference for hi was exactly $174.49, and no more, woul be so clear as to make wholly unnecessar argument in its support. It is insiste by the appellee, however, that, in additio to canceling the plaintiff's debt to the de posit and loan company, the effect of thi deal was to make the latter a subscriber t the stock of the Home Savings & Trus Company with an advance payment thereo of $125.51, and a debtor to its loan fun for the sum of $300. This statement i literally correct from appellee's standpoint but a little exploration under its surfac will demonstrate beyond question the erro in the result reached by the trial court The cross petition filed by the receiver fo the Home Savings & Trust Company serves in effect, to convert this action into one fo the foreclosure of the mortgage, and the law governing such proceedings must be th measure of the rights of the parties for that purpose. The statute provides that, when a building and loan association goes into court and demands recovery upon one of its contracts, "no greater recovery shall be had than the net amount of principal actually received, with interest thereon at a rate not greater than 12 per centum per annum on the net amount of loan actually received by and paid to borrower, with statutory attorney fees; no evasion of this provision shall be had by means of any dues, membership fees, premiums, fines, forfeitures, or other charges, any agreement to the contrary notwithstanding." Code, § 1898. The "net amount of the loan" actually received by the plaintiff is therefore an inquiry which must be answered before we can ascertain whether the demand of the company is or is not excessive. It is not pretended that the Home Savings & Trust Company purchased the loan originally held by the deposit and loan company. That debt was paid, canceled, and discharged. It is not claimed that the Home Savings & Trust Company paid out to the plaintiff or on his account any other or greater sum than $174.49; but the debt of $300 is said to have been created by advancing to him or on his account the said sum of $174.49, and by crediting him with an advance payment of $125.51 on his stock. Admit it, and yet the sum of $174.49 remains the

"net amount of the loan" actually received by the borrower. The net effect of it all is simply a scheme or device by which the association is enabled, upon a net loan of $174.49, to collect monthly dues, premiums, and interest on the basis of a loan of $300. For the difference appellant received no value whatever, except in credit upon stock which was immediately, and as a part of the same transaction, assigned back to the association, to be matured for the payment of the same loan. This may be a legitimate "business," if the borrower is willing to submit to it, but it is manifestly inconsistent with the fundamental principles for the promotion of which building and loan societies were devised.

It will clarify the situation very materially if we keep in mind that a loan by a building and loan association upon the pledge of its stock is neither more nor less that an advance payment of the face or par value of such stock under an agreement by which the borrower is to proceed to mature the stock by series of payments; and, by bringing it to maturity, the debt is paid. This fact or agreement is recognized by the contract in suit. The note sued upon is, by its express terms, a promise to pay to the Home Savings & Trust Company "the sum of $300, being an advance payment on my five C shares of its capital stock." Now, if the company, upon proper security being given, advances to the holder of ten shares of its stock the sum of $1,000, and the holder immediately, and as a part of the same deal, returns to the company $400 as an advance instalment upon the same stock, or if, as in the present case, one advancement is set off against the other, and the company pays over the difference only, is the net amount actually paid to and received by the borrower in such case $1,000, or is it but $600? That the smaller sum is the true amount is so apparent that to offer argument in its support is to impeach the intelligence of those to whom it is addressed. To hold otherwise is to permit a building and loan association to make a loan for any named sum, retain 20, 50, 75, or even greater per cent of that sum as advance stock payments, while the borrower, receiving in fact but a small fraction of the nominal loan, goes on paying monthly premium and interest charged on the full face of the written obligation. If this device is to be upheld, what becomes of the statutory provision which specifically declares that the net amount of the loan actually received by and paid to the borrower shall furnish the basis for computing the amount of recovery, and that the court shall not suffer this rule to be evaded by any system of dues, membership fees, premiums, fines, forfeitures, or charges of any kind? Without following this discussion any further, we hold that, for the purposes of this case, the net amount of the loan secured by the mortgage sought to be foreclosed was $174.49, and no more. Taking this as a basis of computation, let us proceed to ascertain the state of the account between the parties under the rule of the statute (Code, § 1898) as applied by us in Iowa Deposit & L. Co. v. Matthews, 126 Iowa, 743, 102 N. W. 817. In this connection, it should be said it is shown without controversy that plaintiff, in apparent good faith, sought and offered to pay the balance of his indebtedness prior to March 3, 1902, and before the insolvency of the company was demonstrated, and that on the date named these efforts culminated in a written tender to the trustee in charge of the company's affairs to pay the sum of $100 in discharge of the claim against him. In his petition he again offers to pay whatever amount is due the defendant association. For the purposes of testing the sufficiency of this tender, we will therefore attempt to state the account as of March 3, 1902, assuming for the present that the contract is one within the protection of the law governing building and loan associations. If to the net loan, $174.49, we add 12 per cent interest from April 18, 1896, to March 3, 1902, $143.01, we find an aggregate of $317.50, which marks the statutory limit beyond which the association could not, by any device, charge the plaintiff in an action upon the loan contract. Indeed, if we understand the record correctly, the net amount of the loan was reduced to even less than $174.49 by deducting therefrom at least one or two months' dues, premiums, and interest in advance; but, as this is not urged in argument, we do not take it into account. Against the aggregate of allowable charges above mentioned, we have conceded payments as follows. Monthly dues, $117; monthly premiums, $70.20; monthly interest, $58.50; monthly fines, $3.90,—or a total of $249.60.

It appears, then, that at the time of the tender the utmost sum for which the association could enforce recovery in any event was the difference between these aggregates, or $67.90. But it is suggested that the company being now insolvent and in the hands of the receiver, a different rule is to be applied, and in support of this proposition we are cited to Spinney v. Chapman, 121 Iowa, 38, 100 Am. St. Rep. 305, 95 N. W. 230, Spinney v. Miller, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317, and Hale v. Kline, 113 Iowa, 523, 85 N. W. 814. We find nothing in these or other authorities relied upon by appellees with which

this opinion is out of harmony. This is not a proceeding to which the association and all its individual members have been made parties for an adjustment of their mutual equities, and we do not undertake to say what rules might obtain under such circumstances, but we may with propriety suggest that it would be a peculiar quality of equity which would permit a party to increase the amount of his debtor's obligation by declaring his own insolvency. On the contrary, it is well settled that a receiver or assignee in insolvency proceedings takes the debtor's estate subject to all the outstanding rights and equities which attached to it in the hands of the debtor himself. Stewart v. Platt, 101 U. S. 731, 25 L. ed. 816; Warner v. Jameson, 52 Iowa, 70, 2 N. W. 951; Roberts v. Corbin, 26 Iowa, 316, 96 Am. Dec. 146. It has often been held that where a building and loan association, by reason of insolvency or otherwise, ceases business, having unpaid stock and loans outstanding, borrowers are released from payments of monthly installments, and the contract will be treated as an ordinary loan at legal interest, upon which the payments already made will be credited under the accepted rule governing partial payments. This rule is made subject to some modification in certain jurisdictions, but in some the borrower is held to a literal performance of his contract after the association becomes insolvent. Low Street Bldg. Asso. No. 6 v. Zucker, 48 Md. 448; Cook v. Kent, 105 Mass. 246; City Loan & Bldg. Asso. v. Goodrich, 48 Ga. 445. This rule is applied simply because, by the act or default of the association, the maturity of the stock becomes impossible, and the whole plan or scheme on which the loan was taken out is made to fail. The rule is intended to relieve, not to increase, the burden of the borrower, and if, under any possible contingency, the rule would operate to make a debtor liable for a greater amount than he would have to pay to discharge his debt according to the literal terms of the contract, no court would apply it. When plaintiff offered to take up the loan and tendered payment of all the association could have enforced against him had judgment then been rendered, his right to have the obligation surrendered and the mortgage canceled was from that moment fixed. Strictly speaking, the lien of the mortgage then ceased to exist, and no act or default of the asociation, thereafter occurring, could have the effect to restore said lien or deprive the plaintiff of his right to a release of record. None of the cases relied upon by the appellee undertake to hold that, in a foreclosure of a building and loan mortgage by a receiver, the debtor is not entitled to the benefit of the rule established by Code, § 1898. The statute itself provides for no exceptions to its operation, nor is there any hint or suggestion in any of its parts from which such an exception can be implied. Its language is general: "In event that judgment is obtained against a borrower from a building and loan association, no greater recovery shall be had than the net amount of principal actually received, with interest," etc. Were we to say that this provision is not applicable to the case before us it would amount to a practical nullification of the act in a very essential particular. There is an attempt to charge the plaintiff with certain alleged assessments made upon his stock for the payment of losses incurred in the business of the corporation. Issue is taken upon this claim in the pleadings, and, as it does not seem to be supported by any competent or sufficient evidence in the record, we do not therefore consider whether, in any event, the plaintiff could be held upon such assessments.

2. Other questions are argued by counsel, but, as those already considered are decisive of this appeal, we shall not discuss them. The equities of the case are strongly with the plaintiff. It is putting it very mildly to say that the claim asserted by the defendant association and enforced by the decree below is oppressive to the last degree, and requires some better reason than has been suggested in argument to command our approval. The plaintiff received from the defendant corporation a loan or advancement of $174.49, less advance charges. Within a little more than three years *from* that date he had paid on this loan and to mature the stock by which his obligation was to be discharged the sum of $249.60, when the corporation went into voluntary liquidation, thereby declaring its inability or unwillingness to perform its part of the contract. According to its own computation and on a basis of a loan of $300, the utmost amount of its claim on September 24, 1901, was $99.23. On April 26, 1902, the answer filed by the trustee in this case increased that demand to $174.03. On February 11, 1904, the receiver comes into the action and again increases the demand to $297.03, and the court enters a decree against him in the sum of $300.27; and that, too, while the association and its receiver expressly admit that the plaintiff's stock at the date of the decree had a withdrawal value of $296.60. The amount of this judgment, if the plaintiff must pay it, added to the $249.60 already paid, makes a total of $549.87. In other words, he will pay $375.38 for the use of $174.49, although the return payments began im-

mediately and amounted to more than the principal sum within less than two and a half years from the date of the loan. The mythical story of Sisyphus, condemned forever to roll a heavy stone up the mountain side, only to have it escape his grasp and fall deeper than ever into the valley below, must have been inspired by some prophet's vision of a twentieth-century borrower endeavoring to pay a loan upon terms like these. We feel confident that the appellee's claim is justified neither by its contract nor by the statute under which such associations do business. We do not overlook the argument by which payments made upon stock are sought to be distinguished from payments upon the loan. That distinction is largely a play upon terms,—merely a matter of bookkeeping. For, if both parties carry out the contract according to its stipulation, the debt is paid, as we have already repeatedly suggested, solely and only by bringing the stock to maturity. Every payment, therefore, which goes to advance or accelerate the maturing process, is of necessity a payment in some degree or measure on the debt, nor are such payments deprived of their true character as such by the fact that credit therefor may not be applied upon the note representing the loan until the time arrives for final settlement, and may then be increased by profits or decreased by losses which have accrued upon the stock.

The decree appealed from is therefore modified by reducing the amount found against the plaintiff to $67.90, and by taxing the costs of both courts to the receiver.

Modified and affirmed.

ALABAMA SUPREME COURT.

PULLMAN COMPANY, Appt.,
v.
MAX KRAUSS.

(— Ala. —, 40 So. 398.)

Sleeping car company—contagious disease.

1. A sleeping car company may refuse to admit to its car a person having a contagious disease, although he has purchased a ticket for passage thereon.

Same—contract—rescission—tender.

2. To rescind a contract to carry a passenger on a sleeping car the company must tender back the money paid for the passage.

Instructions—variance.

3. Charging that, if the evidence is believed, the jury must find that the allegations of the complaint are true, is reversible error where the action is for breach of contract, which is alleged to have been actuated by malice and bad faith, where there is no evidence to support such charge.

Carrier—breach of contract—damages.

4. One refused passage on a sleeping car, in violation of the company's contract to carry him, is entitled to recover at least the amount paid for his ticket.

Sleeping car company—rules—reasonableness.

5. A rule of a sleeping car company not to admit to its cars persons afflicted with contagious disease is reasonable.

(February 17, 1906.)

APPEAL by defendant from a judgment of the City Court of Birmingham in favor of plaintiff in an action brought to recover damages for breach of contract to carry plaintiff on its car. Reversed.

The facts are stated in the opinion.

Messrs. **Campbell & Walker**, for appellant:

Defendant had the right to exclude from its car a person with a contagious disease.

Paddock v. Atchison, T. & S. F. R. Co. 4 L. R. A. 231, 37 Fed. 841; Hudson v. Lynn & B. R. Co. 178 Mass. 67, 59 N. E. 647; Robinson v. Rockland, T. & C. Street R. Co. 87 Me. 387, 29 L. R. A. 530, 32 Atl. 994; Peavy v. Georgia R. & Bkg. Co. 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70; Chicago City R. Co. v. Pelletier, 134 Ill. 125, 24 N. E. 770; Meyer v. St. Louis, I. M. & S. R. Co. 4 C. C. A. 221, 10 U. S. App. 677, 54 Fed. 116; St. Louis, I. M. & S. R. Co. v. Greenthal, 23 C. C. A. 100, 40 U. S. App. 554, 77 Fed. 150.

The rule is not contrary to public policy.

Memphis & C. R. Co. v. Graham, 94 Ala. 546, 10 So. 283; Montgomery v. Buffalo R. Co. 165 N. Y. 139, 58 N. E. 770; Gregory v. Chicago & N. W. R. Co. 100 Iowa, 345, 69 N. W. 532; Wright v. California C. R. Co. 78 Cal. 360, 20 Pac. 740; Alabama G. S. R. Co. v. Carmichael, 90 Ala. 19, 9 L. R. A. 388, 8 So. 87; Manning v. Louisville & N. R. Co. 95 Ala. 392, 16 L. R. A. 55, 36 Am. St. Rep. 225, 11 So. 8.

Mr. **George Huddleston** for appellee.

Case Note.—Right of carrier to reject persons having contagious disease.—It is well settled that a common carrier may exclude all persons from its vehicles who it has reasonable grounds to believe will injure or annoy their fellow passengers, such as insane or drunken persons, or those whose physical or mental condition is such that their presence upon the vehicle of the carrier may cause injury or substantial discomfort to other passengers. 1 Fetter, Carr. Pass. § 243; Hutchinson, Carr. 2d ed. §§ 539, 540; Ray, Negligence of Imposed Duties, Pass. Carr. p. 160.

There can, therefore, be no doubt of the right to exclude a person suffering from a

Denson, J., delivered the opinion of the court:

This suit was commenced on the 28th day of February, 1903, by Max Krauss against the Pullman Car Company. The complaint contained a single count, which, as amended, is in this language: "Plaintiff claims of the defendant $1,950 damages for the breach of an agreement entered into by it on, to wit, January 30, 1903, by which defendant, for a valuable consideration, promised to carry plaintiff as a passenger on a sleeping car from the city of Memphis, Tennessee, to the city of Birmingham, Alabama. Plaintiff avers that defendant breached said promise in this: That defendant refused to so carry plaintiff as said passenger. Plaintiff avers that he suffered the damage and injury naturally flowing from said breach, and in addition thereto that he was damaged by defendant's said breach of said promise as follows: That at the time defendant made said contract to so carry him, plaintiff, as defendant knew, was sick or in delicate or unsound condition, and desired the passage in defendant's car in order to prevent further injury to his body and health, and the suffering and weariness incident to said travel, and that, because of defendant's said breach of said contract, plaintiff was compelled to travel from said city of Memphis, Tennessee, to said city of Birmingham, Alabama, in a railroad passenger coach, and thus lost, or was prevented from obtaining, the benefit of traveling in a sleeping car, and was made sick and sore, and suffered physical pain and injury and detriment to his physical condition, and suffered mental pain and anxiety, and was greatly humiliated. Plaintiff further avers that said breach of said contract was maliciously, wilfully, or wantonly committed by defendant, and was committed in bad faith, and in a manner calculated to subject plaintiff to humiliation, ridicule, and reproach, and that plaintiff was humiliated and made ashamed thereby. All to plaintiff's damages in the said sum of $1,950."

The defendant filed several pleas in answer to the complaint. Demurrers were sustained to those numbered 4, 5, and 6, respectively. The fourth plea sets up the defense that when the plaintiff presented himself at the defendant's car for passage the conductor and passengers who had bought berths and space in said car thought that the plaintiff had a "contagious and loathsome disease;" that his hands and arms were wrapped in cloth, and that there were eruptions upon a part of his body that was visible; that a number of passengers on the said car objected to plaintiff being allowed to ride thereon, and the conductor of said car would not allow him to take passage thereon because of the appearance of the said disease; and it is averred that the plaintiff did have a loathsome and contagious disease, to wit, syphilitic eczema. The fifth plea set up a rule of the defendant company against carrying persons infected with a contagious disease, and it is averred plaintiff had such a disease, to wit, syphilitic eczema. The sixth plea is in effect the same as the fourth plea, with the additional averment that, at the time plaintiff purchased his ticket, he did not communicate to the agent who sold him the ticket the fact that he had a contagious disease, and that the agent did not know that the plaintiff had a contagious disease.

The right of a person to a berth or passage on a sleeping car is not an unlimited right. But it is subject to such reasonable regulation as the defendant had prescribed for the due accommodation of passengers and for the safety and comfort of passengers. Sleeping car companies are not

contagious disease, rendering him dangerous to other passengers. A *dictum* to this effect is found in Thurston v. Union P. R. Co. 4 Dill. 321, Fed. Cas. No. 14,019.

And, although a person has been accepted as a passenger, it has been held that he may be removed from the train, where he breaks out with eruptions which, from the best medical advice that can be obtained, are believed to be caused by smallpox, although such belief may afterwards turn out to be mistaken. Paddock v. Atchison, T. & S. F. R. Co. 4 L.R.A. 231, 37 Fed. 841.

So, it is said in Conolly v. Crescent City R. Co. 41 La. Ann. 57, 3 L.R.A. 133, 17 Am. St. Rep. 389, 5 So. 259, 6 So. 526: "When the condition of a sick passenger is such that his continued carriage is inconsistent with the safety or even the reasonable comfort of his fellow passengers, regard for the rights of the latter will authorize the carrier to exclude him from the conveyance. Thus, if he had cholera, or smallpox, or delirium tremens, or even if, as in this case, he were subject from any cause to continuous vomiting, utterly inconsistent with the comfort of other passengers in a street car, the right of the carrier, in protection of the latter's privileges, to exclude him, would undoubtedly arise."

But this right of exclusion or removal cannot be exercised arbitrarily and inhumanely, and without due care and provision for the safety and well-being of the ejected passenger. It is the duty of the carrier, on removing such a person from the train, to put him off at a place where he can find accommodations and medical attendance, or where there is reasonable ground to believe that he can do so. Paddock v. Atchison, T. & S. F. R. Co. and Conolly v. Crescent City R. Co. *supra*.

bound to admit persons as passengers on its cars who are guilty of gross and vulgar habits of conduct, or who make disturbances on board, and, *a fortiori*, persons who are afflicted with contagious or infectious disease, so that there would be a probability of other passengers contracting the disease with which said afflicted person was suffering. As is said in Hutchinson on Carriers, with respect of common carriers: "As, therefore, the common carrier holds himself out as the carrier of only such goods as are in a fit condition to be carried, and may, as has been seen, notwithstanding his public profession, refuse to accept such as are unfit to be carried on account of their kind, the unsuitable manner in which they are prepared for transportation, or the insecurity or damage which they may occasion to the goods of other shippers or to the carrier himself, so the carrier of passengers, however publicly he may hold himself out or be engaged as such carrier, may refuse to accept persons offering themselves as passengers who are unfit to be carried, either because such persons, from bad character, from being afflicted by contagious disease, from apprehended evil designs, either upon the carrier himself or his passengers, or from drunkenness or insanity, would be unfit associates for them or unsafe for the carrier." Hutchinson, Carr. 2d ed. § 540; Nevin v. Pullman Palace Car Co. 106 Ill. 222. 46 Am. Rep. 688; Wood, Railway Law, 1035; Putnam v. Broadway & S. Ave. R. Co. 55 N. Y. 108, 14 Am. Rep. 190; Paddock v. Atchison, T. & S. F. R. Co. 4 L.R.A. 231, 37 Fed. 841.

Then, in the first instance, the defendant company, if the plaintiff was afflicted with a contagious or infectious disease, loathsome in its nature, would have been justifiable in refusing to contract with plaintiff to carry him as a passenger or to furnish him a berth in its cars; or if, after receiving him as a passenger or making the contract with him to carry him, the defendant became aware that the plaintiff was afflicted with such disease, the defendant, in consideration of the duty it owed the other passengers to protect them from the misfortune of this one passenger, would have been justified in putting an end to the contract and in declining to admit or carry him as a passenger. Conolly v. Crescent City R. Co. 41 La. Ann. 57, 3 L. R. A. 133, 17 Am. St. Rep. 389, 5 So. 259, 6 So. 526; Paddock v. Atchison, T. & S. F. R. Co. *supra*. But, the action here being in assumpsit for a breach of the contract, to perfect a rescission of the contract—a putting an end to it—the defendant must have offered the purchase price of the ticket or consideration paid by plaintiff on the agreement to carry, back to him. In this respect pleas 4, 5, and 6 were bad, having been pleaded, as they were, in bar of the entire cause of action. Hence the demurrer was properly sustained to them.

After demurrer was sustained to pleas 4, 5, and 6, the defendant filed other pleas which conformed to the ruling of the court with respect to pleas 4, 5, and 6, and the trial was had on said other pleas.

The other assignments of error that are insisted upon relate to a charge given at the plaintiff's request and to charges refused to the defendant.

Charge 2, given for the plaintiff, was in this language: "Gentlemen of the jury, I charge you that, if you believe the evidence, you must find that the allegations of plaintiff's complaint are true." We find that the complaint avers that the breach of the contract was maliciously, wilfully, or wantonly committed by defendant, and committed in bad faith. We have found in the record no evidence of bad faith or malice on the part of the defendant or its agents, yet, under this instruction, the jury was required to find that these averments of the complaint were true. But it is urged that these averments in the complaint were immaterial. If so, the charge should have been formulated so that it would have excluded them. We cannot say that the charge was harmless in its effect, and the giving of it was reversible error. This makes it unnecessary to consider the other insistence of the appellant with respect of this charge.

Charges 1 and 7, refused to the defendant, were calculated to lead the jury to the belief that they could not award the plaintiff damages equal to the amount paid for the ticket or berth, or that they might award him damages less than the amount paid therefor. The plaintiff, if entitled to recover, was entitled at least to recover the amount that was paid for the ticket; and this, although it may have been a small amount, was substantial damages, as contradistinguished from nominal damages. The charges were properly refused.

After proving that the defendant had rules with reference to persons afflicted with contagious or infectious disease, the defendant offered in evidence a rule of the company, which was shown to be in effect at the time plaintiff was refused passage on the sleeper, and which was in words as follows: "Persons known to be afflicted with any contagious or infectious disease, or to be insane, will not be permitted in the cars of this company." By amended plea 8, upon which issue was joined, the rule was pleaded in defense of the action, and it was averred in the plea that the rule was a rea-

sonable regulation. Charge 3, refused to the defendant, is in this language: "The court charges the jury that the rule set up in defendant's plea 8, if said rule has been proved to the reasonable satisfaction of the jury, is a reasonable rule." We think there can be no doubt that the defendant had not only the power, but that it was its duty, to make rules and regulations to insure the safety and comfort of its patrons. Alabama G. S. R. Co. v. Carmichael, 90 Ala. 19, 9 L.R.A. 388, 8 So. 87; Manning v. Louisville & N. R. Co. 95 Ala. 392, 16 L. R. A. 55, 36 Am. St. Rep. 225, 11 So. 8; Montgomery v. Buffalo R. Co. 165 N. Y. 140, 58 N. E. 770; Barker v. Central Park & E. River R. Co. 151 N. Y. 237, 35 L. R. A. 489, 56 Am. St. Rep. 626, 45 N. E. 550. It seems to have been settled by this court that the reasonableness of any given rule or regulation of a carrier is a question of law, to be determined by the court, and not one of fact, for the jury. Memphis & C. R. Co. v. Graham, 94 Ala. 545, 10 So. 283, 9th h. n. We have found very satisfactory reasoning upon which to predicate this rule in Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea, 145, where it was said: "The rules and regulations of a railroad corporation, as of other corporations, are subject to the requirements that they must be reasonable. Whether they are reasonable or not is a question for the court, and not for the jury; and this is for the obvious reason that there must be uniformity in the construction, which can always be obtained by the decision of this court. If left as a question of fact to the jury, the result might vary with each jury, and the corporation could have no certainty that any rule would stand the test with every jury." So "the necessity of holding this to be a question of law, and therefore within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent relation can be established. If this question is to be left to juries, one rule would be applied by them to-day and another to-morrow. In one trial a company would be liable, and in another, presenting the same question, not liable." Gregory v. Chicago & N. W. R. Co. 100 Iowa, 345, 69 N. W. 532; Illinois C. R. Co. v. Whittemore, 43 Ill. 420, 92 Am. Dec. 138; Avery v. New York C. & H. R. R. Co. 121 N. Y. 44, 24 N. E. 20; Vedder v. Fellows, 20 N. Y. 126; Chilton v. St. Louis & I. M. R. Co. 114 Mo. 89, 19 L. R. A. 269, 21 S. W. 457; Norfolk & W. R. Co. v. Wysor, 82 Va. 250, 261; Com. v. Worcester, 3 Pick. 462; Re Vandine, 6 Pick. 187, 17 Am. Dec. 351. The rule in question, it would seem, was adopted for the safety and comfort of defendant's patrons or passengers, and, whether the defendant is to be treated as a common carrier or otherwise, the rule is a wise and salutary one, and we have no difficulty in reaching the conclusion that it is a reasonable one, and that the court should have so declared, as requested in charges 2 and 3, refused to the defendant. The refusal of these charges constitutes reversible error.

If the plaintiff was, at the time he presented himself for passage on defendant's car, afflicted with a contagious or infectious disease, then, under the issues formed, the defendant was entitled to have the jury instructed as requested in refused charge 8. Refused charges 9 and 11, presenting a kindred proposition to that presented in charge 8, were properly refused, for the reason that they precluded any recovery for the sum paid for the sleeping car space or berth.

Charge 12 possessed the vice of being argumentative, and for this reason, if for no other, was properly refused. Under the issues made by the pleading and the evidence adduced, the affirmative charges requested by the defendant were properly refused.

For the errors pointed out, the judgment will be reversed, and the cause remanded.

Haralson, Dowdell, Simpson, and Anderson, JJ., concur.

Petition for rehearing denied April 3, 1906.

COLORADO SUPREME COURT.

FRANK P. TANNER, Plff. in Err.,
v.
TREASURY TUNNEL, MINING, & REDUCTION COMPANY.

(— Colo. —, 83 Pac. 464.)

Eminent domain—tunnel.

The legislature may confer the right of eminent domain upon a tunnel company organized to project a tunnel to drain, ventilate, and aid in securing the mineral from mines along its course, the use being public.

(January 8, 1906.)

Case Note.—Eminent domain; power to exercise for the purpose of securing right of way for mining tunnel.—Since the tunnel for the construction of which the power of eminent domain was invoked in the foregoing case was intended for the benefit of all mines that were so located as to render connection therewith possible and advantageous, the court was not obliged, in order to uphold the constitutionality of the act authorizing the exercise of eminent domain for the purpose, to take the extreme view

ERROR to the District Court for Ouray County to review a judgment in favor of petitioner in a proceeding to condemn a right of way for a mining tunnel. Affirmed.

Statement by Gabbert, Ch. J.:

Defendant in error, as petitioner, instituted proceedings in the court below, under the eminent domain act, to condemn a right of way for tunnel purposes through the Corn Cob lode. To these proceedings the owners of the premises were made parties respondent. According to its articles of incorporation the petitioner is a corporation, organized under the laws of this state "to run, construct, work, operate, and maintain tunnels for mine development, drainage, prospecting, and other purposes; to demand, contract for, and receive royalties or other compensation for the use of such tunnel or tunnels, from any and all persons, associations, and corporations in any manner using same, or benefited thereby, in the drainage of properties operated by them; to excavate, drive, or otherwise construct cross-cuts and branches from any such tunnel for mining, prospecting, development, and other purposes." From the averments of the petition, as well as the testimony, it appears that the purpose of petitioner in constructing the tunnel, among others, is to furnish drainage for mines adjacent to its line; that its portal is in Ouray county, but, as projected, will extend into the county of San Miguel, into a locality highly mineralized, where there are mines being successfully operated; that this tunnel, when completed, will cut the veins in these properties at a depth far below the present workings thereon; and that, if the owners of these properties desire to avail themselves of the facilities conferred by the tunnel, their mines can be drained thereby and waste and ore transported through such tunnel. It also appears that these mines are located at a high altitude, and that many of the inconveniences resulting from such location may be avoided by operations through the projected tunnel of petitioner. Judgment was rendered for the petitioner, and respondents bring the case here for review on error. In 1891 the general assembly passed an act which in terms provided that any corporation formed for the purpose of constructing a road, ditch, reser-

adopted by some of the cases, that the general welfare and benefit of the public should prevail over private property rights even though the use for which the power of eminent domain is asserted is not a public use in the sense that it is available to all members of the public who may be in a position to avail themselves of it. In this respect the case is distinguishable from Amador Queen Min. Co. v. Dewitt, 73 Cal. 483, 15 Pac. 74, holding that a right of way for a tunnel for the private use of a mine owner in working his mine cannot be acquired by condemnation. The latter case appears to be the only other case upon the specific question whether the construction of a mining tunnel constitutes a public use for which the power of eminent domain may be exercised; and the distinction just pointed out deprives it of any effect as an authority against the decision in TANNER v. TREASURY TUNNEL MIN. & REDUCTION Co. It will be observed, upon referring to the note to Nash v. Clark, 1 L.R.A.(N.S.) 208, upon the right to take property for irrigating or draining private lands, the note to Cozad v. Kanawha Hardwood Co. 1 L.R.A.(N.S.) 969, upon the question as to the right to secure a right of way for a private railway, and the note to Highland Boy Gold Min. Co. v. Strickley, 1 L.R.A. (N.S.) 976, upon the right to take property for a mining road, that, in a number of cases, the exercise of the power of eminent domain has been upheld upon the theory of a general public benefit, as distinguished from a strict public use, and these cases, therefore, go much further than the court in the TANNER CASE was obliged to go in order to uphold the exercise of the power of eminent domain for the purpose there involved. It may be pointed out in this connection that the decision of the Utah supreme court in Highland Boy Gold Min. Co. v. Strickley, 28 Utah, 215, 1 L.R.A.(N.S.) 976, 107 Am. St. Rep. 620, 78 Pac. 296, upholding the exercise of the power of eminent domain for the purposes of a right of way across a placer mining claim for an aërial bucket line of a mining corporation, was affirmed in 200 U. S. 527, 50 L. ed. —, 26 Sup. Ct. Rep. 301. The opinion of the Federal Supreme Court adheres to the position previously taken in Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, recognizing the inadequacy of use by the general public as a universal test, and holding that the question whether the public welfare requires the exercise of the power of eminent domain for such purposes as the irrigation of private lands, or the development of private mining property, is one for the local legislature and courts, and that in such unusual cases there is nothing in the 14th Amendment which prevents a state from requiring concessions from individuals upon due compensation. A further discussion of the principles applicable to the determination of the character of a use as public or private for the purposes of the power of eminent domain will be found in the note to State ex rel. Tacoma Industrial Co. v. White River Power Co. 2 L.R.A. (N.S.) 82, in connection with the specific question whether the generation of electrical power by private corporations is a public use for such purpose.

voir, pipe line, bridge, ferry, tunnel, telegraph line, or railroad line, should have the authority to acquire any real estate necessary for its purposes in the manner provided by law, under the eminent domain act. 3 Mills's Anno. Stat. Rev. Supp. § 616; Laws 1891, § 3, p. 98.

Messrs. **Thomas, Bryant, & Malburn** for original plaintiff in error.

Mr. **George Stidger** also for plaintiff in error.

Messrs. **Henry & Sigfrid** for defendant in error.

Mr. **Thomas Y. Bradshaw**, *amicus curiæ*.

Gabbert, Ch. J., delivered the opinion of the court:

The authority to exercise the right of eminent domain for public uses is based upon the theory that property is granted the subject upon condition that it may be retaken to serve the necessities of the sovereign power. To this end agencies created by the state, the purpose of which is to serve the public, may exercise this right. Denver Power & Irrig. Co. v. Denver & R. G. R. Co. (Denver Power & Irrig. Co. v. Colorado & S. R. Co.) 30 Colo. 204, 60 L.R.A. 383, 69 Pac. 568. The vital question is whether or not the use of the property sought to be condemned will be public in its nature. As an aid in solving this question, we may consider the character of the business in which the petitioner proposes to engage through and by means of its tunnel. If this business is wholly for its benefit, then the use of the property sought to be appropriated would be private; while, on the other hand, if the business proposed to be carried on by petitioner through its tunnel is essentially for public benefit and advantage, then the use would be public. State, De Camp, Prosecutor, v. Hibernia Underground R. Co. 47 N. J. L. 43; Sholl v. German Coal Co. 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199; 15 Cyc. Law & Proc. p. 581. No definition, however, has as yet been formulated which would serve as an infallible test in determining whether a use of property sought to be appropriated under the power of eminent domain is public or private. No precise line is drawn between the uses which would be applicable in all cases. Doubtless this arises from the fact that the courts have recognized that the definition of "public use" must be such as to give it a degree of elasticity capable of meeting new conditions and improvements, and the ever-increasing needs of society. Olmstead v. Camp, 33 Conn. 532, 551, 89 Am. Dec. 221. Consequently, we find, in examining the authorities, that, in determining whether or not a use is public, the physical conditions of the country, the needs of a community, the character of the benefit which a projected improvement may confer upon a locality, and the necessities for such improvement in the development of the resources of a state, are to be taken into consideration. Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376; Scudder v. Trenton Delaware Falls Co. 1 N. J. Eq. 694, 729, 23 Am. Dec. 756; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676.

In this state we have conditions to meet and resources to develop, which, in their nature, require the employment of new and appropriate means. This has opened a field for the prosecution of new enterprises. The mineral resources of the state are of prime importance. Generally, they can only be reached by sinking shafts to great depth, or running tunnels of great length. It appears from the testimony that the tunnel which petitioner purposes to run will cut the mountain at a great depth; that it will intersect numerous veins of mineral; that it will reach mines now being operated; that through this tunnel these mines and others which may be developed along its line can be operated if the owners should so desire; that it will drain these properties and furnish ventilation, if connection is made therewith; in short, that the owners of mining properties along the line of this tunnel and adjacent thereto may, if they so desire, secure a distinct benefit and advantage in the operation of their mines by availing themselves of the facilities which may be afforded by the tunnel of the petitioner. The general assembly has provided for the organization of companies for the purposes for which the petitioner was organized. It has provided that a corporation of this character may exercise the power of eminent domain in securing rights of way for its tunnel. It has evidently recognized that the business of a tunnel company may be for the benefit and advantage of the public, for we find that in designating what corporations may exercise the power of eminent domain, tunnel companies have been mentioned in connection with bridge, ferry, railroad, and other companies, whose business is unquestionably to serve the public. While this judgment is not conclusive upon the courts, it is entitled to careful consideration and great weight, as the judgment of a co-ordinate branch of the government of the necessities of the state for the development of its resources, and the needs of the people in this respect. Dayton Gold & S. Min. Co. v. Seawell, 11 Nev. 394.

Subject to the authority of the courts to determine certain questions, the general as-

sembly is the exclusive judge of the necessity or emergency justifying the exercise of the power of eminent domain. Sholl v. German Coal Co. *supra*. It has vested corporations organized for the purposes mentioned in the articles of incorporation of petitioner with the right to exercise this power. For the development of the great mining resources of this state, tunnels of the character contemplated by petitioner are not only expedient, but necessary. The necessity of vesting corporations of the character of petitioner with the right to exercise the power of eminent domain is apparent; for, without this power, enterprises of the character contemplated by the petitioner could be thwarted and the development of the mining resources of the state prevented by those owning property crossing the line of a projected tunnel. The number who may avail themselves of the benefits of the tunnel will be limited, but this is merely the result of natural conditions arising from the character and location of mining properties. The use and benefit of the tunnel will be in common, and may be enjoyed by all whose properties are so located with reference thereto that they may avail themselves, if they so desire, of the opportunities thus afforded for the development and operation of their properties. The business in which petitioner will engage in affording these facilities is essentially for the benefit and advantage of such owners. For these reasons, we are of the opinion that the use of the property sought to be condemned by the petitioner is public. Gilmer v. Lime Point, 18 Cal. 229, 251; O'Reiley v. Kankakee Valley Draining Co. 32 Ind. 169. 185; Coster v. Tide Water Co. 18 N. J. Eq. 54, 68; Hartwell v. Armstrong, 19 Barb. 166.

The judgment of the District Court is affirmed.

IDAHO SUPREME COURT.

STATE OF IDAHO, Respt.,
v.
FRANK CALLOWAY, Appt.

(— Idaho, —, 84 Pac. 27.)

Intoxicating liquors—power of municipality to regulate.

1. Under the provisions of subdivision 4 of § 37 of the charter of Boisé City, the city council has power and authority to enact ordinances and make reasonable regulations therein for the sale of intoxicating liquors, both at retail and wholesale.

Same—validity of ordinance.

2. Ordinance No. 623 of said city is not repugnant to the general laws of the state.

Same—hours of closing.

3. The following provision of ordinance 623 of the said city, to wit: "And it is hereby made unlawful for the proprietor of such a place or wherein is contemplated the sale of intoxicating liquors, to permit any person or persons other than himself and family to enter such room and place where intoxicating liquors are sold during the hours when the sale of such liquors is prohibited,"—is a reasonable regulation, and the common council had the power and authority to enact it.

Same.

4. The provision of said ordinance making it a misdemeanor for the proprietor of a place where intoxicating liquors are sold to permit any person or persons other than himself and family to enter such place during the hours when such place must be kept closed is a reasonable regulation, and not contrary to the provisions of the Constitution or general laws of the state.

Same.

5. The power to prohibit the sale of intoxicating liquors in the interest of the public safety, welfare, good order, and happiness of the people during certain prescribed periods by the proper legislative body is no longer an open question.

Same—admitting person during closed period.

6. Under the provisions of said ordinance it is immaterial for what purpose the proprietor admits the prohibited person into such building. The offense is committed if he permits any person except members of his own family to enter his place of business during prohibited hours.

Same—classificatoin of business.

7. Said ordinance is equally applicable to all dealers in intoxicating liquors, whether at wholesale or retail, and it not class legislation within the well-defined meaning of that term. The classification there made is natural, practical, and reasonable. That being true, it is valid and constitutional. In enacting police regulation, if the classification therein made is usual, practical, and reasonable, that is sufficient.

Same—constitutional rights.

8. Said ordinance does not infringe any right, privilege, or immunity secured to the citizen by the Federal or state Constitution.

Headnotes by SULLIVAN, J.

Case Note.—Validity of ordinance excluding persons from saloon during hours of closing.—On the question of the validity of an ordinance excluding persons from places where intoxicating liquors are sold during the hours when such places are required to be closed, there is very little authority in addition to the cases cited in the opinion in STATE v. CALLOWAY. As shown by those cases, the validity of such ordi-

Same—restraint of trade.

9. The control of the liquor business is within the police power of the state, and restrictions which might lawfully be imposed upon it might be obnoxious as an illegal restraint of trade when applied to other pursuits or avocations.

Same—enforced closing.

10. The right to sell liquor is not an inherent right of the citizen, and to prohibit him from keeping open his place of business from 12 o'clock midnight to 6 o'clock in the morning, and from 12 o'clock Saturday night until 6 o'clock the following Monday morning, does not deprive him of property without due process of law. Said ordinance is a restraint upon the business therein named, and in no wise contemplates a destruction of the business, but places it within the bounds therein named, and is simply a regulation and a restraint.

Municipal ordinance—title.

11. The title to said ordinance, to wit, "An Ordinance Regulating the Hours in Which Intoxicating Liquors Shall Be Sold in Boisé City, and for Sunday Closing, and Providing a Penalty for the Sale Thereof during Prohibited Hours,"—expresses the object and purpose of said ordinance, and is sufficiently comprehensive to include all of the provisions of said ordinance.

(January 31, 1906.)

APPEAL by defendant from a judgment of the District Court for Ada County convicting him of illegal sale of intoxicating liquors. Affirmed.

The facts are stated in the opinion.

Messrs. Hawley, Puckett, & Hawley, for appellant:

A municipal corporation has only such powers as have been expressly delegated to it, and their appropriate incidents.

Wilson v. Beyers, 5 Wash. 303, 34 Am. St. Rep. 858, 32 Pac. 90; State v. Robertson, 45 La. Ann. 954, 20 L.R.A. 691, 40 Am. St. Rep. 272, 13 So. 164; South Covington & C. Street R. Co. v. Berry, 93 Ky. 43, 15 L.R.A. 604, 40 Am. St. Rep. 161, 18 S. W. 1026; Phillips v. Denver, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902; Com. v. Worcester, 3 Pick. 462.

Even if this ordinance made the gist of the offense the selling of intoxicating liquors during prohibited hours, and not the entrance into the saloon building, the ordinance would be void by reason of its being unreasonable.

Bennett v. Pulaski (Tenn. Ch. App.) 47 L.R.A. 278, 52 S. W. 913; Columbia v. Beasly, 1 Humph. 232, 34 Am. Dec. 646; New York v. Dry Dock, E. B. & B. R. Co. 133 N. Y. 104, 28 Am. St. Rep. 614, 30 N. E. 563; People v. Armstrong, 73 Mich. 288,

nances has generally been sustained. But there is some authority the other way.

Thus, an ordinance making it a misdemeanor to let a person in or out of a saloon, or for a person to go in or out of a saloon during the hours in which the saloon is required to be closed, was held, in Bennett v. Pulaski (Tenn. Ch. App.) 47 L.R.A. 278, 52 S. W. 913, to be unreasonable and void.

And a statute empowering towns to make such by-laws, rules, and regulations for the better government of the town as they may deem necessary was held, in State v. Thomas, 118 N. C. 1221, 24 S. E. 535, not to empower a municipality to pass an ordinance forbidding any barkeeper, clerk, or agent, or any person whatsoever, to remain in a barroom or any place where spirituous or intoxicating liquors are sold during the hours of closing. In this case it appeared that the proprietor and his clerk sat in the barroom three quarters of an hour after the time of closing, and the court said that, whether or not the legislature might have power to pass a law forbidding a person to sit in his own house, for whatever purpose it might at the time be used, it was certain that no attempt had been made to authorize a town to make such a regulation.

So, an ordinance forbidding the sale of liquor during certain hours, and making the fact that persons are seen to enter or leave places where such liquors are sold during the time when they are required to be closed prima facie evidence of guilt, was held, in McNulty v. Toof, 116 Ky. 202, 75 S. W. 258, to be invalid as to the latter provision, under legislative power to restrain, regulate, and prohibit the selling or giving away of liquors, and to pass all ordinances expedient in maintaining the peace, good government, health, and welfare of the city. The court expressed the opinion that the state might, by statute, make the fact that persons were seen to enter or leave saloons during the time of closing prima facie evidence of the violation of the act, but held that such power had not been delegated to the municipality.

Decker v. Sargeant, 125 Ind. 404, 25 N. E. 458, is cited in Davis v. Fasig, 128 Ind. 271, 27 N. E. 726, as an authority in favor of the validity of an ordinance requiring visitors to be excluded from saloons during the hours of closing. In this case an ordinance requiring the proprietors of saloons to close them at 11 o'clock, at which time they should raise all door screens, etc., so as to give an unobstructed view of the interior, and require all other persons to vacate the premises, and not to reopen the saloon until 5 o'clock the following morning, was held valid. But nothing is said in the opinion as to the right to forbid the proprietor or anyone else to enter the saloon during the closing hours, and no particular reference is made to the provision requiring that all persons shall vacate the premises at 11 o'clock.

2 L.R.A. 721, 16 Am. St. Rep. 584, 41 N. W. 275.

The ordinance abridges the privileges of a citizen, and deprives a person of liberty and of property.

State v. Nelson, 10 Idaho, 522, 67 L.R.A. 808, 79 Pac. 79; Gastenau v. Com. 108 Ky. 473, 49 L.R.A. 111, 94 Am. St. Rep. 386, 56 S. W. 705; New York v. Dry Dock, E. B. & B. R. Co. *supra;* Robinson v. Franklin, 1 Humph. 156, 34 Am. Dec. 625; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 40 N. E. 454; Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Eden v. People, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108.

This is class legislation.

Ragio v. State, 86 Tenn. 272, 6 S. W. 401; Re Morgan, 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; Re Eight Hour Law, 21 Colo. 29, 39 Pac. 328; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; Ritchie v. People, *supra;* Steffy v. Monroe City, 135 Ind. 466, 41 Am. St. Rep. 436, 35 N. E. 121.

Messrs. **J. J. Guheen**, Attorney General, **Charles F. Koelsch**, **R. P. Quarles**, and **Charles M. Kahn**, for respondent:

Charter power to regulate saloons and dramshops is usually considered as ample to justify penal ordinances prescribing the hours when such places shall open and close.

McQuillin, Mun. Ord. § 480, p. 761; Smith v. Knoxville, 3 Head, 245; Gabel v. Houston, 29 Tex. 335; Maxwell v. Jonesboro, 11 Heisk. 257; Tarkio v. Cook, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202; Provo v. Shurtliff, 4 Utah, 15, 5 Pac. 302; Ex parte Wolf, 14 Neb. 24, 14 N. W. 660; State, Staats, Prosecutor, v. Washington, 44 N. J. L. 605, 43 Am. Rep. 402; Decker v. Sargeant, 125 Ind. 404, 25 N. E. 458; Portland v. Schmidt, 13 Or. 17, 6 Pac. 221; Minden v. Silverstein, 36 La. Ann. 912.

The ordinance cannot be attacked upon the ground of its being unreasonable.

Skaggs v. Martinsville, 140 Ind. 476, 33 L.R.A. 781, 49 Am. St. Rep. 209, 39 N. E. 241; Com. v. Worcester, 3 Pick. 462; McQuillin, Mun. Ord. § 181.

To exempt wholesale houses under the charter of Boisé City from the provision of the ordinance would be discrimination.

Cairo v. Feuchter, 159 Ill. 155, 42 N. E. 308.

No distinction between wholesale liquor houses and retail liquor houses, or saloons, is recognized under the law.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

The closing of saloons on Sunday is reasonable.

Kurtz v. People, 33 Mich. 279; Cranor v. Albany, 43 Or. 144, 71 Pac. 1042; State v. Binnard, 21 Wash. 349, 58 Pac. 210.

Ordinances closing saloons and places where liquor is sold during certain hours in the night have universally been upheld as reasonable.

Maxwell v. Jonesboro, Ex parte Wolf, and State, Staats, Prosecutor, v. Washington, *supra;* Decker v. Sargeant, 125 Ind. 405, 25 N. E. 458; Paul v. Washington, 134 N. C. 363, 65 L.R.A. 902, 47 S. E. 793.

The municipality itself is the best judge respecting the necessity and reasonableness of its ordinances.

McQuillin, Mun. Ord. § 186; Dill. Mun. Corp. § 400; New York v. Drydock, E. B. & B. R. Co. 133 N. Y. 104, 28 Am. St. Rep. 614, 30 N. E. 563; Bennett v. Pulaski (Tenn. Ch. App.) 47 L.R.A. 278, 52 S. W. 913; Paul v. Washington, *supra;* State v. Gerhardt, 145 Ind. 439, 33 L.R.A. 319, 44 N. E. 469.

There is no interference with constitutional rights.

Mugler v. Kansas and Crowley v. Christensen, *supra;* Adams v. Cronin, 29 Colo. 488, 63 L.R.A. 67, 69 Pac. 590; Schwuchow v. Chicago, 68 Ill. 444; Ex parte Christensen, 85 Cal. 208, 24 Pac. 747.

Sullivan, J., delivered the opinion of the court:

The appellant was convicted of the crime of keeping open his saloon in Boisé City after the hour of midnight, or between midnight and the hour of 6 o'clock the following morning; and in another and separate suit he was convicted of keeping open his saloon in said city on the day of the week known as Sunday, in violation of the provisions of ordinance No. 623 of the ordinances of said city. From which convictions he appealed to the district court, where both cases were tried upon an agreed stipulation of facts, and the appellant was again convicted, from which judgments the appellant appeals to this court.

It is agreed between respective counsel that, as the same legal questions are involved in each case, both cases shall be submitted to this court upon the same briefs and arguments. The cases were tried in the court below upon an agreed statement of facts, which is as follows:

"It is stipulated and agreed by and between the parties hereto that the above-entitled cause shall be tried and determined by the court without a jury, and that a jury is expressly waived. It is further stipulated and agreed by and between the

parties hereto that the facts in this case are as follows:

"(1) That on the 6th day of July, 1905, at a regular meeting of the common council of Boisé City, Idaho, said common council passed an ordinance (No. 623), which said ordinance was, on the 8th day of July, 1905, duly approved by the mayor of said city; and which said ordinance since last-mentioned date has not been repealed, and which said ordinance is in the words and figures following, to wit:

"'Ordinance No. 623——By Barber.

"'An Ordinance Regulating the Hours in Which Intoxicating Liquors Shall Be Sold in Boisé City and for Sunday Closing, and Providing for a Penalty for the Sale Thereof during Prohibited Hours.

"'Boisé City does ordain as follows:

"'Section 1. Any room where intoxicating, spirituous, vinous, or malt liquors are sold by virtue of a license under the ordinances of Boisé City, shall be so arranged that the same shall be securely closed and locked and admission thereto prevented; and the same shall be securely locked and all persons excluded therefrom each and every day, after the hour of 12 o'clock midnight until the hour of 6 o'clock A. M., following and on Sundays from 12 o'clock Saturday night until 6 o'clock A. M., on Monday mornings, and no intoxicating liquors shall be sold between such hours. And it is hereby made unlawful for the proprietor of such a place and the business herein contemplated, of selling intoxicating liquors, to permit any person or persons other than himself and family to enter such room and place where intoxicating liquors are sold during the hours when the sale of such liquors is prohibited.

"'Sec. 2. Any person or persons failing to comply with the provisions of § 1 of this ordinance, or violating any of the provisions of said § 1, shall be deemed guilty of a misdemeanor, and, upon conviction in the police magistrate's court of Boisé City, shall be fined in any sum not exceeding two hundred ($200.00) dollars, or by imprisonment in the city jail for a period not to exceed sixty days, or both such fine and imprisonment.

"'Sec. 3. This ordinance shall take effect and be in full force from and after the 8th day of July, 1905.'

"(2) That on the 23d day of July, 1905, defendant, Frank Calloway, was a citizen of the United States and the owner of that certain saloon known as the 'Exchange Bar,' situate in Boisé City, Idaho, and was operating said saloon at said time under a saloon liquor license issued by Boisé City.

"(3) That said defendant, Frank Calloway, did, on the 23d day of July, 1905, said day being the first day of the week, commonly called Sunday, allow and permit people to enter his said saloon for the purpose of purchasing intoxicating liquors."

These cases involve the legality or constitutionality of said ordinance No. 623, and the only question before the court is whether or not said ordinance is a valid and existing ordinance of said city.

It is first contended that the common council of Boisé City is not, by the charter of said city, given the power to pass such ordinance. Subdivision 4 of § 37 of the charter of said city grants to said city the right "to license, tax, regulate, and restrain barkeepers, saloon keepers, dealers in [manufacturers of] spirituous [vinous] or malt liquors [and places where such liquors] are kept for sale or in any manner disposed of. . . ." The provisions of said grant are broad enough to authorize reasonable regulation of the persons and business therein referred to. Then, if the provisions of said ordinance are reasonable, the common council had the authority under the charter to enact said ordinance. In McQuillin on Municipal Ordinances, § 480, the author says: "Charter power to regulate saloons and dramshops is usually considered as amp'e to justify penal ordinances prescribing the hours when such places shall open and close." Smith v. Knoxville, 3 Head, 245; Gabel v. Houston, 29 Tex. 335; Maxwell v. Jonesboro, 11 Heisk. 257; Tarkio v. Cook, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202; Provo v. Shurtliff, 4 Utah, 15, 5 Pac. 302; Ex parte Wolf, 14 Neb. 24, 14 N. W. 660; State, Staats, Prosecutor, v. Washington, 44 N. J. L. 605, 43 Am. Rep. 402; Decker v. Sargeant, 125 Ind. 404, 25 N. E. 458.

Second, it is contended that said ordinance is repugnant to the general laws of the state. There is nothing in this contention, as the general laws contemplate a reasonable control of the liquor traffic, and the legislature has authorized the proper officers of Boisé City to enact such ordinance as they may deem best for its reasonable regulation and control. This ordinance in no manner conflicts with the general laws of the state. It is admitted by counsel for the appellant that the common council has the authority to make reasonable regulations in regard to the conduct of the saloon business and the sale of intoxicating liquors within Boisé City. But he contends that the following provision of said ordinance is unreasonable, and therefore unconstitutional, to wit: "And it is hereby made unlawful for the proprietor of such a place

and the business herein contemplated, of selling intoxicating liquors, to permit any person or persons other than himself and family to enter such room and place where intoxicating liquors are sold during the hours when the sale of such liquors is prohibited." It is argued that this prevents the hired help of the proprietor of the saloon from entering such place during the prohibited hours to clean up the place and put it in order for the next day's business, and that it prevents the bookkeeper of the proprietor from going into such place for the purpose of posting his books and arranging his accounts. All except the proprietor and his family are prohibited from entering the place where such liquors are sold each and every day after the hour of 12 o'clock midnight until the hour of 6 o'clock the next morning following, and on Sundays from 12 o'clock Saturday, midnight, until 6 o'clock A. M. on Mondays. I do not think that an unreasonable regulation, for it would seem that eighteen hours out of twenty-four was a reasonable time for the proprietors of saloons to do their business, clean up their places of business, and keep their books; and it does seem that the good health of the proprietor of the saloon and his barkeeper and bookkeeper, as well as that of the citizen, and the good order of the city, would require that saloons be closed from 12 o'clock midnight until 6 o'clock the following morning, and on Sundays. While the saloon and liquor business may be a very strenuous business, I do not think that the health of the people and the peace and quiet of the community demand that business to be carried on for more than eighteen hours during a single day. It certainly would be hard to convince the general public that the peace, good order, and welfare of a community demanded dramshops and even wholesale liquor stores to be kept open for twenty-four hours per day.

It is most strenuously contended by counsel for the appellant that this ordinance makes the gist of the offense the entering of such room and place where intoxicating liquors are sold, and that it was undoubtedly the intention of the framers of that ordinance to make the gist of the offense the selling of intoxicating liquors during the prohibited hours. It is clear to me that the object of said ordinance was to prohibit the sale of intoxicating liquors during the prohibited hours, and that the only effective way to do so was to make it a misdemeanor for the proprietor to permit any person, other than his family, to enter his saloon during the prohibited hours. Great reliance is placed by counsel for appellant upon the case of Bennett v. Pulaski (Tenn. Ch. App.) 47 L.R.A. 278, 52 S. W. 913. That action was brought by a retail liquor dealer doing business in Pulaski against the mayor and aldermen of that town to enjoin them from enforcing against him certain ordinances enacted by the municipal authorities, on the ground that they were arbitrary, unreasonable, oppressive, contrary to common rights, and deprived him of his property without due process of law, and that they were passed in obedience to the edicts of the church to which the mayor and aldermen belonged, for the purpose of furthering its propaganda for the prohibition of the liquor traffic, and not to regulate it. The validity of four ordinances was involved in that action, and they are designated, first, as the "Curtain Ordinance;" second, the "Letting In and Out Ordinance;" third, the "Insertion of Hours of Business in Saloon License Ordinance;" and the "Closing and Opening Hour Ordinance." The court held that the ordinance requiring the curtains to front windows and doors of the lower story of a retail liquor house to be hoisted, raised up, or otherwise removed from sunset to sunrise during the night, was unreasonable and invalid as applied to the retail liquor dealer. Also that the ordinance requiring saloons to be closed between 10 P. M. and 4 A. M., and also on Sunday, is a reasonable and valid exercise of the power to regulate such business, and that the ordinance making it a misdemeanor to let persons in or out of the saloon during the hours in which the saloon is required to be closed is unreasonable and void, and that the ordinance requiring the insertion in every saloon license of the legal hours in which the saloon keeper is permitted to do business is not invalid, as it is harmless, though useless. The court also held, without comment, *arguendo*, or citation of authorities, that the letting in and out ordinance was open to the objection that it was unreasonable and void. The court further held that the motive that prompted the enactment of such ordinance could not be considered by the court in determining whether the ordinance was reasonable or unreasonable or oppressive. The court, in commenting upon the authority of the municipality to determine in the first instance what regulations of the whisky traffic were proper and reasonable, said: "The court is also of the opinion that it is within the province of the municipal authorities of the town to determine, in the first instance, what regulations of the whisky traffic within its limits are proper and reasonable for the preservation of the peace, quiet, and good order, and that, if reasonable and in conformity to its charter and the general law, the court cannot substitute its judg-

ment for that of the authorities as to the need of the community in the matter." It will be observed that that court held the ordinance requiring saloons to be closed between 10 o'clock P. M., to 4 o'clock A. M., and also on Sunday, was a reasonable and valid exercise of the power to regulate such business. The said letting in and out ordinance made it a misdemeanor for the owner of a saloon or his clerk to let a person in or out of such saloon between the prohibited hours, and also made it unlawful for any person to go in or out of such saloon, except the owner or clerk, between such hours. This letting in or out ordinance, as the decided court is not inclined to follow the supreme court of Tennessee upon the question of the weight of authority is adverse to the position taken by that court.

The supreme court of the state of North Carolina, in the case of Paul v. Washington, 134 N. C. 363, 65 L.R.A. 902, 47 S. E. 793, which was a case involving the validity of an ordinance requiring liquor saloons to be closed between 8 o'clock in the evening and 6 o'clock in the morning, and forbidding the doors to be open during those hours, held it not unreasonable. That court also held that an ordinance forbidding the owners or employees in places where liquors are sold to be in such places between the hour of closing on Saturday night and the hour for opening on Monday morning is not so clearly unreasonable as to require the court to set aside an ordinance making such provision. From the language there used the court evidently concluded that the ordinance came very close to the line of "unreasonableness," as they say it is not so "clearly" unreasonable. But in the case at bar this court concludes that the provisions of said ordinance are clearly reasonable. It was contended in that case that said ordinance was arbitrary, oppressive, vexatious, unreasonable, and void, in that it deprived the plaintiff of the use and convenience of his property without due process of law. The court held against the liquor dealer on that proposition, and further held that police regulation statutes are valid unless the purpose or necessary effect is not to regulate the use of property, but to destroy it. And in the case at bar it certainly will not be contended that the provision of the ordinance prohibiting any person from entering the saloon except the owner and his family would deprive him of the use and convenience of his property without due process of law. In the last-mentioned case the owners of the saloons were excluded from their places of business during the prohibited hours, and still it was held reasonable, while in the ordinance in question the owner and his family are permitted to enter the saloon during prohibited hours. If people can be legally restrained from working more than eight hours per day in some of the ordinary avocations of life, it certainly does not seem unreasonable that liquor dealers should be restrained from plying their vocation more than eighteen hours per day.

In the case of State v. Gerhardt, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469, the court said: "The power to prohibit the sale of intoxicating liquors in the interest of public safety or welfare during certain prescribed periods is not denied. The legislature possessing the right, as it unquestionably does, may further extend or exercise it so as to require a proprietor of a liquor saloon to securely close the same and permit no person to enter therein during the times when the sale of intoxicating liquor is forbidden." That case involved the validity of a statute, but that makes no difference so far as this case is concerned. The legislature in this state has authority to regulate the sale of intoxicating liquors, and the charter of Boisé City authorizes the city to regulate the liquor traffic within its corporate limits. A part of the statute under consideration in the case last above cited is substantially the same as that provision of the ordinance here under consideration, and makes it unlawful for the proprietor of a saloon to permit any person or persons other than himself and family to go into such room and place where intoxicating liquors are sold upon the days and hours when the sale of such liquors is prohibited. In commenting on that provision, the supreme court there said. "It is true that the part relative to the exclusion of the persons is somewhat sweeping, making but one exception; however, criminal statutes are not always literally construed, and possibly an emergency might arise of great necessity to admit someone other than those mentioned in the section, and, while such admission might infringe upon the letter of the statute, it would not come within its spirit, and the court, under the particular circumstances, might make the necessary exception." See also Davis v. Fasig, 128 Ind. 271, 27 N. E. 726. It would seem to me that the effect of the ordinance would be nullified if such places were permitted to be kept open and visited by everybody who desired to do so. In McCarty v. Atlanta, 121 Ga. 365, 49 S. E. 287, the court said: "If once excuses were admitted for keeping open such places upon prohibited days or after prohibited hours, the law would be practically nullified. It would rarely be possible for the state or city to meet the excuses or to show that the place had been open for an unlawful pur-

pose. The fact furnishing the excuse and the illegal act after the innocent entry would so often be blended that they could not be separated. The opening, absolutely prohibited by law, would be legalized by the motive with which the prohibited act was done. . . . If such an excuse could be given in one case, it could be in others, and the issue on each trial would be diverted from the question as to whether the place had been open at an unlawful hour into a consideration of the question as to whether it had been opened for an innocent purpose. It is manifest that any such construction would in effect repeal the law and be utterly subversive of the very policy on which it was enacted." In that case and in the case of State v. Binnard, 21 Wash. 349, 58 Pac. 210, it apparently is held that the very gist of such ordinances and statutes is the opening of liquor saloons during prohibited hours, and not the purpose for which they were open. In People v. Waldvogel, 49 Mich. 337, 13 N. W. 620, the defendant was arrested for allowing persons in his saloon for the purpose of cleaning it out during prohibited hours. It was there held that the question of intent is wholly immaterial under the statute there involved; that the legislature, in order to guard against the danger of sales being made, had directed that the place where liquors are kept should be closed, so that no opportunity to violate it by making sales should be afforded; and that such places must be closed and cannot be kept open for any business purpose of any kind. In People v. Roby, 52 Mich. 577, 50 Am. Rep. 273, 18 N. W. 367, the court said: "The purpose for which it [the bar] was open was immaterial under the statute there inopening it for cleaning as much as it would have been by opening it for the sale of liquors." In the case of St. Anthony v. Brandon, 10 Idaho, 205, 77 Pac. 322, which was a case where a restaurant or lunch counter was conducted in a room where intoxicating liquors were sold, this court held that the sole purpose of the ordinance there under consideration was to control the retail liquor trade of that village as to best preserve the quiet and peace of its citizens, and if the room where the saloon was kept is permitted to be kept open during the prohibited hours the officers would be hampered in the enforcement of the ordinance. We therefore conclude from the decided weight of authority and the reason of the case that the letting in and out ordinance is not unreasonable, and that, under the charter of Boisé City and the general statutes of the state, the city council was authorized to enact the same.

Counsel for appellant contends that said ordinance is unconstitutional upon the ground that it is class legislation and contravenes § 1 of article 14 of the Amendments of the Federal Constitution, in that it abridges the privileges of the citizen and deprives him of liberty and property. Said section of the Constitution provides, among other things, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." As to said ordinance being class legislation, it applies to all dealers in intoxicating liquors, and applies equally to all of that class. That classification is natural, practical, and reasonable, and where the classification is natural, practical, and reasonable, the uniform holding of the Supreme Court of the United States and of the several state supreme courts is that such classification is valid and constitutional. Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594. The court in that case held that the state may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion. If the classification is practical, that is sufficient, and it is not reversible unless palpably arbitrary. Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281. As the provisions of said ordinance apply equally to all liquor dealers, it does not discriminate, is a proper classification, and does not come within the term "class legislation." It is contended that wholesale dealers should not be classed with retail dealers, but no valid reason is advanced for excepting them from the provisions of said ordinance, as the charter of Boisé City authorized the regulation of wholesale, as well as retail, dealers. In Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, it was held that legislation by a state prohibiting the manufacture of intoxicating liquors within such state, to be there sold for general use as a beverage, does not infringe any right, privilege, or immunity secured by the Constitution of the United States. If a total prohibition of the manufacture and sale of intoxicating liquors does not infringe any right, privilege, or immunity secured to the citizen by the Constitution, certainly a prohibition of the sale of such liquors for six hours out of twenty-four hours would not infringe such right, privilege, or immunity.

The council of Boisé City is empowered, under the provisions of its charter, granted by the state legislature, to regulate the sale

of intoxicating liquors within Boisé City, and the provisions of said ordinance are not unreasonable, nor do they impinge upon the right, privilege, or immunity of any citizen. In Mugler v. Kansas, *supra*, it was held that it belonged to the legislative department to exert what is known as the police powers of the state, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety, subject, however, to the power of the courts to adjudge whether any particular law is an invasion of a right secured by the Constitution, and also holds that the legislature did not interfere with nor impair anyone's constitutional rights of liberty or of property by the enactment of said prohibition law. Yet it may determine that the manufacture and sale of intoxicating drinks for general or individual use as a beverage are or may become hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. But in the state of Idaho the manufacture and sale of intoxicating liquors are not prohibited, but the legislative department has the authority to regulate its manufacture and sale. The provisions of said 14th Amendment of the Constitution of the United States do not take from the states the power to enact reasonable police regulations, and do not restrain the legislative power from enacting laws for the protection of the safety, health, or morals of the community. Prohibition of the use of property for purposes that are declared by valid legislation to be injurious to the health, morals, or safety of the community cannot in any just sense be deemed a taking or an appropriation of the property for public benefit or without due process of law. The above principles are amply supported by reason and by a long line of decisions. The business of manufacturing and selling intoxicating liquors is one that history and experience show requires legislative restraint and supervision, and, even after the manufacturers have erected large plants for the manufactory of such liquors in any state, the legislature of such state may enact a prohibition law and make it unlawful to manufacture such liquors, as was held in the case of Mugler v. Kansas, *supra*.

It was held in Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13, that there is no inherent right in the citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. It may be entirely prohibited by state legislation, or be permitted under such conditions as will limit the evils. The possession and enjoyment of all such rights are subject to such reasonable conditions as may be determined by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. In that case it is recognized and also is a well-known fact in history that much evil results from the sale of intoxicating liquors. Liquor dealers are not permitted to engage in that avocation without first obtaining licenses therefor, and such licenses are always issued with the understanding that the granting power may reasonably regulate such a business. That business is looked upon very differently from the ordinary avocations of life. It was said in Adams v. Cronin, 29 Colo. 488, 63 L.R.A. 67, 69 Pac. 594, that "these restraints are not like such as restrict the ordinary avocations of life, which advance human happiness, or trade and commerce,—that neither produce immorality, suffering, nor want. This business is, on principle, within the police power of the state, and restrictions which may rightfully be imposed upon it might be obnoxious as an illegal restraint of trade when applied to other pursuits. . . . That the right to sell liquor is not an inherent right of the citizen of the United States is beyond cavil; that plaintiff has not been deprived of any property or civil right without due process of law or denied any privilege belonging to a citizen of the United States, is equally clear." See also Schwuchow v. Chicago, 68 Ill. 444; Ex parte Christensen, 85 Cal. 208, 24 Pac. 747. The business of selling intoxicating liquors is not considered as of equal dignity, respectability, and necessity as that of the grocery, dry goods, or clothing business, or many other occupations that might be mentioned; and from time immemorial its prohibition or regulation has been held to be within legislative power under what is known as police power. The case of State v. Nelson, 10 Idaho, 522, 67 L.R.A. 808, 79 Pac. 79, is not in point in this case. The ordinance under consideration in that case prohibited the wife or mother of a recreant husband or wayward son from going into the saloon in search of such husband or son. This court there held that that provision was unreasonable, arbitrary, and oppressive. It is contended that the ordinance under consideration prohibits, and does not regulate nor restrain. There is nothing in that contention. Under the decision of this court in St. Anthony v. Brandon, 10 Idaho, 205, 77 Pac. 322, the court there made some observations on the meaning of the words "regulate" and "license." While it is true the ordinance under consideration prohibits the conduct of the business therein referred to during certain hours, it is a regulation of that

business, and not a prohibition of it. It was said by the court in Re Charge, 4 Inters. Com. Rep. 781, 62 Fed. 828, that, "to prohibit, limit, confine, or abridge a thing, the restraint may be permanent or temporary. It may be intended to prohibit, limit, or abridge for all time or for a day only." Restraint does not contemplate an absolute destruction of business, but rather places it within certain bounds. The ordinance under consideration is simply a regulation and a restraint, but not a prohibition.

It is next contended that said ordinance is defective in form. There is nothing in this contention, as its objects and purposes are clearly shown from the language used therein.

It is also contended that the title to said ordinance does not express the object or purpose of the ordinance. Said title is as follows: "An Ordinance Regulating the Hours in Which Intoxicating Liquors Shall Be Sold in Boise City, and for Sunday Closing, and Providing for a Penalty for the Sale Thereof during Prohibited Hours." The object and purpose of the title is to show the general character of the ordinance, so that anyone may not be misled thereby. It is well settled that matters of detail need not be specified in the title, nor it need not catalogue all of the powers intended to be bestowed. McQuillin, Mun. Ord. § 141; St. Anthony v. Brandon, *supra*; Pioneer Irrig. Dist. v. Bradley, 8 Idaho, 310, 101 Am. St. Rep. 201, 68 Pac. 295; Turner v. Coffin, 9 Idaho, 338, 74 Pac. 962. The title is sufficient.

The judgment of the lower court is affirmed, with costs in favor of respondent.

Stockslager, Ch. J., and Ailshie, J., concur.

FLORIDA SUPREME COURT.

CLEARWATER MERCANTILE COMPANY, Plff. in Err.,
v.
ROBERTS, JOHNSON, & RAND SHOE COMPANY.

(— Fla. —, 40 So. 436.)

Substituted service—domestic corporation.

1. A personal judgment against a domestic corporation, based upon service by publication, as provided in § 1024, Rev. Stat. 1892, is not void.

Same—due process of law.

2. Service by publication upon a domestic corporation which has failed to provide officers or agents upon whom other service may be had constitutes "due process of law."

(February 20, 1906.)

ERROR to the Circuit Court for Hillsborough County to review a judgment denying a motion to vacate a personal judgment which had been rendered against the defendant corporation upon constructive service of process. Affirmed.

The facts are stated in the opinion.

Mr. F. M. Simonton, for plaintiff in error:

Service of process by publication only supports a judgment that is rendered against property.

Brown, Jurisdiction of Courts, p. 151, § 55; Bernhardt v. Brown, 118 N. C. 700, 36 L. R. A. 402, 24 S. E. 527, 715.

Mr. Donald C. McMullen, for defendant in error:

Constructive service on residents is sufficient.

Cairo & F. R. Co. v. Hecht, 95 U. S. 168, 24 L. ed. 423; United States Trust Co. v. United States F. Ins. Co. 18 N. Y. 214; Lyon v. Comstock, 9 Iowa, 306; Fernandez v. Casey, 77 Tex. 452, 14 S. W. 149; Cameron v. Savage, 40 Ill. 124; Continental Nat. Bank v. Thurber, 74 Hun, 632, 26 N. Y. Supp. 956.

A corporation can only have constructive notice.

10 Cyc. Law & Proc. p. 1033.

Cockrell, J., delivered the opinion of the court:

This writ of error is prosecuted to review the denial of a motion to vacate a personal judgment against a domestic corporation consequent upon a default for want of appearance, the service having been made pursuant to § 1024 of the Revised Statutes of 1892. It is admitted that the provisions of the section were complied with strictly, but it is insisted that the said section is unconstitutional, in that it authorizes a personal judgment without personal service, and therefore does not constitute due process of law.

The statute, originally enacted in 1853, chap. 529, § 1, and brought forward in the Revised Statutes of 1892, reads:

"1024. Service upon domestic corpora-

Headnotes by COCKRELL, J.

Case Note.—Writ; validity of statutes authorizing constructive or substituted service on domestic corporation.—The validity of statutes authorizing constructive or substituted service on domestic corporations depends upon two considerations,—first, whether the legislature has power, in view of constitutional requirements as to due process, to authorize such service; and, second, whether, such general power being conceded, the method adopted is reasonably calculated to bring notice home to some of the officers or agents of the corporation.

tion in the absence of officers or agents. When process against any corporation of this state cannot be served owing to the failure of said corporation to elect officers or appoint agents, their absence from the state for the period of six months before the issuing of said writ, or because they are unknown, it shall be the duty of the officer to return said writ, with the causes of his inability to serve the same, and upon the return of said writ as aforesaid, the judge of the court from which the same shall have issued shall make an order at any time, setting forth the names of the parties, the nature of the action, suit, or other proceeding, the court in which the same has been instituted, and requiring the said corporation to appear and defend the said action, suit, or other proceeding, and the publication of said order once a week for the space of two months in some newspaper published in the county in which said action, suit, or other proceeding shall be instituted shall be a full and sufficient notification to the said corporation of the institution of said action, suit, or other proceeding. However, no judgment by default or decree *pro confesso* shall be taken or rendered against said corporation until due proof shall have been made of the publication of said order, as hereinbefore provided."

The transcript before us is scant, but we feel safe in holding that the plaintiff in error, now attacking this statute, was created by the authority of the state subsequent to 1853, and received its charter subject to all valid general laws applicable to domestic corporations.

It may be remarked incidentally that no contention is made that notice of the institution of the action was not actually received, nor that the venue was improperly laid in a county other than the one in which, under its charter, the principal office of the corporation was located.

Assuming, then, these conditions, was it competent in the legislature to provide as to a domestic corporation, when it fails to put forth officers or agents upon whom service may be made, that by reason of such failure it shall be brought into court by publication, with proper precautions as to the ascertainment of the essential facts by the court in advance of any judgment? We answer in the affirmative.

We are dealing not with natural persons, who create the governments, but with the fictitious entities, called corporations, which are created by the government, deriving therefrom their very existence, with such limitations as the creating power may impose, except only such limitations as may be expressly or by clear implications forbidden by its organic law or by the Federal authority.

A statute providing that when a domestic corporation does not have an officer in the state upon whom legal service of process can be made, service in an action or proceeding against such corporation may be made by depositing a copy of the process in any proceeding for the collection of an unpaid personal property tax in the office of the secretary of state, which shall be taken as personal service on such corporation, does not violate the requirement of due process of law. Hinckley v. Kettle River R. Co. 70 Minn. 105, 72 N. W. 835.

But in Bernhardt v. Brown, 118 N. C. 700, 36 L.R.A. 402, 24 S. E. 527, 715, 119 N. C. 506, 36 L.R.A. 402, 26 S. E. 162, it is held hat the legislature may provide that as to a corporation created by it, if no officer or agent thereof can be found in the state, service can be had by publication only where there is an attachment or seizure of property to form a basis of jurisdiction. Note comment on this case in the opinion in the case in hand.

A statute providing: "Where the defendant corporation is the owner or the lessee of a railway in this state, or the builder or constructor of a railway in this state, and cannot be served with summons under the existing laws, then the person or corporation controlling or operating the railway so owned or built or constructed shall be treated as the representative of the defendant, and service of summons upon such of the officers or agents of the persons or corporation operating or controlling the railway as would be required if such controller or operator were the party sued shall be a sufficient service of summons upon the defendant to the action, ... and the appearance of the defendant to move for the quashal of the service of the summons shall operate an appearance for all the purposes of the action,"— was held constitutional in Maysville & B. S. R. Co. v. Ball, 108 Ky. 241, 56 S. W. 188.

The decision, however, evidently refers to the portion of the act with reference to the effect of an appearance, since the court held that there was an appearance within the meaning of the act. If there were no appearance, the question as to whether the service provided for was reasonable would arise when the validity of the judgment based on it came into question.

On the other hand, in Pinney v. Providence Loan & Invest. Co. 106 Wis. 396, 50 L.R.A. 577, 80 Am. St. Rep. 41, 82 N. W. 308, a statute authorizing service of summons on corporations which neglect to file lists of the names of officers on whom process may be served by leaving copies with the register of deeds where the corporation has its principal office was held invalid as not providing due process of law, on the ground that such service was not reasonably calculated to bring notice of the commencement of the action home to some of the officers or agents of the corporation.

No provision of the state Constitution is pointed out to us that inhibits such limitations, nor do we think that the due process clause of the Federal Constitution is thereby violated. The great case of Pennoyer v. Neff, 95 U. S. 715, 24 L. ed. 565, expressly disclaims an intention to apply the principles there enunciated to the conditions before us, and while we entertain a high respect for the justice pronouncing the opinion in the case of Bernhardt v. Brown, 118 N. C. 700, 36 L.R.A. 402, 24 S. E. 527, 715, and may agree to the result therein reached, yet much of the reasoning is inapplicable to the case before us, and the principle controlling us—that is, the power of the state over its own creatures—is not discussed in the cited opinion. See note on this case in 50 L.R. A. 586.

To say in the instant case that no property of the corporation may be found within the state upon which an execution may attach means only that the judgment may be futile, not that it is void, and the statute confers upon the creditor the privilege of accepting that chance as to a domestic corporation, which can hold property only by the will of the state.

Strictly speaking, there can be no personal service upon a corporation, but only such constructive or substituted service as the law may provide. It is not unusual to provide as to certain kinds of nonresident corporations, that they may come into a state only on condition that service of process upon some state officer shall bind them personally; and we do not recall any decision holding that such service does not constitute due process of law. Generally, service is made upon the principal officer of a corporation, who may be found; this is constructive service, strictly speaking; yet upon such service personal judgments are daily rendered. The fundamental object of all laws relating to service of process is to give that notice which will, in the nature of things, most likely bring the attention of the corporation to commencement of the proceedings against it, and when legislation carries out this clear design, it should not be stricken down by the courts.

A case directly in point is Hinckley v. Kettle River R. Co. 70 Minn. 105, 72 N. W. 835. See also Continental Nat. Bank v. Thurber, 74 Hun, 632, 26 N. Y. Supp. 956. Affirmed in 143 N. Y. 648, 37 N. E. 828.

The judgment is affirmed.

Shackleford Ch. J., and **Whitfield**, J., concur.

Taylor, Hocker, and Parkhill, JJ., concur in the opinion.

4 L.R.A.(N.S.)

LOUISIANA SUPREME COURT.

MRS. CONRAD HENRY SIEFKER, Appt.,
v.
LOUIS PAYSEE.

(115 La. 953, 40 So. 366.)

Injury by discharge of gun.

1. Damages for personal injury was the alleged cause of action.

The discharge of the gun was sudden and unexpected. In handling a gun, usual caution was observed. The gun was in good condition, and whatever defect there may have been in the cartridge was not, in so far as the evidence discloses, apparent.

There was a turn made by defendant in order to close the stock and barrel of the gun in an opposite direction from the boys standing near. One, and possibly two, of the boys, the evidence shows, moved from where they were standing, and at the same moment the gun went off.

The testimony and the circumstances point to an accident.

Same—negligence.

2. Where persons are gunning together, and an accident occurs, the negligence, to render one liable, must be in its nature gross. Fault must be shown.

Same—evidence.

3. The judge *a quo* who saw and heard the witnesses as they testified, to whom they explained the occurrence with gun in hand, decided that defendant was not liable in damages.

On appeal, a close examination of the evidence has not resulted in convincing the court that the judgment appealed from should be reversed.

(Monroe and Provosty, JJ., dissent.)

(December 18, 1905.)

Headnotes by **Breaux**, Ch. J.

Case Note.—Negligence; civil liability for injury by negligent discharge of firearms.—A very high degree of care is required from all persons using firearms in the immediate vicinity of others, no matter how lawful or innocent such use may be. Bahel v. Manning, 112 Mich. 24, 36 L.R.A. 523, 67 Am. St. Rep. 381, 70 N. W. 327; Hankins v. Watkins, 77 Hun, 360, 28 N. Y. Supp. 867. Or, as said in Moebus v. Becker, 46 N. J. L. 41, and Morgan v. Cox, 22 Mo. 373, 66 Am. Dec. 623, those who handle firearms are bound to use more than ordinary care to prevent injury to others. In Welch v. Durand, 36 Conn. 182, 4 Am. Rep. 55, it was said: "Shooting at a mark is lawful, but not necessary, and may be dangerous, and the law requires extraordinary care to prevent injury to others; and if the act is done where there are objects from which the balls may glance and endanger others, the act is wanton, reck-

APPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans in favor of defendant in an action brought to recover damages for the alleged negligent killing of her son. Affirmed.

The facts are stated in the opinion.

Messrs. **Miller, Dufour, & Dufour** and **John Janvier**, with Mr. **Joseph B. Derbes**, for appellant.

Messrs. **Dinkelspiel & Hart, J. B. Grinage**, and **G. G. Kronenberger**, for appellee:

Where one must use a loaded weapon, he is responsible only as he might be for any negligent handling of dangerous machinery; that is to say, for care proportioned to the danger of injury from it.

Thomas, Neg. p. 678; Moebus v. Becker, 46 N. J. L. 41; Weaver v. Ward, Hobart, 134.

Breaux, Ch. J., delivered the opinion of the court:

Plantiff's demand is for damages in the sum of $5,000. Of this sum, $2,500 is claimed for the loss of her son, the sorrow and grief occasioned thereby, and $2,500 for the affection and companionship of which she has been deprived by his death.

less, without due care, and grossly negligent."

And the party injured, either in his person or property, by the discharge of a gun, even when the act is lawful, is entitled to redress in a civil action to the extent of his damage; and, *a fortiori*, if the act is a matter of idle sport and negligence. Cole v. Fisher, 11 Mass. 137.

In Bahel v. Manning, *supra*, it was held that it is negligence *per se* to point a gun at another, cock it, and pull the trigger, and the person so doing, if the gun chances to be loaded, and is discharged, and injures another, is not excused from the consequences on account of the care which he took prior to this negligent act to determine whether the gun was loaded. And so it was held in Castle v. Duryee, 2 Keyes, 169.

In Sutton v. Bonnett, 114 Ind. 243, 16 N. E. 180, it was held that one who negligently shoots another is liable; but where the weapon is accidentally discharged, and not purposely pointed at another, there is no liability.

In Chiles v. Drake, 2 Met. (Ky.) 146, 74 Am. Dec. 406, it appeared that defendant drew a loaded pistol, intending to use it in a room where many persons were present, and that it was discharged, killing plaintiff's husband, with whom he had no quarrel, and whom he did not intend to injure. It was held that the act of drawing and presenting a loaded pistol under such circumstances manifested such an utter disregard of the consequences that might result from the use of the weapon as to leave the party without an excuse for his conduct; that the killing, although not intentional, was the result of perfect recklessness, and, as such, rendered the defendant liable for the civil injury which was produced by his wilful negligence.

Flourishing a pistol in order to frighten a boy, and accidentally discharging it, to the injury of the child, is gross negligence; and that there was no intention to do an injury, under such circumstances, is no defense. Seltzer v. Saxton, 71 Ill. App. 229.

In Tally v. Ayres, 3 Sneed, 677, where defendant's rifle was discharged while in his hands, and killed plaintiff's mare, defendant was held liable, although the discharge was accidental and wholly unintentional, and in carrying his rifle he was in the exercise of a lawful right. The gist of the action was said to be the fault of the defendant in neglecting to exercise such a reasonable degree of skill or diligence, or caution and prudent foresight, as, under the circumstances, might have avoided the injury.

In Benson v. Ross (Mich.) 106 N. W. 1120, it was held that where three persons were engaged in shooting at a mark, using the rifle by turns, the jury would be justified in finding that they were acting in concert, and all would be liable as joint tort feasors for an injury done by a stray bullet.

In The Barracouta, 39 Fed. 428, it was held that for negligence in ship's work the ship herself is liable, and therefore she was liable for injury done to a pilot on a tug boat lying alongside the ship by firing a small cannon as a departing salute, where such salute was incident to her navigation.

In Wright v. Clark, 50 Vt. 130, 28 Am. Rep. 496, it was held that killing a dog while shooting at a fox under cover creates a liability to the owner of the dog for the loss.

The rule laid down in Chataigne v. Bergeron, 10 La. Ann. 699, is set out in the opinion in SIEFKER v. PAYSEE.

Evidence as to whether defendant intended to shoot the plaintiff is not admissible where recovery is sought only on the ground of defendant's negligence. Hankins v. Watkins, 77 Hun, 360, 28 N. Y. Supp. 867.

Whether defendant was guilty of negligence in the discharge of the firearm to the injury of another or his property is a question for the jury. Hankins v. Watkins, *supra;* Castle v. Duryee, 2 Keyes, 169; Baxter v. Krainik (Wis.) 105 N. W. 803.

Where one member of a hunting party was accidentally shot by another, the question of defendant's negligence was left to the jury in the following cases: Whitten v. Hartin, 163 Mass. 39, 39 N. E. 412; Moebus v. Becker, 46 N. J. L. 41; McCleary v. Frantz, 160 Pa. 535, 28 Atl. 929; Winans v. Randolph, 169 Pa. 606, 32 Atl. 622.

The question as to liability for intentional injuries by firearms or for injuries caused by negligently allowing others to handle or get possession of loaded firearms, is not touched upon in this note.

Plaintiff, prior to her marriage with Siefker, was the widow of the late George Stumborg, and her son Gustave was the issue of her marriage with the late George Stumborg.

Plaintiff's charge for damages is that her son was wantonly and recklessly shot and killed by defendant, by whose fault, she says, the gun he held in his hands was discharged and inflicted a wound which caused death in a few minutes.

Defendant admits that plaintiff's son was killed by the gun he held and was handling at the time, but he denies that he is liable in damages.

The judge of the district court, before whom the case was tried without a jury, rejected plaintiff's demand.

On the morning of the 20th of September, 1904, defendant, Sylvan, his son, plaintiff's son Gustave, and another boy, Albert Weiser, crossed the river from the city on their way to Westwego to hunt birds.

These boys had joined the defendant, with his permission. They were about the same age, fourteen years, and about the same size, except defendant's son, who was a little larger than the other two.

None of the boys had guns, except the son of plaintiff, who had a 22-caliber Monte Christo rifle. The defendant's gun was a hammerless breech-loading central fire.

They repaired to the woods, and when about to enter the woods they stopped under a large willow tree. They saw rice birds at a little distance. The boys were standing on the left of defendant. The son of plaintiff was first in front of the other boys. The defendant said to his son, "Hand me two cartridges," which were handed over to him. Upon receiving the cartridges from the hand of his son, he turned around and placed one in each of the barrels and then turned and closed his gun. As it was closed, one of the cartridges exploded and killed the deceased, who was standing in front of defendant at the moment.

We will not stop to consider the purpose which prompted the defendant to go hunting and the feeling which actuated him in complying with his young son's request, permitting the other two boys to accompany him, as there was nothing about it either unlawful or improper.

The gun of defendant was not defective. He bought the cartridges from a dealer in ready-made cartridges.

The evidence does not show that the cartridges were defective in appearance. It was stated in evidence that sometimes shells are defective, and the defect is very seldom detected by those who buy and use them, and the evidence further disclosed that, owing to the defectiveness of the shell, guns sometimes explode accidentally.

With reference to the act of loading the gun, the defendant and the two boys, Sylvan, defendant's son, and Weiser, one of Sylvan's companions, agree in the statement that the defendant, after placing the shells in the barrels, turned to an opposite direction from that at which the boys were standing on his left, and that, as he turned, he brought the barrel of the gun to its proper position,—*i. e.*, closed it,—and that it was at that moment that the gun fired and struck plaintiff's son in the back.

There is an exception to this corroboration.

After having corroborated the statement above as to where defendant, his father, was standing, defendant's son, at another time testifying, says that some of the shot struck him; and this, although he had stated that, had the deceased remained where he and his little companions were,—*i. e.*, on the left of his father,—he could not have been killed.

This boy, Sylvan, further states that he was struck by the shot and that powder hit his face.

We do not reconcile the contradiction. If this last statement be correct, then the theory of the case should be different from that which struck us as the correct theory after having read the first part of the testimony of this witness, and the testimony of the defendant and that of the boy Weiser.

The witness Weiser said:

"The boy run right in front of the gun, and said that he wanted to shoot. I saw where he went in the weeds over here by a gate."

He further states that the deceased was about two or three yards from defendant when he was struck and killed.

To this point of the case, in reading the testimony, we have not found that defendant can be held liable.

Taking for granted that he turned in order to avoid the possibility of hurting the boys, who were, as he thought, on his left, can he be held liable for not noticing that the deceased was no longer on his left, but in front of the gun?

He was not looking in that direction. The change of the deceased's position from left to front may have been quickly made, and in the hurry of the moment the mind can conceive that a gun may be closed by a person by whom it is handled without his looking to the front while he is engaged in bringing it to a close.

If the defendant had just seen the boys on the left, it was not unreasonable or imprudent on the part of the defendant to act as he did.

In order to be entitled to recover, it must appear that the death was by wrongful act.

Plaintiff's counsel cite the case of Chataigne v. Bergeron, 10 La. Ann. 699, in which defendant owned to witness that he had a quarrel with plaintiff; that he and plaintiff had met one evening at dark, each armed with a gun; that he stooped to pick up a stick, when his gun fired.

The court said:

"Without recapitulating the statement made by the defendant himself, it may be sufficient to say that, assuming its truthfulness, he would not be relieved from liability for damages incident to his gross neglect in handling his gun."

And sustained a verdict.

There was a wrong, gross neglect, found in this and other cases we have had occasion to examine, and in which the court pronounced for liability.

Before concluding, we will state that the casualty should, by consistent statement, be traceable to actionable negligence.

The judge of the district court saw and heard the witnesses. The witnesses described fully the different phases of the casualty. The witnesses had the gun of defendant while they were in court. They testified regarding the motions and gestures of the parties.

We have noted that the little boy—that is, the deceased—had a gun and said that he wished to shoot. There were rice birds about or in sight. The deceased, according to the testimony of one of his little companions, said that he wished to shoot, and that he saw the deceased step forward and to the front of where the defendant was standing. In turning aside to close the gun, as before stated, the defendant's eyes may have been directed to the gun, instead of in the direction of the boy. It should appear, with reasonable certainty, that he saw the boy move, and that he none the less closed the gun.

The act of defendant prior to the time of and immediately after the casualty was not negligence. Guns will sometimes go off without apparent cause. To say the least, there is a decided uncertainty. The defendant and the boys were gunning together.

In a case decided in another jurisdiction, the court held that in no case is it said that, where persons are gunning voluntarily together, each may be held responsible for every accident or mishap.

"If one should pass in front of the other by his request or by his own motion, and, by stumbling or falling, the gun of the other is discharged and a wound inflicted [it does not follow] that the only question to be considered by the jury is the amount of damages. . . . Each case must stand upon its own peculiar facts, and rational, rather than distinctively legal, conclusions must usually be drawn from them." Moebus v. Becker, 46 N. J. L. 41.

We have given the case our careful attention. We have not found the defendant guilty of the negligence and wrong charged.

For the reasons assigned, the judgment appealed from is affirmed.

Monroe, J.: I respectfully dissent.

Provosty, J.: I concur with Justice Monroe.

NEBRASKA SUPREME COURT.

OMAHA STREET RAILWAY COMPANY, Plff. in Err.,
v.
JOHN BOESEN.

(—Neb.—, 105 N. W. 303.)

Carrier—injury to passenger—burden of proof.

1. In an action against a street railway company for damages for injuries sustained by one of its passengers, the burden of proof on the question of negligence does not shift to the defendant upon proof that the injuries resulted from a derailment of the car.

Same—presumption of negligence.

2. In such case a presumption of negligence arises from the fact of derailment; but, when that presumption is met by evidence which makes it equally probable that

Headnotes by ALBERT, C.

Case Note.—Carrier; measure of diligence required toward passenger on street railway.—The measure of diligence which a street railway is bound to employ toward its passengers has been defined by the courts in varying terms, the rule adopted in OMAHA STREET R. Co. v. BOESEN being a favorite. Their generalities, which, when taken by themselves, seemingly present a mass of contradictions, may generally be harmonized when read with reference to the particular circumstances to which they refer,— a harmony which, however, can sometimes only be secured at the expense of fine-spun distinctions. A great deal of this confusion is attributable to the different effect which is to be given to language used by the court in the course of its opinion, in contradistinction to language used in an instruction given to the jury. An instance may be found in Magrane v. St. Louis & S. R. Co. 183 Mo. 119, 81 S. W. 1158, in which the supreme court of Missouri, in disapproving an instruction embodying the definition of the duty of a street railroad company, given by itself in a previous decision, says: "The court, how-

the accident was not due to negligence on the part of the defendant, in the absence of other evidence tending to establish the affirmative of the issue, the defendant is entitled to a verdict.

Same—care required.

3. A street railway company is not an insurer of its passengers. It is not bound to do everything that can be done to insure their safety. It fulfils its obligations in that regard when it exercises the utmost skill, diligence, and foresight consistent with the practical conduct of the business in which it is engaged.

Witness—conflicting statements—previous trials.

4. On a subsequent trial the evidence of a deceased witness, taken at a second trial, cannot be impeached by showing that some of his statements on the witness stand at the first trial are inconsistent therewith, where, upon the second trial, his attention was not directed to such statements, and he was given no opportunity to explain the alleged discrepancies.

(October 19, 1905.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. John L. Webster and W. J. Connell, for plaintiff in error:

The presumption of negligence from de-

ever, in using that language, was not discussing an instruction containing those words, and was not prescribing the form of an instruction. It is not always safe to take an excerpt from an opinion and embody it in an instruction, because the opinion is addressed to lawyers, while the instruction is addressed to laymen." Accordingly, an attempt has been made in this note to separate the generalities phrased by the courts from definitions embodied in approved instructions.

Also it has been felt by the courts that the same amount of caution should not be required on street railroads as on steam railroads, or in operating horse cars as in transporting passengers by the more rapid means of cable or electric cars; hence, such expressions as are found in Louisville City R. Co. v. Weams, 80 Ky. 420, that the degree of care and skill increases with the hazards of the mode of conveyance employed by the carrier; or in Topeka City R. Co. v. Higgs, 38 Kan. 375, 5 Am. St. Rep. 754, 16 Pac. 667, that "steam cars may require greater care in their management and greater caution in their operation, but the passengers are entitled to the highest possible degree of each; so those riding on street cars have the legal right to insist that they shall be managed and operated with all possible skill, care, and foresight which, in their nature, they are capable of;" or, in Kane v. Cicero & P. Electric R. Co. 100 Ill. App. 181, that the highest degree of care consistent with the mode of conveyance used must be employed. The decisions in relation to this subject are summarized in Fetter on Carriers of Passengers, § 18, as follows: "The rule requiring the highest degree of care applies not only to carriers of passengers operating steam railroads, but also to those operating street cars and other vehicles drawn by horses. There is a *dictum* to the contrary in one of the New York cases, and also a decision that only ordinary care for the safety of the passenger is required at the hands of street car lines operated by horse power. But the great weight of authority, even in New York, requires the highest degree of care, bearing in mind that care and negligence are relative terms, and that the means and instrumentalities used to protect the safety of passengers may differ with the different modes of conveyance. The rule itself extends to the management of the cars and track, and to all arrangements necessary for the safety of passengers as respects accidents from collision or otherwise. When electricity is used as the motive power, the rule is applied in all its strictness. 'The agent employed, common experience has taught, is one dangerous to life, even when the utmost skill and prudence of best-trained electricians are exercised. It is a subtle, imponderable, death-dealing element or fluid. Of its nature or the laws governing it very little is known, even among the few and most advanced in the study of it. It may be harnessed, utilized as a motive power, and made to perform much economic service in mechanics, but as to its nature and vagaries nothing is known. It is full of surprises, and deals injury and death under what is deemed the most prudent management, and under what are supposed to be the circumstances least liable to inflict injury. In the use of such an agent, extraordinary care in its management is required.'"

The following definitions of the degree of care which a street railway is required to exercise on behalf of its passengers have been given by the courts:

In Philadelphia City Pass. R. Co. v. Hassard (1874) 75 Pa. 367, "reasonable care and diligence;" in O'Brien v. St. Louis Transit Co. (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939, "a very high degree of care;" in Maggioli v. St. Louis Transit Co. (1904) 108 Mo. App. 416, 83 S. W. 1026, "a very high degree of care and diligence;" in Little Rock Traction & Electric Co. v. Kimbro (1905; Ark.) 87 S. W. 121, "a very high degree of care and skill" except in the protection of passengers against accidents and injuries caused by their own acts or omissions, in which case the exercise of reasonable foresight only is required; in Dallas Consol. Traction R. Co. v. Randolph (1894) 8 Tex. Civ. App. 213, 27 S. W. 925,

railment of the car will be overcome by proof that the cars and track were in good order at the time of the accident, and that the train was being properly operated at the time of the accident.

Omaha Street R. Co. v. Boeson (Neb.) 94 N. W. 610; Meier v. Pennsylvania R. Co. 64 Pa. 225, 3 Am. Rep. 581; Cheetham v. Union R. Co. 26 R. I. 279, 58 Atl. 881; Whipple v. Michigan C. R. Co. 130 Mich. 460, 90 N. W. 287; Perry v. Malarin, 107 Cal. 363, 40 Pac. 489; Florida C. & P. R. Co. v. Rudulph, 113 Ga. 143, 38 S. E. 328; Murray v. Pawtuxet Valley Street R. Co. 25 R. I. 209, 55 Atl. 491; Chicago, R. I. & P. R. Co. v. Driggers, 1 Ind. Terr. 412, 45 S. W. 124; Grand Rapids & I. R. Co. v. Boyd, 65 Ind. 526.

If there was no negligence on the part of the street railway company, the plaintiff was not entitled to recover, even though derailment of the car had occurred.

Grand Rapids & I. R. Co. v. Boyd, Chicago, R. I. & P. R. Co. v. Driggers, Florida C. & P. R. Co. v. Rudulph, Perry v. Malarin, Whipple v. Michigan C. R. Co., Cheetham v. Union R. Co. and Meier v. Pennsylvania R. Co. *supra*.

The company was only required to exercise the highest degree of care consistent with the practical conduct of its business.

Johnson v. Seattle Electric Co. 35 Wash. 382, 77 Pac. 677; Magrane v. St. Louis & S. R. Co. 183 Mo. 119, 81 S. W. 1158; Tyler v. Texas & P. R. Co. (Tex. Civ. App.) 79 S. W. 1075; East Tennessee, V. & G. R. Co.

"that high degree of care which cautious, prudent persons, skilled in a particular business, would commonly use under like circumstances;" in Hansen v. North Jersey Street R. Co. (1900) 64 N. J. L. 686, 46 Atl. 718, "a high degree of care to protect them from dangers that foresight can anticipate;" in Metropolitan Street R. Co. v. Hanson (1903) 67 Kan. 256, 72 Pac. 773, "the utmost degree of care and skill in the preparation and management of the means of conveyance which may be employed under the circumstances;" in Louisville City R. Co. v. Weams, *supra*, Brown v. Louisville R. Co. (1899) 21 Ky. L. Rep. 995, 53 S. W. 1041, "the utmost care and skill which prudent men are accustomed to use under like circumstances;" in Baltimore City Pass. R. Co. v. Nugent (1897) 86 Md. 349, 39 L.R.A. 161, 38 Atl. 779, "the utmost care and diligence which human foresight can use;" in Nichols v. Lynn & B. R. Co. (1897) 168 Mass. 528, 47 N. E. 427, "the utmost care consistent with the nature and extent of its business to guard against all dangers which it could reasonably anticipate;" in Jacquin v. Grand Ave. Cable Co. (1894) 57 Mo. App. 320, "the utmost care and diligence of a very cautious person, or, as sometimes otherwise expressed, the utmost care and skill which prudent men are accustomed to use under similar circumstances;" Posch v. Southern Electric R. Co. (1898) 76 Mo. App. 601, "the utmost care and skill which prudent men would use and exercise in a like business and under similar circumstances;" in Spellman v. Lincoln Rapid Transit Co. (1893) 36 Neb. 890, 20 L.R.A. 316, 38 Am. St. Rep. 753, 55 N. W. 270, and Lincoln Traction Co. v. Webb (1905; Neb.) 102 N. W. 258, "the exercise of extraordinary care; the exercise of the utmost skill, diligence, and human foresight;" in Stierle v. Union R. Co. (1898) 156 N. Y. 70, 50 N. E. 419, "the utmost skill and diligence to guard against the possibility of accidents from the condition of its road and of the machinery used in the transportation of passengers;" in Klinger v. United Traction Co. (1904) 92 App. Div. 100, 87 N. Y. Supp. 864, "the exercise of the utmost human skill and foresight with reference to maintaining, operating, and keeping in repair its tracks and switches;" in Topeka City R. Co. v. Higgs (1888) 38 Kan. 375, 5 Am. St. Rep. 754, 16 Pac. 667, "the greatest degree of skill, care, and foresight of which the mode of conveyance is susceptible;" in North Chicago Street R. Co. v. Wrixon (1893) 51 Ill. App. 307, "the highest diligence for the safety of its passengers while riding, getting on and getting off its cars. In the providing of appliances for the safety of its passengers, it is bound to make use of such well known and approved means as are reasonably consistent with its condition, the business it is doing, and its duty to the public;" in West Chicago Street R. Co. v. Nash (1896) 64 Ill. App. 548, "the highest degree of diligence;" in West Chicago Street R. Co. v. Luka (1897) 72 Ill. App. 60, "the highest degree of care, skill, and diligence for the safety of its passengers that is practicable and consistent with the efficient use and operation of its cars;" in Kane v. Cicero & P. Electric R. Co. (1902) 100 Ill. App. 181, "the highest degree of care consistent with the mode of conveyance used;" in North Chicago Street R. Co. v. Polkey (1903) 203 Ill. 225, 67 N. E. 793, "the highest degree of care consistent with the practical operation of its railroad. It is bound to do all that human care, vigilance, and foresight can reasonably do consistent with the mode of conveyance [for] the practical operation of its road and the exercise of its business as carrier;" in Citizens' Street R. Co. v. Jolly (1903) 161 Ind. 80, 67 N. E. 935, "the highest degree of care, skill, and diligence for the safety of its passengers in operating its cars and road consistent with the mode of its conveyance, and likewise in the construction and maintenance of its tracks, roadway, and machinery;" in Louisville R. Co. v. Park (1895) 96 Ky. 580, 29 S. W. 455, "the highest diligence used by prudent men in like or the same business;" in Galligan v. Old Colony Street R. Co. (1902) 182 Mass. 211, 65 N. E. 48, "the highest degree of care consistent with the nature

v. Miller, 95 Ga. 738, 22 S. E. 660; Alabama Midland R. Co. v. Guilford, 119 Ga. 523, 46 S. E. 655; West Chicago Street R. Co. v. Winters, 107 Ill. App. 221; Chicago Union Traction Co. v. Mommsen, 107 Ill. App. 353; Palmer v. Warren Street R. Co. 206 Pa. 574, 63 L.R.A. 507, 56 Atl. 49; Lincoln Street R. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898.

Messrs. **T. W. Blackburn** and **Richard S. Horton**, for defendant in error:

The plaintiff proved the derailment of the car. A presumption thereupon arose that the defendant was guilty of negligence.

Spellman v. Lincoln Rapid Transit Co. 36 Neb. 890, 20 L.R.A. 316, 38 Am. St. Rep. 753, 55 N. W. 270; 2 Rorer, Railroads, p. 1434; Shearman & Redf. Neg. § 226.

Carriers of passengers for hire are bound to exercise the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill in either themselves or their servants.

Sales v. Western Stage Co. 4 Iowa, 547; Bonce v. Dubuque Street R. Co. 53 Iowa, 278, 36 Am. Rep. 221, 5 N. W. 177; Derwort v. Loomer, 21 Conn. 245; Wheaton v. North Beach & M. R. Co. 36 Cal. 590; Maverick v. Eight Ave. R. Co. 36 N. Y. 378; Carroll v. Staten Island R. Co. 58 N. Y. 126, 17 Am. Rep. 221; Denver, S. P. & P. R. Co. v. Woodward, 4 Colo. 1; Philadelphia & R. R. Co. v. Derby, 14 How. 485, 14 L. ed. 502;

of the undertaking;" in Parker v. Metropolitan Street R. Co. (1896) 69 Mo. App. 34, "a very high degree of care or the very highest degree of care of a very prudent person;" in Magrane v. St. Louis & S. R. Co. (1904) 183 Mo. 119, 81 S. W. 1158, "a very high degree of care, but not the utmost care that human imagination can conceive. It is the highest degree of care that can reasonably be expected of prudent, skilful, and experienced men engaged in that kind of business;" in Redmon v. Metropolitan Street R. Co. (1904) 185 Mo. 1, 105 Am. St. Rep. 558, 84 S. W. 26, "the highest care and skill which prudent men would use and exercise in a like business and under like circumstances;" in Nelson v. Mertopolitan Street R. Co. (1905) 113 Mo. App. 702, 88 S. W. 1119, "the highest degree of care;" in Payne v. Spokane Street R. Co. (1896) 15 Wash. 522, 46 Pac. 1054, "the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons engaged in that business, in view of the instrumentalities employed and the dangers naturally to be apprehended;" in Foster v. Seattle Electric Co. (1904) 35 Wash. 177, 76 Pac. 995, Johnson v. Seattle Traction Co. (1904) 35 Wash. 382, 77 Pac. 677, "the highest degree of care consistent with the practical conduct of its business;" in Denham v. Washington Water Power Co. (1905) 38 Wash. 354, 80 Pac. 546, "the highest degree of skill and care reasonably compatible with the practical operation of its business;" in Wanzer v. Chippewa Valley Electric R. Co. (1900) 108 Wis. 319, 84 N. W. 423, "the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted, and consistent with the practical prosecution of their business."

The rule adopted in a large number of the foregoing cases is more fully stated in Foster v. Seattle Electric Co. *supra*, as follows: "It is not the rule that a street car company is an insurer of the safety of its passengers. There are dangers attending on their transportation which it seems no human prudence can foresee, while there are others which can be foreseen, but which cannot be effectually guarded against, because to do so would make the conduct of the business so burdensome as to prohibit it altogether. Hence, when a street car company exercises towards its passengers the highest degree of care consistent with the practical conduct of its business, it performs towards them its full legal duty, and is not liable, even for injuries which might have been foreseen and prevented, if the means required to prevent them would involve a burden amounting to a practical prohibition of the business."

Among the cases approving instructions embodying the rule as to the measure of diligence which street railway companies are required to employ on behalf of their passengers, are Smedley v. Hestonville, M. & F. Pass. R. Co. (1898) 184 Pa. 620, 39 Atl. 544, approving an instruction that the defendant was "not liable for extraordinary events which he could not foresee or prevent;" Merrill v. Metropolitan Street R. Co. (1902) 73 App. Div. 401, 77 N. Y. Supp. 122, approving an instruction that "the measure of duty on the part of the defendant's servants was to conduct themselves with reasonable care under all the circumstances;" Koehne v. New York & Q. C. R. Co. (1898) 32 App. Div. 419, 52 N. Y. Supp. 1088, approving an instruction that a street railway is required to exercise a very high degree of care and skill in the operation of its cars; Scott v. Bergen County Traction Co. (1899) 63 N. J. L. 407, 43 Atl. 1060, approving an instruction that a street railroad company is bound to exercise a "high degree of care for the safety of the passengers;" Denver Tramway Co. v. Reid (1893) 4 Colo. App. 53, 35 Pac. 269, approving an instruction that a carrier of passengers operating its cars by means of electricity is "bound to use extraordinary care;" Hutcheis v. Cedar Rapids & M. C. R. Co. (1905; Iowa) 103 N. W. 779, approving an instruction imposing on a street railroad the duty "to use extraordinary care and precaution to protect its passengers

2 Rorer, Railroads, p. 1434; Smith v. St. Paul City R. Co. 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; The New World v. King, 16 How. 469, 14 L. ed. 1019; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Lincoln Street R. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; Topeka City R. Co. v. Higgs, 38 Kan. 375, 5 Am. St. Rep. 754, 16 Pac. 667; Meier v. Pennsylvania R. Co. 64 Pa. 225, 3 Am. Rep. 581; Omaha Street R. Co. v. Boesen (Neb.) 94 N. W. 619; Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269; Hutcheis v. Cedar Rapids & M. C. R. Co. (Iowa) 103 N. W. 779.

On petition for rehearing.

The opinion in this case not only overruled every case heretofore decided in this state touching the questions involved, but also has taken a position contrary to the courts of England and of every state in the Union, with the possible exception of New York.

The burden was on the carrier to rebut the presumption of negligence by showing that the accident was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight, the casualty could not have been prevented.

Lincoln Traction Co. v. Webb (Neb.) 102 N. W. 258; Lincoln Traction Co. v. Shep-

from injury," the court saying that the expression in the instruction given is no more than equivalent to the well-recognized rule that the carrier should use the highest degree of care that is reasonably consistent with the practical conduct of the business; Bischoff v. People's R. Co. (1894) 121 Mo. 216, 25 S. W. 908, approving an instruction holding defendant to the use of such degree of care as "would be exercised by very prudent persons under like circumstances;" Posch v. Southern Electric R. Co. (1898) 76 Mo. App. 601, approving an instruction requiring the exercise of such "a high degree of care . . . as would have been exercised by very careful and skilful railroad employees under like or similar circumstances;" Bosqui v. Sutro R. Co. (1901) 131 Cal. 390, 63 Pac. 682, approving an instruction defining the standard of care to be used by a motorman to be that of a "very cautious man standing in his shoes and compelled to exercise care . . . in the same situation and surrounded by the same circumstances;" Snider v. Chicago & A. R. Co. (1904) 108 Mo. App. 234, 83 S. W. 530, approving an instruction imposing on a street railroad company "the exercise of a very high degree of care and foresight of skilful, careful, and practical railroad operatives under the same or similar circumstances;" Watson v. St. Paul City R. Co. (1889) 42 Minn. 46, 43 N. W. 904, approving an instruction in an action against a street railway company that "the law does not require that such additional precautions as it is apparent after the accident might have prevented the same should have been previously adopted . . . unless they are of such a character as should have been contemplated in the exercise of the greatest care and foresight;". West Chicago Street R. Co. v Johnson (1899) 180 Ill. 285, 54 N. E. 334, approving an instruction requiring a street railway company "to use the highest degree of care and caution consistent with the practical operation of the road to provide for the safety and security of passengers while being transported;" Crump v. Davis (1904) 33 Ind. App. 88, 70 N. E. 886, approving an instruction requiring the exercise by a street railroad company of "the highest practicable degree and kind of care" for the safety of its passengers; Fitch v. Mason City & C. L. Traction Co. (1904) 124 Iowa, 665, 100 N. W. 618, approving an instruction that it is the duty of a street railway company "not to expose its passengers to any danger which human care and foresight could reasonably anticipate and to exercise the highest degree of care and diligence reasonably consistent with the practical operation of its railroad and the conducting of its business;" Louisville & P. R. Co. v. Smith (1866) 2 Duv. 556, approving an instruction that "the proper care required by law is such as prudence requires in the management of a railroad for passengers, having due and proper regard to the mode of conveyance, and the means employed;" Baltimore City Pass. R. Co. v. Nugent (1897) 86 Md. 349, 39 L.R.A. 161, 38 Atl. 779, approving an instruction defining the degree of care and diligence exacted of the defendant railroad company as the "highest degree of care and diligence practicable under the circumstances;" O'Connell v. St. Louis Cable & W. R. Co. (1891) 106 Mo. 482, 17 S. W. 494, approving an instruction that a railroad company was only bound to operate its cars "under all of the circumstances with the highest degree of care of a very prudent person;" Powers v. Union R. Co. (1895) 60 Mo. App. 481, approving an instruction that it was the duty of the railway company "to exercise the highest practicable care, caution, and diligence" safely to transport its passengers; Feary v. Metropolitan Street R. Co. (1901) 162 Mo. 75, 62 S. W. 452, approving an instruction requiring the exercise by a street railway company of "all the care and foresight that was reasonably practicable;" Zimmer v. Third Ave. R. Co. (1899) 36 App. Div. 265, 55 N. Y. Supp. 308, approving an instruction that the defendant, with respect to carrying the plaintiff, "was bound to exercise all the care and skill which human prudence and foresight can suggest;" Keegan v. Third Ave. R. Co. (1898) 34 App. Div. 297, 54 N. Y. Supp.

herd (Neb.) 104 N. W. 882; Spellman v. Lincoln Rapid Transit Co. 36 Neb. 890, 20 L.R.A. 316, 38 Am. St. Rep. 753, 55 N. W. 270; Smith v. St. Paul City R. Co. 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; Stokes v. Saltonstall, 13 Pet. 181, 10 L. ed. 115; Montgomery & E. Co. v. Mallette, 92 Ala. 209, 9 So. 363; Birmingham Union R. Co. v. Hale, 90 Ala. 8, 24 Am. St. Rep. 748, 8 So. 142; Eureka Springs R. Co. v. Timmons, 51 Ark. 459, 11 S. W. 690; Arkansas Midland R. Co. v. Griffith, 63 Ark. 491, 39 S. W. 550; Osgood v. Los Angeles Traction Co. 137 Cal. 280, 92 Am. St. Rep. 171, 70 Pac. 169; Green v. Pacific Lumber Co. 130 Cal. 435, 62 Pac. 747; Scott v. Wood, 81 Cal. 398, 22 Pac. 871; Rupp v. Sarpy County (Neb.) 98 N. W. 1042; Wall v. Livezay, 6 Colo. 465; Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; North Chicago Street R. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899; Galena & C. Union R. Co. v. Yarwood, 15 Ill. 468; Pittsburg, C. & St. L. R. Co. v. Thompson, 56 Ill. 138; Peoria, P. & J. R. Co. v. Reynolds, 88 Ill. 418; Eagle Packet Co. v. Defries, 94 Ill. 598, 34 Am. Rep. 245; Chicago City R. Co. v. Engel, 35 Ill. App. 490; Cleveland, C. C. & I. R. Co. v. Newell, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836; Indianapolis Street R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201; Terre Haute & I. R. Co. v. Sheeks, 155 Ind. 74, 56 N. E. 434; Fitch v. Mason City & C. L. Traction Co. 124 Iowa, 665, 100 N. W. 618; Cronk v. Wabash R. Co. 123 Iowa, 349, 98 N. W. 884; Southern

391 (Affirmed without opinion in 165 N. Y. 622, 59 N. E. 1124) approving an instruction requiring of a street railway company "the exercise of all the care and vigilance that human foresight may suggest to secure the safety of its passengers;" Citizens' R. Co. v. Craig (1902; Tex. Civ. App.) 69 S. W. 239, approving an instruction that "it was the duty of the defendant to have exercised the highest degree of care in the operation of its cars to prevent injury to its passengers thereon;" El Paso Electric R. Co. v. Harry (1904; Tex. Civ. App.) 83 S. W. 735, approving an instruction that it was the duty of the defendant and its servants "to use such high degree of care and foresight in the protection of their passengers from possible dangers, and to exercise such high degree of prudence in guarding against them, as would be used by very cautious and prudent and competent persons under like circumstances;" Sears v. Seattle Consol. Street R. Co. (1893) 6 Wash. 227, 33 Pac. 389, 1081, approving an instruction that the defendant "was bound to the exercise of the highest degree of care, prudence, and caution in the running and operating of it cars so as to prevent injury to its passengers;" Central Pass. R. Co. v. Bishop (1887) 9 Ky. L. Rep. 348, approving an instruction that "it was the duty of the defendant and its employees in carrying plaintiff to use the utmost care and skill which prudent men, engaged in similar services, are accustomed to use under like circumstances;" Hamilton v. Great Falls Street R. Co. (1895) 17 Mont. 334, 42 Pac. 860, 43 Pac. 713, approving an instruction that the defendant company was "bound to exercise the utmost degree of precaution and care in every respect such as prudent men would employ under similar circumstances) in providing for the safety and safe transportation of their passengers while on their cars;" Contreras v. San Antonio Traction Co. (1904; Tex. Civ. App.) 83 S. W. 870, approving an instruction imposing on a street railway the duty to use "the utmost care that would be used by a very prudent person under like circumstances." And in Osgood v. Los Angeles Traction Co. (1902) 137 Cal. 280, 92 Am. St. Rep. 171, 70 Pac. 169, it was held, in view of the declaration of § 2100 of the Civil Code, that a carrier of persons for reward must use the utmost care and diligence for their safe carriage, an instruction requiring a street railway company to exercise "the highest degree of care" in the transportation of passengers was proper.

The following instructions have been held not to require too high a degree of care:

An instruction "that the defendants and their servants were bound to exercise great care and caution in carrying the plaintiff, "in Clark v. Eighth Ave. R. Co. (1860) 32 Barb. 657; an instruction requiring the exercise of "reasonable care and diligence as a prudent person would exercise in the management of his own affairs," in Houston City Street R. Co. v. Ross (1894; Tex. Civ. App.) 28 S. W. 254; an instruction that "the defendant owes to its passengers the duty to exercise great care and caution to keep the machinery and appliances of its cars in reasonably safe condition and repair, and to exercise like caution in the operation of its cars," in Dallas Consol. Electric Street R. Co. v. Broadhurst (1902) 28 Tex. Civ. App. 630, 68 S. W. 315.

The following instructions, given respecting the duty of a street railway company toward its passengers, have been held not to impose a sufficiently high degree of care on the defendant company:

An instruction that the defendant was bound "to use only ordinary and reasonable care in the operation of its cars," in Holmes v. Ashtabula Rapid Transit Co. (1900) 10 Ohio C. D. 638; an instruction requiring of the defendant the use of "that high degree of care that would be exercised by a prudent person under like circumstances," in Knauff v. San Antonio Traction Co. (1902; Tex. Civ. App.) 70 S. W. 1011; an instruction requiring the exercise "of such care as persons usually engaged in the particular line of business in question ordinarily exercise in and about such business," in Payne v. Spokane Street R. Co. (1896) 15 Wash. 522, 46 Pac. 1054.

And the following instructions have been

Kansas R. Co. v. Walsh, 45 Kan. 653, 26 Pac. 45; Meador v. Missouri P. R. Co. 62 Kan. 865, Appx., 61 Pac. 442; Louisville & N. R. Co. v. Ritter, 85 Ky. 368, 3 S. W. 591; Felton v. Holbrook, 21 Ky. L. Rep. 1824, 56 S. W. 506; Central Pass R. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. Rep. 309, 6 S. W. 441; Davis v. Paducah R. & Light Co. 113 Ky. 267, 68 S. W. 140; Ware v. Gay, 11 Pick. 106; Christie v. Griggs, 2 Campb. 79; Feital v. Middlesex R. Co. 109 Mass. 398, 12 Am. Rep. 720; Savage v. Marlborough Street R. Co. 186 Mass. 203, 71 N. E. 531; Memphis & C. R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Furnish v. Missouri P. R. Co. 102 Mo. 438, 22 Am. St. Rep. 781, 13 S. W. 1044; Clark v. Chicago & A. R. Co. 127 Mo. 197, 29 S. W. 1013; Logan v. Metropolitan Street R. Co. 183 Mo. 582, 82 S. W. 126; Hedrix v. Hedrix, 103 Mo. App. 40, 77 S. W. 495; Shay v. Camden & S. R. Co. 66 N. J. L. 334, 49 Atl. 547; Bergen County Traction Co. v. Demarest, 62 N. J. L. 755, 72 Am. St. Rep. 685, 42 Atl. 729; Marcom v. Raleigh & A. Air Line R. Co. 126 N. C. 200, 35 S. E. 423; Iron R. Co. v. Mowery, 36 Ohio St. 418, 38 Am. Rep. 597; Laing v. Colder, 8 Pa. 479, 49 Am. Dec. 533; Philadelphia & R. R. Co. v. Anderson, 94 Pa. 351, 39 Am. Rep. 787; Palmer v. Warren Street R. Co. 206 Pa. 574, 63 L.R.A. 507, 56 Atl. 49; Texas Midland R. Co. v. Jumper, 24 Tex. Civ. App. 671, 60 S. W. 797; Baltimore & O. R. Co. v. Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Baltimore & O. R. Co. v. Noell, 32 Gratt. 394; Shenandoah Valley R. Co. v. Moose, 83 Va. 827, 3 S. E. 796; Southern R. Co. v. Dawson, 98 Va. 577, 36 S. E. 996; Carpue v. London & B. R. Co. 5 Q. B. 747.

Albert, C., filed the following opinion:

This is an action wherein the plaintiff seeks to recover for personal injuries alleged to have been sustained by reason of the negligence of the defendant. It is alleged in the petition that, while the plaintiff was a passenger on one of the cars operated by the defendant on its street railway, such car, by reason of certain negligent acts and omissions of the defendant, was derailed, and in consequence the plaintiff was thrown violently therefrom, and thereby sustained serious and permanent bodily injuries. These allegations are put in issue by the answer, which also charges the plaintiff with contributory negligence. The reply consists of a general denial. A trial of the issues resulted in a verdict and judgment for plaintiff. The defendant brings error.

The court instructed the jury that if they found that the car was derailed, and that in consequence the plaintiff was thrown from the car and injured, it devolved upon the defendant to show, by a preponderance of the evidence, that the injuries were not due in any degree to a failure on the part of the defendant to exercise the utmost care, diligence, and foresight for the safety of its passengers. It would seem that the theory of the court that the burden of proof on the question of negligence shifted to the defendant upon a showing that the plaintiff was injured in consequence of a derailment of the car is erroneous. Section 3, art. 1, chap. 72, Comp. Stat. 1903, which charges railroad companies with liability for all damages inflicted upon the persons of their passengers while being transported over their roads, except when the injury arises from the criminal negligence of the person injured, has no application to street railways. Lincoln Street R. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074. The latter class of carriers are liable only when such injuries are traceable to some negligent act or omission on their part. Negligence is the gist of the action, and the plaintiff holds the affirmative, which he must establish by a preponderance of the evidence. Proof of the accident is not direct proof of negligence. The accident is a mere col-

condemned as imposing too rigorous a rule:

An instruction that a defendant street railway company "was bound, as far as human foresight and care would enable it, to carry the plaintiff with safety," in Louisville City R. Co. v. Weams (1882) 80 Ky. 420; an instruction "that if it was possible for the defendant to prevent this accident, then the defendant was negligent," in Gilbert v. West End Street R. Co. (1893) 160 Mass. 403, 36 N. E. 60; an instruction requiring the defendant to exercise the "utmost practical skill, care, knowledge, foresight, and wisdom," in Jacquin v. Grand Ave. Cable Co. (1894) 57 Mo. App. 320; an instruction declaring that it was the duty of the defendant, "as far as it is capable of human care and foresight, to carry such passengers safely, and the defendant is responsible for all injury resulting to such passengers from any, even the slightest, neglect or negligence," in Magrane v. St. Louis & S. R. Co. (1904) 183 Mo. 119, 81 S. W. 1158; an instruction that "a transportation company is not an insurer of the lives or limbs of its passengers, but the law calls upon it to do whatever can be done to insure their protection while they are being transported," in Johnson v. Seattle Electric Co. (1904) 35 Wash. 382, 77 Pac. 677; a charge requiring the defendant "to operate its cars with the highest degree of skill and care commensurate with or proportionate to the possibility of injury to its passengers," in Wanzer v. Chippewa Valley Electric R. Co. (1900) 108 Wis. 319, 84 N. W. 423.

lateral fact, but one so commonly associated with the lack of due care that, when proved, it raises a strong probability, amounting to presumption, of negligence. But when the proof of such accident is met by proof of other facts and circumstances, making it equally probable that it was the result of causes wholly beyond the control of the defendant, and which no human skill and foresight could have guarded against or prevented, one probability offsets the other, and the affirmative of the issue, in the absence of other evidence tending to establish it, stands, just as it stood at the beginning of the controversy, not proved. As was said by Commissioner Ames, in Rupp v. Sarpy County (Neb.) 98 N. W. 1042: "The burden of sustaining the affirmative of an issue involved in an action does not shift during the progress of the trial, but is upon the party alleging the facts constituting the issue, and remains there until the end."

The charge of the court is also open to the further criticism that it imposed upon the defendant too high a degree of care. A street railway company is not bound "to exercise the utmost care, diligence, and foresight for the safety of its passengers." In no case should such carriers be held to a higher degree of care than is consistent with the practical conduct of their business. While the precise point was not under consideration at the time, this court recognized the justice of the qualification just suggested in Lincoln Street R. Co. v. McClellan, *supra*. In Johnson v. Seattle Electric Co. 35 Wash. 382, 77 Pac. 677, the court said: "While the jury are told that a common carrier is not an insurer of the lives and limbs of its passengers, yet they are told that it is liable if it has not done everything that could have been done to insure their safety. The rule is not so onerous as this. There are many things that a carrier could do which would conduce to the safety of its passengers, but which it is not required to do, simply because the practical prosecution of the business will not permit of it. The carrier could, for example, by simply increasing its force of attendants, reduce to a minimum the happening of accidents like the one complained of here; but this, simple as the remedy may seem, might so increase the cost of operation as to compel the abandonment of the business. Hence, the carrier cannot be held bound to do everything that can be done to insure the safety of its passengers, but only to the highest degree of care consistent with the practical conduct of its business. The measure of duty as laid down by the trial court was more than the law requires of the carrier, and for that reason erroneous." To the same effect are the following: West Chicago Street R. Co. v. Winters, 107 Ill. App. 221; Chicago Union Traction Co. v. Mommsen, 107 Ill. App. 353; Palmer v. Warren Street R. Co. 206 Pa. 574, 63 L.R.A. 507, 56 Atl. 49; Fitch v. Mason City & C. L. Traction Co. 124 Iowa, 665, 100 N. W. 618; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed 898.

The defendant asked the court to instruct the jury to the effect that, although they found that the car was derailed, yet if they found that, at the time and place of the accident, the car and track were in good order and condition, and without defect or imperfection, the presumption arising from the derailment of the car would be thereby overcome. It was not error to refuse this instruction because it ignores the inference of negligence in the operation of the car, which the jury might legitimately draw from the fact of derailment.

This case has been tried in the district court six times. A witness who had testified at the first and second trial died before the last trial. The testimony of the witness taken at the second trial was received on behalf of the plaintiff at the last trial of the case. For the purpose of impeachment, the defendant offered certain portions of the evidence of the same witness, given at the first trial. The offer was rejected, and its rejection is now assigned as error. It does not appear that any attempt was made at the second trial to lay a foundation for the impeachment of the witness by calling his attention to the alleged inconsistent statements or otherwise. The evidence offered was not, under the circumstances, admissible for the purpose of impeachment. 3 Jones, Ev. § 851; Ayers v. Watson, 132 U. S. 394, 33 L. ed. 378, 10 Sup. Ct. Rep. 116.

There is some question whether the defendant is in a position to complain of that portion of the charge in regard to the degree of care required of a carrier of passengers; but, as the judgment must be reversed for the error in the charge with respect to the degree of proof necessary to rebut the presumption of negligence arising from the derailment of the car and consequent injury to the plaintiff, we have not gone into that question.

It is recommended that the judgment of the district court be reversed, and the cause remanded.

Duffie and Jackson, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the cause remanded for further proceedings according to law.

Holcomb, Ch. J., did not sit.

Petition for rehearing denied.

NORTH CAROLINA SUPREME COURT.

JOHN P. LEDFORD, Appt.,
v.
ALFRED S. EMERSON.

(140 N. C. 288, 52 S. E. 641.)

Arrest of partner.

The statute permitting arrest for fraud applies when, by reason of the character of the transaction, or the general termination of the partnership dealings, an action at law will lie against one partner in favor of the other.

(December 15, 1905.)

APPEAL by plaintiff from an order of the Superior Court for Cherokee County discharging an order for arrest in a civil action. Reversed.

Plaintiff and defendant entered into a transaction for procuring certain options on land and selling them on partnership account. Several were procured and taken in the name of defendant under an agreement that he was to advance the incidental expenses, sell the options, and divide the profits equally with plaintiff. The options were sold for $10,000, which fact was fraudulently concealed by defendant, who paid plaintiff $250 as his share. Upon discovering the facts plaintiff brought this action for the remainder and secured an order for defendant's arrest.

Further facts appear in the opinion.

Messrs. **Axley & Axley, Edmund B. Norvell,** and **Busbee & Busbee,** for appellant:

The "fraud" perpetrated upon the plaintiff fully justified the issuing of the order and arrest.

Madge v. Puig, 12 Hun, 16; Southworth v. Resing, 3 Cal. 377; Travers v. Deaton, 107 N. C. 503, 12 S. E. 373; Melvin v. Melvin, 72 N. C. 384; Raisin Fertilizer Co. v. Grubbs, 114 N. C. 473, 19 S. E. 597; Powers v. Davenport, 101 N. C. 293, 7 S. E. 747.

Messrs. **Ben Posey** and **Dillard & Bell,** for appellee:

The most that the plaintiff could do was to sue for his part of the profits made by the partnership, and that after a settlement of the entire matter embraced within the partnership.

Newby v. Harrell, 99 N. C. 149, 6 Am. St. Rep. 503, 5 S. E. 284; Graham v. Holt,

Case Note.—Right to arrest partner in civil action or proceeding. One partner interested with other partners in the running of a steamboat is not entitled to procure the arrest of a copartner, who is in charge of the boat, in an action by the former for a dissolution and an accounting, on the ground that the latter has never paid anything to the former, and refuses to render any account. The court held that the copartner is not liable for any specific sum received, since his obligation is to account as managing partner, and it may turn out that although he has actually received the sum alleged, he may owe no part of it to the plaintiff, as the whole amount may have been or will be employed by him in the payment of the debts and expenses of the boat; and that one who acts in the capacity of a partner, which gives him the control and disposition of funds received, cannot be considered as failing to pay them until he has rendered an account, and the sum for which he is liable has been ascertained. Hanna v. Auter, 4 Rob. (La.) 221.

In Cary v. Williams, 1 Duer, 667, a partner made an application for an order for the arrest of his copartner in an action brought against the latter to recover damages for the fraudulent removal by him of a stock of goods belonging to the firm, but the court, without special discussion, refused to grant the order, holding that the action was not maintainable, and that the plaintiff's proper remedy was for an accounting.

Nor will an order of arrest be granted at the instance of one partner for the alleged failure of a copartner to apply a certain sum received from the former to the purchase of the article for the buying and selling of which the partnership was formed, where the defendant claims that the sum received was only the difference between the price at which the plaintiff directed the partnership purchases to be bought and the sum actually paid by the defendants therefor, and that the same was to be charged against defendant's share of the profits, upon final settlement. Smith v. Small, 54 Barb. 223.

A partner who was arrested by his copartner in a civil suit, under a statute which authorizes an arrest in an action for money received or property embezzled or fraudulently misapplied by an officer or agent of a corporation, or by any factor, agent, broker, or other person in a fiduciary capacity, was properly discharged, since that statute does not apply in a case of one partner suing to recover money received by his copartner. Soule v. Hayward, 1 Cal. 345.

But in Madge v. Puig, 12 Hun, 15, it was held that in an action brought by a partner against his copartner, to recover for the latter's breach of certain covenants contained in the partnership contract, an order of arrest was properly granted upon affidavits alleging that the plaintiff had been induced to enter into the contract by the fraudulent representation of the defendant. This case, however, was reversed in 71 N. Y. 608, on the ground that the plaintiff, having united in his complaint two causes of action, one of which was bailable and the other not, he thereby waived his right to bail as to both, and the order of arrest could not be sustained.

5 N. C. (3 Ired. L.) 300, 40 Am. Dec. 408; 2 Parsons, Partn. 231.

Hoke, J., delivered the opinion of the court:

The judge below on the hearing found the facts contained in the plaintiff's affidavits to be true, and held, as a matter of law, that on these facts there was no right shown to arrest defendant. His honor thereupon discharged the order of arrest and entered judgment exonerating the bail from any and all liability by reason of his suretyship. This, as we understand, was on the idea that the facts disclosed a case of partnership, and in such case there was no legal right in one partner to cause the arrest of another. It is a well-recognized principle that, during the continuance of a partnership, one partner cannot sue another on any special transaction which may be made an item of charge or discharge in a general partnership account. This has sometimes been put on the ground that such a suit would necessitate that the party complained of should be both plaintiff and defendant. But I apprehend a reason of more moment is that as to such a transaction, till a full accounting is had, it cannot be ascertained or declared what portion of such claims belongs to the one or the other; and so it is true that one partner, during the continuance of the partnership, cannot ordinarily bring trover or trespass against the other by reason of acts concerning partnership property, unless the same be destroyed or removed entirely beyond the reach or control of the complaining party, for one has no more right to deal with the property than the other. Where, however, the partnership has terminated, and, all the debts having been paid and the partnership affairs otherwise adjusted, nothing remains to be done but to pay over an amount due from one to the other, to be ascertained by a reckoning as to one special item, or even several items, the matter presenting no complication of any kind, as in Clarke v. Mills, 36 Kan. 393, 13 Pac. 569; or where the partnership was for a single venture or special purpose, which has been closed, and nothing remains but to pay over the claimant's share of the proceeds, as in Jaques v. Hulit, 16 N. J. L. 38,—in either case an action would lie in favor of one against the other. George, Partn. 304; Bates, Partn. 865, 866; Clarke v. Mills and Jaques v. Hulit, *supra;* Musier v. Trumpbour, 5 Wend. 274; Moran v. Le Blanc, 6 La. Ann. 113; Wheeler v. Arnold, 30 Mich. 304. In Clarke's case, *supra*, Holt, P. J., for the court, said: "There were no debts to be paid, no money to be collected, no property to be disposed of, and under the findings of fact in this case it was a purely pecuniary demand, involving no complications that could not properly be determined in the justice's court." In Wheeler v. Arnold, *supra*, it is held: "The remedy at law for contribution between two partners after dissolution is admissible; and, when there have been no such dealings with assets, and no such private relations with the firm, as to make a settlement difficult, there would be no occasion, under our statutes making discovery obtainable at law by the examination of parties as witnesses, for an accounting in equity." In Jaques v. Hulit, *supra*, it is held: "A mutual covenant to divide the proceeds of a certain crop, if it be a partnership, is so only for a special purpose and terminates as soon as the crop is sold; and an action lies by one of the parties against the other for any balance due thereon to the plaintiff from the defendant, without resorting to the action of account render."

This being the correct doctrine, and an action at law maintainable if the facts bring the claim within the provisions of our statutes on arrest and bail, no reason occurs to us why the plaintiff should be deprived of this ancillary remedy. The statute (Code, § 291, subsec. 4) provides that when a defendant has been guilty of fraud in contracting the debt or incurring the obligation for which action is brought, or for concealing or disposing of property, or to recover damages for fraud or deceit, an order for arrest may be issued; and it has been held in Powers v. Davenport, 101 N. C. 286, 7 S. E. 747, that such an order is proper when there has been fraud committed after contracting the debt, as by concealing property or other devices for defeating the creditor. Here is allegation, and ample evidence to sustain it, charging intentional fraud throughout the entire transaction on the part of the defendant, and the judge below has found that these charges are true: A fraudulent design in having the options drawn in the name of the defendant; a fraudulent effort and purpose in concealing the sale from the plaintiff; false and fraudulent statements in procuring from the plaintiff a receipt in full, etc. We must not be understood as holding that no right of arrest can ever exist where the partnership has terminated and the affairs are so complicated that, in order to a proper settlement, an action in the nature of a bill in equity for an account is required. We have only elaborated the position that the right of arrest may exist when an action at law would lie, with a view of confining the decision to the points required by the facts of the case before us.

The court is referred to the case of Soule

v. Hayward, 1 Cal. 345, as authority supporting the defendant's position; but this was a case construing the California statutes that a partner was not included under the term "agent" in their statute on arrest, and the propositions here discussed do not seem to have been presented or considered by the court.

There was error in allowing the defendant's motion, and the order to that effect will be set aside.

Error.

WEST VIRGINIA SUPREME COURT OF APPEALS.

LEWIS, HUBBARD, & COMPANY, Plff. in Err.,
v.
MONTGOMERY SUPPLY COMPANY.

(— W. Va. —, 52 S. E. 1017.)

Check—presentation.

1. A person receiving a check on a fund in the hands of a bank, for the amount of a demand against the drawer thereof, is bound to exercise reasonable diligence in making presentment thereof for payment, if he wishes to avoid risk of loss by insolvency of the drawee.

Headnotes by POFFENBARGER, J.

Same—local.

2. If the payee of the check and the drawee reside, or have their places of business, in the same city or town, presentment must be made before the expiration of business hours of the day next after the day of the receipt thereof.

Same—foreign.

3. If the person receiving a check and the bank on which it is drawn are in different places, it must be forwarded, for presentment, by mail or other usual mode of transmission, on the next day after the receipt thereof at the place in which the payee resides or does business, if reasonably and conveniently practicable; and, if it is not so practicable, then by the next mail, or other similar means of conveyance, leaving after said date.

Same—inconvenient mail.

4. Neither payee nor his agent is required to transmit such check by the only, or last, mail of the day next after its receipt, if such mail closes or departs at an hour so early as to render it inconvenient for the holder to avail himself of it.

Same.

5. What is an unreasonably early hour in such case depends upon all the circumstances of the transaction and situation of the parties, and, the facts being free from controversy and doubt, is a question of law for the court.

Same—collection through bank.

6. In the absence of any agreement to the contrary, and of any circumstance,

Case Note.—Bills and notes; time allowed for mailing check or notice of dishonor, as affected by the hour at which the mail closes or departs.—There is some conflict among the authorities whether the general rule requires a check or notice of dishonor to be deposited in the post in time to catch the first mail leaving the day after the check is received or the bill or note is dishonored, as the case may be, or whether it is satisfied if the check or notice be deposited in time to catch any mail leaving on that day. But whichever form the general rule takes, it is now well established that it is subject to the exception indicated in the fourth headnote in LEWIS, H. & Co. v. MONTGOMERY SUPPLY CO. in case the first or only mail closes or departs at an unreasonably early hour. Thus, in 2 Daniel on Negotiable Instrument, § 1039, it is said that the notice *i. e.*, notice of dishonor, must be sent by the first mail which leaves after the day of dishonor is passed, and does not close before early and convenient business hours of the day succeeding the day of dishonor. Here, it will be observed, the exception is incorporated in a statement of the general rule in terms requiring the notice to be sent by the first mail. Upon the other hand, the provision of the Uniform Negotiable Instrument Law (§ 104, subsection 1 of the original draft) provides that, if sent by mail, it (notice of dishonor) must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or, if there be no mail at a convenient hour on that day, by the next mail thereafter. Here, again, it will be observed that the exception is incorporated in a statement of the general rule in terms which are satisfied if the notice is deposited in time to catch any mail of the next day. Disregarding, for the purposes of this note, the difference already noted in the statements of the general rule, the exception alluded to is supported by the following among cases that might be cited: Sanderson v. Sanderson, 20 Fla. 292; Chick v. Pillsbury, 24 Me. 458, 41 Am. Dec. 394; Haskell v. Boardman, 8 Allen, 38; Downs v. Planters' Bank, 1 Smedes & M. 261, 40 Am. Dec. 92; Deminds v. Kirkman, 1 Smedes & M. 644; Carter v. Burley, 9 N. H. 558; Manchester Bank v. Fellows, 28 N. H. 302; Burgess v. Vreeland, 24 N. J. L. 71, 59 Am. Dec. 408; Sussex Bank v. Baldwin, 17 N. J. L. 487; Smith v. Poillon, 87 N. Y. 590, 41 Am. Rep. 402; Lawson v. Farmer's Bank, 1 Ohio St. 206; Cox v. Boone, 8 W. Va. 500, 23 Am. Rep. 627.

Assuming, then, that the day on which the check or notice of dishonor must be mailed has been determined by the application of the general rule on the subject, the question whether the case falls within the exception depends upon the question whether the first or only mail of that day —accordingly as one or the other of the forms of the general rule is adopted— closes or leaves at an unreasonably early

known to the payee, making it imprudent to do so, he may indorse and deliver the check to a bank for collection; but this does not extend the time within which it must be forwarded for presentment. The bank, however, in such case, is not required to forward it on the next day after its receipt by the payee, if there be no reasonably convenient means of doing so, within the banking hours of that day.

Judicial notice—bank rules.

7. Though the courts of this state cannot have judicial knowledge of the existence of any particular bank, or of any mode of business peculiar to a given bank, they will take judicial notice that, in all cities and towns of large population and extensive business, within their jurisdiction, banks exist, and of the facts that their operations are governed by reasonable rules and regulations, to which parties dealing with them, or in commercial paper, are deemed to have subjected themselves.

Same—business hours.

8. Courts cannot take judicial notice of the business hours of any particular bank, but the courts of this state judicially know that ordinarily banks in the cities and larger towns of the state do not open their doors for business at an hour earlier than 9 o'clock A. M.

Check—collection through bank.

9. The parties to a check drawn on a bank and sent to a distant place to be forwarded for presentation are deemed in law to have acted with knowledge of the usual diligent method of making such presentment through a bank at the place to which it is sent, and to have agreed to suffer any reasonable delay incident to such mode of presentment.

Same—insolvency of bank.

10. In such case, the drawer, by allowing his funds to remain in the drawee bank, and the payee, by accepting the check, evince belief in the solvency of the bank, and the former voluntarliy takes the risk of his solvency during the reasonable period necessary for presentment of the check in the usual manner.

Same—delivery to agent.

11. The drawer, in delivering a check to an agent of the payee, having no authority to indorse it, at the place of business of the drawer, impliedly agrees to allow such additional time for presentment as may be necessary for the transmission of the check to the principal of the agent.

Same—failure to present.

12. Failure to present a check does not bar recovery from the drawer, if the time intervening between delivery thereof and the failure of the bank is not sufficient for presentment by the exercise of such diligence as the law requires.

Instruction—without evidence.

13. It is reversible error to give an instruction presenting an hypothesis which has no foundation in the evidence adduced, unless the court can clearly see that it did not prejudice the exceptor.

or inconvenient hour. As held in LEWIS, H. & Co. v. MONTGOMERY SUPPLY CO., this question is usually regarded as one of law, for the court, at least, when the facts are simple and free from controversy. It was expressly so held in Smith v. Poillon, *supra*, and is implied in the cases subsequently cited. But see Mitchell v. Cross, 2 R. I. 437, holding the question to be one of fact, for the jury. Each case depends to a greater or less extent upon its own circumstances and it is impossible to fix upon any definite hour of the day which will serve as a criterion, for all communities and in all cases, of what is an unreasonably early or inconvenient hour, for the purposes of this exception.

Thus, it was said in Smith v. Poillon, that what is a practical and convenient mail for the purposes of the exception depends upon the circumstances; it may be controlled by the usages of business and the customs of the people at the place of mailing, and the condition, situation, and business engagements of the persons required to give notice; the rule should have a reasonable application in every case.

LEWIS, H. & Co. v. MONTOMERY SUPPLY Co., in holding, as a matter of law, that the failure to deposit a check in the post in time to catch a mail leaving at 9 or 10 o'clock was not negligence, is, perhaps, more favorable to the party who mails the check or notice than the majority of cases. Thus, in Downs v. Planters' Bank, *supra*, it was implied that 9 o'clock A. M. would not be regarded as an unusually early or inconvenient hour, for the purposes of the exception. And so 10 o'clock A. M. has been held not to be an unreasonably early hour for such purpose. Haskell v. Boardman, 8 Allen, 38; Lawson v. Farmer's Bank, *supra*. In Smith v. Poillon, *supra*, upon the other hand, the court, though holding that the general rule required the notice to be deposited in time for the first mail if it did not leave at an inconvenient hour, held that depositing the notice in the postoffice in time to catch a mail that closed at 1:30 P. M. was sufficient, although there was an earlier mail which closed at 9:30 A. M. of the same day. Sunrise is regarded as an unreasonably early or inconvenient hour for the purposes of the exception. Deminds v. Kirkman, 1 Smedes & M. 645; Farmer's Bank v. Duvall, 7 Gill & J. 78. So, 4 o'clock has been held to be an unreasonably early hour (Wemple v. Dangerfield, 2 Smedes & M. 445); and 5 o'clock A. M. (West v. Brown, 6 Ohio St. 542); and 6 o'clock A. M. (Chick v. Pillsbury, *supra*); and 7:30 o'clock (Cox v. Boone, *supra*).

But 3:30 P. M. is not an unreasonably early hour, for the purposes of the exception (Seventh Ward Bank v. Hanrick, 2 Story, 416, Fed. Cas. No. 12,678), nor 2 o'clock P. M. (National Bank v. Bradley, 117 N. C. 526, 23 S. E. 455), nor 12 o'clock M. (Burgess v. Vreeland, *supra*).

Evidence—rejection.

14. An offer of evidence, not appearing in any way to be relevant and material, is properly rejected.

(February 20, 1906.)

ERROR to the Circuit Court for Fayette County to review a judgment in favor of defendant in an action brought to enforce payment of a check which had failed of collection because of failure of the bank upon which it was drawn. Reversed.

The facts are stated in the opinion.

Messrs. Berkeley Minor, Jr., and Payne & Hamilton for plaintiff in error.

Messrs. Dillon & Nuckolls, for defendant in error:

Plaintiff was negligent, and failed to make the prompt presentment which the law requires.

5 Am. & Eng. Enc. Law, p. 1042; McDonald v. Mosher, 23 Ill. App. 206; Davis v. Hanly, 12 Ark. 645; Brown v. Ferguson, 4 Leigh, 50, 24 Am. Dec. 707; Cox v. Boone, 8 W. Va. 500, 23 Am. Rep. 627.

If the holder of a check fails to present it for payment, when he might do it, until after the bank fails, the drawer is not responsible, if he had funds in the bank for its payment.

Zane, Banks & Banking, p. 432; Purcell v. Allemong, 22 Gratt. 739; Compton v. Gilman, 19 W. Va. 316, 42 Am. Rep. 776.

The time for reasonable presentation begins from the time of delivery to the agent.

5 Am. & Eng. Enc. Law, p. 1042; Gifford v. Hardell, 88 Wis. 538, 43 Am. St. Rep. 925, 60 N. W. 1064; Rosenthal v. Ehrlicher, 154 Pa. 396, 26 Atl. 435.

Pofferbarger, J., delivered the opinion of the court:

A question of commercial law arises on this record. Lewis, Hubbard, & Co., of the city of Charleston, doing a wholesale business in groceries, had, prior to the 24th day of September, 1900, sold goods to the Montgomery Supply Company, doing a retail grocery business in the town of Montgomery, and on that day there was due from said last-mentioned concern the sum of $183.69. On that day W. G. Hubbard, a traveling salesman for Lewis, Hubbard, & Co., was at Montgomery, called upon the Montgomery Supply Company, received from it, not earlier than 4 o'clock P. M. of that day, a check for the amount of the bill, payable to Lewis, Hubbard, & Co., drawn on the Montgomery Banking & Trust Company, a bank in Montgomery, neglected or failed to forward the same to his principal, and went on from Montgomery to call upon other customers of his house, taking the check with him. He received the check on Monday, the 24th day of September, and on Friday, September 28th, the Montgomery Banking & Trust Company failed to open its doors for business, went into the hands of a receiver, and finally paid a small percentage to its depositors. The drawer of the check had ample funds in the bank to pay it, and it presumably would have been paid, had it been presented for payment at any time during banking hours on Thursday, the 27th. It was afterwards sent to the bank through proper channels and protested.

This action was brought by Lewis, Hubbard, & Co. against the drawer of the check, in a justice's court, and went from that court to the circuit court of Fayette county, where judgment was rendered in favor of the plaintiff for the sum of $26.60, the amount received by the defendant as a dividend on its deposits from the assets of the defunct bank. This judgment being substantially one for the defendant, the plaintiff has brought the case to this court on a writ of error.

From the testimony in the case, it appears that Hubbard had authority to collect and to give receipts for his collections, but did not have authority to indorse checks in the name of his principal and receive money thereon. It further appears that, had he promptly mailed the check to his principal, it would have been received by it the following day, and, if discounted at Charleston on the same day and promptly forwarded back to Montgomery within business hours of that day, it would have reached the latter place not earlier than Wednesday morning. The mails left Montgomery for Charleston three times a day; namely, about noon, between 3 o'clock and 5 o'clock P. M. and between 7 o'clock and 8 o'clock P. M. The first two reached Charleston in about one hour's time. By the last one delivery was made in Charleston the next day. The eastbound train took western mail at Montgomery, carried it east, and delivered it to a westbound train which passed Charleston at about 3 A. M. the next morning. The mails from Charleston reached Montgomery twice a day, one at about 6 A. M. and the other between 10 and 11 A. M. It was by the latter one that mail could be posted at Charleston and be received at Montgomery on the same day. If, therefore, the plaintiff was bound by law to exercise the utmost diligence possible under the circumstances to obtain the money on the check, and is precluded from recovery by its failure to exercise such diligence, its case would clearly fail; for it could have had the check presented for payment at Montgomery on Thursday. But, if the law does not demand of the holder of a check the ut-

most diligence and haste in procuring payment of a check by the drawee, the question depends upon the degree of diligence that is required. If such diligence did not require the discounting or depositing of the check at Charleston on the day of its reception at that place by the plaintiff, and it was allowable to deposit at a Charleston bank on the next day, namely, Wednesday, it could not have reached Montgomery until Thursday, unless deposited and forwarded early in the morning, for the last mail from Charleston to Montgomery on that day left not later than 10 o'clock A. M., for it arrived at Montgomery between 10 and 11 o'clock A. M. The mail for that train would probably close by 9:30 o'clock A. M. If the plaintiff was bound to put the check in the hands of the bank in time for that mail on Wednesday, it was necessary, therefore, to do so on Tuesday or at an early hour on Wednesday. If the plaintiff was bound to deposit it on the same day of its reception, and the Charleston bank was not required to forward it until the next day, it would not have reached Montgomery until Thursday, unless mailed at an early hour on Wednesday. If so, and the Charleston bank had the whole of the business day in which to mail it, it would not have reached Montgomery until Thursday. If it had been received at Montgomery by the agent or correspondent of the Charleston bank on Thursday, then the question arises whether the agent or correspondent was bound to present it on the day of its reception, or was entitled to hold it until the next day, Friday. Upon the answers to these questions, to be found in the principles declared by the courts, the correctness of some of the positions taken by the attorneys in the case depends.

In some respects, the rights of the parties to a check, drawn by an individual on a bank, are governed by the principles applicable to the parties to an inland bill of exchange, but not in all respects. Notice of dishonor and nonpayment of a check, and diligence in the presentation thereof, are required only when it is necessary to protect the drawer from loss by reason of the failure of the drawee, holding funds of the drawer sufficient to pay the check. Presumably the check is drawn upon funds in the hands of the drawee belonging to the drawer, and amounts to an appropriation thereof in favor of the payee of the check, and he owes to the drawer the duty of exercising a certain amount of diligence to obtain payment in order to prevent a loss to the drawer by reason of failure of the bank. In other words, if he fails to perform such duty, the loss falls upon himself, and he is barred by law of any right to recover against the maker of the check. If, by delay in presentation, a loss occurs, the payee or holder is deemed to have extended credit to the bank, and must suffer the consequences. Cox v. Boone, 8 W. Va. 500, 23 Am. Rep. 627; Compton v. Gilman, 19 W. Va. 312, 42 Am. Rep. 776; Purcell v. Allemong, 22 Gratt. 739; 5 Am. & Eng. Enc. Law, p. 1030; 2 Parsons, Notes & Bills, pp. 58, 59; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 647, 19 L. ed. 1008.

For the reasons above stated, presentation of the check for payment, at the bank on which it is drawn must be made within a reasonable time, and what is a reasonable time depends upon the situation of the parties with reference to one another and with reference to the bank, and all other material facts and circumstances entering into the transaction. When the drawee and payee are in the same town or city, presentation must be made not later than the next day after the reception of the check, unless there is some understanding or agreement to the contrary, or some circumstance intervenes or is connected with the transaction sufficient to vary the rule; but it is sufficient to present it at any time on the next day within business hours. Alexander v. Burchfield, 1 Car. & M. 75: In that case Tindal, Ch. J., said: "The only way in which I can state the rule to you is this: that, if a party receive a check on a particular day, he may present it at any time during banking hours on the following day to that on which he received it." See also, to the same effect, Moule v. Brown, 4 Bing. N. C. 266; Cox v. Boone, *supra;* Simpson v. Pacific Mut. L. Ins. Co. 44 Cal. 139; Cawein v. Browinski, 6 Bush, 457, 99 Am. Dec. 684; Schoolfield v. Moon, 9 Heisk. 171; Boddington v. Schlencker, 4 Barn. & Ad. 752; Holmes v. Roe, 62 Mich. 199, 4 Am. St. Rep. 844, 28 N. W. 864; Lloyd v. Osborne, 92 Wis. 93, 65 N. W. 859; 5 Am. & Eng. Enc. Law, p. 1042. But when the person receiving the check is at a place different from that of the place of business of the drawee, additional time is allowed. The person receiving it need not forward it for presentment on the day of its reception, but may do so on the next day thereafter, and the person to whom it is forwarded for presentation need not present it on the day of its reception, but may do so on the next day after he receives it. In this case two extra days are allowed, while, in the other, but one is allowed. 5 Am. & Eng. Enc. Law. p. 1042; Moule v. Brown and Holmes v. Roe, *supra;* Prideaux v. Criddle, L. R. 4 Q. B. 455; Griffin v. Kemp, 46 Ind. 172, 176; Burkhalter v. Second Nat. Bank, 42 N. Y. 538; Parsons, Notes & Bills, 72. The reason for this indulgence is well stated by Story on

Bills (§ 290), in discussing the law of notice of dishonor and protest, in which the principle is generally held to be the same. He says: "In the first place, then, it is not by our law necessary in any case to give notice, either by post or otherwise, on the very day on which the dishonor and protest took place, although the holder is at liberty to do so, at his option. He is always allowed by law a whole day for this purpose, and is not compellable to lay aside all other business . . . to devote himself to that particular purpose. For it would be most inconvenient and unreasonable to require such strictness, as it might interfere with other business and duties of quite as pressing an importance; and therefore it is sufficient if he sends notice by the post or otherwise by the next day." The same reason which suffices to give two days, one for reception and the other for presentation, when the payee and drawee are at the same place, justifies the general rule allowing four days when they are at different places.

In view of these principles, the way to a conclusion would seem to be perfectly clear, but for the circumstance of there being no mail from Charleston to Montgomery on the afternoon of Wednesday, the last day allowed by the rule for forwarding the check to Montgomery. Did this circumstance make it necessary to forward the check in the mail leaving Charleston at about 9 or 10 o'clock A. M.? If not, and it was allowable to deposit it in the postoffice within business hours on Wednesday, it could not have reached Montgomery until Thursday. Enough has been stated to clearly demonstrate that the utmost diligence possible is not required. The payee is bound to exercise only reasonable diligence, and need not do that which is contrary to, or variant from, the ordinary and prudent mode of transacting business. But the law does seem to require such action, within reasonble to the parties to an inland bill of extions of convenience, but not of leisure, as is calculated, in view of the possibility of loss by delay, to prevent it. Hence, the two-day rule, allowed for forwarding notices or paper for presentment, is subject to this qualification; namely, that it must be sent by the mail of the second day. If there be more than one mail on that day, it need not go by the first; but, if there be but one, it must go by it, unless it leaves or closes at an unreasonably early hour. The whole of the second day is not allowed, unless the last mail of that day goes at the close of business.

To this point the American authorities seem to be unanimous. They are ably reviewed, and the result clearly stated, by Chief Justice Green, in Burgess v. Vreeland, 24 N. J. L. 71, 59 Am. Dec. 408. In that case the controversy related to presentment, nonpayment, and protest of a note and notice thereof, but the principles governing that subject are applicable to checks when loss occurs by failure to promptly present them. "In the more recent edition of Kent's Commentaries, the rule is stated thus: 'According to the modern doctrine, the notice must be given by the first direct and regular conveyance. . . . This means the first mail that goes after the next to the third day of grace; so that, if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice may, indeed, be sent on Thursday, but must be put into the postoffice or mailed on Friday, so as to be forwarded as soon as possible thereafter.' 3 Kent, Com. 6th ed. 105, 106. And in note a to page 106 the author further states that the rule was laid down too strictly in Lenox v. Roberts, 2 Wheat. 373, 4 L. ed. 264, *viz.*, that notice of dishonor must be put into the postoffice early enough to be sent by the mail of the day succeeding the last day of grace; and that the rule, as it is now generally and best understood in England and in the commercial part of the United States, is that notice put into the postoffice on the next day after the third day of grace, at any time of the day so as to be ready for the first mail that goes thereafter, is due notice, though it may not be mailed in season to go by the mail of the day after the default. This is certainly very high authority on a question of commercial law, and the change in the statement of the principle shows that it was made deliberately and upon examination and reflection. Yet it is worthy of notice that this authority was before this court at the time of the decision in Sussex Bank v. Baldwin, 17 N. J. L. 487. It has since undergone the examination of other American courts without securing their concurrence or approbation. Downs v. Planters' Bank, 1 Smedes & M. 261, 40 Am. Dec. 92; Wemple v. Dangerfield, 2 Smedes & M. 445. In both these cases the rule was held to be that the notice must be in the postoffice in time to go by the mail of the day next after the day of protest, if a mail goes on that day, unless it leaves at an unreasonably early hour. In Beckwith v. Smith, 22 Me. 125, 38 Am. Dec. 290, it was held that the notice must be in the postoffice in season to be carried by the mail of the next day after the note is dishonored. In Chick v. Pillsbury, 24 Me. 458, 41 Am. Dec. 394, it was held by a majority of the court that it is sufficient if notice of the dishonor of a promissory note be put into the mail within a convenient time after the commencement of business on the day succeeding that of

the dishonor. In that case the note was protested in the city of New York on the 29th of November, and on the same day notice was given to the agent of the plaintiff. On the next day notice of dishonor, directed to the defendant at his residence in Bangor, Maine, was put into the postoffice in the city of New York, between 12 o'clock at noon and 8 o'clock at night. So far the facts correspond precisely with the facts of the present case. But it was further proved in the case that there was but one daily mail from the city of New York by which letters would go to Bangor; that this mail closed at 6, and left the city at 7 in the morning, which, in the month of November, would be soon after daylight. The counsel of the defendant insisted that the notice was not mailed in season; that it must be put into the postoffice in season to go by the mail of the next day after dishonor, however early it might depart. And of this opinion was Shepley, J., who, in an elaborate opinion, after an able review of the cases, held that the strictest rule, requiring in all cases that the notice should be mailed in season for the mail of the day next after the dishonor of the note, was sustained by the weight of the authority. And it is remarkable that Justice Kent, notwithstanding the opinion previously expressed, that the party had the whole of the day following the third day of grace in which to mail notice of protest, concludes the note to which allusion has been made by saying that he apprehends that the weight of authority is in favor of the view of the rule as taken by Mr. Justice Shepley. But the majority of the court in Chick v. Pillsbury held that the rule does not require that the notice should be mailed in season to go by the mail of the next day, however early it might close, but that it extends to the allowance of a convenient time after the commencement of business hours on the next day to prepare and despatch the notice; and, inasmuch as the notice was mailed in season to go by the next mail, which left on the day succeeding that of the dishonor after business hours had commenced, the notice in that case was adjudged sufficient. This principle is precisely in accordance with the ruling of this court in the case of Sussex Bank v. Baldwin, *supra*. There is, it is believed, no well-considered adjudication that carries the doctrine further." Burgess v. Vreeland, 24 N. J. L. 71, 77-80, 59 Am. Dec. 408.

Morse on Banks & Banking, in treating of the law of diligence in respect to the presentment of checks, says, in substance, at § 421, the same rules and principles are alike applicable to them and the giving of notice of protest. In the absence of agreement or special circumstances, the time allowed is as has been hereinbefore stated. In subsection (c) 2, of said § 421, he says: "The drawer cannot (except by agreement or under special circumstances as above) be held absolutely beyond the business hours of the day following his delivery of the check, if the bank is in the same place, or, if the bank is in another place, the period of his liability will be until the close of business hours on the first secular day following the receipt of the check by someone in the bank's *locus*, the check having been mailed upon the day following its delivery by the drawer." At § 423 he states the qualification of the rule, under the special circumstances of the departure of the mail at an unreasonably early hour, citing Cox v. Boone, 8 W. Va. 500, 23 Am. Rep. 627, in which the failure of the holder to send the check by the only mail of the day on which ordinarily it should have been sent was excused because it departed at 7:30 o'clock A. M. in the month of February. Had it departed at a reasonable hour, the decision would have been different. It would have been his duty to forward it on the next day after its reception.

The reason for requiring the check or notice to be forwarded on the second day, if it be practicable to do so, is apparent; for otherwise the effect would be to give the party three days instead of two, and without any substantial reason therefor. The holder of a check cannot extend the time allowed him by depositing it in a bank for collection. Alexander v. Burchfield, 1 Car. & M. 75. It must be forwarded or presented on the next day after receipt, if reasonably practicable, whether it be done in person or by agent.

What is an unreasonable hour depends upon circumstances. If the court could say, as matter of law, that 9 o'clock or half past 9 o'clock A. M. is an unreasonable hour, within the meaning of this law, then we could say it would have been sufficient to have forwarded it in the mail of Thursday by depositing it in the postoffice at some time on Wednesday. No evidence was introduced showing the business hours of the banks in Charleston, nor the situation, with reference to the postoffice, of the bank with which the plaintiff transacted its business. Therefore the question submitted to the jury was whether the time of departure of the mail, shown by the evidence, was, under ordinary circumstances, unaffected by any local custom or mode of business, an unreasonable hour. It did not involve any inquiry as to whether, under a given state of facts, a thing could reasonably be done or accomplished. It seems therefore to have presented very little matter of fact,

if any at all, for the consideration of the jury, and to have been substantially a question of law. It has been frequently held that when the only question is the reasonableness of the time, the facts being undisputed, it is one of law for the court. It is rather a question of commercial law than one of mere fact; the exigencies of commercial transactions, and the peculiarities of that kind of business, having established certain rules and regulations by which both court and jury are bound. Taylor v. Sip, 30 N. J. L. 284. Rosenthal v. Ehrlicher, 154 Pa. 399, 26 Atl. 435, holds that, when the only question is that of diligence, and the facts are uncontroverted, it is one of law for the court. See also Cawein v. Browinski, 6 Bush, 457, 99 Am. Dec. 684; Walker v. Stetson, 14 Ohio St. 89, 84 Am. Dec. 362; Linville v. Welch, 29 Mo. 203. In Downs v. Planters' Bank, 1 Smedes & M. 261, 277, 40 Am. Dec. 92, it is said the question is not what inference the jury might draw, but what testimony does the law require in the case? In Prescott Bank v. Caverly, 7 Gray, 217, 66 Am. Dec. 473, Bigelow, J., said: "Ordinarily, the question whether a presentment was within a reasonable time is a mixed question of law and fact, to be decided by the jury, under proper instructions from the court. And it may vary very much, according to the particular circumstances of each case. If the facts are doubtful or in dispute, it is the clear duty of the court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the court to determine whether the time required by law for the presentment has been exceeded or not." Parsons on Notes & Bills, p. 340, says: "Where the facts are few and simple, and the acts or admissions of parties clear and unequivocal, the question is one of law for the court. But where the rights and liabilities of parties depend on contracts, and a variety of transactions and dealings arising therefrom, or where the facts are contradictory and complicated, it is a question for the jury to determine."

In the exercise of the power to determine what is a reasonable time, or whether an act is done within a reasonable time, according to the law merchant, the courts have always taken judicial notice of some of those customs, habits, and practices which may be deemed to be a part of the knowledge and information of the people generally, and also of customs and practices peculiar to banks and other financial and commercial institutions. They have determined repeatedly what is a reasonable hour for presentation of a bill for acceptance at the place of business of a trader, as well as for the presentation of a note or other negotiable instrument at a bank, marking a distinction between the two classes of institutions, due to the known difference in their hours of business. What is a sufficient presentation in point of time at the place of business of a merchant might not be sufficient in the case of a bank. Numerous illustrations of this will be found in the reported cases. In making such distinctions the courts necessarily take judicial notice of the difference in methods of transacting business. In some instances they have expressly declared their power to take judicial notice of such matters. Thus, in Davis v. Hanly, 12 Ark. 645, it is said: "This court will take notice of the general custom and usages of merchants as well as of the 'general customs of our own country,' as matters that are generally known." Wigmore on Evidence, at § 2580, says: "Courts are found noticing, from time to time, a varied array of unquestionable facts, ranging throughout the data of commerce, industry, history, and natural science. It is unprofitable, as well as impracticable, to seek to connect them by generalities and distinctions; for the notoriousness of a truth varies much with differences of period and of place." In the note to this section the author cites a vast number of instances illustrating the proposition. As indicated by his language, the basis of judicial notice is the common notoriety of the thing which the courts judicially observe. While a court cannot take judicial notice of the existence of a bank in any particular place, nor of the peculiar methods of business adopted by any bank, they must presume that every bank operates under some reasonable rules and regulations in the transaction of their business; and that parties, in dealing with them or making themselves parties to commercial paper, contemplated the delay incident to, as well as the promptness designed to be effectuated by, such rules and regulations. They do not expect a bank, handling a large number of important securities or commercial instruments each business day, to give to one any particular or special attention not ordinarily given to others of the same class. It is notorious that, for business purposes, banks open their doors later, and close them earlier, than other institutions, and that, as a rule, in cities and towns of considerable size, they are never open earlier than 9 o'clock A. M. Charleston is a city of considerable proportions, in which there must necessarily be a number of banks, doing business after the manner and customs adopted by banks generally throughout the country. Hence, it requires no strain of judicial cognizance to say that they are not open for business before 9 o'clock A. M. As the evidence dis-

closes that the last mail leaving Charleston for Montgomery must have gone very soon after the banks opened in September, 1900, the forwarding of the check by that mail would have required more than ordinary diligence. A bank is entitled to a reasonable time after the commencement of business in which to perform any given duty. It cannot be expected to lay aside all other matters and give its attention to that one. "Banks would be kept in continual fever if they were obliged to send out a check the moment it was paid in." Lord Ellenborough, in Rickford v. Ridge, 2 Campb. 537. It is not a question of what it is possible for banks to do, but one of what they do, and of what the parties to the paper know to be the custom and practice of banks. Since the mail must have left Charleston between 9 and 10 o'clock A. M., it must have been closed at the postoffice very soon after the banks opened; for some time is required for the preparation of it and for carrying it from the postoffice to the railway station. It is highly probable that this mail closed just about the time the banks opened, and it is reasonably certain that it was closed within a few minutes after the opening of the banks. All this the drawer of the check must be deemed to have contemplated. He was bound to know that the usual method of collecting checks is to indorse them to the banks, to be forwarded by mail for presentment. Both parties, in view of their knowledge of this method of transacting such business, are deemed to have agreed to be bound by the delays incident to this mode of demanding payment. It may be said that both contemplated the possible insolvency of the bank on which the check was drawn, or were bound to know that such a thing might happen; but the drawer, by allowing his money to remain in that bank, and the payee, by accepting the check upon it, each evinced belief in its solvency, and the former a willingness to take the risk thereof, during the reasonable period of time necessary for the presentation of the check in due course of business, by the means which both parties knew the banks generally employ for that purpose.

As long ago as 1853, the supreme court of New Jersey, in Burgess v. Vreeland, 24 N. J. L. 71, 59 Am. Dec. 408, expressed the opinion that a mail closing at half past 9 in the morning would be before usual business hours. If since that time there has been any change in this respect, it cannot be deemed to have been to the contrary of, or in conflict with, this proposition. The tendency is to limit, rather than extend, the business day in all branches of industry and commerce. A bank is not required to take advantage of a mail which closes before, or at the time of, the opening of business. In Chick v. Pillsbury, 24 Me. 458, 41 Am. Dec. 394, it was expressly decided that a convenient time after the commencement of business hours of the day is allowed for the mailing of a notice of dishonor. In Haskell v. Boardman, 8 Allen, 38, it was held that the mailing of a notice of protest at 10 o'clock A. M. was not due diligence; it appearing that the only mail for that day departed at 10 o'clock. It was sent by an individual to a prior indorser for the purpose of binding him. The rule in such case would be different, for the reason that there is no presumption that an individual engaged in business other than banking does not commence business at an early hour. On the contrary, it is a matter of common knowledge that merchants and traders open their places of business at an earlier hour than banks. Moreover, in this instance, the evidence shows the mail must have closed long before 10 o'clock. "What is reasonable time must depend upon circumstances, and, in many cases, upon the time, the mode, and the place of receiving the bills, and upon the relations of the parties between whom the question arises." Dan. Neg. Inst. § 605. That the check in this case was not actually put in course of presentment can make no difference. It is enough to make the drawer liable, that, if it had been, the time allowed by the rule of diligence was not sufficient. Cox v. Boone, 8 W. Va. 500, 23 Am. Rep. 627.

In view of these principles the court clearly erred in giving the following instruction: "The court instructs the jury that, if they believe the plaintiff could, by due diligence, have presented the check in question to the bank upon which it was drawn before it failed, it was the duty of plaintiff to do so; and, if the jury further believe the plaintiff failed to use due diligence in such respect, and its lack of diligence caused the loss of the amount of the check to the defendant, the defendant is not liable to the plaintiff for the amount of the check, but may find for the plaintiff for the sum of $22.60, interest from November 15, 1901." There was no evidence of lack of diligence. On the contrary, the evidence showed that, by the exercise of due diligence, the loss would not have been averted.

An assignment of error is predicated on the action of the court in giving the following instruction: "The court instructs the jury that, if they believe from the evidence that W. G. Hubbard was the collector of the plaintiff and had authority to collect as agent, and as such agent and collector accepted the check of the defendant, his act in so accepting the said check was the act

of the plaintiffs." This, however, is a proper instruction. It was the duty of the agent to forward the check to his principal, and delivery to him was delivery to the principal; but it must have been contemplated that he would promptly forward it, and that the time allowed for presentment would be correspondingly extended. Rosenthal v. Ehrlicher, 154 Pa. 396, 26 Atl. 435; First Nat. Bank v. Buckhannon Bank, 80 Md. 475, 27 L.R.A. 332, 31 Atl. 302; Balkwill v. Bridgeport Wood Finishing Co. 62 Ill. App. 663; Gifford v. Hardell, 88 Wis. 538, 43 Am. St. Rep. 925, 60 N. W. 1064.

The rejection of the following offer of evidence is also complained of: "Here plaintiff offered to prove by witness (W. G. Hubbard) that he stated to S. B. Morgan (manager of defendant), and that Morgan knew, his regular course to be leaving Montgomery on Monday and go up on the C. & O. railroad and back on Friday evening on the same week to Charleston." In this no error was committed, for the materiality of the proposed evidence was not shown. If Morgan knew of this practice, it does not follow that he knew the agent habitually carried checks with him over this route, delivering them to his principal on Friday. Jackson v. Hough, 38 W. Va. 236, 18 S. E. 575.

It is hardly necessary to say that, if a different state of evidence should appear on the new trial to be allowed, the rulings of the court will have to be varied so as to conform thereto. The law here declared is applicable only to the evidence in the trial which resulted in the judgment now under review.

For the reasons stated, the judgment will be reversed. the verdict set aside, a new trial allowed, and the case remanded.

KANSAS SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plff. in Err.,

v.

WILLIAM WIMMER.

(—Kan.—, 84 Pac. 378.)

Carrier—time for passenger to alight.

1. In an action by a passenger against a railway company to recover for injuries which it is claimed were caused by the negligence of the company in starting its train without giving him sufficient time to get off in safety, where the jury find generally for the plaintiff, a special finding by the jury that the train stopped the usual and ordinary length of time will not warrant the court in rendering judgment for the railway company *non obstante veredicto.*

Same—question for jury.

2. In such a case, where the jury, in answer to special questions, find that the train stopped about a minute, which was the usual and ordinary stop at the station where the injury occurred, and that it ordinarily takes passengers about a minute to leave a train, the court cannot say that the time was sufficient. The time required to leave a train depends upon the circumstances. Whether the stop was reasonably sufficient under the circumstances in evidence was a question for the jury to determine.

Carrier—termination of carrier's duty.

3. The duty which a railway company owes to a passenger, to exercise the highest degree of care for his safety which is reasonably practicable, does not cease until the passenger has reached his destination, and left the train.

(January 6, 1906.)

ERROR to the District Court for Smith County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. M. A. Low, W. F. Evans, and Paul E. Walker, for plaintiff in error:

Before this case should have been submitted to the jury, it must not only have appeared that Mr. Wimmer was free from fault in stepping from the train, but it had also to appear that the railway company was guilty of negligence which was the proximate cause of the injury.

Simmons v. Seaboard Air-Line R. Co. 120 Ga. 225, 47 S. E. 570.

The train was stopped a sufficient length of time to enable passengers to leave the train if they were in the exercise of that care which the law requires.

Straus v. Kansas City, St. J. & C. B. R. Co. 75 Mo. 185; Clotworthy v. Hannibal & St. J. R. Co. 80 Mo. 220; St. Louis S. W. R. Co. v. Turner, 33 Tex. Civ. App. 604, 77 S. W. 255; Chicago, B. & Q. R. Co. v. Landauer, 36 Neb. 642, 54 N. W. 976; Brown v. Interurban Street R. Co. 43 Misc. 374, 87 N. Y. Supp. 461; Shealey v. South Carolina

Headnotes by PORTER, J.

Case Note.—Carrier; time allowed passenger to alight.—With reference to the time which must or should be allowed a passenger to enable him to alight with safety, it is generally held that the carrier must allow a "sufficient" or a "reasonable" time. These two words seem to have been used indiscriminately, the tendency of the courts being to employ the one used in the requested instruction on the subject. In Barringer v. St. Louis, I. M. & S. R. Co. 73 Ark. 548, 85 S. W. 94, 87 S. W. 814, however, the

& G. R. Co. 67 S. C. 61, 45 S. E. 119; Harris v. Gulf, C. & S. F. R. Co. 36 Tex. Civ. App. 94, 80 S. W. 1023.

Messrs. E. S. Rice and Mahin & Mahin, for defendant in error:

The question was, What time should the train have stopped on the particular occasion, in order to allow the defendant in error a sufficient time in which to alight?

Luse v. Union P. R. Co. 57 Kan. 361, 46 Pac. 768; Culberson v. Chicago, M. & St. P. R. Co. 50 Mo. App. 556; Sheridan v. Brooklyn City & N. R. Co. 36 N. Y. 39, 93 Am. Dec. 490.

As to what is a sufficient time for a passenger to alight from a railroad train in any given case is a question for the jury.

Gilhooly v. New York & S. Steam Nav. Co. 1 Daly, 197; Culberson v. Chicago, M. & St. P. R. Co. *supra;* McDonald v. Long Island R. Co. 116 N. Y. 546, 15 Am. St. Rep. 437, 22 N. E. 1068; Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Louisville & N. R. Co. v. Abell, 14 Ky. L. Rep. 239; Boikens v. New Orleans & C. R. Co. 48 La. Ann. 831, 19 So. 737; Straus v. Kansas City, St. J. & C. B. R. Co. 86 Mo. 421; Omaha & R. Valley R. Co. v. Chollette, 33 Neb. 143, 49 N. W. 1114; Chicago, B. & Q. R. Co. v. Landauer, 36 Neb. 642, 54 N. W. 976; Murphy v. Rome, W. & O. R. Co. 32 N. Y. S. R. 381, 10 N. Y. Supp. 354; Pennsylvania R. Co. v. Lyons, 129 Pa. 113, 15 Am. St. Rep. 701, 18 Atl. 759; Dunn v. Pennsylvania

trial court modified the plaintiff's requested instruction by changing the word "sufficient" to the word "reasonable," and it was held that there was no error in the modification; that a "sufficient" time, where the passenger acts with reasonable diligence, is but tantamount to giving the passenger a "reasonable" opportunity to alight. In Omaha & R. Valley R. Co. v. Chollette, 33 Neb. 143, 49 N. W. 1114; Raughley v. West Jersey & S. R. Co. 202 Pa. 43, 51 Atl. 597; and Appleby v. South Carolina & G. R. Co. 60 S. C. 48, 38 S. E. 237,—the two words were used interchangeably in separate paragraphs.

In the following cases it was held that the carrier must allow a "sufficient" time to enable passengers to alight in safety: Central R. & Bkg. Co. v. Miles, 88 Ala. 256, 6 So. 696; Carr v. Eel River & E. R. Co. 98 Cal. 366, 21 L.R.A. 354, 33 Pac. 213; Fuller v. Naugatuck R. Co. 21 Conn. 557; Southern R. Co. v. Hobbs, 118 Ga. 227, 63 L.R.A. 68, 45 S. E. 23; Baltimore & O. S. W. R. Co. v. Slanker, 77 Ill. App. 567; Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Toledo, St. L. & K. C. R. Co. v. Wingate, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477; Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332; New Orleans, J. & G. N. R. Co. v. Statham, 42 Miss. 607, 97 Am. Dec. 478; Dorrah v. Illinois C. R. Co. 65 Miss. 14, 7 Am. St. Rep. 629, 3 So. 36; Straus v. Kansas City, St. J. & C. B. R. Co. 75 Mo. 185; Gress v. Missouri P. R. Co. 109 Mo. App. 716, 84 S. W. 122; Onderdonk v. New York & S. B. R. Co. 74 Hun, 42, 26 N. Y. Supp. 310; Flanagan v. New York, N. H. & H. R. Co. 29 N. Y. S. R. 543, 8 N. Y. Supp. 744. Affirmed in 125 N. Y. 773, 27 N. E. 409; Pennsylvania R. Co. v. Kilgore, 32 Pa. 292, 72 Am. Dec. 787.

And, in the following cases, applying this rule, the court used the word "reasonable:" Rutledge v. New Orleans & N. E. R. Co. 63 C. C. A. 596, 129 Fed. 94; Jeffersonville, M. & I. R. Co. v. Parmalee, 51 Ind. 42; Cincinnati, etc., R. Co. v. Richardson, 14 Ky. L. Rep. 367; Louisville & N. R. Co. v. Constantine, 14 Ky. L. Rep. 432; Keller v. Sioux City & St. P. R. Co. 27 Minn. 178, 6 N. W. 486; Murphy v. Rome, W. & O. R. Co. 32 N. Y. S. R. 381, 10 N. Y. Supp. 354; McDonald v. Long Island R. Co. 116 N. Y. 546, 15 Am. St. Rep. 437, 22 N. E. 1068; St. Louis Southwestern R. Co. v. Byers (Tex. Civ. App.) 69 S. W. 1009; Galveston, H. & S. A. R. Co. v. Hubbard, 33 Tex. Civ. App. 343, 76 S. W. 764.

In Imhoff v. Chicago & M. R. Co. 20 Wis. 344, it was said that such "reasonable time" is the time within which persons of ordinary care and prudence, under like circumstances, get off the cars.

In Cullar v. Missouri, K. & T. R. Co. 84 Mo. App. 340, it was said that the time of stoppage should be "reasonably sufficient" to enable passengers to alight.

This general rule is applied to freight trains carrying passengers. Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 19 L.R.A. 313, 33 N. E. 204; Young v. Missouri P. R. Co. (Mo. App.), 84 S. W. 175. And to cable street cars. Finn v. Valley City Street & Cable R. Co. 86 Mich. 74, 48 N. W. 696. And to electric street cars. United R. & Electric Co. v. Weir (Md.) 62 Atl. 588.

Street cars drawn by horses must not only stop a reasonable time for passengers to alight, but the driver must see and know, before starting again, that no one is in the act of alighting or in any other perilous position. Birmingham Union R. Co. v. Smith, 90 Ala. 60, 24 Am. St. Rep. 761, 8 So. 86; Chicago City R. Co. v. Mumford, 97 Ill. 560; Chicago West Div. R. Co. v. Mills, 105 Ill. 63. And this additional duty of seeing and knowing that no passenger is in the act of alighting was held to apply to electric street cars, in Little Rock Traction & Electric Co. v. Kimbro (Ark.) 87 S. W. 121, and Union Traction Co. v. Siceloff, 34 Ind. App. 511, 72 N. E. 266.

Railroad companies must allow a reasonable time to passengers, whether young or old, to leave the cars in safety; and, if the timetables do not allow sufficient time for this purpose, and an injury is thereby occasioned, the company will be liable therefor. Toledo, W. & W. R. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71.

What is a reasonable time is not to be determined by the age or decrepitude of the alighting passenger. Toledo, W. & W.

R. Co. 20 Phila. 258; Texas & P. R. Co. v. Miller, 79 Tex. 78, 11 L.R.A. 395, 23 Am. St. Rep. 308, 15 S. W. 264.

Porter, J., delivered the opinion of the court:

William Wimmer was injured in alighting from a train of plaintiff in error at Athol in Smith county. He brought this action for damages, and recovered a judgment for $1,999, from which the railway company appeals. Mr. Wimmer's ticket was from Alta Vista to Athol, and the train upon which he was a passenger reached Athol at 3 o'clock on the morning of June 23, 1903. He was between seventy-nine and eighty years of age. He had no luggage, except a valise, and was occupying a seat at the rear of the smoking car. As the train approached the station, it slowed up, and Mr. Wimmer inquired of the train porter, and was told that it was his station. He

R. Co. v. Baddeley, *supra*. But regard should be had as to the passenger's age, sex, and physical condition. Straus v. Kansas City, St. J. & C. B. R. Co. 75 Mo. 185. And in Keller v. Sioux City & St. P. R. Co. 27 Minn. 178, 6 N. W. 486, it was said: "As railroad companies usually carry not merely the vigorous and active, but also those who, from age or extreme youth, are slower in their movements than vigorous and active persons, the time of stopping is not to be measured by the time in which the latter may make their exit from the cars, but by the time in which the other class may, using diligence, but without hurry and confusion, alight. Those in charge of the trains are bound to presume that there may be such persons in the cars, and, unless they know there are not, they have no right to start the trains until they have waited long enough to allow such persons to alight; nor, even after waiting a reasonable time for such persons to get off, have they a right to start the trains without using reasonable care to ascertain if there are such persons in the act of getting off."

But if the conductor has reason to believe that any passenger who has reached his destination has not alighted, and, though dilatory, may be in the act of alighting, and he starts his train without examination or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, the company will be liable. Straus v. Kansas City, St. J. & C. B. R. Co. 86 Mo. 421.

However, it is not the duty of the conductor to pass along the train and examine the platform of each coach to see whether there are any persons attempting to get off, before starting his train. Straus v. Kansas City, St. J. & C. B. R. Co. 75 Mo. 185.

And having given a reasonable time for passengers to alight, the employees of the carrier have the right to presume that all passengers desiring to do so have left the cars. St. Louis Southwestern R. Co. v. Turner, 33 Tex. Civ. App. 604, 77 S. W. 255.

If, because of sickness or physical infirmity, a passenger requires assistance and longer time in safely alighting, he should give notice of the same to the conductor. New Orleans, J. & G. N. R. Co. v. Statham, 42 Miss. 607, 97 Am. Dec. 478. And where the passenger so notifies the conductor, then due opportunity to alight in safety must be allowed. Southern R. Co. v. Hobbs, 118 Ga. 227, 63 L.R.A. 68, 45 S. E. 23.

Where a bystander is directed by the conductor to assist in putting an invalid on the train, it must be delayed a reasonable time to permit him to get off in safety. Bishop v. Illinois C. R. Co. 25 Ky. L. Rep. 1363, 77 S. W. 1099. But no duty arises to hold the train for a reasonable time in order that one may alight who assists a passenger aboard a train, intending not to become a passenger himself, but to leave the train after helping the passenger on the cars, unless knowledge of such purpose has been communicated to the company's servants. Sea Board Air Line R. Co. v. Bradley (Ga.) 54 S. E. 69.

The exact length of time to be given must depend very largely upon the circumstances,—a longer time being necessary when there are many passengers to alight than when there are but few; on a dark night, with the station badly lighted, than when there is full light; at a difficult place to alight, than where it is easy. Keller v. Sioux City & St. P. R. Co. 27 Minn. 178, 6 N. W. 486. Where the train is crowded and passengers are occupying the aisles, a longer time is required than when the train is occupied by the ordinary number of passengers. Smalley v. Detroit & M. R. Co. 131 Mich. 560, 91 N. W. 1027.

In Houston & T. C. R. Co. v. Gorbett, 49 Tex. 573, the trial court charged the jury "that it is the duty of a railroad company to stop its passenger trains at each station not less than five minutes, and longer, if necessary, to enable passengers with safety to get on and off, they using reasonable diligence to do so, in accordance with their condition and circumstances." No exception seems to have been taken to this instruction, and the supreme court said that it was "free from any material error."

In each particular case it is for the jury to decide what was a reasonable time to stop the train for the alighting of passengers. McSloop v. Richmond & D. R. Co. 59 Fed. 431; Texas & P. R. Co. v. Nunn, 39 C. C. A. 364, 98 Fed. 963; Central R. Co. v. McKenney, 116 Ga. 13, 42 S. E. 229. And also whether that time was actually given. Smalley v. Detroit & M. R. Co. *supra*; Pennsylvania R. Co. v. Lyons, 129 Pa. 113, 15 Am. St. Rep. 701, 18 Atl. 759; Leggett v. Western New York & P. R. Co. 143 Pa. 39, 21 Atl. 996.

In Illinois C. R. Co. v. Taylor, 46 Ill. App. 141, where, during the first stoppage, all the passengers who were intending to alight had not time to do so, and for this purpose a second stop was made, this was held sufficient to justify the jury in finding that the first stop was unreasonably brief.

testified that he waited until the train stopped, but no longer, and then got off as fast as he could; that he had his grip in his right hand, and held to the railing with his left hand; and that, while in the act of stepping from the lower step, the train started, throwing him off, and he fell on his left hip and side upon the cinder walk. It was dark at the time and there were no lights. The fall fractured the left thigh bone near the hip joint, leaving the leg an inch short and the muscles of the leg somewhat shrunken. Mr. Wimmer's son, who was at the station to meet him, reached the old gentlemen just after the latter fell to the ground.

It is contended by plaintiff in error that the court should have sustained a demurrer to the evidence because no attempt was made to show that the train was started in a negligent manner, and because the proof showed that it started up slowly. This contention is based upon the claim that the petition contained two separate allegations of negligence: First, that the train was not stopped a sufficient length of time; and, second, that it was started in a negligent manner. There is, however, but one act of negligence charged,—the starting of the train without giving plaintiff sufficient time to get off safely. That the demurrer should have been overruled seems so clear as not to require the citation of authorities. The claim that the court should have directed a verdict is based upon practically the same reasons; that is, that plaintiff below admitted that the train started slowly, and the further fact brought out in the testimony of the engineer, a witness for defendant below, who said the train made a slow, gradual start in the ordinary way. But none of this testimony precluded plaintiff below from a recovery upon the negligence of which complaint is made.

The jury, in answer to special questions submitted by the railway company, made the following findings: "(1) What time of the day, June 23, 1903, did the accident occur? Ans. About 3 o'clock in the morning. (2) What was the distance from where plaintiff was sitting in said car to the lower step of said car? Ans. About 7 or 8 steps. (3) What part of the car was plaintiff sitting with reference to the car door that he went out of the car to get off? Ans. Rear end. (4) How long did the train stop, on which plaintiff was riding, at Athol, Kansas, on June 23, 1903? Ans. About a minute. (5) Did the train start slow and gradual? Ans. Yes. (6) Was the plaintiff told before the train stopped that the next station was Athol? Ans. Yes. (7) Did the train make the usual and ordinary stop at said station of Athol? Ans. Yes. (8) Was there any baggage unloaded from said train while it stopped at Athol? Ans. Yes. (9) How many passengers got off of said train at Athol, on June 23, 1903? Ans. Three. (10) How long does it take for passengers to leave a train ordinarily? Ans. About a minute. (11)In what car was plaintiff riding? Ans. Smoker. (12) In what part of car was he riding? Ans. Rear. (13) From what platform of the car did he alight? Was it forward or rear? Ans. Rear. (14) . . . (15) Did the train start with a lurch or jerk? Ans. No. (16) Did the plaintiff know the train was approaching Athol before it stopped? Ans. Yes. (17) Did the porter or someone of the train crew inform the plaintiff in answer to his question as the train was approaching the station of Athol, that the next stop was Athol? Ans. Yes, by someone supposed to belong to the train crew. (18) Did the plaintiff sit in the last seat of the car, next to the door by which he left the car? Ans. Yes. (19) How many passengers did the conductor of the train on which plaintiff was riding have for Athol? Ans. Three. (20) How many persons alighted from the train before the conductor signaled the engineer to proceed out of town? Ans. Two or more. (21) Were there three persons standing by the side of the train when the conductor signaled the engineer to go ahead? Ans. Three or more." It is urged that the court erred in refusing to render judgment in favor of plaintiff in error upon these findings.

The main contention of plaintiff in error is that, by proof that the train made the ordinary stop at this station, the burden was placed upon the defendant in error to show that, by reason of some peculiar or particular circumstances, the ordinary stop was not sufficient. On the contrary, it is contended that where the passenger shows he was without fault, that he made no unnecessary delay, but attempted to get off as quickly as he could, and was not given sufficient time to do so safely, and was injured by reason of the train starting without giving him enough time to alight, he is entitled to recover. Plaintiff in error cites Straus v. Kansas City, St. J. & C. B. R. Co. 75 Mo. 185, as follows: "If the train was stopped a sufficient length of time to enable plaintiff to conveniently alight, and, without any fault of the company's servants he failed to do so, and the conductor, not knowing, and having no reason to suspect, that plaintiff was in the act of alighting, caused the train to start while he was so alighting, then the company would not be liable." This is cited in support of the proposition that, if the train stopped the ordinary length of time, the railway company would not be liable. The authority does not

bear out the contention of plaintiff in error here. Whether the train stopped that night at Athol a sufficient length of time to enable defendant in error, by the exercise of ordinary care and diligence, to get off in safety, was the very question to be determined by the jury. Chicago B. & Q. R. Co. v. Landauer, 36 Neb. 642, 54 N. W. 976, cited by plaintiff in error, is an extreme case, and the dissenting opinion by Chief Justice Maxwell states the law in accordance with the weight of authorities, in our opinion. Some courts hold the law to be that the train must be stopped a reasonable length of time. In the case of Harris v. Gulf, C. & S. F. R. Co. 36 Tex. Civ. App. 94, 80 S. W. 1023, it is held that when this is done, and the train started properly, the railway company is not liable, even though the train men might have discovered the dangerous position of the passenger.

The evidence in this case upon the part of the train men was that the train stopped about a minute. The jury made a finding to this effect. In order to warrant the court in rendering judgment upon the findings, it must have declared, as a matter of law, that to stop this train at the time and place and under the circumstances in evidence about a minute was a sufficient time. This no court would be justified in doing, nor could the court say that because the jury found that the train stopped the usual length of time to permit passengers to get off and on the train, and to load and unload baggage and express matter, the time was sufficient. Whether the stop was reasonably sufficient was for the jury to determine, and by their verdict they found that on this occasion it was not. In Luse v. Union P. R. Co. 57 Kan. 361, 364, 46 Pac. 768, the jury found that the train stopped the usual length of time to permit passengers to get off and on, and the court sustained a motion for judgment in favor of the railway company *non obstante veredicto*. This court, in reversing the case, said: "The findings show that the defendant was guilty of ordinary negligence in starting its train before the plaintiff had time to alight therefrom, and that she exercised due care in attempting to leave it and in stepping therefrom just as it was starting, and before she had knowledge that it was in motion. The care of her babe and the entry and departure of other passengers retarded her egress, but the jury must have found that she was not at fault for the delays occasioned thereby. It is the duty of a railroad company to afford a sufficient time to passengers to alight in safety by the exercise of reasonable care and diligence on their part. . . . The mere fact that the train stopped the usual length of time is not sufficient to show negligence of the plaintiff nor due diligence of the defendant; for the circumstances may have required a longer stop on that day than usual, and it was a question for the jury to determine whether the stop was reasonably sufficient or not." In the above case the court quotes approvingly from Keller v. Sioux City & St. P. R. Co. 27 Minn. 178, 6 N. W. 486, the rule laid down by Chief Justice Gilfillan, as follows: "When the cars stop at a passenger's place of destination, it is his duty to leave the car without unnecessary delay, and the company's to give him a reasonable opportunity to do so with safety. The exact length of time to be given must depend very largely upon circumstances. . . . It certainly would not be permissible for them to be so reckless of the lives and limbs of passengers as to start the trains when they know, or, with reasonable care, might know, that passengers are in the act of alighting." In Washington & G. R. Co. v. Harmon, 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557, it is said: "A railway company being bound to deliver a passenger, its failure to stop long enough to enable him to alight with safety is a neglect of duty which involves liability for injuries resulting therefrom." See also Atchison, T. & S. F. R. Co. v. Hughes, 55 Kan. 491, 498, 40 Pac. 919; Brooks v. Boston & M. R. Co. 135 Mass. 21; Fairmount & A. Street Pass. R. Co. v. Stutler, 54 Pa. 375, 93 Am. Dec. 714; McDonald v. Long Island R. Co. 116 N. Y. 546, 15 Am. St. Rep. 437, 22 N. E. 1068; Cullar v. Missouri, K. & T. R. Co. 84 Mo. App. 340. It is clear, therefore, that the court did not err in denying the motion for judgment upon the special findings.

Complaint is made that certain instructions requested by plaintiff in error were refused. These instructions were not signed by the party asking them, as required by § 275 of the Civil Code (Gen. Stat. 1901, § 4722), and the refusal is not a ground of error. Douglass v. Geiler, 32 Kan. 499, 4 Pac. 1039; Tays v. Carr, 37 Kan. 141, 14 Pac. 456; Morisette v. Howard, 62 Kan. 463, 63 Pac. 756; Craig v. Frazier, 127 Ind. 286, 26 N. E. 842. We have examined the instructions, however, and find no error in them. Instruction No. 7 is one which is complained of as especially erroneous. The particular part of the charge objected to is as follows: "A railway company, in the conduct and management of its train, is required to employ agents who will faithfully perform their respective duties and use such means and foresight in providing for the safety of passengers as persons of the greatest care and prudence usually exercised in similar cases; and this duty continues until the passenger reaches his destination and has alighted from the train." This instruction states

the law correctly. It cannot be that the duties which a carrier owes to a passenger cease before the passenger has left the train. In Texas & P. R. Co. v. Miller, 79 Tex. 78, 11 L.R.A. 395, 23 Am. St. Rep. 308, 15 S. W. 264, a similar instruction was held proper. The court in that case says: "We are of opinion that, in reference to the movement of a train at a station, as well as on the journey, the degree of care declared by the charge is required of all passenger carriers." In Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 50 N. E. 713, it is said: "A carrier must use the highest degree of care which is reasonably practicable, to provide its passengers with a safe passage from the train." See also Terre Haute & I. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168; Leggett v. Western N. Y. & P. R. Co. 143 Pa. 39, 21 Atl. 996; North Chicago Street R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958; 6 Cyc. Law & Proc. pp. 611, 612, and cases cited. The time required to leave a train depends upon the circumstances. "For instance, a longer time would be required when there are many passengers to alight than when there are but few; in a dark night, with the landing-place badly lighted, than when there is full light; at a difficult place to alight, than where it is easy. And as railroad companies usually carry not merely the vigorous and active, but also those who, from age or extreme youth, are slower in their movements than vigorous and active persons, the time of stopping is not to be measured by the time in which the latter may make their exit from the cars, but by the time in which the other class may, using diligence, but without hurry and confusion, alight." Keller v. Sioux City & St. P. R. Co. *supra*; 5 Am. & Eng. Enc. Law, p. 577.

This instruction, of course, is to be considered in connection with the charge generally in which the jury were instructed fully as to contributory negligence, and that if plaintiff below had sufficient time to get off in safety, and did not do so, but negligently remained upon the train until it started, and then attempted to get off, and was injured, he could not recover. One of the train men in this case testified that it takes from 10 to 15 seconds for a passenger to leave a car under ordinary circumstances. This might be true in broad daylight as to some passengers. It frequently happens that passengers in their haste are out upon the platform before the train comes to a stop and step off at once. In this case it was at 3 o'clock in the morning, in the dark, with no lights at the station, and the passenger an old man, eighty years of age. To say that he could or should have gotten off in less than one minute seems, under the circumstances, hardly reasonable. Neither the conductor nor the porter of the train was near the place when he attempted to alight. The conductor was at the rear of the chair car, next the smoking car, and the porter was at the rear of the train. None of the train men were aware that a passenger had been injured until informed of it next day. Under the circumstances the jury seem to have been warranted in finding that plaintiff below was not afforded sufficient time in which to leave the train safely, and that his injuries resulted therefrom.

The judgment will be affirmed.

All the Justices concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

EDWARD FRANKLIN
v.
ELLEN FRANKLIN.

(190 Mass. 349, 77 N. E. 48.)

Divorce—desertion.

Refusal by an English woman to accompany her husband upon his emigration to this country to better his condition in life, without other excuse than disinclination to leave her native land, is desertion which will entitle him to a divorce.

(February 27, 1906.)

Case Note.—Refusal of wife to follow husband, on change of domicil, as desertion. The question whether or not a wife's refusal to emigrate with her husband to a foreign country constitutes desertion entitling him to a divorce seems to be squarely decided for the first time in FRANKLIN v. FRANKLIN. The declaration of the court in Bishop v. Bishop, 30 Pa. 412, that the refusal of a wife to accompany her husband from England to America did not constitute wilful and malicious desertion so as to entitle him to a divorce, must be regarded as a *dictum* merely, since the suit for divorce was dismissed for lack of jurisdiction.

So, the declaration in Hair v. Hair, 10 Rich, Eq. 163, that the husband has the right, without the consent of the wife, to establish his domicil in any part of the world, and that it is the duty of the wife to follow his fortunes wheresoever he may go, can hardly be deemed an authority on the question of the wife's duty to accompany her husband to a foreign country, since this question was not before the court, the husband in the case under consideration having removed simply from one state to another. And in that case, also, the suit was brought by the wife, for alimony, on the ground that the husband had deserted her.

REPORT by the Superior Court for Plymouth County for the opinion of the Supreme Judicial Court after a ruling in libellee's favor of a proceeding to secure a divorce on the ground of desertion. Decree for libellant.

The facts are stated in the opinion.

Mr. **Percy A. Bridgham**, for libellant:

A man may change his domicil, and, if his wife refuses to follow him, it is desertion.

Hunt v. Hunt, 29 N. J. Eq. 96; Angier v. Angier, 7 Phila. 305.

Knowlton, Ch. J., delivered the opinion of the court:

The libellant and his wife are natives of England, where they were married in 1874, and where several children were born to them. The libellant, being a skilful mechanic came to America "to better his condition in life" in 1891, and he has remained here ever since. His wife refused to accompany him, and he has not seen her since their separation. Some of their children have joined him here. He testified that on two occasions after his arrival in America he sent her sums of money sufficient to defray the expense of bringing her and the children who were then with her to America in a comfortable and respectable manner. Once she kept the money, but refused to come, and on the other occasion she refused to come, and returned a portion of the money. There is an averment in the libel that the libellant has continuously resided

A similar statement of the rule is made in Re Bye, 2 Daly, 525, where the court says: "It is not in the power of a man's wife or family to control his free right to fix his residence and place of permanent abode in any part of the world to which his interests or his inclination may lead him. It is the wife's duty to follow the fortunes of the husband; to go 'whither he goeth' and abide in that place where it is most convenient for him to enjoy her society, and where he is able and willing to make provision for her support and that of his children." In this case the husband, a native of Holland, had come to the United States, and had been employed for fifteen years as a mariner on American vessels, his wife refusing to follow him to this country because of her dread of venturing on the ocean, notwithstanding his solicitations that she should do so. But the question to be decided was not whether the wife's refusal constituted a desertion, but whether the husband's domicil was in the United States so as to entitle him to naturalization, or in Holland with his family.

That ordinarily the husband may change his domicil at pleasure, and that the wife is bound to follow him, is well settled. Hardenbergh v. Hardenbergh, 14 Cal. 654; Kennedy v. Kennedy, 87 Ill. 250; Walton v. Walton, 114 Ill. App. 116; Chretien v. Chretien, 5 Mart. N. S. 60; Gahn v. Darby, 36 La. Ann. 70; Messenger v. Messenger, 56 Mo. 329; Hunt v. Hunt, 29 N. J. Eq. 96; Horn v. Horn, 17 Pa. Super. Ct. 486; Beck v. Beck, 163 Pa. 649, 30 Atl. 236; Cutler v. Cutler, 2 Brewst. (Pa.) 511.

And an antenuptial promise not to take the wife away from the neighborhood of her mother and friends is held not to affect the husband's right to change his domicil, or the wife's duty to follow him. Hair v. Hair, 10 Rich. Eq. 163.

But this right is not without its limitations. Nelson, on Divorce and Separation, vol. I., § 68, p. 110, says that the limits of the doctrine, so far as established by adjudications, are not satisfactory to any line of reasoning, and expresses the opinion that nothing should excuse the wife from following the husband to the new domicil which would not justify her in separating from him. This rule is also laid down in Messenger v. Messenger, 56 Mo. 329, where the court said that a wife is bound to follow the fortunes of her husband, and to live where he chooses to live, and in the style and manner which he may adopt, unless her refusal to follow him is justified by such cruelty and indignities as would entitle her to a separation, and that the fact that the husband had no house to take her to, and that she was comfortably situated where she was, was not sufficient to justify the refusal.

But the majority of the cases seem to establish a more liberal rule than this in favor of the wife. It is stated in many cases that the husband's change of residence must be reasonable, and that he is bound to provide a suitable home for the wife before he can insist that she follow him. Thus, in Haymond v. Haymond, 74 Tex. 414, 12 S. W. 90, where the husband had removed to Central America, and had requested his wife to follow him there, the court said, in regard to the doctrine that the husband has a right to choose the domicil: "While this rule has been held to apply to emigration to a foreign government as well as a sister state, other principles, involving, among others, questions of health and conditions of civilization, may limit its application. There are many places to which the wife of an inhabitant of this state would not be required to change her domicil, or be held guilty of the desertion of her husband so as to entitle him to divorce for that cause." Since the facts in this case were held to show an abandonment of the wife by the husband, the court considered it unnecessary to pass upon the effect of the wife's refusal to follow her husband.

So, in Angier v. Angier, 7 Phila. 305, though the suit was decided against the wife, the court said that the husband was not entitled to exercise an entirely arbitrary power in choosing the family domicil; that doubtless the wife would not be bound to follow him if her health would not per-

in this commonwealth for the last five years, and we infer from the report that there is no question on this part of the case. On these facts the libellant asked for a decree of divorce nisi for desertion; but the judge declined to order a decree, and ruled that the libellee, in thus refusing to follow her husband to this country, was not guilty of desertion, and reported the case to this court. If the ruling was wrong and the evidence warrants it, a decree nisi for a desertion is to be entered.

If the libellee was guilty of desertion, there is no question as to the jurisdiction of the court. Jurisdiction depends upon the situs of the libellant, and not upon place of the marriage, or of the commission of the offense against the marital relation. Under our statute, "if the libellant has lived in the commonwealth for five years last preceding the filing of the libel, . . . a divorce may be decreed for any cause allowed by law, whether it occurred in this commonwealth or elsewhere, unless it appears that the libellant has removed into this commonwealth for the purpose of obtaining a divorce." Rev. Laws, chap. 152, § 5. If, therefore, the evidence warrants a finding of utter desertion by the libellee, whether it occurred in England or America, and if it continued for three consecutive years next prior to the filing of the libel, a divorce should be granted. Rev. Laws, chap. 52, § 1.

The fundamental fact to be considered is that the husband, as head of the family,

mit the removal, since the very removing of her, to the injury of her health, would be legal cruelty.

And the wife is under no obligation to abandon a home, and means of support, and children of a former marriage, to follow her husband to a place where he has provided no home and has no visible means of support. Phelan v. Phelan, 35 Ill. App. 511. Affirmed in 135 Ill. 445, 25 N. E. 751.

And in Gleason v. Gleason, 4 Wis. 64, it was held that the refusal of a wife to accompany her husband upon his removal from Massachusetts to Wisconsin was insufficient to prove desertion; that it must be shown that her refusal was unreasonable. The court said that it must at least be shown that the bodily health of the wife was sufficient to withstand the fatigues and hardships of the journey to the new home.

So, the refusal of a wife to follow her husband to another state, on the ground that she was not willing to live near his relatives, was held, in Powell v. Powell, 29 Vt. 148, not to constitute desertion. The court said: "While we recognize fully the right of the husband to direct the affairs of his own house and to determine the place of the abode of the family, and that it is, in general, the duty of the wife to submit to such determinations, it is still not an entirely arbitrary power which the husband exercises in these matters. He must exercise reason and discretion in regard to them. If there is any ground to conjecture that the husband requires the wife to reside where her health or her comfort will be jeopardied, or even where she seriously believes such results will follow, —which will, almost of necessity, produce the effect,—and it is only upon that ground that she separates from him, the court cannot regard her desertion as continued from mere wilfulness. Any man who has proper tenderness and affection for his wife would certainly not require her to reside near his relatives if her peace of mind were thereby seriously disturbed. . . . And, in the present case, as the wife alleges the vicinity of the husband's relatives as a reason why she cannot consent to come to Milton to live with him, and as everyone at all experienced in such matters knows that it is not uncommon for the female relatives of the husband to create, either intentionally or accidentally, disquietude in the mind of the wife, and thereby to destroy her comfort and health often, and as there is no attempt here to show that this is a simulated excuse, we must treat it as made in good faith; and, if so, we are not prepared to say that she is liable to be divorced for acting upon it."

And, in Albee v. Albee, 43 Ill. App. 370, Affirmed in 141 Ill. 550, 31 N. E. 153, the court said it was not to be laid down as settled law that a wife must live in the house of her mother-in-law or be divorced from her husband for desertion, and, where the husband failed to provide any other home than the house of his mother, it was held that the wife was not guilty of desertion in refusing to live there, even though she had agreed before marriage to do so. But it was also held that the decree in favor of the husband must be reversed because of lack of jurisdiction.

So, in Horn v. Horn, 17 Pa. Super. Ct. 486, the fact that a wife did not follow her husband to a new domicil was held not conclusive of her intention to desert him. And where the husband removed to a distant city and the wife did not accompany him, but remained at the old home, in order that her daughter might complete her education, but promised to go to her husband at the end of that time, and the husband had not provided a suitable and proper home in his new place of residence, and had failed to send his wife money, when requested, to pay rent, etc., the evidence was held not sufficient to sustain a charge of desertion by the wife.

And where the husband left his home without cause, and went to live in another house, and, after an absence of three months, returned and requested his wife to go to the new home, but, at the same time, told her that she need not expect any happiness, for she would have none, and that he might take his family where he

legally responsible for its support, has a right to choose and establish a domicil for himself and his wife and children. A refusal of the wife to stay with him in that domicil, without a sufficient reason for her refusal, is desertion. This right of the husband is not limited to the state or country in which the parties live at the time of their marriage, but, in these days of easy communication between different countries, and different parts of the same country, he may exercise it reasonably, in a way which will change his citizenship and allegiance. So far as he personally is concerned, if his duties to his wife are left out of consideration, this right is doubtless absolute. But in reference to the rights, duties, and liabilities of the parties in their marital relations it is not absolute. It should be exercised with some reference to the welfare of the wife. We can conceive of a choice of a domicil so plainly unreasonable and improper, in reference to the health and welfare of the wife, that the selection of it, and an attempted enforcement of his general marital right to have her share it with him, would be extreme cruelty, such as would justify her in declining to accompany him or follow him to such a place of abode. His wife's marital right and his duty as a husband would come in conflict with the exercise of his general right to choose his own domicil, if he attempted to exercise the right in such a way as would be utterly and grossly unreasonable because of the peril to her life and health, and perhaps because of her deprivation of other things essential to her welfare. But the determination of such matters must, in the first instance and ordinarily, be left to the husband, upon whom rests the legal duty to provide for his family, as well as for himself. The wife cannot legally refuse to accompany him in a change of domicil unless such a change is plainly unreasonable. See Keech v. Keech, L. R. 1 Prob. & Div. 641; Hair v. Hair, 10 Rich. Eq. 163; Hardenbergh v. Hardenbergh, 14 Cal. 654. There is nothing in the present case to show a legal excuse for the wife's refusal. There was nothing very difficult in the distance, or in the time required for the journey, or in the discomfort attending it. The removal from the old home to the new one would have involved no change of race or language in the wife's companions. It included departure from her native land and separation from the friends of her youth. But these are no more than common experiences nowadays. In these years of emigration, to hold that a wife ought not to be required to accompany her husband from England to America, if his interests and those of his family would be greatly promoted by such a change, would impede social progress and individual advancement. We are of opinion that the ruling as matter of law that the libellee was not guilty of desertion was erroneous. In our opinion the evidence would warrant a finding that, without other excuse than her disinclination to leave her native land, she wilfully refused to accompany her husband to America when his interests and those of his family required such a change of domicil, and that she persisted in this refusal. This would justify a finding of utter desertion on her part.

The alleged desertion referred to in Bishop v. Bishop, 30 Pa. 412, occurred nearly fifty years ago, when conditions were very different from those at present, and the decision was made to depend upon a question of jurisdiction under the statutes of Pennsylvania.

Decree for libellant.

pleased, to Europe or Illinois, that they must go where he said, and see whom he pleased, and that none of their friends should come to see them, that he would have his authority if he died for it, and that they must obey and respect him, go when he said, and come when he said,—the wife was held justified in refusing to follow him. Walker v. Laighton, 31 N. H. 111. This was an action of assumpsit to recover for goods furnished the wife while living separate from her husband.

So, in Vosburg v. Vosburg, 136 Cal. 195. 68 Pac. 694, it was held that, under the Civil Code, providing that the husband may choose any reasonable place or mode of living, and, if the wife does not conform thereto, it is desertion, the husband's right was limited to choose any reasonable place; and that where husband and wife had lived for years in a suitable home near the friends and family of the wife, and, although he had often suggested a desire to change their home, and had urged the matter upon the wife, but she had refused to give her consent, yet he did not choose a new home and offer it to her until he had, by his conduct, given her cause for divorce, the wife was not guilty of desertion in refusing to follow him to such home.

It has been held, also, that the husband must state to his wife in plain, unequivocal terms the alternative of a compliance with his wishes or a surrender of all her claims to his support and protection,—a proposal of removal stated in such terms that she might consider it a proposition addressed to her discretion simply not being sufficient. Hardenbergh v. Hardenbergh, 14 Cal. 654.

ARKANSAS SUPREME COURT.

J. T. MILLER, Appt.,
v.
RHODA NUCKOLLS.

(— Ark. — 91 S. W. 759.)

Instructions—error—waiver.

1. Error in the remarks of the presiding judge to the jury is waived if not referred to in the motion for new trial.

Evidence—error—waiver.

2. Failure to specify, in the motion for new trial, the particular error complained of in the admission or rejection of evidence, constitutes a waiver thereof.

Libel—proof.

3. Proof of the charge substantially as laid is necessary to recover in an action for libel or slander.

Same—instructions—variance.

4. An instruction permitting the jury to find for plaintiff in a slander case for charging a woman with fornication, if they find that defendant used such words as amount to charging plaintiff with fornication, without limiting them to those set out in the complaint, is not misleading if the evidence shows the use of no words except those set out.

Libel—communication to peace officer—privilege.

5. A communication to a peace officer to aid in the detection of crime, is privileged only when made in good faith, not when made recklessly, with the intention to gratify personal malice toward the person affected by the charge, or his family,—especially where no facts are stated, but mere rumors, that might easily have been ascertained to be untrue.

Trial—remarks of counsel—rebuke.

6. That the court rebuked improper remarks by counsel to the jury in a quiet manner merely is not reversible error, where the objecting party offered no instructions requiring them to disregard the remarks.

Same—prejudicial remarks.

7. Permitting counsel to state to the jury, in an action for charging a girl with fornication, that one guilty of making such charge is not fit to live in the county, is not reversible error.

(November 11, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for Independence County in favor of plaintiff in an action brought to recover damages for publication of a libel and slander. Affirmed.

Statement by **Riddick, J.**:

This is an appeal from a judgment in favor of Rhoda Nuckolls against J. T. Miller for the sum of $2,000 in an action for slander and libel. The complaint contained two causes of action. The first alleged, among other matters, that the plaintiff was a single and unmarried woman, and that

Case Note.—Privilege of informal communication with respect to criminal charge.—The right to exemption from liability for libel or slander growing out of an informal communication made to an officer of the law with respect to the misconduct or criminal offense of another, on the ground that such communication was privileged, seems to depend on the question whether it was made in good faith, in the discharge of a duty to the public, to forward legal investigation, or for some other justifiable purpose, or whether it was made to vent malice or spite.

Thus, declarations charging another with robbery, made to a neighbor whom the defendant consulted for suggestion as to the detection of the robber, are privileged communications if made in good faith and for the purpose of detecting the criminal. Eames v. Whittaker, 123 Mass. 342. If this is true of communications made to a neighbor, it would seem, *a fortiori*, that it would be true of communications made to an officer.

So, statements charging theft of money from a store, made to a body of prominent merchants assembled in secret to consult as to the best mode of recovering the money and detecting the thief, and elicited from the informant upon being urged to tell as a matter of duty and as a means of aiding in the detection of the offender, and similar statements made to officers of the law, for the same purpose, are privileged, and will not support an action for slander. Grimes v. Coyle, 6 B. Mon. 301.

Information given detectives connected with the police department, in regard to the larceny of a bicycle, and a statement of the suspicion that a certain woman, whose name is not known, is the thief, with the reasons for such suspicion, are privileged. Shinglemeyer v. Wright, 124 Mich. 230, 50 L.R.A. 129, 82 N. W. 887. It is clearly implied that this is conditional upon the statements being made without malice.

A reply that "it seems a great deal worse, being done by one's own family," thereby referring to a son, who, it was claimed, had attempted to commit murder, and made in the presence of a constable and another, who were in search of the one who had attempted to commit the crime, and in answer to a statement by the latter to the effect that it was pretty rough to be shot down in one's own house, is privileged under the rule that it was made in good faith, to forward legal investigation. Cristman v. Cristman, 36 Ill. App. 567.

A letter written to a mayor by a resident of the city, charging a policeman with misconduct, is a privileged communication; but, if it contains strong and abusive language as to the conduct of the officer, an inference of malice may be created and the privilege destroyed. Tyree v. Harrison, 100 Va. 540, 42 S. E. 295.

If the communication is not made to an officer for the public good, one cannot claim

the defendant, maliciously intending to injure her good name and reputation in the community, did utter and publish of and concerning her certain false, defamatory, and scandalous matter, to wit: "There has been a secret burial of a child at Hopewell, and there is no doubt about its being Miss Rhoda Nuckolls'." Again, that he said, "Miss Rhoda Nuckolls has given birth to a child, and it was secretly buried at Hopewell;" and that he also said to E. J. Peters, "Did you hear of the secret burial at Hopewell? There is no doubt but what it was Rhoda Nuckolls'." It was further lleged that on each occasion the defendant meant by the language used to charge plaintiff with the offense of fornication, to her damage in the sum of $7,500. For the second cause of action the plaintiff alleged that defendant, intending to injure her good name and character, published about her the following defamatory and libelous matter, to wit:

Newark, Ark., May 18, 1903.

Esq. C. P. Pickens,
Dota, Ark.

Dear Sir:—

You no doubt have heard before now that, agreeable to public gossip, Miss Rhoda Nuckolls did, in the latter part of the winter, give birth to a child, and whether you have ever learned or not that the child was destroyed and secreted about or in the old warehouse used by Mr. Nuckolls as a warehouse and bedroom. That the same child was kept secreted in the warehouse until decomposition was so far advanced that considerable stench was created about the building, so much so that questions were asked concerning the cause, and to the questions would come the answer that it was caused by rotten onions, and it was said that when it could no longer be kept about the place that Nuckolls, Buck Crigler, and Will Osborne had taken it to the graveyard early one morning and dug a hole as deep as they could without getting down in it, and buried it. Now this taken place the day that Will Thornton's wife's grave was dug, and Buck Crigler still at the graveyard when the crowd got there to dig Thornton's wife's grave, and help with the work of digging of the grave. I call your attention to this matter because you are guardian of the law, and that it should be looked into no one will deny, and even if it was Mr. Nuckolls, the officers of the law should take the matter up and sift it, and see if there is any foundation for the report. It is a fact that the man named did go and bury a child on the morning named. Then whose child was it? If there is anything in it I aim to see that it is dug up if I can get it done. Not that I want to persecute the woman, but that contemptible scoundrel Nuckolls, I have almost prayed for some way that I might get revenge out of him, and I do hope that I have got it now. I have learned that that that blk. smith there made the box the child was put in. Mr. Frank Pierce could show where it was put in the graveyard, so I am told.

I think the matter should be investigated.

Very respectfully,
J. T. Miller.

that it is privileged. Thus, a statement that a certain butcher, naming him, had killed and was selling a steer which had been run over by the train and had its leg broken, and that it had a running sore or cancer on its leg, made to a mayor and city marshal whom the one making the declaration merely casually met, and also to others who were present, is slanderous, and exemption cannot successfully be claimed on the ground that the statement was made for the public good. Bigner v. Hodges, 82 Miss. 215, 33 So. 980.

And a declaration by one who had no personal interest in or knowledge of the matter, made to a city marshal on the street, to the effect that he and the one from whom it was claimed money had been stolen by a young woman guest had talked the matter over, and the former had told the latter that he knew the girl had taken the money the minute he heard of its disappearance; that everywhere she goes money disappears, and that she is an adventuress of the first water, and destined to become a noted crook,—is not a privileged communication, exempting the one making such statement from liability for slander. Hancock v. Blackwell, 139 Mo. 440, 41 S. W. 205.

A statement made to a public officer in the presence and hearing of other persons, charging a woman with being an abandoned character, and that defendant would like to get her out of his way, but did not wish to resort to the law to put her out of his house, was not made for the purpose of preventing a crime or for the protection of the one making the statement, and therefore was not privileged. Stewart v. Major, 17 Wash. 238, 49 Pac. 503.

And if one, in the presence of a police officer, wantonly and maliciously charges another with taking the former's money, he cannot claim protection against an action for slander on the ground that the statement was a privileged communication. Robinson v. Van Auken, 190 Mass. 161, 76 N. E. 601.

Cases upon the question as to privilege of statements made upon application for a warrant of arrest or in other formal proceedings are not included in this note.

The defendant denied that he uttered the words alleged as slander. He admitted the writing, but claimed that it was made in good faith to an officer of the law, and was privileged. On the trial the jury returned a verdict of $1,000 for slander and $1,000 for libel, and judgment was rendered accordingly. Defendant appealed.

Mr. **Gustave Jones**, for appellant:

The letter was an absolutely privileged communication.

Lister v. Perryman, L. R. 5 Exch. 365; Torrey v. Field, 10 Vt. 353; Thorn v. Blanchard, 5 Johns. 508; James v. Boston, 2 Car. & K. 4; Harrison v. Bush, 5 El. & Bl. 344; 1 Jaggard, Torts, p. 529.

Information furnished a magistrate is privileged.

Hastings v. Lusk, 22 Wend. 410, 34 Am. Dec. 330; Shock v. M'Chesney, 4 Yeates, 507, 2 Am. Dec. 415; McMillan v. Birch, 1 Binn. 178, 2 Am. Dec. 426; Bunton v. Worley, 4 Bibb, 38, 7 Am. Dec. 735; Jarvis v. Hatheway, 3 Johns. 180, 3 Am. Dec. 473; Hardin v. Cumstock, 2 A. K. Marsh. 480, 12 Am. Dec. 427; Stackpole v. Hennen, 6 Mart. N. S. 481, 17 Am. Dec. 187.

Communications made to public officials having power to remedy the evils complained of are privileged.

Howard v. Thompson, 21 Wend. 319, 34 Am. Dec. 240; Smith v. Kerr, 1 Edm. Sel. Cas. 193; Hosmer v. Loveland, 19 Barb. 116; Vogel v. Grauz, 110 U. S. 311, 28 L. ed. 158, 4 Sup. Ct. Rep. 12; Reid v. McLendon, 44 Ga. 156; Bunton v. Worley, *supra;* Kidder v. Parkhurst, 3 Allen, 393; Vanderzee v. M'Gregor, 12 Wend. 545; Worthington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736.

Messrs. **W. A. Oldfield and Wright & Reeder**, for appellee:

The letter was founded upon unauthorized rumors.

Whatever defendant's motive may have been, the letter was not privileged.

Newell, Defamation, § 93, p. 500, § 13, p. 396; Odgers, Libel & Slander, p. 222; Roberts v. Richards, 3 Fost. & F. 507; 13 Am. & Eng. Enc. Law, p. 418; Starkie, Slander & Libel, * 218; Smith v. Smith, 73 Mich. 445, 3 L.R.A. 52, 16 Am. St. Rep. 594, 41 N. W. 499.

In communications relative to the crimes of others, the law requires such charges to be made in an honest desire to promote the ends of justice.

Newell, Defamation, § 98, p. 500; Odgers, Libel & Slander, * 222; Roberts v. Richards, *supra;* 13 Am. & Eng. Enc. Law, p. 418; Conroy v. Pittsburgh Times, 139 Pa. 334, 11 L.R.A. 725, 23 Am. St. Rep. 188, 21 Atl. 154.

Even though the letter is regarded as privileged, still defendant will not be protected thereby if the same was written without reasonable and probable cause.

13 Am. & Eng. Enc. Law, p. 405, and note 3; Newell, Defamation, § 46; Ark. Const. art. 2.

Riddick, J., delivered the opinion of the court:

This is an appeal from a judgment in favor of Rhoda Nuckolls against J. T. Miller for $2,000 for slander and libel. Several grounds are urged in the brief of the appellant why the judgment should be reversed, and which we shall now notice.

First, as to certain remarks made by the presiding judge during the progress of the trial, and as to his rulings in admitting evidence offered by the plaintiff, and excluding evidence offered by the defendant, it is sufficient to say that these objections are not sufficiently set forth in the motion for new trial, and must be treated as waived. No reference whatever is made to the remarks of the presiding judge in the motion for new trial, and the reference to the error in admitting and refusing evidence is as follows: "The court erred in admitting testimony introduced by plaintiff over defendant's objection, as shown by the stenographer's transcript thereof. The court erred in refusing the testimony offered by defendant, as shown by the stenographer's transcript thereof." It will be seen that the particular ruling made by the court for which the new trial is asked is not shown by the motion. The attention of the court is not called to the particular error complained of, and the assignment is too indefinite. Edmonds v. State, 34 Ark. 721; Choctaw & M. R. Co. v. Goset, 70 Ark. 427, 68 S. W. 879.

The first instruction given by the court does not, in our opinion, state the law correctly; for it tells the jury that they should find for the plaintiff if they find from the evidence that defendant did utter and publish concerning the plaintiff, as a basis of her action for slander, or if he used, such words as amount to charge the plaintiff with fornication, or with having been guilty of fornication, or did utter or publish words of or concerning the plaintiff which, in their common acceptation, amount to such a charge. Now it will be noticed that the part of this instruction which we have quoted in effect told the jury to find for the plaintiff if the words used by defendant amounted to charge plaintiff with having been guilty of fornication, without regard to whether such words were substantially the same as those set out in the complaint or not. Under this instruction it

would have been the duty of the jury to find for plaintiff if the evidence had showed that defendant had said of the plaintiff, an unmarried woman, that she had permitted a man to have sexual intercourse with her, though no such words were set out in the complaint; for such words would, in effect, charge the plaintiff with fornication. But in an action for slander the plaintiff must prove that the defendant used substantially the same words as those alleged in the complaint. It is not sufficient to prove that the defendant made the same charge against the plaintiff in words substantially different from those alleged, even though of equivalent and similar import. 18 Am. & Eng. Enc. Law, p. 1078.

Nor do we think that it necessarily follows that the defect in this instruction was cured by the fact that the law was correctly stated in another instruction, given at the request of the defendant; for the two instructions are, to a certain extent, contradictory. But a consideration of the evidence has convinced us that it does not show that the defendant uttered any words tending to charge plaintiff with having committed fornication except those set out in the complaint. There is evidence tending to show that the defendant did utter about plaintiff words substantially the same as those set out in the complaint. For instance, the complaint alleged that he said, "There has been a secret burial of a child at Hopewell, and there is no doubt about its being Miss Rhoda Nuckolls'," and the witness testified that he said, "There has been a secret burial of a child at Hopewell, and there is no doubt about its being Miss Rhoda Nuckolls' child." The addition of the word "child" to that stated in the complaint did not alter the meaning. Again, the complaint alleged that defendant said, "Miss Rhoda Nuckolls has given birth to a child and it was secretly buried at Hopewell," and the evidence showed the same words except those referring to the burial. But the words not proved were not essential to make out the defamatory charge. The substance of the charge was that defendant had said that "Miss Rhoda Nuckolls had given birth to a child," and, these words being shown, the others were immaterial, for the words proved, of themselves, amount to a charge of fornication when uttered about a single woman. 18 Am. & Eng. Enc. Law, p. 1079. Now, as there was evidence tending to show that the defendant uttered the words set out in the complaint, and as the evidence does not show that he used any other language which could be taken as charging her with fornication, we do not think that the jury could have been misled by the erroneous part of this instruction. They must have found that the defendant uttered the language set out in the complaint; otherwise, their finding should, under the instructions, have been for defendant. We are therefore of the opinion that no prejudice resulted from this instruction, though, theoretically considered, it is not accurate.

Counsel contend with much force that the writing on which the second cause of action was based was a privileged communication, and that it cannot be made the basis of an action of libel. It may be true that, when a communication is made to an officer with the intention to aid him in the detection of crime, the courts will not compel the officer to disclose the name of the informer. It was so held in Worthington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736. When such communication is in a writing filed before the proper officer as the basis of a criminal prosecution, such as an affidavit showing the commission of a crime, then no action for libel can be based upon any pertinent matter therein contained. The remedy of the party charged, if he have any, is for malicious prosecution. The statement, being made in the course of a judicial proceeding, cannot be made the basis of an action for slander or libel, whether malicious or not. Shock v. M'Chesney, 4 Yeates, 507, 2 Am. Dec. 415; Hastings v. Lusk, 22 Wend. 410, 34 Am. Dec. 330; 18 Am. & Eng. Enc. Law, p. 1023, and cases cited. But in this case the libelous matter is not contained in any affidavit or paper filed in a judicial proceeding. It is not a statement of fact within the knowledge of the defendant who made it, but is only a statement of certain rumors concerning the birth of a child, its concealment, and burial, which he claims to have made to the justice of the peace that the justice might order an investigation to ascertain the facts. It is the duty of everyone to assist in the detection of crime, and, if he knows facts that tend to show that a crime has been committed, it is not only proper, but it is his duty, to communicate them to the proper officer. But, while such statements are privileged, the weight of authority seems to show that they are not absolutely privileged; for charges of that kind should not be made recklessly and maliciously, but in good faith, with an honest desire to promote justice. If made in good faith, they are privileged; but, on the other hand, if made maliciously, and with no probable cause to believe them to be true, they are not privileged. This point was directly decided in the old case of Bunton v. Worley, 4 Bibb, 38, 7 Am. Dec. 735, when

it was held that words spoken to a justice on application for a warrant for felony may be made the basis of an action for slander when not made in good faith. See also O'Donaghue v. M'Govern, 23 Wend. 26; Howard v. Thompson, 21 Wend. 319, 34 Am. Dec. 238; Sands v. Robison, 12 Smedes & M. 704, 51 Am. Dec. 132; Hancock v. Blackwell, 139 Mo. 440, 41 S. W. 205; Pierce v. Oard, 23 Neb. 828, 37 N. W. 677; Odgers, Libel & Slander, 220; Newell, Defamation, 500; 13 Am. & Eng. Enc. Law, p. 418. There are a few cases that seem to hold that communications of this kind to an officer are absolutely privileged. Johnson v. Evans, 3 Esp. 32; Vogel v. Gruaz, 110 U. S. 311, 28 L. ed. 158, 4 Sup. Ct. Rep. 12. The first case mentioned above is a very old case. The last one was decided by the Supreme Court of the United States. But the decision in that case was based mainly on the ground that it was a communication made to a state's attorney, or public prosecutor of crimes, in order to ascertain whether certain facts constituted a crime. The court held that the communication was as much privileged as if it had been made to an attorney hired by him. While these cases do seem to some extent to sustain the contention of appellant, the weight of authority, as before stated, seems to show that a communication of the kind under consideration here is privileged only when made in good faith, but not when made recklessly, with the intention to gratify personal malice towards the plaintiff or his family. This is certainly true where, as in this case, the informant does not state facts, but mere rumors, which he might easily have ascertained to be untrue. It is doubtful if he was under any duty to voluntarily repeat mere rumors of that kind affecting the character of an unmarried woman, even to an officer of the law, and if he did so maliciously an action would lie. The instruction given on this point was, we think, proper, and when the instructions are considered as a whole, in the light of the evidence, we find no reversible error.

Again, it is said that the judgment should be reversed on account of improper argument of counsel for plaintiff, who said to the jury, in his closing argument, "Dr. Miller should thank God that the people of that community allowed him still to live." On objection being made, the court "quietly" said to the attorney not to make improper remarks. Afterwards the attorney said: "A man who is guilty of such a heinous crime ought not to be permitted to live in this county." On objection being made, the court "mildly" said to the attorney that the remark was improper, to which counsel for plaintiff responded: "Your honor, I say if he is guilty he is not fit to live in this county, and I stand on that proposition." The court overruled the objection to this remark. It will be noticed that the prosecuting judge sustained the objection to all the remarks of counsel, except the last. It is true that his language does not appear to have been very emphatic, but the tone of the voice has much to do with a matter of that kind, and, though the record states that the court "quietly" cautioned the attorney not to make improper remarks, we are not able to say that this remonstrance did not clearly convey to the jury the idea that the argument was improper. If counsel desired to have the jury instructed to disregard the remarks, or if he wished a more emphatic reprimand, he should have asked for an instruction of that kind. That brings us to the last remark of counsel, to which objection was made and overruled in which he said that, if defendant was guilty, he was not fit to live in the county. This was only an expression of the opinion of counsel, and intended to convey to the jury his idea of the gravity of the charge against the defendant. Now it is often the case that expressions of that kind are made in argument of counsel. The law does not confine counsel to a cold statement of the facts of the case. He must not misstate the facts, or undertake to supply the place of a witness by stating facts not in evidence. But, to quote the language of a recent case, he is not required to forego the embellishments of oratory; for, "stored away in the property room of the profession are moving pictures in infinite variety, from which every lawyer is expected to draw on all proper occasions." State v. Burns, 119 Iowa, 671, 94 N. W. 238. Now counsel does not say in this last remark that a man guilty of that crime ought not to be permitted to live in that county. Such a statement, whether prejudicial or not, would be out of place and exceedingly improper in a court of justice, as it might be taken as an indorsement of mob law. But in the last statement he simply said that he was not fit to live there. In other words, he maintained that a person who would slander an innocent girl was not a fit associate of the people there. This, as we have said before, was only an attempt to impress upon the jury the gravity of the offense committed against the plaintiff, and, in our opinion, furnishes no ground for reversal.

There are other errors complained of, but after consideration thereof we are of the opinion that no prejudicial error is shown that is raised by motion for new trial.

Judgment affirmed.

KANSAS SUPREME COURT.

STATE OF KANSAS
v.
GEORGE M. BUFFINGTON, Appt.

(— Kan. —, 81 Pac. 465.)

Criminal law—defendant as witness—cross examination.

1. The defendant, having assumed the character of a witness, was subject to the rules applicable to any witness, and questions as to his past life and conduct which would impair his credibility were not improper.

Instructions—separate propositions.

2. No error was committed in refusing an instruction covering several propositions of law, where the court adopted the better practice of giving each important proposition in a single instruction, and arranging all in logical order.

Same—pertinency.

3. An instruction that, "if the jury believe from the evidence that at the time of the shooting in question the said Oda Miller made an attack upon the defendant with a chair, under such circumstances as to create in the mind of a reasonably and ordinarily prudent man a belief that he was in danger of being killed or of receiving great bodily harm immediately; and if the jury further believe from the evidence that the defendant at the time did honestly believe that he was in imminent danger of receiving great bodily harm, and in good faith shot to protect himself therefrom; and if you further believe that the defendant, acting in good faith, did not fire any more shots than he had a rea-

Headnotes by JOHNSTON, Ch. J.

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I. The general and common-law rule.

a. Statement of.

The common-law rule, and the general rule or the rule as it is generally stated on this subject, is that asserted and acted upon in STATE v. BUFFINGTON, that, where there is an intent to kill, upon the part of a person taking the life of another, or when the act is one which would otherwise be murder, no words of reproach, no matter how grevious, or however abusive and insulting, are a sufficient provocation to free the slayer from the guilt of murder.

The rule has been announced and acted upon by a large number of cases. The following either directly or substantially assert it: Taylor v. State, 48 Ala. 180; Judge v. State, 58 Ala. 406, 29 Am. Rep. 757; Mitchell v. State, 60 Ala. 26; Reese v. State, 90 Ala. 624, 8 So. 818; Watson v. State, 82 Ala. 10, 2 So. 455; McKee v. State, 82 Ala. 39, 2 So. 451; Kennedy v. State, 85 Ala. 326, 5 So. 300; Johnson v. State, 102 Ala. 1, 16 So. 99; Ellis v. State, 120 Ala. 333, 25 So. 1; Bondurant v. State, 125 Ala. 31, 27 So. 775; Teague v. State, 120 Ala. 309, 25 So. 209; Smith v. State, 103 Ala. 4, 15 So. 843; Wilson v. State, 140 Ala. 43, 37 So. 93; Nutt v. State, 63 Ala. 180; Jarvis v. State, 138 Ala. 17, 34 So. 1025; Thomas v. State, 126 Ala. 4, 28 So. 591; Felix v. State, 18 Ala. 720; Ex parte Sloane, 95 Ala. 22, 11 So. 14; Compton v. State, 110 Ala. 24, 20 So. 119; Gilmore v. State, 141 Ala. 51, 37 So. 359; Raines v. State (Ala.) 40 So. 932; Kennedy v. State (Ala.) 40 So. 658; Allison v. State, 74 Ark. 444, 86 S. W. 409; Petty v. State (Ark.) 89 S. W. 465; Dow v. State (Ark.) 92 S. W. 28; People v. Freeland, 6 Cal. 96; People v. Butler, 8 Cal. 435; People v. Turley, 50 Cal. 469; People v. Tamkin, 62 Cal. 469; People v. Murback, 64 Cal. 369, 30 Pac. 608; State v. Harrigan, 9 Houst. (Del.) 369, 31 Atl. 1052; State v. Walker, 9 Houst. (Del.) 464, 33 Atl. 227; State v. Warren, 1 Marv. (Del.) 487, 41 Atl. 190; State v. Faino, 1 Marv. (Del.) 492, 41 Atl. 134; State v. Trusty, 1 Penn. (Del.) 319, 40 Atl. 766; State v. Draper, Houst. Crim. Rep. (Del.) 531; State v. Emory (Del.) 58 Atl. 1036; State v. Bell (Del.) 62 Atl. 147; Olds v. State, 44 Fla. 452, 33 So. 296; Ray v. State, 15 Ga. 223; Buchanan v. State, 24 Ga. 282; Malone v. State, 49 Ga. 210; Edwards v. State, 53 Ga. 428; Bird v. State, 55 Ga. 317; Ross v. State, 59 Ga. 248; Arwood v. State, 59 Ga. 391; Wortham v. State, 70 Ga. 336; Hanvey v. State, 68 Ga. 612; Smith v. State, 73 Ga. 31; Fry v. State, 81 Ga. 645, 8 S. E. 308; Boatwright v. State, 89 Ga. 140, 15 S. E. 21; Lewis v. State, 90 Ga. 95, 15 S. E. 697; Chestnut v. State, 112 Ga. 366, 37 S. E. 384; Robinson v. State, 118 Ga. 198, 44 S. E. 985; Steffy v. People, 130 Ill. 98, 22 N. E. 861; Crosby v. People, 137 Ill. 325, 27 N. E. 49; Friederich v. People, 147 Ill. 310, 35 N.

sonable right to believe, under the circumstances in which he was placed, was necessary to protect himself or his wife from death or great bodily harm, then you should find the defendant not guilty,"—was pertinent and correct.

Same—heat of passion.

4. In the absence of a request for a definition of the words "in the heat of passion," the omission to give one is not ground for reversal.

Same—defendant as witness.

5. An instruction that "the defendant is a competent witness in his own behalf, and that they have a right to consider his evidence, and are to give it such faith and credit as they may believe it entitled to receive," when considered in connection with other instructions given, did not imply that any consideration of defendant's evidence was optional with the jury.

Homicide—words as provocation.

6. Mere words, however abusive and insulting, will not justify an assault, nor constitute a sufficient provocation to reduce to manslaughter what would otherwise be murder.

Instructions—sufficiency.

7. Points of law applicable to the case in defendant's requests are found to be included in the instructions given to the jury.

(July 7, 1905.)

APPEAL by defendant from a judgment of the District Court for Ellsworth County convicting him of murder. Affirmed.

The facts are stated in the opinion.

Messrs. **Charles J. Evans** and **Ira E. Lloyd**, for appellant:

A killing committed under the influence of

E. 472; Murphy v. State, 31 Ind. 511; Boyle v. State, 105 Ind. 469, 55 Am. Rep. 218, 5 N. E. 203; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; Rapp v. Com. 14 B. Mon. 614; Cotrell v. Com. 13 Ky. L. Rep. 305, 17 S. W. 149; Sawyers v. Com. 18 Ky. L. Rep. 657, 38 S. W. 136; Cook v. Com. 10 Ky. L. Rep. 222, 8 S. W. 872; Donnellan v. Com. 7 Bush, 676; State v. Conerly, 48 La. Ann. 1564, 21 So. 192; State v. Daniels, 49 La. Ann. 954, 22 So. 415; Com. v. York, 9 Met. 93, 43 Am. Dec. 373; Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70, Gil. 178; Preston v. State, 25 Miss. 383; State v. Howard, 102 Mo. 142, 14 S. W. 937; State v. Brown, 64 Mo. 367; State v. Starr, 38 Mo. 270; State v. Ellis, 74 Mo. 207, Affirming 11 Mo. App. 587; State v. Elliott, 98 Mo. 150, 11 S. W. 566; State v. Berkley, 109 Mo. 665, 19 S. W. 192; State v. Sansone, 116 Mo. 1, 22 S. W. 617; State v. Martin, 124 Mo. 514, 28 S. W. 12; State v. Hurdspeth, 150 Mo. 12, 51 S. W. 483; State v. Atchley, 186 Mo. 174, 84 S. W. 984; State v. Gordon, 191 Mo. 114, 89 S. W. 1025; State v. Anderson, 4 Nev. 265; State v. Raymond, 11 Nev. 98; State v. Crozier, 12 Nev. 300; Clifford v. State, 60 N. J. L. 287, 37 Atl. 1101; State v. Blair, 2 N. J. L. J. 346; People v. Kelly, 113 N. Y. 647, 21 N. E. 122; People v. Carlton, 115 N. Y. 618, 22 N. E. 257; State v. Tackett, 8 N. C. (1 Hawks) 210; State v. Merrill, 13 N. C. (2 Dev. L.) 269; State v. Jarrott, 23 N. C. (1 Ired. L.) 76; State v. Carter, 76 N. C. 20; State v. Barfield, 30 N. C. (8 Ired. L.) 344; State v. Savage, 78 N. C. 520; State v. McNeill, 92 N. C. 812; Com. v. Crozier, 1 Brewst. (Pa.) 349; Com. v. Drum, 58 Pa. 9; Com. v. Bell, Addison (Pa.) 156, 1 Am. Dec. 298; State v. Jacobs, 28 S. C. 29, 4 S. E. 799; State v. Workman, 39 S. C. 151, 17 S. E. 694; Williams v. State, 3 Heisk. 376; Johnson v. State, 11 Lea, 47; Johnson v. State, 27 Tex. 758; Boyett v. State, 2 Tex. App. 93; Clore v. State, 26 Tex. App. 624, 10 S. W. 242; Hatchell v. State (Tex. Crim. App.) 84 S. W. 234; State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; United States v. Wiltberger, 3 Wash. C. C. 515, Fed. Cas. No. 16,738; United States v. Carr, 1 Woods, 480, Fed. Cas. No. 14,732; United States v. Travers, 2 Wheeler, C. C. 504, Fed. Cas. No. 16,537; Allen v. United States, 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. Rep. 154; R. v. Campbell, 4 Boston L. Rep. 131; Reg. v. Noon, 6 Cox, C. C. 137; Reg. v. Welsh, 11 Cox, C. C. 336; Reg. v. Rothwell, 12 Cox, C. C. 145; Watts v. Brains, 1 Cro. Eliz. pt. 2, p. 778.

And it is likewise the common-law rule, and the general rule,—or at least the rule as generally stated,—that indecent and provoking actions or gestures expressive of contempt or reproach do not furnish provocation sufficient to reduce a killing in resentment therefor below the grade of murder. People v. Olsen, 4 Utah, 413, 11 Pac. 577; State v. Walker; State v. Warren; State v. Faino; State v. Trusty; State v. Draper; State v. Emory; Malone v. State; Edwards v. State; Hanvey v. State, and Chestnut v. State,—*supra;* Phelps v. State, 75 Ga. 571; Boatwright v. State; Crosby v. People; Rapp v. Com. and State v. Starr,—*supra;* State v. Elliott 90 Mo. 350, 2 S. W. 411; State v. Raymond; Com. v. Bell; State v. Barfield; State v. McNeil; and Boyett v. State,—*supra;* Lanure's Case, 1 Hale, P. C. 456.

As a general rule it requires an assault or personal violence to constitute adequate provocation to reduce homicide from murder to manslaughter. State v. Bulling, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830; State v. Ellis, 11 Mo. App. 587; Reese v. State, 90 Ala. 624, 8 So. 818; Vance v. State, 70 Ark. 272, 68 S. W. 37; Wortham v. State, 70 Ga. 336; State v. Elliott, 11 Ohio Dec. Reprint, 332; Reg. v. Welsh, *supra.*

Provocation by words can only reduce the grade of a homicide from murder in the first degree to murder in the second. State v. Gartrell, 171 Mo. 489, 71 S. W. 1045; Smith v. State, 103 Ala. 4, 15 So. 843.

Though precisely the same state of mind which, when produced by a blow, will constitute a killing manslaughter, is produced

sudden passion produced by adequate provocation is manslaughter, and not murder.

State v. Grugin, 147 Mo. 39, 42 L.R.A. 774, 71 Am. St. Rep. 553, 47 S. W. 1058; 21 Am. & Eng. Enc. Law, 2d ed. p. 173, and authorities cited; Smith v. State, 83 Ala. 26, 3 So. 551; Maher v. People, 10 Mich. 220, 81 Am. Dec. 781; State v. Davis, 50 S. C. 405, 62 Am. St. Rep. 837, 27 S. E. 905; Haile v. State, 1 Swan, 248; People v. Calton, 5 Utah, 451, 16 Pac. 902.

Messrs. C. C. Coleman, Attorney General, Dallas Grover, and Grattan & Grattan for appellee.

Johnston, Ch. J., delivered the opinion of the court:

George M. Buffington was charged with the felonious killing of Oda Miller, and convicted of murder in the second degree. Because of the failure to charge the jury on the lower degrees of the offense, that conviction was set aside. State v. Buffington, 66 Kan. 706, 72 Pac. 213. On the new trial he was again found guilty of murder in the second degree, and has again appealed. The facts were quite fully set out in the first decision, and the testimony in the second trial appears to have been substantially the same as on the first; showing that Miller was an employee of the defendant, and that the tragedy grew out of a dispute between them as to whether Miller and other of the hired men were entitled to pay for working a quarter of a day more than was credited to them by the defendant. The testimony of-

by such grievous and degrading words of reproach as are naturally and justly calculated to produce that state of mind, the instant killing of the person using such words in such a state of mind is murder. State v. Ellis, 74 Mo. 207.

And evidence as to provocation by words, in a prosecution for homicide, does not call for an instruction on manslaughter. State v. Gartrell, *supra;* State v. Spivey, 132 N. C. 989, 43 S. E. 475.

And refusal of the court, in a prosecution for homicide, to submit to the jury the question of provocation by actual violence in connection with provocation by opprobrious epithets, is not error where there is no evidence of provocation caused by violence. State v. Martin, 124 Mo. 514, 28 S. W. 12.

Nor does the fact that one person wrote a libel against members of the family of another mitigate the act of the latter, of aiding and abetting in the killing of the former, from murder to manslaughter. State v. Elliott, 11 Ohio Dec. Reprint, 332.

b. Method of killing as affecting.

The rule that no words of reproach, however grievous, and no provoking actions or gestures expressive of contempt or reproach, constitute sufficient provocation to reduce a homicide from murder to a lower degree, is especially applicable where a deadly weapon is used in the killing, or where it is done by an act apparently dangerous to human life. State v. Davis, 50 S. C. 405, 62 Am. St. Rep. 837, 27 S. E. 905; State v. Levelle, 34 S. C. 120, 27 Am. St. Rep. 799, 13 S. E. 319; State v. McIntosh, 39 S. C. 97, 17 S. E. 446; State v. Warren, 1 Marv. (Del.) 487, 41 Atl. 190; Malone v. State, 49 Ga. 210; Smith v. State, 73 Ga. 31; Beauchamp v. State, 6 Blackf. 299; Clifford v. State, 60 N. J. L. 287, 37 Atl. 1101; People v. Kelly, 113 N. Y. 647, 21 N. E. 122; State v. Merrill, 13 N. C. (2 Dev. L.) 269; State v. Elliott, 90 Mo. 350, 2 S. W. 411; State v. Elliott, 11 Ohio Dec. Reprint, 332; People v. Olsen, 4 Utah, 413, 11 Pac. 577; United States v. Carr, 1 Woods, 480, Fed. Cas. No. 14,732.

And neither written nor spoken calumny against a man or members of his family, no matter how grievous it may be in character, can reduce an intentional homicide done with a deadly weapon from murder to manslaughter. State v. Elliott, 11 Ohio Dec. Reprint, 332.

The use of a dangerous weapon under provocation of words only is always evidence of malice aforethought. Beauchamp v. State, *supra.*

Malice is presumed from the nature of the instrument used and the absence of legal provocation. State v. Merrill, *supra.*

And provocation by words alone will not reduce homicide from murder to a lower degree where the retaliation for the provocation was by an act apparently dangerous to life or with a deadly weapon, though only a slight punishment was intended. Boatwright v. State, 89 Ga. 140, 15 S. E. 21.

While opprobrious words may justify a simple assault or an assault and battery, they will not justify an attack with a deadly weapon, made in a manner likely to produce death. Mathews v. State (Ga.) 54 S. E. 196; Butler v. State, 92 Ga. 601, 19 S. E. 51.

c. Character of words or conduct as affecting.

As we have seen, the character of words or conduct is of no importance on the question of their sufficiency as a provocation, under strict application of the general rule. They will not reduce a homicide from murder to manslaughter, however grievous, however abusive, or however insulting, they may be. See *supra*, I. a, b.

And the rule that opprobrious words or conduct do not constitute sufficient provocation to reduce homicide from murder to manslaughter is not affected by the fact that the words or conduct in question were designed, or such as to warrant the belief that they were designed, to provoke a difficulty. Williams v. State, 3 Heisk. 376.

So, the application of the rule is not affected by the fact that the words and conduct consisted of threats and menaces. Edwards v. State, 53 Ga. 428; Ross v. State,

fered by the state is to the effect that, in discussing this claim with one Shepard, the defendant made a remark imputing blame to Miller, or rather to the effect that he had shirked in his work. Miller, who was in an adjoining room, came into the room where defendant was, saying: "Look here, old man. You don't know who you're talking about. I will fix you." Buffington, who was sitting in a rocking-chair, said to Miller: "Get out of here, Oda. I don't want anything to do with you." Shepard then interposed, saying to Miller: "Leave the old man alone. We can settle this without trouble." Miller then turned aside, when the defendant said: "Get out of here, Oda, or I will shoot hell out of you." Miller then took hold of the back of the rocking-chair, tipping it forward; and the defendant slid out of it, going down on one knee by the side of an open satchel, in which was a loaded revolver, which he seized. His wife, who had come into the room, threw her arms about his neck, saying, "Oh, don't do that, George!" and placed her body between him and Miller. While in these positions, Miller, who had lifted the chair in front of him, said, "Get out of the way, old lady, and I will fix him;" and just then defendant fired a shot at Miller, which was quickly followed by a second one, and Miller in the meantime fell forward against the defendant. Two other shots were fired into his body. Immediately after the shooting Miller was found dead, and four bullet holes were discovered in his body,—one in his breast and

59 Ga. 248; Hawkins v. State, 25 Ga. 207, 71 Am. Dec. 166; Harvey v. State, 68 Ga. 612; Phelps v. State, 75 Ga. 571; Chestnut v. State, 112 Ga. 366, 37 S. E. 384; State v. Scott, 26 N. C. (4 Ired. L.) 409, 42 Am. Dec. 148; State v. Leonard, 6 La. Ann. 420; State v. Brown, 64 Mo. 367; State v. Ellis, 11 Mo. App. 587, Affirmed in 74 Mo. 207; State v. Howard, 102 Mo. 142, 14 S. W. 937; State v. Blair, 2 N. J. L. J. 346; Territory v. Anderson, 4 N. M. 213, 13 Pac. 21; Davis v. State, 37 Tex. Crim. Rep. 371, 35 S. W. 388; Ewing v. State (Tex. Crim. App.) 42 S. W. 381; Johnson v. State, 27 Tex. 758; Wall v. State, 18 Tex. 683, 70 Am. Dec. 302.

And the rule that threats and menaces do not furnish an adequate provocation to reduce homicide from murder to manslaughter is especially applicable where the person killed was unarmed, and neither making nor attempting any violence upon the accused, at the time of the killing. Hawkins v. State, 25 Ga. 207, 71 Am. Dec. 166.

Thus the act of one person, of telling another to dry up and go off or he would make him, furnishes no provocation sufficient to reduce the killing of the former by the latter from murder to manslaughter. Abram v. State, 36 Tex. Crim. Rep. 44, 35 S. W. 389.

And the act of a husband, upon being informed of improper conduct upon the part of his father-in-law toward his wife, of telling him to leave the country or he would kill him, is not such a legal provocation as will reduce the act of the father-in-law, of killing his son-in-law, from murder to manslaughter. Davis v. State, *supra*.

And evidence that the deceased had made some remarks about the accused to the effect that he had been abusing his sister, and also some threats against him, is sufficient to warrant an instruction in a prosecution for homicide that no language used by the deceased would justify the accused in taking his life. State v. McCollum, 119 Mo. 469, 24 S. W. 1021.

So, uncommunicated threats should be given no weight in a prosecution for homicide, in establishing manslaughter, or in mitigating its punishment, since unknown facts cannot constitute constituent elements of adequate cause. Levy v. State, 28 Tex. App. 203, 19 Am. St. Rep. 826, 12 S. W. 596.

And the word "menace," within the meaning of the rule that neither threats nor menaces are adequate provocation to reduce homicide from murder to manslaughter, is synonymous with the word "threat," and is not distinguished from threat by word of mouth upon being applied to a threat by act or demonstration. Lynch v. People, 33 Colo. 128, 79 Pac. 1015.

II. Exceptions and judicial modifications.

a. Where mutual combat results.

The rule that words of reproach and contempt do not constitute adequate provocation to reduce a killing in resentment thereof from murder to manslaughter does not apply where, as a result of such words, the parties become suddenly heated, and engage in a mutual combat, fighting on equal terms, and death results in the combat. State v. Hill, 20 N. C. 629 (4 Dev. & B. L. 491) 34 Am. Dec. 396; Caruthes v. State, 95 Ga. 343, 22 S. E. 837; Pennsylvania v. Biron, 4 Dall. 125, 1 L. ed. 769.

While insulting language will not of itself constitute a provocation which will mitigate a killing in resentment from murder to manslaughter, if one person uses indecent language to another, and the latter thereupon strikes the former, but not mortally, and the former then strikes the latter, and then the latter kills the former, the stroke by the former is deemed a new provocation, and the killing is manslaughter only. State v. Way, 38 S. C. 333, 17 S. E. 39.

And where the evidence in a prosecution for homicide tends to show that the killing was the result of a sudden quarrel, an instruction should be given with relation to the grades of homicide lower than murder. State v. Berkley, 92 Mo. 41, 4 S. W. 24.

And an instruction in such a prosecution, that, though the elements of self-defense were not present, yet, if the fatal shot was fired by the accused in a sudden heat of passion, or on a sudden quarrel, believing his

three in his back. Defendant asked some of the men to take Miller's body from his room, and, as no one did so, he went in, seized hold of Miller's feet, and dragged the body face downwards out of the room and upon a porch, where it remained all night, and until the coroner came on the following day. There is testimony of coarse and harsh statements made by the defendant after the killing as to the corpse and its disposition. There is testimony that he told a witness that in the scuffle, "I grabbed for my gun, and finally I got my gun, and as soon as I got my gun I knew he was a dead man." The defendant claims that Miller made an unprovoked attack upon him, and for his own protection it appeared to be necessary to shoot and kill him. There is the further claim that his wife was not trying to prevent him from using the revolver when she threw her arms around his neck, but placed herself between him and Miller to shelter him from an assault which Miller was making upon him with the uplifted rocking-chair. The state contends that Miller merely used the chair as a shield as against the bullets of defendant's gun.

A number of exceptions were taken to rulings upon testimony. The defendant was placed upon the witness stand and testified upon his own behalf; and, upon cross-examination, inquiry was made as to past difficulties of a like character with that under investigation. Of this he complains. Having assumed the character of a witness, he was subject to the rules applicable to any wit-

life to be in danger, it is manslaughter, and not murder, is favorable to the accused, and not subject to objection by him. State v. Jackson, 32 S. C. 27, 10 S. E. 769.

And a verdict for manslaughter is sustained by evidence that the deceased walked in the highway with an ax on his shoulder, preceded by his two sons, to a place where the accused and his son were sitting in a wagon, and that accused made insulting remarks to them, and that deceased's sons started to return with rocks in their hands, and that, as the accused's son started to drive away, the accused slid off the wagon and struck deceased upon the head with a wagon stake, killing him. Bennyfield v. Com. 15 Ky. L. Rep. 321, 22 S. W. 1020.

Though the statute provides that provocation by words, threats, menaces, or contemptuous gestures, shall in no case be sufficient to free the person killing another from the guilt of murder, if the parties engaged in a quarrel suddenly fight without weapons, both entering into the fight with equal willingness, and one happens to kill the other, it is manslaughter only, though it happens that the slayer was the one who gave the first blow. Stokes v. State, 18 Ga. 17.

And if a killing was done, though without legal provocation, upon a sudden falling out, but with an instrument not calculated to produce death, the jury may infer a want of malice, so that it would be regarded as voluntary manslaughter only; but if it was done with a deadly weapon, it would be murder, the weapon used being controlling as to the intent and malicious motive. Smith v. State, 73 Ga. 31.

But the rule that, where parties become suddenly heated, and engage immediately in mortal combat, fighting upon equal terms, and one kills the other, the homicide is mitigated to manslaughter, applies only to equals, and not to the case of a white man and a slave, where the slave kills the white man. State v. Jarrott, 23 N. C. (1 Ired. L.) 76.

b. When combined with an assault.

An assault too slight in itself to be a sufficient provocation to reduce a homicide in resistance thereof from murder to manslaughter may become such by being coupled with insulting words. Reg. v. Smith, 4 Fost. & F. 1066; Reg. v. Sherwood, 1 Car. & K. 556; State v. Elliott, 98 Mo. 150, 11 S. W. 566; State v. Hudspeth, 150 Mo. 12, 51 S. W. 483; State v. Howard, 102 Mo. 142, 14 S. W. 937.

And insulting words, in consequence of which an assault was made, may be given in evidence in a prosecution therefor, as tending to explain the acts of the assailant. State v. Elliott, 98 Mo. 150, 11 S. W. 566; Turner v. State (Tex. Crim. App.) 46 S. W. 830.

So, where insulting words were used by one person to another, which resulted in an assault which caused death, it is material to inquire who was the aggressor in the altercation in which the abusive words which constituted the provocation were spoken. And an instruction in a prosecution for the killing is properly refused where it permits no inquiry on that question. Smith v. State, 103 Ala. 4, 15 So. 843.

Provocation by mere words is insufficient to reduce homicide from murder to manslaughter, though accompanied by the drawing of a knife however, where no attempt was made to use it. Edwards v. State, 53 Ga. 428.

c. Rule that passion is the controlling element.

Many of the more modern cases have displayed a tendency toward rejecting or modifying the general rule that opprobrious words and conduct are not a sufficient provocation to reduce murder to manslaughter so far as it makes the presence or absence of physical violence the test, by an attempt to make the question of murder or manslaughter turn upon the existence or nonexistence of sufficient passion properly aroused; the means by which the passion was excited being regarded as immaterial so long as they were of a nature naturally calculated to excite such passion.

Under this rule, an insult, though offered

ness, and questions as to his past life and conduct which would affect or impair his credibility were not improper. The extent to which such an examination may go is largely a matter of discretion with the trial court. State v. Pfefferle, 36 Kan. 90, 12 Pac. 406; State v. Wells, 54 Kan. 161, 37 Pac. 1005; State v. Greenburg, 59 Kan. 406, 53 Pac. 61.

The questions asked Mrs. Buffington are not deemed to be outside of the boundaries of legitimate cross-examination.

Objections were made to many of the rulings of the court in instructing the jury. Most of the criticisms of the charge are directed at the refusal of requested instructions. Of those refused, many were correct statements of the law, but they were fairly covered by the instructions given by the judge in phraseology of his own. The offense, as well as the inferior degrees of the same, was distinctly defined, and the points of law arising under the evidence were fully and carefully stated in separate propositions. In those requested, a number included several propositions in a single instruction, but the court adopted the better practice of giving each important proposition in a separate instruction, and arranged them in logical order, so they could be correctly understood and applied. For instance, the sixth request, which was refused, presented certain elements which would reduce the offense from murder to manslaughter, and also related to self-defense. In several of the instructions given, the court pointed out

in words, is entitled to the same effect, by way of reducing a killing by the person insulted of the insulter from murder to manslaughter, as an insult by way of assault, where it was of such a nature as to excite the passions of the mass of men, and as to enthrall their reason. State v. Grugin, 147 Mo. 39, 42 L.R.A. 774, 71 Am. St. Rep. 553, 47 S. W. 1058.

And opprobrious epithets, under some circumstances, may be left to the jury to determine whether they constitute a reasonable provocation to reduce a homicide from murder to manslaughter. State v. Hudspeth, *supra*.

Thus opprobrious words or conduct used with reference to the wife of a person usually tend to excite in him the fiercest of passions, and are a sufficient provocation to mitigate a killing from murder to manslaughter. Stott v. Com. 17 Ky. L. Rep. 308, 29 S. W. 141.

And evidence in a prosecution for homicide, tending to show that the accused, on the day before the killing, received from apparently reliable sources information concerning actions and statements of the deceased in relation to the wife of the accused which would naturally excite and arouse the fiercest of passions, and that he became very much excited and angry, and so continued up to the time of the killing, warrants and requires an instruction to the jury on the law of manslaughter. Ibid.

So, a slanderous charge by a person afterwards killed, that the person who killed him maintained improper relations with two unmarried cousins who were members of his family, and that, with the assistance of his wife, he kept a house of ill fame, is directly calculated to provoke ungovernable passion and anger, and is a sufficient ground to reduce the killing of the slanderer from murder to manslaughter though no assault was made. Massie v. Com. 16 Ky. L. Rep. 790, 29 S. W. 871.

And where a father is informed that his young daughter, just budding into womanhood, had been ravished by his son-in-law while under the supposed protection of his roof, and, upon asking the son-in-law why he had done it, the son-in-law replied that he would do as he pleased about it, it should be left to the jury, in a prosecution against the father for killing the son-in-law, to say whether or not the circumstances constituted a reasonable provocation; and, if so, the father should be found guilty of no higher offense than manslaughter. State v. Grugin, *supra*.

But an instruction, in a prosecution for homicide, as to voluntary manslaughter, based upon the theory that the killing was done because of an insult to a female relative of the slayer, is not required or warranted by evidence that, in a conversation between the parties immediately prior to the killing, some words passed between them which the witnesses present did not understand, where the conversation was in an ordinary tone of voice and there was nothing indicating any feeling of passion. Warner v. Com. 27 Ky. L. Rep. 219, 84 S. W. 742.

So, a provocation by words may be attended by special circumstances which will render it sufficient to mitigate a homicide resulting therefrom to manslaughter. Reg. v. Rothwell, 12 Cox, C. C. 145.

And foul and opprobrious language in connection with vexatious acts and conduct may be a sufficient provocation to reduce a resulting killing from murder to manslaughter if they are of such a character as usually excite the passions of the mass of men so as to enthrall their reason; whether or not they are such being a question of fact for the jury. Seals v. State, 3 Baxt. 466.

Thus, while, as a general rule, nothing short of blows is a sufficient provocation to reduce homicide from murder to manslaughter, there may be words of reproach so aggravating when uttered by a slave to a white person as to excite in the white man the temporary fury which negatives the charge of malice; and this is the rule without reference to the personal merit or demerit of the white man. State v. Jarrott, 23 N. C. (1 Ired. L.) 76.

And if a person having a hatchet in his hand said to another, "You damned son of a bitch, I am going to chop your brains out with this hatchet," and advanced upon him

tne distinctions between murder in the second degree and the several degrees of manslaughter, and in other instructions the jury were advised how far the defendant might go in repelling an attack; presenting every phase of the law of self-defense applicable to the case. Among those on this subject, and which largely embraced the points of the refused request, was the following: "(33) If the jury believe from the evidence that at the time of the shooting in question the said Oda Miller made an attack upon the defendant with a chair under such circumstances as to create in the mind of a reasonably and ordinarily prudent man a belief that he was in danger of being killed or of receiving great bodily harm immediately; and if the jury further believe from the evidence that the defendant at the time did honestly believe that he was in imminent danger of receiving great bodily harm, and in good faith shot to protect himself therefrom; and if you further believe that the defendant, acting in good faith, did not fire any more shots than he had a reasonable right to believe, under the circumstances in which he was placed, was necessary to protect himself or his wife from death or great bodily harm,—then you should find the defendant not guilty." It is contended that in the refusal of several requests the jury were not permitted to consider or make due allowance for the effects of sudden passion excited by an attack upon the defendant. This criticism is hardly justified. In the twentieth instruction the attention of the jury

with it drawn to strike, and then threw it at him, whereupon the latter shot and killed the former in the excitement produced by the epithet and threats, and but for such provocation the shooting would not have occurred, the slayer is guilty of manslaughter only; and failure so to instruct the jury in a prosecution for the killing is fatal error. State v. Garrison, 147 Mo. 557, 49 S. W. 508.

So, whether abusive language used in the presence of a person's family and at his table, in connection with other vexatious conduct, was sufficient to produce such excitement and passion as would mitigate the killing of the offender to manslaughter, is a question of fact for the jury, to be determined under proper instructions. Seals v. State, 3 Baxt. 459.

And where a wife declares to her husband that she will have no more to do with him, and that in the future she will not perform her marital duties, and that she has been false to him once and will be so again; and he thereupon strikes her, and the blow causes her death.—it is a question for the jury, in a prosecution for the killing, whether the provocation is such as would, from the standpoint of an ordinary man, justify him in striking her; and, if it is such a provocation, the killing is manslaughter only. Reg. v. Rothwell, *supra*.

So, in Com. v. Hourigan, 89 Ky. 305, 12 S. W. 550, it was held that an instruction with reference to voluntary manslaughter was properly modified by striking out the assertion that mere words, however opprobrious or insulting, are not sufficient provocation to reduce a killing from murder to manslaughter.

Nor is the efficacy of insulting language or conduct, or an insulting charge made by the deceased against the accused, as a ground for reducing the killing by the accused of the deceased from murder to manslaughter, affected by the question whether or not the charge was true or false, or whether or not the accused assented to the truth of it; and no inquiry as to either fact should be permitted in a prosecution for the killing. Massie v. Com. 16 Ky. L. Rep. 790, 29 S. W. 871.

And the simple fact that the killing was done with a deadly weapon will not affect the case if the blow was struck under adequate provocation. Seals v. State, *supra*.

Nor is the right to be there, of a man who went upon the premises of another to arrest him for a felony, having knowledge that a felony had been committed, destroyed by the fact that while there, under provocation by words by the person sought to be arrested and in hot blood, he killed him; and the jury, in a prosecution for the killing, should be instructed, upon request, that he did not thereby become a trespasser. State v. Grugin, 141 Mo. 39, 42 L.R.A. 774, 71 Am. St. Rep. 553, 47 S. W. 1058.

d. Application to murder in second or lower degree.

While mere words, no matter how insulting or abusive, cannot of themselves reduce a killing from murder to manslaughter, if one without provocation grossly abuses or insults another, and the latter kills him in resenting the insult, the jury, in a prosecution for the killing, may consider the insult in determining whether there was a wilful, deliberate, malicious, and premeditated killing, constituting murder in the first degree. Watson v. State, 82 Ala. 10, 2 So. 455.

And words or conduct which are not a legal provocation, but which are well calculated to arouse, and do arouse, sudden passion, may be sufficient to modify homicide from murder in the first degree to murder in the second or a lower degree. North Carolina v. Gosnell, 74 Fed. 734; Ex parte Sloane, 95 Ala. 22, 11 So. 14; Mitchell v. State, 60 Ala. 26; Petty v. State (Ark.) 89 S. W. 465; State v. Williams, 186 Mo. 128, 84 S. W. 924; State v. Kotovsky, 74 Mo. 247; State v. Berkley, 109 Mo. 665, 19 S. W. 192; State v. Hudspeth, 150 Mo. 12, 51 S. W. 483.

If an insult by words is of such a character as is reasonably calculated to kindle passion and provoke sudden resentment, and if it appears that it had this effect, and that a homicide was traceable solely to the influence of passion kindled by the insult, then the killing cannot be said to be wilful,

was directly called to this subject, and they were told that, since the killing was admitted, it was important to consider whether the killing was purposely and maliciously done, without justification and excuse, "and not done in the heat of passion, upon a sudden and sufficient provocation, before reason had time to resume its sway." In the twenty-first instruction the court, in describing a malicious killing, eliminated one done in a sudden transport of passion under sufficient provocation. In the twenty-sixth, twenty-seventh, and twenty-eighth instructions the court presented the different phases of the law in respect to the taking of life in the heat of passion; telling the jury how that element reduced the grade of the offense and measured the defendant's responsibility. In these instructions this branch of the case was fairly presented to the jury.

There is complaint that the words "in the heat of passion" were not defined; but it may be noted that the court was not asked to define them. It may well be doubted if there is any necessity for defining a phrase which is in such common use as the one in question. The words were doubtless used by the legislature and by the court in their general and popular signification, and it is hard to conceive that they were not correctly understood by the jury. It at least may be said that, in the absence of a request for a definition of the words, the omission to give one is not ground for a reversal.

Instead of giving a requested instruction

malicious, deliberate, and premeditated so as to be murder in the first degree, but will be murder in the second degree. Ex parte Sloane, *supra*.

And insult by mere words may, when acted upon and when not provoked, be weighed with the other evidence by a jury in a prosecution for homicide, in determining whether the murder was in the first or in the second degree. Watson v. State, 82 Ala. 10, 2 So. 455.

Thus, evidence that deceased called the accused a black son of a bitch, and quarreled with him about a woman, and warned him not to continue meddling with her, and shook his finger in the face of the accused, and that a furious personal affray resulted, —warrants an instruction, in a prosecution for a resulting homicide, defining just provocation. State v. Rose, 14 Mo. App. 567.

And when there is evidence in such a prosecution of degrading language addressed by the deceased to the accused, and of attending circumstances well calculated to produce that sudden rage which would be inconsistent with deliberation, the court should tell the jury that the provocation and passion, if established by the evidence, do as matter of law, reduce the crime to murder in the second degree, and leave it to them to determine whether such provocation and passion did in fact exist. Ibid.

Insulting language will not mitigate a killing from murder in the first to murder in the second degree, however, where there is sufficient evidence of a formed design to show that the homicide was deliberate and premeditated. Watson v. State, *supra*.

And provocation by words which will reduce the grade of a homicide from murder in the first to murder in the second degree must be caused by the words of the victim, and not by rumors or reports. State v. Lewis, 14 Mo. App. 191.

Nor, if a person provokes a difficulty, or gives a first insult to another, should an insulting reply be considered as mitigating the offense of his act of killing the person making it, so as to reduce it to murder in the second degree. Watson v. State, *supra*.

What words of reproach and attendant circumstances will be deemed a just cause of provocation, and constitute a homicide committed in resentment thereof murder in the second degree, is in every case a question of law for the court. State v. Ellis, 74 Mo. 207.

But whether the state of mind necessary to make a killing murder in the second degree was in fact superinduced by provocation by words, and actually existed at the time of the killing, is a question of fact for the jury. Ibid.

III. Statutory modifications of the rule.

a. Under miscellaneous provisions.

Where it is provided by statute, as in Texas, that any condition or circumstance which is capable of creating, and does create, sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not, is adequate cause; if a person, on account of abuse heaped upon him by another, voluntarily slays the latter in a sudden heat of passion engendered by the abuse, taken in connection with previous wrongs done him by the deceased; and the combined circumstances are of such a character as to render the mind of the slayer incapable of cool reflection, the killing is manslaughter. Bonnard v. State, 25 Tex. App. 173, 8 Am. St. Rep. 431, 7 S. W. 862; Wadlington v. State, 19 Tex. App. 266.

And the statutory rule, as applied to a killing in a sudden heat of passion engendered by abuse, taken in connection with previous wrongs, is not affected by an express statutory declaration that no insulting words or gestures, unaccompanied by violence, are adequate cause; since, though one of several causes alone and independent of the others may not be deemed adequate, yet all combined and existing conjointly with one another may be adequate cause. Wadlington v. State, *supra*.

And an assault made by the person afterwards killed, upon the slayer a short time before the killing, and repeated threats by

that the jury could not disregard the testimony of the defendant, the court told them "that the defendant is a competent witness in his own behalf, and that they have a right to consider his evidence, and are to give it such faith and credit as they may believe it entitled to receive." It is contended that the language that they "have a right to consider his evidence" implies that they may use their discretion as to whether they shall or shall not consider it. Although not the best form of expression, we do not think that it conveys the idea that the consideration of the defendant's evidence was optional with the jury, because in the same instruction they are specifically told to give his evidence such faith and credit as they believe it is entitled to receive. The general instruction given as to weighing the evidence in the case makes no exception of his, and it is impossible to think that the jury understood that they could overlook his testimony.

The defendant has no reason to complain of the instructions as to malice, or as to the definition of the term.

The court instructed the jury "that no words, however abusive and insulting, will justify an assault, or will constitute a sufficient provocation to reduce to manslaughter what would otherwise be murder." The instruction is both appropriate and correct, and within the authorities. Murphy v. State, 31 Ind. 511; Boyle v. State, 105 Ind. 469, 55 Am. Rep. 218, 5 N. E. 203; Crosby v. People, 137 Ill. 325, 27 N. E. 49; People v. Kelly, 113 N. Y. 647, 21 N. E. 122; Allen v. United States, 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. Rep. 154; 21 Am. & Eng. Enc. Law, 2d ed. p. 179.

Other criticisms of the instructions are made, which have been considered, but which are not deemed to be material. The evidence did not warrant the submission of an instruction as to manslaughter in the second degree, and it would have been error to have charged the jury upon that grade of the offense. Upon the whole case, the court is of the opinion that no prejudicial error was committed in the trial of the case, and that there is sufficient evidence to sustain the verdict of the jury.

The judgment will be affirmed.

Burch, J., did not sit, having been of counsel. All the other Justices concur.

the former to take the latter's life, even after a peace bond had been required of him, and a meeting between them at an unusual place upon the premises of the slayer, furnish a basis for adequate cause to engender passion in the mind of a man of ordinary temper, making it necessary to charge, in a prosecution for the killing, on the subject of manslaughter. Schauer v. State (Tex. Crim. App.) 60 S. W. 249.

So, abusive language, accompanied by an advance with a drawn knife, may be sufficient to reduce the killing of the person using such language from murder to manslaughter. Gray v. State (Tex. Crim. App.) 83 S. W. 705.

And where two persons act together in ill-will toward another, insulting language or conduct addressed to him by one of them is properly regarded as the act of both. Willis v. State (Tex. Crim. App.) 90 S. W. 1100.

To reduce homicide from murder to manslaughter because of provocation by the use of insulting words, under such a statute, however, the killing must have taken place immediately upon their utterance. Evers v. State, 31 Tex. Crim. Rep. 318, 18 L.R.A. 421, 37 Am. St. Rep. 811, 20 S. W. 744.

And it is necessary not only that the adequate cause existed to produce anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection, but such a state of mind must actually exist at the time of the killing. Eanes v. State, 10 Tex. App. 421.

And a bare threat without any act indicative of an intention of carrying it into execution is not adequate cause to excite such anger, rage, sudden resentment, or terror as renders the mind incapable of reflection, made by the statute a ground for reducing a homicide from murder to manslaughter. Johnson v. State, 27 Tex. 758.

Nor can an insulting remark, made by a person afterwards killed to and in the presence of the person who killed him, avail the slayer as a ground for mitigation of the killing from murder to manslaughter, where, after it was made, he went away, and returned only when he was dared to do so by the other. Evers v. State, *supra*.

So, heat of passion, within the meaning of a statutory provision defining manslaughter in a named degree to be the involuntary killing of another by means neither cruel nor unusual, in the heat of passion in any other cases than those which are declared by statute to be excusable homicide, affords the intended protection, whether it was produced by words or acts of provocation such as are naturally calculated to produce it. Wilson v. People, 4 Park. Crim. Rep. 619.

A statutory provision like that of Alabama, making the use of opprobrious words or abusive language an extenuation or justification for an assault brought on thereby, however, applies to assault and battery only, and not to homicide. Prior v. State, 77 Ala. 56.

And the equivalent circumstances referred to in a statutory provision like that of Georgia, making actual assault, or other equivalent circumstances, adequate cause to reduce a homicide from murder to manslaughter, do not include words, threats, menaces, and contemptuous gestures. Findley v. State (Ga.) 54 S. E. 106; Edwards v. State, 53 Ga. 428.

But, while words, threats, menaces, and

contemptuous gestures are not equivalent circumstances to an actual assault which will reduce a killing from murder to manslaughter, what circumstances will present these equivalents, and justify an excitement of passion, and exclude all idea of deliberation or malice, is a question for the jury in a prosecution for homicide, to be determined in accordance with the standard laid down by law. Findley v. State, *supra*.

And an inaccurate instruction to the effect that the equivalent circumstances which will reduce a homicide from murder to manslaughter must correspond somewhat in their character with an actual assault or an attempt to commit a serious personal injury is not a ground for reversal, where no provocation appears in the evidence except one by words, threats, or menaces. Edwards v. State, *supra*.

So, where, as in Georgia, the statute provides that provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free a person killing another from the guilt of murder, no words, however opprobrious, and no passion caused thereby, however great, can, when considered alone, reduced a homicide from murder to manslaughter. Fry v. State, 81 Ga. 645, 8 S. E. 308.

Nor will provocation by threats be sufficient in any case to free the person threatened from guilt of murder, and reduce the crime to manslaughter, where he kills the threatener. Jackson v. State, 45 Ga. 198.

And the fact that a person has been told that another has spoken slanderous words concerning a member of his family will not reduce the act of the former, of killing the latter, from murder to manslaughter. Perryman v. State, 114 Ga. 545, 40 S. E. 746.

And where it appears that hot words passed between the parties, and the deceased drew his knife from his pocket, but had not opened it or offered to use it, and was stabbed and killed by the accused as deceased was being taken from the room by others present; and a proper charge was given as to heat of passion, malice, express or implied and as to murder and manslaughter, it is proper further to charge that something more is necessary than provocation by words, threats, menaces, or contemptuous gestures, and that such words, accompanied by drawing a knife with no attempt to use it, are not sufficient. Edwards v. State, 53 Ga. 428.

So, when the circumstances of a case make it one of manslaughter, the statutory provision that provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free a person killing another for such threats from the guilt of murder cannot be regarded as providing by implication that such a provocation may free him from the crime of voluntary manslaughter. Jackson v. State, *supra*.

And a verdict of voluntary manslaughter in a prosecution for homicide will not be disturbed where it appears that the deceased had threatened the life of the accused, whereupon the accused left the place where the quarrel took place, and returned later and said he was ready if deceased was going to whip him, when deceased advanced upon him pistol in hand, upon which accused shot him. Ibid.

Nor will a verdict of involuntary manslaughter be disturbed where the evidence shows that the prisoner was the assailant upon provocation by words only, and that he began by a blow with a pitchfork, and that the difficulty terminated in another stroke with the same instrument, producing death. Arwood v. State, 59 Ga. 391.

But the meaning of such a statutory provision is that, in all cases of homicide in which the provocation is but words, the offense shall not be reduced from murder to manslaughter; in cases of homicide where the provocation consists of some actual assault the offense may be so reduced. Stokes v. State, 18 Ga. 17.

And where there was an exchange of abusive words, resulting in the drawing of a knife by the deceased and hot blood in both combatants, and an interval of two hours elapsed, and then a fatal rencounter ensued, it is proper, in a prosecution for the killing, to instruct the jury on the law of voluntary manslaughter. Williams v. State (Ga.) 54 S. E. 108.

b. Texas provision as to insults to female relatives.

1. Terms of.

In Texas insulting words or conduct by the person killed toward a female relative of the slayer is made, by statute, adequate cause to reduce the offense of killing the offender from murder to manslaughter if it takes place at the first meeting after the slayer receives information concerning the insult. Jones v. State, 33 Tex. Crim. Rep. 492, 47 Am. St. Rep. 46, 26 S. W. 1082; Norman v. State, 26 Tex. App. 221, 9 S. W. 606; Price v. State, 36 Tex. App. 403, 37 S. W. 743; Davis v. State, 37 Tex. Crim. Rep. 371, 35 S. W. 388; Richardson v. State, 9 Tex. App. 613; Niland v. State, 19 Tex. App. 166.

2. The insult.

Insulting language with reference to a female relative, which will constitute adequate cause for reducing the killing of the person uttering it from murder to manslaughter, is not limited to language used in the presence of the female relative. Hudson v. State, 6 Tex. App. 565, 32 Am. Rep. 595.

Nor need such insulting language or conduct be such that the female relative in question would herself feel insulted or affronted. Garrett v. State, 36 Tex. Crim. Rep. 230, 36 S. W. 454.

And where the conduct sought to be used to mitigate a homicide to manslaughter is toward a female relative, and is calculated reasonably to impress the male relative interfering that they are engaged in, or about to engage in, an immoral act, the provoca-

tion is sufficient, though the conduct is not such as to afford her any personal grievance. Ibid. Canister v. State, 46 Tex. Crim. Rep. 221, 79 S. W. 24; Young v. State (Tex. Crim. App.) 69 S. W. 153.

So, to constitute adequate cause for the reduction of a homicide from murder to manslaughter insulting language with reference to a female relative need not have been uttered in the presence or hearing of the slayer. Orman v. State, 22 Tex. App. 604, 58 Am. Rep. 662, 3 S. W. 468; Niland v. State, 19 Tex. App. 166.

It is enough that the slayer was informed of its utterance, and slew the utterer at their first meeting after receiving such information. Howard v. State, 23 Tex. App. 265, 5 S. W. 231; Doss v. State, 43 Tex. Crim. Rep. 551, 67 S. W. 321.

And, where a charge of murder is defended on the ground that it was committed because of insulting conduct by the deceased toward the wife of the accused, he may prove by original evidence that, prior to the killing, the wife communicated the fact of the insult to a witness, who in turn communicated it to him. Jones v. State, 38 Tex. Crim. Rep. 37, 70 Am. St. Rep. 719, 40 S. W. 807, 41 S. W. 738.

So, that the slayer received information of the alleged insult, and believed it, are the essential ingredients of adequate cause; and the mere fact that no insult was actually offered is immaterial where the slayer was informed and honestly believed that one had been offered. Jones v. State, 33 Tex. Crim. Rep. 492, 47 Am. St. Rep. 46, 26 S. W. 1082; Brown v. State (Tex. Crim. App.) 24 S. W. 509; Messer v. State, 43 Tex. Crim. Rep. 97, 63 S. W. 643; Melton v. State (Tex. Crim. App.) 83 S. W. 822; McAnear v. State, 43 Tex. Crim. Rep. 518, 67 S. W. 117.

And where a husband seeks to reduce a homicide committed by him to manslaughter on the ground that it was committed because of insulting words and conduct by deceased toward his wife, which she communicated to him, evidence that, before the homicide, she had stated the facts to others, is admissible to support her testimony, and to show that the husband believed her statement and acted in consequence thereof; the theory of the prosecution being that her testimony was wrongfully fabricated solely to aid in defense of her husband. Jones v. State, 38 Tex. Crim. Rep. 87, 70 Am. St. Rep. 719, 40 S. W. 807, 41 S. W. 638.

And the bad general reputation of the person killed, and his reputation as a man of unchaste habits toward women, are admissible in evidence upon an issue as to whether or not the accused believed information received from his wife with reference to insulting conduct toward her, and acted upon it. Ibid.

So, the act of one man calling another a son of a bitch is not adequate cause to reduce a killing of the former by the latter to manslaughter, under a statutory provision making insulting words toward female relatives such adequate cause, since the insult is to the man himself, and not to his mother. Levy v. State, 28 Tex. App. 203, 19 Am. St. Rep. 826, 12 S. W. 596; Hayman v. State (Tex. Crim. App.) 83 S. W. 204; Simmons v. State, 23 Tex. App. 653, 5 S. W. 208; Driver v. State (Tex. Crim. App.) 65 S. W. 528.

And a charge made by one person that another person and his wife had a venereal disease furnishes no ground for mitigation of the killing of the former by the latter from murder to manslaughter on the ground of insulting language to a female relative where the charge was made directly to the man. Townsell v. State (Tex. Crim. App. 78 S. W. 938.

Nor is the act of a husband, of frequently while his wife had her menses, copulating with her against her will from three to four times in a night, such an insult by a husband to his wife as will reduce the killing of the husband therefor by a brother of the wife from murder to manslaughter. Willis v. State (Tex. Crim. App.) 75 S. W. 790.

To determine whether conduct of a person afterwards killed was or was not insulting within the meaning of a statute making insulting language or conduct toward a female relative adequate cause to reduce the crime of killing the insulter from murder to manslaughter, all the testimony bearing on that subject, or in any manner relating to it, should be taken into consideration. Jones v. State, 33 Tex. Crim. Rep. 492, 47 Am. St. Rep. 46, 26 S. W. 1082.

3. The time of killing.

To reduce a homicide to manslaughter under a statutory provision making insulting words or conduct of the person killed toward a female relative of the slayer adequate cause so to reduce the killing, the killing must take place immediately upon the uttering of the insulting words or the happening of the insulting conduct, or as soon thereafter as the parties meet after knowledge of the insult. Pitts v. State, 29 Tex. App. 374, 16 S. W. 189; Hardcastle v. State, 36 Tex. Crim. Rep. 555, 38 S. W. 186; Hill v. State, 5 Tex. App. 2; Howard v. State, 23 Tex. App. 265, 5 S. W. 231; Melton v. State, 24 Tex. App. 47, 5 S. W. 652; Willis v. State (Tex. Crim. App.) 90 S. W. 1100; Green v. State (Tex. App.) 12 S. W. 872; Stewart v. State (Tex. Crim. App.) 40 S. W. 499; Townsell v. State (Tex. Crim. App.) 78 S. W. 938.

And an insult offered to a female relative in the actual presence and hearing of the slayer is not an adequate provocation to reduce his act of killing the person offering the insult from murder to manslaughter where it was not acted upon until some time afterwards. Townsell v. State, *supra*.

But to render insulting words or conduct toward a female relative in the absence of, and not heard or seen by, the slayer sufficient provocation to reduce homicide from murder to manslaughter, the killing need not have immediately followed the utterance of the insulting words. Orman v. State, 22 Tex. Crim. Rep. 604, 58 Am. Rep. 662, 3 S.

W. 468; Melton v. State (Tex. Crim. App.) 83 S. W. 822.

There is no question of cooling time up to the time of the first meeting of the parties in a prosecution for homicide under this statute. If it takes place at the first meeting after the information concerning the insult the law prescribes no limit to the subsistence of the passion engendered thereby. Jones v. State, 33 Tex. Crim. Rep. 492, 47 Am. St. Rep. 46, 26 S. W. 1082; Miller v. State, 27 Tex. App. 63, 10 S. W. 445; Crews v. State, 34 Tex. Crim. Rep. 533, 31 S. W. 373; Eanes v. State, 10 Tex. App. 421; Niland v. State, 19 Tex. App. 166.

Though a charge with reference to cooling time is harmless error where a proper and pertinent charge upon manslaughter based upon such words and conduct is given. Crews v. State, *supra*.

To be manslaughter, and not murder, under this provision, the killing need not have taken place under the immediate influence of sudden passion. Orman v. State, 22 Tex. App. 604, 58 Am. Rep. 662, 3 S. W. 468.

And the jury should not be limited in their finding to a provocation arising at the time of the difficulty. Tucker v. State (Tex. Crim. App.) 50 S. W. 711; Williams v. State, 24 Tex. App. 637, 7 S. W. 333; Maxwell v. State (Tex. Crim. App.) 56 S. W. 62; Niland v. State, *supra*.

Nor is the length of the period of time intervening between apprisal of the insult and the first meeting with the insulter material on the question of the sufficiency of the provocation to reduce the degree of the crime of killing the person offering the insult, where the provocation and the proper state of mind upon the part of the slayer coexist. Williams v. State, *supra*; Hudson v. State, 43 Tex. Crim. Rep. 420, 66 S. W. 668.

And the fact that the meeting between a person whose female relative had been insulted and the person offering the insult was not casual, but that the former sought out the offender, does not prevent the insult from mitigating the offense of the former in killing the latter, as a matter of law. Halliburton v. State, 32 Tex. Crim. Rep. 51, 22 S. W. 48.

A meeting, within the meaning of the statutory provision, may be either casual or intended; and an instruction with reference thereto, in a prosecution for the killing, is not subject to the objection that it fails to define the character of the meeting. Allen v. State, 44 Tex. Crim. Rep. 205, 70 S. W. 85.

Insulting language and conduct toward a female relative of the slayer furnish no ground of mitigation of the offense in a prosecution for homicide, however, where it appears that the slayer, after being informed of the insult, met the person killed several times before he killed him. Bledsoe v. State (Tex. Crim. App.) 34 S. W. 120.

And a provocation by way of an insult offered to a female relative, not adequate to reduce the killing of the insulter from murder to manslaughter because not taken advantage of upon the first opportunity, cannot be coupled with insulting language or conduct subsequently indulged in, so as to constitute adequate cause. Hardcastle v. State, 36 Tex. Crim. Rep. 555, 38 S. W. 186.

Nor can it be coupled with insulting language or conduct toward another female relative for that purpose. McComas v. State (Tex. Crim. App.) 72 S. W. 189.

Though an instruction in a prosecution for homicide on the issue of mitigation as to insulting words or conduct toward the daughter and wife of the accused is not objectionable for failure separately to charge on insulting conduct toward each. McComas v. State (Tex. Crim. App.) 81 S. W. 1212.

But though the killing of the insulter by a person whose female relative had been insulted was not at the first meeting subsequent to knowledge of the insult, where the insulting statements were repeated to the slayer upon his asking if it were true that they had been made, the repetition constitutes a new and aggravated provocation which may in itself be adequate to reduce the killing from murder to manslaughter. Richardson v. State, 28 Tex. App. 216, 12 S. W. 870; McAnear v. State, 43 Tex. Crim Rep. 518, 67 S. W. 117; Loyd v. State, 46 Tex. Crim. Rep. 533, 81 S. W. 293.

And where insulting conduct or language toward a female relative, upon the part of a person who was killed, is relied upon to reduce the killing to manslaughter, the accused is entitled to have the law given to the jury in a prosecution therefor with reference to the condition of his mind at the time of the first meeting between him and the person killed after he had learned of the insulting conduct or language, and at a time of the renewal of the statement, or an indorsement of the former statement by the deceased. Tucker v. State (Tex. Crim. App) 50 S. W. 711.

Nor does the fact that the accused and the deceased had a meeting after the wife of the accused had informed him that deceased had solicited intercourse with her, and requested her to kiss him, prevent an acquittal on the charge of murder in a prosecution against the accused for killing deceased, and a conviction of manslaughter, where the wife further informed the accused, subsequent to such meeting, of an attempt of the deceased to ravish her, and the killing occurred after the second communication; since this would be a sufficient cause if the necessary passion was engendered. Venters v. State (Tex. Crim. App.) 83 S. W. 832.

The term "meet" as used in this statute, signifies that the parties were brought into such proximity as would enable the slayer to act in the premises, whether armed or unarmed. Brown v. State, 45 Tex. Crim. Rep. 139, 75 S. W. 33; Pitts v. State, 29 Tex. App. 374, 16 S. W. 189.

4. The person killed.

The effect of provocation by insulting words or conduct with reference to a female relative is not altered by the fact that the killing was of a person other than the utterer of the insult, where the intent was to

kill him, and the killing of the other resulted from accident or interference by the person killed in behalf of the person offering the insult. Nelson v. State (Tex. Crim. App.) 87 S. W. 143.

And where a man uses insulting language and conduct toward a female relative of another, and a third person, by express declaration, makes all the insulting language and conduct of the other his own, and dares the person whose relative was insulted to take it up, and the latter kills him, the insult is, in effect, adopted by the person killed, and the slayer is within the protection of the statutory provision making insulting language or conduct to a female relative adequate cause to reduce the killing from murder to manslaughter. Willis v. State (Tex. Crim. App.) 75 S. W. 790.

5. Passion and killing as a result of insult.

The mere fact that an insult was given is not sufficient, under a statutory provision making insulting words or conduct of the person killed toward a female relative of the slayer adequate cause, to reduce the killing from murder to manslaughter; it must have induced the requisite degree of passion. Knowles v. State, 31 Tex. Crim. Rep. 383, 20 S. W. 829; Fendrick v. State, 39 Tex. Crim. Rep. 147, 45 S. W. 589; Jones v. State (Tex. Crim. App.) 85 S. W. 5.

The question in a prosecution for homicide on an issue of mitigation on the ground of insulting language or conduct to a female relative is whether the slayer acted under the impulse of passion, and not whether the insult was given. The law will not presume passion from the insult. Knowles v. State, *supra*.

And the passion engendered by the insult must have been the real cause of the killing. Hill v. State, 5 Tex. App. 2; Norman v. State, 26 Tex. App. 221, 9 S. W. 606; Orman v. State, 22 Tex. App. 604, 58 Am. Rep. 663, 3 S. W. 468; Jones v. State, 33 Tex. Crim. Rep. 492, 47 Am. St. Rep. 46, 26 S. W. 1082.

It must appear that the slayer did the killing by reason of passion produced by the insult, and for no other cause. Orman v. State, *supra*.

And where a prosecution for homicide is defended upon the ground that it was done upon provocation by insulting words of the deceased in relation to the wife and daughter of the accused, threats made by the deceased against the accused cannot be looked to in order to determine whether or not the provocation was sufficient. Davis v. State, 37 Tex. Crim. Rep. 371, 35 S. W. 388.

And to reduce a killing from murder to manslaughter because of insults to female relatives the defendant's mind at the time of the killing must have been so agitated by reason of the insult that he was rendered incapable of cool reflection. Lane v. State, 29 Tex. App. 310, 15 S. W. 827.

The material questions in a prosecution for homicide on an issue of adequate cause by way of insulting words or conduct are, Were there insulting words or conduct on the part of the person killed toward a female relative of the slayer? Was that the real cause which provoked and induced the killing? Did the killing take place as soon as the slayer met the person killed after having been informed of the insult? and, Was the slayer, at the time of the killing, laboring under a degree of anger, rage, resentment, or terror such as would commonly, in a person of ordinary temper, render the mind incapable of cool reflection? Eanes v. State, 10 Tex. App. 421.

An insult to a female relative furnishes no ground for mitigation of the killing of the person uttering the insult, by the one whose relative was insulted, from murder to manslaughter, unless the slayer was informed of the insult before the killing was done. Howard v. State, 23 Tex. App. 265, 5 S. W. 231; Cockerell v. State, 32 Tex. Crim. Rep. 585, 25 S. W. 421; McVey v. State (Tex. Crim. App.) 81 S. W. 740; Orman v. State, *supra*.

And an instruction in a prosecution for homicide, with reference to mitigation or the offense to manslaughter because of insulting words to a female relative, is not called for where there is nothing to show that the slayer heard, or was informed, of the insult. Gibson v. State, 23 Tex. App. 414, 5 S. W. 314.

But, in determining whether insults offered to a female relative of the slayer by the person whom he killed were the cause of the crime, previous insults should be considered in connection with them. Messer v. State, 43 Tex. Crim. Rep. 97, 63 S. W. 643; Spangler v. State, 41 Tex. Crim. Rep. 424, 55 S. W. 326; Willis v. State (Tex. Crim. App.) 75 S. W. 790; Gossett v. State (Tex. Crim. App.) 70 S. W. 319.

And the general reputation of a female relative for chastity is a subject for consideration by the jury in a prosecution against a person who killed another for insulting her, on the question of the extent of the provocation. Wood v. State, 31 Tex. Crim. Rep. 571, 21 S. W. 602.

And the right to take the want of chastity of the wife of the accused into consideration in a prosecution for homicide alleged to have been committed because of insulting language and conduct with reference to the wife does not depend upon the knowledge and consent of the husband to the want of chastity while she was his wife. Ibid.

Special acts showing want of chastity upon the part of a woman who had been insulted, however, are not to be considered on the question of the extent of the provocation, in a prosecution against one of whom she was a relative, for killing one who had insulted her. Ibid.

And slanderous remarks made by a person concerning other women are not admissible in evidence in a prosecution against a person for killing him, claimed to have been done because the deceased insulted the slayer's daughter. McComas v. State (Tex. Crim. App.) 72 S. W. 189.

Nor can a wife, who has testified to in-

sulting conduct of a man toward her, and to communicating it to her husband, and that the man and her husband were friends until such communication, be called upon by the prosecution to testify, on cross-examination, as part of the *res gestæ* in a trial for murder, to matters relating to the disposition of her property, and the connection therewith of the person killed, or the squandering of her property by her husband. Jones v. State, 38 Tex. Crim. Rep. 87, 70 Am. St. Rep. 719, 40 S. W. 807, 41 S. W. 638.

6. Who are female relatives

That a man's wife, mother, daughters, nieces, etc., are his female relatives within the meaning of the statute seems to be too obvious to have been made a subject of judicial consideration.

So, a promised wife is a female relative within the meaning of a statute making insulting words or conduct of the person killed toward a female relative of the slayer adequate cause to reduce the offense of killing the insulter from murder to manslaughter. Lane v. State, 29 Tex. App. 310, 15 S. W. 827.

The statutory provision does not apply, however, to insulting language concerning a woman whom the slayer afterwards married, spoken years before the marriage. Cockerell v. State, 32 Tex. App. 585, 25 S. W. 421; Coleman v. State (Tex. Crim. App.) 88 S. W. 238.

But where a homicide is sought to be reduced to manslaughter by showing that the killing was caused by insulting conduct of the deceased toward the wife of the accused, both prior and subsequent to the marriage of the accused, evidence is admissible to show that the deceased committed a rape upon the wife of the accused prior to the marriage. Jones v. State, 33 Tex. Crim. Rep. 492, 47 Am. St. Rep. 46, 26 S. W. 1082.

And, while a criminal assault upon a woman before her marriage cannot be relied on to reduce the killing of the assailant by the man who afterwards married the woman from murder to manslaughter, it may be looked to for the purpose of giving character to the conduct of the assailant toward the woman after her marriage. Ibid.

So, a stepdaughter is a female relative of her stepfather while the marriage relation subsists between her mother and her stepfather, whether she is under the protection of her stepfather or not. Clanton v. State, 20 Tex. App. 615.

But, if the marriage relation between a man and woman is dissolved by death or divorce, a daughter of the wife by a former husband is no longer a female relative of the stepfather, within the meaning of the law with relation to insults to female relatives. Ibid.

Nor is the application of the statutory provision with reference to the mitigation of a homicide because of insults to female relatives limited to living female relatives; it includes as well insults offered to a female relative who was dead at the time of the insult or its communication to the slayer. Willis v. State (Tex. Crim. App.) 75 S. W. 790.

And the fact that a woman is married does not prevent the statutory provision from applying to her with relation to the mitigation of the crime of a brother in killing her husband for an insult offered to her. Ibid.

And evidence of an assault by a husband upon his wife and an attempt to poison her is sufficient to go to the jury under appropriate instructions, in a prosecution against the wife's brother for killing the husband, on the question whether or not there was adequate cause to reduce the killing from murder to manslaughter, in connection with the other facts and circumstances in evidence. Ibid.

So, any female under the protection of a person is his female relative within the meaning of a statutory provision making insulting words or conduct of the person killed toward a female relative of the slayer adequate cause to reduce the killing to manslaughter. Clanton v. State, *supra;* Ex parte Jones, 31 Tex. Crim. Rep. 432, 20 S. W. 983.

But, where the female insulted is not a relative, it must appear that both the insult and the killing occurred during the continuance of the statutory relation; if the female leaves the protection of the slayer before his first meeting with the insulter the right is gone. Ex parte Jones, *supra.*

Though it is not necessary that the female insulted, if a relative of the slayer, should have been under his protection, either permanent or temporary, at the time either of the insult or the killing; it is enough that she is a relative. Clanton v. State, *supra.*

A woman is not a relative of herself, within the meaning of a statute making insulting words or conduct of the person killed toward a female relative of the slayer adequate cause to reduce the killing from murder to manslaughter, where she herself does the killing on account of insulting language addressed to her. Moore v. State, 33 Tex. Crim. Rep. 351, 26 S. W. 404.

7. Submission and determination of the issue.

The statutory provision that insulting words or conduct of the person killed toward a female relative of the slayer shall be adequate cause to reduce the offense of killing from murder to manslaughter if it takes place at the first meeting after information concerning the insult, provides for an issue of mitigation in a prosecution for homicide; and failure to submit the issue of manslaughter to the jury, where there was evidence of insulting words or conduct toward the wife or other female relative of the slayer, is erroneous as tantamount to deciding upon the weight of evidence. Jones v. State, 33 Tex. Crim. Rep. 492, 47 Am. St. Rep. 46, 26 S. W. 1082;

Alexander v. State, 40 Tex. Crim. Rep. 395. 49 S. W. 227, 50 S. W. 716.

And an instruction in such a prosecution, authorizing conviction for murder in the second degree, is erroneous where it appears by the evidence that the deceased had used insulting language to the wife of the slayer about a month before the killing, which was communicated to the slayer for the first time just before the killing, and the killing was done at their first meeting. Ray v. State, 46 Tex. Crim. Rep. 511, 81 S. W. 737.

So, in Richardson v. State, 9 Tex. App. 612, which was a prosecution for homicide, it was held that an instruction that, if the deceased used insulting words or conduct toward a female relative of the accused at the place of the killing, this would constitute a sufficient, adequate cause to reduce the offense from murder to manslaughter, should be given on request, where the state depended entirely on circumstantial evidence, and statements of the accused in the nature of admissions of guilt, and the evidence of certain witnesses of the state; but the case fails to state what such evidence was.

Likewise, failure of the court, in a prosecution for homicide, to submit the law of manslaughter upon the theory of insulting conduct and language by the deceased toward the wife of the accused, and limiting it alone to insulting conduct and language by the deceased toward his daughter, is erroneous where there was testimony tending to show insulting language in regard to the wife. McComas v. State (Tex. Crim. App.) 75 S. W. 533.

A general, comprehensive charge on the subject of mitigation of homicide, that, if the accused killed the deceased on their first meeting after he had learned that the latter had insulted his wife, it would be manslaughter and not murder, however, is sufficient in the absence of any request for a special instruction. Allen v. State, 44 Tex. Crim. Rep. 205, 70 S. W. 85.

And giving a correct charge in a prosecution for homicide, in the abstract, that insulting words or conduct of a person killed toward a female relative of the slayer will constitute adequate cause provided the killing occurs immediately after the happening of the insulting conduct, or as soon thereafter as the parties may meet after the slayer has been informed of such conduct; and following it by a charge applying the rules of law thus stated to the evidence in the case raising the issue of manslaughter,—are not objectionable as tending to confuse and mislead the jury. Crews v. State, 34 Tex. Crim. Rep. 533, 31 S. W. 373.

Whether insulting words or conduct used by a person afterwards killed, to a female relative of a person who killed him, were the cause of the killing; or whether the killing was done deliberately and with premeditated design,—is a question of fact for the jury in a prosecution therefor. Norman v. State, 26 Tex. App. 221, 9 S. W. 606; Lane v. State, 29 Tex. App. 310, 10 S. W. 827; Jones v. State, 33 Tex. Crim. Rep. 492, 47 Am. St. Rep. 46, 26 S. W. 1082.

And a verdict of the jury in such a prosecution, determining that insulting words by the person killed, addressed to a female relative of the slayer, were not the real cause which provoked the killing, is justified by evidence of threats by the deceased to kill the accused, previously uttered, since this tends to show a previous ill-will between the parties. Norman v. State, *supra*.

IV. Conclusion.

The rule that no words of reproach, however grievous, and no actions or gestures expressive of reproach or contempt, however provoking, constitute sufficient provocation to reduce a homicide from murder to manslaughter, has been asserted so frequently as to warrant the assumption that, subject to the two exceptions, that opprobrious words or conduct may be sufficient to mitigate a homicide from murder to manslaughter when accompanied by an assault, or where they result in a mutual combat, it is settled law. But the rule seems to be based upon the theory that the question of mitigation is controlled by the character of the offense rather than by the passion aroused by it; and the tendency of modern judicial thought seems to be to regard passion as the essential element of mitigation, and that which caused the passion as merely the incident. Pursuant to this tendency, many of the more modern cases, while still asserting and upholding the general rule in its original form, have modified it by holding that an insult, though by opprobrious words or conduct, is entitled to the same effect by way of reducing a killing in resentment thereof from murder to manslaughter as an insult by way of assault when it was of such a nature as to excite the passions of the mass of men and as to enthrall their reason, and making it a question for the jury, in a proper case, whether or not such a degree of passion was actually aroused: and, where the insulting words or conduct involve injury to, or foul aspersion upon, a wife, daughter, or other female relative, they are usually held to be within the class of provocations which may be adequate notwithstanding the general rule.

So, the general rule has been modified by statute in some of the states, as in Texas, in which any condition or circumstance which is capable of creating, and which does create, sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection, is made adequate cause: and as in New York, in which a specified degree of manslaughter is defined to be involuntary killing in the heat of passion, heat of passion being sufficient whether produced by words or acts. And Texas has a statute which has given rise to much litigation, making insulting words and conduct by the person killed toward a female relative of the slayer adequate cause to reduce the homicide from murder to manslaughter, when the killing takes place at the first meeting after the slayer receives information concerning the insult. Under

this provision, the insult need not have been offered directly to the female relative, and it need not have been such that she herself would regard it as an insult; nor need it have been offered in the presence of the slayer; it is sufficient that he was afterwards informed of it, and did the killing on the first meeting with the person offering it after receiving the information, or after being brought to believe that it had been offered. The requisite degree of passion must have induced, however, to make the provocation adequate, and the passion must have been both the real and sole cause of the killing; the question whether or not it was so being one of fact for the jury. Besides the more direct and immediate relations, the statute includes a promised wife and a stepdaughter, and neither marriage nor death removes one from the catalogue of relations an insult to whom is adequate cause; and females under the protection of the slayer are included, though the killing must have been done during the statutory relation. But a woman is not a relative of herself, so as to authorize the mitigation of a killing by her in resenting an insult offered directly to her.

The general rule above set forth, however, as well as its exceptions and modifications, has reference only to the mitigation of homicide from murder to manslaughter. Words or conduct which are well calculated to arouse, and which do arouse, sudden passion, may be sufficient to reduce a homicide from murder in the first degree to murder in the second or a lower degree; but this effect will not be given them as against sufficient evidence of premeditation and a formed design to kill. And here, as elsewhere, whether the proper degree of passion was superinduced by the provocation and actually existed at the time of the killing is a question of fact for the jury; though what words of reproach and attendant circumstances will be deemed to be a just cause of provocation to reduce a homicide to murder in the second degree is always a question of law for the court.

F. H. B.

WYOMING SUPREME COURT.

FRANK E. STERRITT
v.
CHARLES C. YOUNG et al.

(—Wyo.—, 82 Pac. 946.)

Eminent domain—notice of hearing.

1. A statute providing for condemnation of a right of way for an irrigation ditch must provide for notice to the person whose land is to be taken of the hearing for fixing the damages, and it is not sufficient that notice is provided of the time for appointment of the appraisers.

Same—estoppel to contest proceedings.

2. One who has accepted the compensation awarded for a right of way over his property is estopped to question the validity of the proceedings by which it was ascertained.

(November 20, 1905.)

CERTIFICATION by the District Court of Carbon County of questions arising upon trial of an action brought to restrain defendants from going upon and constructing an irrigation ditch over plaintiff's land. Answers favorable to plaintiff returned.

The facts are stated in the opinion.

Messrs. **McMicken & Blydenburgh**, for plaintiff:

In all proceedings to take property under eminent domain there must be notice and opportunity to be heard.

Burns v. Multnomah R. Co. 8 Sawy. 543, 15 Fed. 177; Ames v. Port Huron Log Driving & Boom Co. 11 Mich. 139, 83 Am. Dec. 731; Lang v. People, 14 Mich. 454; Kundinger v. Saginaw, 59 Mich. 355, 26 N. W. 634; Langford v. Ramsey County, 16 Minn. 375, Gil. 333; McGavock v. Omaha, 40 Neb. 64, 58 N. W. 543.

Where a statute does not provide for a notice, the mere fact that the notice may be given does not remedy the defect in the statute.

Board of Education v. Aldredge, 13 Okla. 205, 73 Pac. 1104; Lewis, Em. Dom. § 365; Aldredge v. School Dist. No. 16, 10 Okla. 694, 65 Pac. 96.

Mr. N. R. Greenfield, for defendants:

All that is required is that the tribunal making the assessment be an impartial one, and that the parties interested have an opportunity to be heard.

7 Enc. Pl. & Pr. p. 545; Fallbrook Irrig. District v. Bradley, 164 U. S. 167, 41 L. ed. 392, 17 Sup. Ct. Rep. 56; Farm Invest. Co. v. Carpenter, 9 Wyo. 110, 50 L.R.A. 747, 87 Am. St. Rep. 918, 61 Pac. 258.

Beard, J., delivered the opinion of the court:

This action was commenced in the district court of Carbon county by the plaintiff against the defendants for an injunction to restrain the defendants from going

Case Note.—Necessity of providing in statute for notice of hearing on question of damages or compensation in eminent domain proceedings.—Although, as subsequently shown, there are a few cases to the contrary, the great weight of authority either holds or assumes that notice, in some form and at some stage of the proceedings, which will afford property owners an opportunity to be heard upon the question of damages or compensation for the property taken, is a constitutional requisite of the validity of

upon and constructing an irrigating ditch over and across plaintiff's land. In a supplemental answer filed by defendants they alleged that appraisers had been duly appointed by the county commissioners of said county to view the premises and assess plaintiff's damages for the construction of said ditch, and that said appraisers had viewed the premises and had made due report and return of their ascertainment and assessment of plaintiff's damages; that defendants had paid all costs and expenses incurred by reason of said appraisement, and had offered and tendered to plaintiff the amount awarded to him by said appraisers, which he refused to accept; and that said sum was then deposited with the board of county commissioners with instructions that the same be paid to plaintiff. It also appears from the pleadings that a petition had been presented to the commissioners by the defendants, praying for the appointment of appraisers, and that notice was published by the commissioners of the time when the appraisers would be appointed. There is no allegation in the supplemental answer that any notice was given to plaintiff of the time or place of meeting of the appraisers, or that they gave him any opportunity to be heard as to the amount of such damages, or that he appeared at such meeting. To this supplemental answer a general demurrer was filed by the plaintiff, and the court, upon the request of both parties and on its own motion, deeming difficult constitutional

condemnation proceedings. Savannah, F. & W. R. Co. v. Savannah, 96 Ga. 680, 23 S. E. 847; Kellogg v. School Dist. No. 10, 13 Okla. 285, 74 Pac. 110; Burns v. Multnomah R. Co. 8 Sawy. 543, 15 Fed. 177; Pearsall v. Eaton County, 74 Mich. 558, 4 L.R.A. 193, 42 N. W. 77; Curry v. Place, 99 Mich. 524, 58 N. W. 472; Boonville v. Ormrod, 26 Mo. 193; Grady v. Dundon, 30 Or. 333, 47 Pac. 915; State, Morris, Prosecutor, v. Heppenheimer, 54 N. J. L. 268, 23 Atl. 664; Towns v. Klamath County, 33 Or. 225, 53 Pac 604; Sullivan v. Cline, 33 Or. 260, 54 Pac. 154; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289, *obiter;* Anderson v. Turberville, 6 Coldw. 150. See also cases subsequently cited, holding that notice is necessary to the validity of the proceedings, though not expressly provided for by the statute.

It is to be observed, however, that while the cases above cited insist upon notice as a constitutional requisite of a valid assessment and determination of damages or compensation for the property taken, they do not expressly pass upon the question involved in STERRITT *v.* YOUNG,—,whether there must be a specific notice of the hearing to fix the damages, or compensation, or whether a notice at some prior stage in the proceedings is sufficient. The decision on this point in STERRITT v. YOUNG appears to be in conflict with St. Joseph v. Geiwitz, 148 Mo. 210, 49 S. W. 1000, holding that an eminent domain statute does not violate due process of law because it makes no provision for notice of the time when commissioners will view the premises and pass on the question of damages, but compels the property owners to take cognizance of all proceedings after service of summons.

In Savannah, F. & W. R. Co. v. Savannah, 96 Ga. 680, 23 S. E. 847, the court, while holding the eminent domain provision of a city charter unconstitutional for failure to provide for notice, said that it was not prepared to say that the mere failure of the charter to provide for notice to property owners of proceedings before the assessors upon the question of compensation would be fatal, if it anywhere provided for such notice as would allow them to be heard before some appropriate tribunal upon the question.

While it is now thoroughly established that notice is a constitutional requisite of the validity of the determination and assessment of damages, there is considerable conflict of authority upon the question whether the failure of an eminent domain statute to provide for such notice will render it unconstitutional and the proceedings thereunder void, irrespective of the question of actual notice.

Some of the cases hold, in accordance with the view adopted in STERRITT v. YOUNG, that the statute must expressly provide for such notice, and that its omission in that respect cannot be supplied by implication. Thus, in Board of Education v. Aldredge, 13 Okla. 205, 73 Pac. 1104, the court after an examination of the authorities came to the conclusion that the statute must stand or fall as enacted by the legislature; and that where no notice is provided, a court ought not to say that notice is implied. The statute involved in this case was accordingly held unconstitutional for want of an express provision for notice; and the court withdrew any expressions in its opinion in Aldredge v. School Dist. No. 16, 10 Okla. 694, 65 Pac. 96, intimating that notice might be effectually given, although not expressly provided for. The statute involved in this case was identical with that involved in Buckwalter v. School Dist. No. 42, 65 Kan. 603, 70 Pac. 605, *infra*, and the decision in the latter case was disapproved in the former.

In Hood v. Finch, 8 Wis. 381, a proceeding to open a street over private property was held invalid because no award was made to the owner of the property; but the court said that it had less reluctance in making such decision from the fact that the charter of the city under which the proceedings were conducted enabled the city council, one of the parties to the proceeding, to take private property for public use without any notice

questions to have arisen upon the demurrer, reserved its ruling thereon, and certified the following questions to this court for decision, viz.: "(1) Do §§ 897, 898, 899, and 900 of the Revised Statutes of Wyoming of 1899 provide a valid way, under the Constitution of the state of Wyoming, by which a private person may condemn the lands of another for a right of way for a ditch to irrigate his own lands? (2) Are §§ 897, 898, 899, and 900 of the Revised Statutes of Wyoming of 1899, and the procedure therein indicated, in conflict with § 6 of article 1 of the Constitution of the state of Wyoming? (3) Are §§ 897, 898, 899, 900 of the Revised Statutes of Wyoming of 1899, and the procedure therein indicated, in conflict with § 7 of article 1 of the Constitution of the state of Wyoming? (4) Are §§ 897, 898, 899, and 900 of the Revised Statutes of the state of Wyoming of 1899, and the procedure therein indicated, in conflict with § 32 of article 1 of the Constitution of the state of Wyoming? (5) Are §§ 897, 898, 899, and 900 of the Revised Statutes of Wyoming of 1899, and the procedure therein indicated, in conflict with § 33 of article 1 of the Constitution of the state of Wyoming? (6) These §§ 897, 898, 899, and 900 of the Revised Statutes of Wyoming of 1899, having been originally adopted in 1875, while Wyoming was a territory, and before the adoption of the state Constitution, were they void at that time, and, if so, did they

to the individual whose property it proposed to take, and to summon six freeholders to determine both the necessity for such taking and to appraise and fix the compensation.

In Langford v. Ramsey County, 16 Minn. 375, Gill. 333, holding that an act providing for the taking of private land for a state road was unconstitutional, the fact that it did not provide for notice of proceedings before the commissioners to determine the compensation was mentioned as an objection, but the stress was laid upon the fact that the commissioners were appointed directly by the legislature, without the consent of the owners of the property to be taken.

In Kundinger v. Saginaw, 59 Mich. 355, 26 N. W. 634, and Re Smith, 9 Wash. 85, 37 Pac. 311, 494, statutes which provided for constructive, but not for personal, notice to property owners, were held unconstitutional. In the former case the court said that when the statute specifies what notice shall be given, and does not include personal notice, it excludes that method, and renders the statute invalid. Assuming, as these cases do, that personal notice is a constitutional requisite, and that constructive notice is not sufficient, they are distinguishable from the cases subsequently cited, holding that the omission of the statute to provide for proper notice may be cured by implication, since the express provision in these statutes for constructive notice prevented the implication of a personal notice.

In Re Oneida Street, 37 App. Div. 266, 55 N. Y. Supp. 959, the court said if the portion of the section of a city charter with reference to the opening of streets upon lands taken, but not benefited, was unconstitutional because of its failure to provide expressly for notice to the owners of such property, the portion with reference to the opening of a street over land all of which is deemed to be benefited, and which did provide for notice, was not thereby rendered unconstitutional.

It is expressly held in some cases, and assumed in others, that the failure of the statute to provide expressly for notice does not render it unconstitutional, but that the omission is supplied by implication. In some of these cases the court apparently takes the view that notice is to be implied from the very fact that it is a constitutional requisite, and independently of any provisions of the statute that contemplated, or were evidently framed upon the assumption, that the property owner is entitled to notice. Thus, in Kearney Twp. v. Ballentine, 54 N. J. L. 194, 23 Atl. 821, the court said that the commissioners of assessment constituted the only tribunal charged by the statute with the duty of fixing the compensation to be paid to the owners of the land taken, and that it was a judicial duty, and therefore, although the statute was silent on the subject of notice, it was essential to the legal performance of their functions that the commissioners should have afforded to the landowners a reasonable opportunity of being heard before the tribunal upon the questions involved in that decision. The award of damages in this case was held illegal for lack of notice.

And the following cases also seem to base the decision that notice is to be implied upon the constitutional necessity of notice, irrespective of particular provisions in the statutes apparently contemplating that notice is to be given: People ex rel. Heiser v. Gilon, 121 N. Y. 551, 24 N. E. 944, holding an award of damages illegal for lack of notice, although none was expressly provided for by statute; Re Road, 109 Pa. 118, holding that, while notice is necessary, though not expressly provided for by statute, it need not be shown by the record, but may be shown by parol; Strachan v. Brown, 39 Mich. 168, holding proceedings invalid for lack of notice, although none was expressly provided for by statute.

In Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co. 17 W. Va. 835, the court said: "It is true that the statute has omitted to provide that notice of the application for condemnation shall be given to the landowner before the viewers are appointed to ascertain a just compensation for the land, but does it follow that the owner is not entitled to such notice, and is not al-

ever become valid laws of the state of Wyoming?"

The sections of the statutes involved in the questions are those which provide the manner in which a private person may exercise the right of eminent domain for the right of way for an irrigating ditch over the lands of another. Section 897, Rev. Stat. 1899, provides in substance that where one's lands are so situated that to irrigate the same it is necessary to construct a ditch for that purpose over the lands of another, he shall be entitled to such right of way. Section 898 limits the extent of such right of way to a ditch, dyke, or cutting sufficient for the purposes required. Sections 899 and 900 provided the manner in which such right of way may be condemned, if the owner of the land over which the ditch is to be constructed refuses to grant the same, and are as follows:

"Sec. 899. Upon the refusal of owners of tracts of land or lands, through which said ditch is proposed to run, to allow of its passage through their property, the persons desiring to open such ditch may present to the county commissioners of the county in which said lands are located, a petition signed by the person or persons, describing, with convenient accuracy, the lands so desired to be taken as aforesaid, setting forth the name or names of the owner or other person interested, and praying the appointment of three appraisers to ascertain the compensation to be made to such owner or persons interested. Upon the receipt of said

lowed to appear and show, if he can, that the applicant has no lawful right to take the land from him? This is not the construction to be given such a statute. Where a statute authorizes a legal proceeding against anyone, and does not expressly provide for notice to be given, it is implied that an opportunity shall be afforded him to appear in defense of his rights, unless the contrary clearly appears."

The decision in Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750, though involving the question of an assessment against property for the construction of a sewer, and not the question of a taking of property, seems to be relevant, by analogy at least, upon the point under discussion. The court, in that case, while not questioning that notice in some form must be given before the assessment could be sustained, held that it was not essential to the validity of a city charter granting the power to construct sewers, that there should in terms be expressed either the necessity for, or the time or manner of, such notice.

A number of cases, though probably not opposed to the doctrine that bases the implication of notice upon the constitutional necessity therefor, without reference to the particular provisions of the act, nevertheless base the implication of notice upon particular provisions of the act that were evidently framed upon the assumption that the property owners would receive notice. Thus, the necessity of notice was held, in Peoria & R. I. R. Co. v. Warner, 61 Ill. 52 (holding proceedings invalid for want of notice), to be implied by express provisions of the act for an application to a justice of the peace in case of disagreement as to the amount of damages, and for an appeal by either party from the assessment; in Swan v. Williams, 2 Mich. 427, by the express provisions in the charter of a railroad company authorizing the owner to assist in striking the jury to assess the damages, and giving him the right, upon the return of the inquisition into the circuit court, to show cause against it; in Tracy v. Elizabethtown, L. & B. S. R. Co. 80 Ky. 259 (holding the proceedings invalid, *inter alia*, for lack of notice), by express provisions in a railroad charter giving owners the right to an appeal, and authorizing an agreement for compensation before the application for a writ of *ad quod damnum;* in Baltimore Belt R. Co. v. Baltzell, 75 Md. 94, 23 Atl. 74 (writ of error dismissed in 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294), by express provisions that in case the railroad company cannot agree with the owner on the amount of compensation, application may be made to a justice of the peace, and giving the owner the right to participate in the selection of the jury upon the inquest of damages; in Re Hinckley, 15 Pick. 447 (holding proceedings invalid for lack of notice to the town), by express provisions that persons through whose lands a private way for the use of the town shall be laid out shall receive such recompense as they and the selectmen shall agree upon, to be paid by the town or as shall be ordered by the justice of the court of sessions, on inquiry by a jury or by a special committee, *if the parties agree thereunto;* in Dickey v. Tennison, 27 Mo. 373 (holding the proceedings invalid, *inter alia*, for want of notice), by express provisions of the statute with reference to an appeal by the property owners; in Boonville v. Ormrod, 26 Mo. 193 (holding the proceedings invalid because notice was given to the administrator instead of to the heirs), by an express provision in a city charter that, if the parties cannot agree upon compensation, the mayor shall cause the same to be ascertained by a jury.

In Buckwalter v. School Dist. No. 42, 65 Kan. 603, 70 Pac. 605, it was held that the failure to give any notice to the property owner of the pendency or progress of the proceedings did not invalidate the proceedings under a statute which authorizes the condemnation of a schoolhouse site, and provides that, upon payment of the appraised value of the land by the school district to the county treasurer, the title to the site shall vest in the school district, without making any provision for notice, but allowing an ap-

petition, the said county commissioners shall give notice, at least thirty days prior to the appointment of the said appraisers, by public notice in a newspaper, when published in the county, or by posting three or more notices in three different places in said county, stating that such appraisers will be appointed on the—day of——.

"Sec. 900. The said appraisers, before entering upon the duties of their office, shall take an oath to faithfully and impartially discharge their duties as said appraisers. They shall hear the proofs and allegations of the parties, and any two of them, after reviewing the premises, shall, without fear, favor, or partiality, ascertain and certify the compensation proper to be made to said owner, or persons interested, for the lands to be taken or affected, as well as all damages accruing to the owner or person interested, in consequence of the condemnation of the same, taken or injuriously affected as aforesaid, making such deduction or allowance for real benefits or advantages as such owner or parties interested may derive from the construction of any such ditch or flume. They, or a majority of them, shall subscribe a certificate of their said ascertainment and assessment, which shall be recorded in the county clerk's office of the county in which said lands are situated, and, upon the payment of the compensation (if any), the said person or persons shall have the right of way to construct said ditch or flume."

The foregoing are all of the statutory

peal by either party from the appraisement to the district court. The court said it is only when compensation for a taking comes to be considered that the owner of the condemned property becomes interested, and only of proceedings to determine that question is he entitled to notice, for upon that question only has he a right to be heard. The court, however, seems to have been of the opinion that, in view of the fact that under the statute the taking precedes the assessment of damages, the provision for appeal gave the property owner a sufficient opportunity to be heard upon the question of damages, and obviated the necessity of notice of the hearing to appraise the damages.

As above pointed out the decision in this case was disapproved in Board of Education v. Aldredge, 13 Okla. 205, 73 Pac. 1104.

In Savannah, F. & W. R. Co. v. Savannah, 96 Ga. 680, 23 S. E. 847, however, the court held that a mere general declaration in a city charter that the owners of land affected by the decision of the assessors upon the question of compensation in condemnation proceedings should have the right to appeal therefrom to a jury in the superior court was too vague, uncertain, and indefinite to cure the omission of the charter to provide for any notice to the property owners which would afford them an opportunity to be heard on the question of compensation.

In Seifert v. Brooks, 34 Wis. 443, the provisions of a village charter with reference to proceedings to take property for a street were held unconstitutional because they failed to provide for notice to the landowner of the time and place of assembling of the jury to determine as to the necessity of the taking, notwithstanding that the charter provided that the jury should hear the declarations of the parties interested for or against the laying out of the street,—thus impliedly holding that the omission of the statute to provide for notice could not be cured by the implication of notice.

There are also a few cases holding that the objection to the statute under which eminent domain proceedings were instituted on the ground of its failure to provide for notice had been waived. Thus, it was held by the majority of the court in Kramer v. Cleveland & P. R. Co. 5 Ohio St. 140, that where property owners had notice of the proceedings for the assessment of damages, and actually appeared before the appraisers, the omission of the act to require notice could not be made use of to invalidate the proceedings, even allowing notice to be indispensable in the absence of waiver. There was a vigorous dissent on this point, however.

In State ex rel. Flint v. Fond du Lac, 42 Wis. 287, also, it was held that the objection that the lot owner had no notice of the meeting of commissioners for the apportionment and assessment of damages was waived by the fact that he took an appeal from the report of the commissioners.

But it was held in Seifert v. Brooks, *supra*, that the failure of the charter to provide for notice to landowners of a meeting of jurors to determine the necessity of the taking was not waived or cured by the fact that the property owner was actually present at the meeting, without, however, taking any part in the proceedings.

As intimated at the beginning of the note, a few cases have denied that notice to the property owners is a constitutional requisite of the validity of the determination or assessment of damages for property taken, and therefore, of the validity of the condemnation proceedings.

Thus, it was held in Wilson v. Baltimore & P. R. Co. 5 Del. Ch. 524, that the failure of a statute authorizing the taking of private property for a railroad to provide for notice to the owner of the assessment of damages for the land taken did not render the act unconstitutional. This decision, though accompanied by a long and elaborate opinion of the chancellor, is largely discredited as authority by the strained construction placed upon the provisions of the state Constitution, and the false assumption as to the scope and purpose of the due process of law provision of the 14th Amendment of the Federal Constitution. The chancellor

provisions on the subject. It is contended by counsel for plaintiff that the procedure thus provided and authorized attempts to take, and authorizes the taking of, private property without due process of law and without just compensation to the owner, and therefore violates both the letter and the spirit of the Constitution, and is void. In considering the question it must be remembered that we are dealing with the question of the constitutionality of the law only, and must assume that all of its requirements are to be fully complied with, and that nothing has been or will be done that the statute does not in express terms or by necessary implication require. The proceeding is to be initiated by the filing of a petition by the applicant with the county commissioners of the county in which the lands sought to be taken are located, the appointment of three appraisers to ascertain the compensation to be made such owner or person interested. Upon the receipt of such petition the commissioners are required to give at least thirty days' notice prior to the appointment of said appraisers, stating that such appraisers will be appointed on a certain day. The appraisers are required to qualify by taking an oath. They are to hear the proofs and allegations of the parties, to view the premises, and to certify the compensation to be made to the owner, which certificate is to be signed by them, or a majority of them, and shall be recorded in the office of the county clerk of the county in which the lands are situated, and, upon payment of the amount so certified, the petitioner shall have the right of way to construct said ditch. It is insisted that, as the statute makes no provision for notice to the property owner as to the time or place of the meeting of the appraisers, he is deprived of the right to be heard upon the question of the amount of damages, and for that reason the statute contravenes §§ 6 and 32 of article 1 of the Constitution. These sections of the Constitution are as follows:

"Sec. 6. No person shall be deprived of

held that the provision of the state Constitution against depriving one of life, liberty, or property, unless by the judgment of his peers or the law of the land, being incorporated in the section relating to the rights of the accused person in criminal proceedings, did not apply to the exercise of the right of eminent domain. The provision of the state Constitution guaranteeing a remedy by due course of law for any injury done to person or property was disposed of upon the ground that it had reference solely to suits or actions, and therefore was inapplicable to a process in the exercise of the right of eminent domain. It was conceded that the provision of the state Constitution that no man's property shall be taken or applied to public use without the consent of his representatives and without compensation being made was applicable to the exercise of the right of eminent domain, but was held not to require notice to the owner of the assessment of damages. The provision of the 5th Amendment of the Federal Constitution, to the effect that private property shall not be taken for the public use without just compensation, was held—and properly so—to apply only to the Federal government, and not to the state governments. The due process provision of the 14th Amendment was held inapplicable, apparently upon the theory that the purpose and function of that provision was limited to the securing of the objects contemplated by the civil rights bill. It is to be noted in this connection that this theory of the scope and function of the 14th Amendment was exploded by the United States Supreme Court in the Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394, and Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, and has been impliedly repudiated in almost countless other cases.

So, it was held in Johnson v. Joliet & C. R. Co. 23 Ill. 202, that notice to nonresident owners of the intention to condemn land was not required by the provision of the Constitution that no one's property shall be taken for public use without the consent of his representatives, nor without just compensation being made to him; and that the provision of the Constitution that no one shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land did not apply to eminent domain proceedings.

In New Orleans, J. & G. N. R. Co. v. Hemphill, 35 Miss. 17, it was held that notice to the owners of proceedings to fix compensation for the land taken was not a constitutional necessity, upon the ground that condemnation proceedings are *in rem*, and that the seizure of the property is notice to all parties in interest.

It is apparent from the foregoing review of the authorities that although quite a number, if not the majority, of the cases hold or assume that failure of the statute to provide for notice to the property owner of the proceedings to fix or ascertain his damages will not render it unconstitutional or invalid, most of them rest upon the ground that notice is implied, although not expressly provided for; and only a few upon the ground that notice is not essential to the validity of the proceedings, and the latter are now thoroughly discredited as authority.

The cases upon the question as to the necessity of a provision for notice in statutes providing for assessments on private property for local improvements, though quite analogous to the subject of this note, have not been included, or at least have been referred to incidentally only.

life, liberty, or property without due process of law."

"Sec. 32. Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes, nor in any case without due compensation."

That the owner of property taken from him by virtue of the right of eminent domain is entitled to notice and an opportunity to be heard upon the question of the amount of his compensation can hardly be questioned. The decisions are almost unanimous on that subject. But the important question presented in this case is: Must the statute so provide? Upon this question there is an apparent, if not real, conflict in the decisions. In many cases it has been held that notice must be given, although the statute does not in terms require it, and that a statute providing for a hearing implies that notice must be given, or the proceeding will be void. A brief review of a few of those cases will be sufficient here. The case of Whiteford Twp. v. Phinney, 53 Mich. 130, 18 N. W. 593, was a writ of certiorari to bring before the supreme court the proceedings of the probate judge appointing a special drain commissioner to construct a ditch to drain certain lands, and to assess the expense of the same against the property benefited. There was no notice given to the land owners of the application or proceedings before the judge of probate, or of the time and place when the same would be heard. It was held that "such notice is always necessary when it is sought to deprive the citizen of his property; and, if the notice is not expressly provided for in the law itself, it is in all such cases necessarily implied, and the failure to give such notice renders the proceedings, if otherwise regular, null and void." Chief Justice Cooley, in his concurring opinion, said: "I do not think it legally competent to confer upon the probate or any other court the power, without notice to the parties concerned, to appoint an officer to decide finally upon the question of laying taxes, and to proceed to lay taxes in his discretion, as has been done here; and, if the legislation under which this so-called commissioner has proceeded will permit of such action, it is void." Campbell, J., concurred with the chief justice, and the proceedings were held void. The case of Re Road, 109 Pa. 118, was certiorari to the quarter sessions in the establishment of a public road. Viewers were appointed and made their report, and it was objected that "legal notice of the meeting of the viewers to make the view was not given." In the opinion it is said: "In the act of 1836 there is no provision made for notice; it may have been supposed that the presentation of a petition to the court, the appointment of viewers, their actual appearance upon the ground, the view and survey of the route, and the filing of their report, were circumstances of such notoriety as would put all parties on their guard (Re Baldwin & S. Road, 3 Grant, Cas. 62), and that the intervention of a whole term of court gave full opportunity for knowledge, and for preparation to resist the confirmation. But, as the appropriation of a man's property and the assessment of his damages, without notice, is repugnant to every principle of justice, it was held in a number of cases, under the act of 1836, notably in Re Neeld's Road, 1 Pa. St. 355, Re Boyer's Road, 37 Pa. 257, and Central R. Co.'s Appeal, 102 Pa. 38, that notice to the property owner is absolutely essential to the validity of the view or assessment." In many other cases it has been held that, although the statute does not expressly provide for notice, the proceedings are void unless notice is given, and that statutes which provide for a hearing imply that notice must be given, and, if not given, the proceedings are void. Tracy v. Elizabethtown, L. & B. S. R. Co. 80 Ky. 259; Peoria & R. I. R. Co. v. Warner, 61 Ill. 52; Gamble v. McCrady, 75 N. C. 509; Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co. 17 W. Va. 812; People ex rel. Heiser v. Gilon, 121 N. Y. 551, 24 N. E. 944; Strachan v. Brown, 39 Mich. 168; Dickey v. Tennison, 27 Mo. 373. Other cases on the question of the necessity for notice might be cited. But an examination of these cases discloses that in but few of them is the constitutionality of the statutes called in question. What is really decided is that, in order to a valid exercise of the right of eminent domain, the landowner must have notice whether the statute in express terms requires it or not; and that unless notice is given the proceedings are void. It has also been held that, although the statute did not in terms provide for notice, but did provide for a hearing by the appraisers, or commissioners, as they are sometimes called, and notice was actually given, the party could not complain. Kramer v. Cleveland & P. R. Co. 5 Ohio St. 140–147; Paulsen v. Portland, 149 U. S. 30-41, 37 L. ed. 637-641, 13 Sup. Ct. Rep. 750.

This brings us to the consideration of the question: Must the statute, to be valid, provide for notice to the landowner, and must he be given an opportunity to be heard as to the amount of his damages?

The statute under consideration provides for notice by the county commissioners that on a certain day appraisers will be appointed, and it is argued that, having been once notified, the landowner must take notice of all subsequent proceedings. But when the commissioners have given the required notice, and have appointed the appraisers, their duty and authority in the matter are at an end. They are not authorized to fix the time or place of the meeting of the appraisers, nor is any report to be made to them, and they are without power to confirm, modify, or set aside the report of the appraisers. The appraisers, or a majority of them, are to make and sign a certificate of their ascertainment and assessment, which is to be recorded in the office of the county clerk, and this certificate, when so made and recorded, and upon payment of the amount so ascertained, gives to the applicant the right of way for the ditch. It is the act of the appraisers that deprives the party of his property, and not the act of the commissioners in appointing them that does so. There is nothing that the commissioners are authorized to do that can in any manner be construed into notice of when or where the appraisers will meet, nor does the statute do so. It is true that the statute says they shall hear the proofs and allegations of the parties and shall review the premises; but how are the parties to know when or where the appraisers will meet for that purpose without notice? In all other proceedings to condemn private property by virtue of the right of eminent domain the statute has provided for notice. The statute providing for the establishment of private roads requires that the county commissioners shall, at the time of the hearing of the application, cause an order to be issued directing the viewers to meet, on a day named in such order, on the proposed road, and if, for any reason, they are unable to meet at that time, they may fix some other date, but shall be required to give notice in writing of the time and place where they will meet; and an appeal is provided for to the district court. Chapter 11, p. 9, Sess. Laws 1901. Similar provisions are made for notice where property is to be taken for a public road. Sections 1918 et seq., Rev. Stat. 1899. Likewise, notice is required for the condemnation of a right of way for railroads and for other purposes. Sections 2916 et seq., Rev. Stat. 1899, and § 3084, as amended and re-enacted by chapter 31, p. 30, Sess. Laws 1901. In all such cases, except the one under consideration, the viewers or appraisers are required to make their report to the county commissioners or to the court or judge, and provision is made for review or appeal.

A leading case upon the subject, and where the constitutionality of the law was directly raised and determined, is found in Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289. The act there under consideration authorized an assessment to be made against property benefited by the opening of a street, without notice to the owner of the property found to be benefited by the commissioners appointed for that purpose. Earl, J., in delivering the opinion of the court, said: "We shall examine and consider but one question, which we deem decisive of this case, and that is whether the act authorizing the assessment was constitutional. . . . I am of opinion that the Constitution sanctions no law imposing such an assessment, without notice to, and a hearing or an opportunity of a hearing by, the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done." In Gatch v. Des Moines, 63 Iowa, 718, 18 N. W. 310, the supreme court of Iowa quotes and approves the foregoing quotation, and held a law unconstitutional that did not provide for notice, and cites many cases in support of the proposition. To the same effect see Rutherford's Case, 72 Pa. 82, 13 Am. Rep. 655. And in Re New York, 34 Misc. 719, 70 N. Y. Supp. 227, this language is used: "It is manifest, from a reading of the above-cited statute, that, unless included by permissible construction of § 2, there is a total absence of provision for notice to the parties against whose property an assessment might be imposed. Without such a provision, an act which authorizes an assessment must be deemed unconstitutional, since it has the effect of depriving the owner of the property to be assessed of his property without 'due process of law.'" In the case of Board of Education v. Aldredge, 13 Okla. 205, 73 Pac. 1104, after stating the holding of the courts on the question, the court concludes as follows: "After a careful examination of all the authorities at our command, we are clearly of the opinion that the statute must stand or fall as enacted by the legislature, and that, where no notice is provided, a court ought not to say that notice is implied;

and, as has been said by other law writers, the question is not what was done, but what did the statute authorize to be done." It was held, in Seifert v. Brooks, 34 Wis. 443, that where a statute failed to require notice to be given of the time and place of the assembling of the jury, the act must, in that particular, be held unconstitutional and void, and the proceedings taken under it also inoperative and wholly void, and it said: "It is true that § 40 enacts that the jury shall hear the declarations of the parties interested for or against the laying out of the street, and shall take such evidence as a majority of the jury think proper; but this, with no regulation for the giving of some reasonable notice enabling the landowner to appear, must in general, if not always, be found a fruitless and nugatory provision. . . . It is the omission or unconstitutional feature in the statute which vitiates, and that can be cured only by the legislature itself, or, in particular cases, it may be, by the waiver or voluntary abandonment of his constitutional rights by the landowner, who has that power." In Lumsden v. Milwaukee, 8 Wis. 485, the act was held unconstitutional because it did not provide that the jury should be sworn before acting, and the fact that they were actually sworn did not render their acts valid. See also McGavock v. Omaha, 40 Neb. 64, 58 N. W. 543; Kundinger v. Saginaw, 59 Mich. 355, 26 N. W. 634; Langford v. Ramsey County, 16 Minn. 375, Gil. 333.

We are of the opinion that the better reasoning is that the statute must provide for notice, and that, where none is provided, it should not be implied by the court. Especially in view of the clear and explicit provisions for notice contained in our statutes in all other cases where the right of eminent domain is authorized to be exercised, and in view of the further fact that, not only in this case, but in those arising under similar statutes in other states, the appraisers have acted upon the assumption that they were not required to give any notice. Again, if notice is implied, what kind of notice shall be given? Certainly it must be legal notice, and, in the absence of a statute authorizing notice by publication or posting, in a proper case, none but personal notice would be legal, and it might often occur that, by reason of nonresidence of a party or where his residence was unknown, no notice could be given. We think these views are also supported by the weight of authority, and we are constrained to hold that the statute in question violates the provisions of § 6 and § 32 of article 1 of the Constitution, and is therefore void. It is contended by counsel for defendants that to so hold will unsettle the title to the right of way of many ditches in the state which have been acquired under the statute. But that argument is not sound, because, if the compensation has been accepted by the landowner, it matters not how it was arrived at, and he cannot be heard to complain after having accepted the money.

Several other points have been presented by counsel for plaintiff which may be referred to briefly. It is contended that, as the statute does not provide for any hearing before the county commissioners, the plaintiff would have no right to contest the sufficiency of the petition, and that the commissioners must appoint appraisers in any event; and, if this be not true, then the statute invests the commissioners with judicial powers which can only be exercised by the court. The conclusions at which we have arrived render it unnecessary to decide these questions, but it may not be out of place to say here that the provisions of the statute are very meager and involve much uncertainty. This will no doubt be corrected, should the legislature pass another act on the subject. The proceeding to condemn property under the right of eminent domain is not a civil action, nor is it necessary that it should be considered in the ordinary course of legal proceedings. The appointment of appraisers may be confided to any fair tribunal, board, or officer, and still be due process of law, provided the landowner shall have notice and an opportunity to be heard; and he would have the right to show, if he could, that no such case was made as would authorize the commissioners to act. Lewis, Em. Dom. 2d ed. pp. 881, 882.

The first question submitted by the district court is therefore answered in the negative; and, as it includes the second, third, fourth, and fifth questions, it is a sufficient answer to each of them, and also eliminates from consideration the sixth question submitted.

Potter, Ch. J., and Van Orsdel, J., concur.

IOWA SUPREME COURT.

CEDAR RAPIDS LUMBER COMPANY
v.
R. H. FISHER.
D. C. MAY et al., Appts.
(— Iowa—, 105 N. W. 595.)

Contract—telegram to bidder.

1. A telegram to a bidder for public work, "You are low bidder. Come on morn-

Case Note.—Contracts; illustrations of the distinction between a definite proposal

ing train," does not conclude a contract with him.

Same—forfeiture of deposit.

2. A forfeiture of a deposit made by a bidder for public work cannot be predicated upon a conference between him and the committee, at which he suggests a mistake in his bid, and asks leave to correct it, and the committee state a desire to change the specifications, where no demand is made upon him to comply with the terms of his bid.

Same—damages.

3. Damages recoverable from a bidder for public work upon his refusal to comply with his contract cannot be fixed at the difference between his bid and the price at which the contract is awarded to a nonbidder, where the authorities have no power to award the contract to the latter.

(January 15, 1906.)

APPEAL by the garnishees from a judgment of the Superior Court of Cedar Rapids in favor of plaintiff in an action brought to subject to the payment of a claim against R. H. Fisher money in the hands of the garnishees which was alleged to belong to him. Affirmed.

Statement by **Bishop, J.:**

This is a proceeding in garnishment. Plaintiff is a judgment creditor of R. H. Fisher, and, under execution issued, caused the school district of Silver Lake township, Dickinson county, and the officers of said district, to be garnished as supposed debtors of said Fisher. The garnishees answered, and, upon issue joined, a hearing was had before the court, resulting in a judgment in favor of plaintiff. The garnishees appeal.

Messrs. **Francis & Owen** for appellants.

Messrs. **Redmond & Stewart,** for appellee.

Forfeitures are odious, and will not be enforced except upon the clearest evidence that it was the intention of the parties.

Gunther v. New Orleans Cotton Exch. Mut. Aid Asso. 40 La. Ann. 776, 2 L.R.A.

or acceptance, and a mere preliminary step in the negotiation of a contract.—From the nature of the subject, the question whether certain acts or conduct constitute a definite proposal or acceptance upon which a binding contract may be predicated without any further action on the part of the person from whom it proceeds, or a mere preliminary step, which is not susceptible, without further action by such party, of being converted into a binding contract, depends upon the nature of the particular acts or conduct in question, and the circumstances attending the transaction; and it is impossible to formulate a general principle or criterion for its determination. All that can be usefully done is to call attention to individual cases which have passed upon the question under various states of facts,—it being remembered that the question for determination is not as to the general requisites of effect of a proposal or acceptance essential to completion of a contract, but merely whether certain acts or conduct of a person, relied upon as a proposal or acceptance, are in fact such, or, upon the other hand, constitute a mere preliminary step, looking eventually toward a proposal or acceptance by that party.

In Leskie v. Haseltine, 155 Pa. 98, 25 Atl. 886,—a case very similar in many respects to CEDAR RAPIDS LUMBER CO v. FISHER,—upon the opening of bids for a private enterprise, the defendant or his agent said to the plaintiff, "You are the lucky man." The court held that such a statement did in nowise complete the contract, but was simply an acknowledgment that the plaintiff was the lowest bidder; other negotiations being necessary before the contract would be complete. It may be well to note that in this case it was a private enterprise, while in CEDAR RAPIDS LUMBER CO. v. FISHER the contract was a public contract, although neither case seems to make any distinction upon that point.

In Erving v. New York, 131 N. Y. 133, 29 N. E. 1101, it was held that where there had been an advertisement for proposals for a public work, the mere fact that the lowest bidder knew that he was the lowest bidder did not award the contract to him, nor did the mere arithmetical operation of compiling the bids definitely establish the contract.

This distinction between a definite completion of a contract and a step in the negotiations is very clearly brought out in Wilie v. Price, 5 Rich. Eq. 91, where the defendant wrote to plaintiff's agent that "we [citizens of a town] have had a meeting . . . and are resolved to make her [the plaintiff] this proposition, We will guarantee her $400 a year." The court said that this communication simply narrated the proceedings of a public meeting, and proposed a basis upon which the plaintiff might treat for a contract with the citizens of the town.

Another case illustrating the same distinction is Stagg v. Compton, 81 Ind. 171, where there had been some negotiations concerning the purchase of a horse, and the defendant wrote to the plaintiff, saying: "I might purchase your horse at $200, the price you ask. I would like to get it at once if it will do me, which I am quite certain it will." This message was sent in reply to a letter of the plaintiff, stating the price of the horse. The court said that even if the plaintiff had replied directing the defendant to take the horse at the price named, and telling him when and how to get it, there still would have been no completed contract, because even then, by the terms of his communication. the defendant was en-

118, 8 Am. St. Rep. 554, 5 So. 65; Hancock v. Carlton, 6 Gray, 39; Asher v. Pendleton, 6 Gratt. 628; 8 Am. & Eng. Enc. Law, p. 449.

Deposit made on bid cannot be forfeited for the failure to sign a contract with conditions more burdensome than specifications or advertisement.

Cotter v. Casteel (Tex. Civ. App.) 37 S. W. 791.

Fisher's proposal or bid was never unqualifiedly accepted.

Leskie v. Haseltine, 155 Pa. 98, 25 Atl. 886: Erving v. New York, 131 N. Y. 133, 29 N. E. 1101; Smith v. New York, 10 N. Y. 504; Nash v. St. Paul, 11 Minn. 174, Gil. 110; People ex rel. Ream Pav. Co. v. Board of Improvement, 43 N. Y. 227; Nichols v. State, 11 Tex. Civ. App. 327, 32 S. W. 452; Kirwin v. Byrne, 9 Misc. 76, 29 N. Y. Supp. 287; Havens v. American F. Ins. Co. 11 Ind. App. 315, 39 N. E. 40.

There was no competent or legal evidence as to any damage the garnishees sustained by Fisher's failure to enter into the contract.

Coggeshall v. Des Moines, 78 Iowa, 237, 41 N. W. 617, 42 N. W. 650.

Bishop, J., delivered the opinion of the court:

We shall not attempt to set forth the issues in detail. It will be sufficient to state the facts. October 14, 1903, the school district advertised for bids for the erection of a schoolhouse, and in the notice made requirement for a certified check for $500 to accompany each bid. Nothing was said in the notice as to the purpose of such requirement. The notice closes thus: "It is the intention of the board to award the contract to the lowest responsible bidder, and to require the successful bidder to give bonds, etc., but the board reserves the right to reject any and all bids." Said R. H. Fisher forwarded a bid on the work, and accompanied the same with a certified check for the sum of $500, made payable to

titled to determine whether the horse would suit him.

In Demuth v. American Institute, 10 Jones & S. 336, Affirmed in 75 N. Y. 502, the defendant was about to hold a public exhibition, and issued a prospectus, a copy of which was sent to the plaintiff with a blank application for space, which plaintiff filled out, signed, and sent to defendant, together with a check for the required entrance fee. The defendant refused to grant the space and returned the check. The court held that the plaintiff could not recover, as there was no contract; that, if there was any agreement at all, it was only an agreement to make an agreement. This opinion cites Brown v. New York C. R. Co. 44 N. Y. 79, where the plaintiff desiring to lease to defendant a railroad, stated by letter the terms desired in the lease and also said that certain other details would require consideration, and would thereafter be arranged. The defendant, by letter, accepted the proposal, and the plaintiff, replying to this letter, stated that the rent would begin on the day of his writing, and offered to put defendant in possession of the road. There was some delay in the settlement of the terms of the formal contract, which was, however, finally agreed upon and signed. The plaintiff brought suit for the rent of the road from the date of his letter to time that the formal lease went into effect. The court held that there was no binding contract up to the time when the formal contract was signed. In his opinion in this case, Judge Earl quoted from Lyman v. Robinson, 14 Allen, 254, as follows: "A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation. The question in such cases always is, Did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted?" Judge Earl in the same opinion, also quoted from the opinion of Lord Wensleydale in Ridgway v. Wharton, 6 H. L. Cas. 304: "An agreement to enter into an agreement upon terms to be afterward settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled he is perfectly at liberty to retire from the bargain."

In Knight v. Cooley, 34 Iowa, 218, in reply to a letter requesting the price of certain lots, the defendant wrote: "Yours is received. The lots are so encumbered that it would be difficult to make title at once. Price is $1700 and $1500, net, and cheap." The plaintiff immediately replied that he would take the lots, and sent a draft as partial payment. The defendant returned the draft and refused to sell the lots. Upon a suit at law brought to recover damages for breach of contract the court held that there was no contract, and regarded the correspondence as amounting simply to negotiations, and not to a bindng offer.

In Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869, a proposal for a contract was made in a letter closing with these words: "If this is agreed to, the agreement can be drawn up and signed." It was held that, upon the acceptance of the terms by the one to whom the proposal was made, no further action by the proposer was necessary to make a complete contract.

In Havens v. American F. Ins. Co. 11 Ind. App. 315, 39 N. E. 40, it was held that correspondence concerning the employment of one of the writers by the other, which did

the president of the board. At a meeting of the board thereafter held for that purpose the bids filed were opened, and it was found that out of fourteen Fisher was the lowest bidder. Thereupon, as shown by the secretary's minutes of the meeting, "motion was made and carried that the contract, . . . as per plans and specifications, be awarded to R. H. Fisher, he being the lowest bidder, . . . and that the secretary be instructed to telegraph said Fisher to that effect." The secretary sent to Fisher a telegram as follows: "You are low bidder. Come on morning train." Upon reaching the ground, Fisher met the members of the board informally, and told them that he had made a mistake in his bid of $1.533, and explained that the same occurred in footing up the figures. Thereupon the board members stated that they desired to change the specifications by adding different and more expensive material, to the additional value of about $600. Fisher then stated that the amount of his bid as filed,—being $15,131,—with the sum omitted by error, as claimed by him, and the value of the materials to correspond to the change requested, would make a total sum of $17,400, and expressed his willingness to build the building for that sum. It appears that such aggregate sum was $100 less than the next lowest bidder, and $325 less than the third lowest bidder. Without a further word being said, as far as shown by the record, the members of the board withdrew and held a meeting, Fisher not being present. In such meeting, as shown by the minutes of the secretary, it was declared that Fisher had refused to go into a contract on the basis of the bid as made by him, and on motion the $500 deposited by him was declared forfeited to the district. The board then proceeded to award the contract for the building to a contracting firm who had made no bid on the work; the contract price being the sum of $17,900. The record does not disclose any further conversation or communication between the board or its members and Fisher.

The argument of counsel for appellants proceeds upon the theory that, in view of the action taken by the board and the sending of the telegram, there was a completed contract; that, as Fisher refused to join in reducing such contract to formal writing and thereunder proceed with the work, the right of the board to declare forfeited the check and appropriate the same to its own use was complete. In view of the record before us, there is no force in the argument thus presented. Without stopping to speculate upon the purpose of requiring the deposit of the check, or what might be the rights of the district under some state of facts, it is clear to our minds that there is no warrant for the conclusion that a completed contract was accomplished by the sending of the telegram. The action as in fact taken by the board, considered by itself, cannot be permitted to control the situation. Until communicated to Fisher, it amounted to no more than the forming of a conclusion to accept of his bid and to enter into contract relations with him. It

not distinctly state the work which was to be done and the length of time which the contract was to continue, did not make a binding contract, although it appeared in the correspondence that a definite acceptance of the employer's offer had been made.

In Commercial Telegram Co. v. Smith, 47 Hun, 494—an action brought by the telegram company against the defendant as president of the New York Stock Exchange, to restrain him from interfering with the right of the company to collect quotations of dealings made at the exchange,—it appeared that a letter was sent by the defendant to the plaintiff in reply to an offer made by the plaintiff, which read as follows: "I am instructed by our executive committee to say in reply that the plan set forth in your letter is entirely satisfactory to this company; that we accept the same and are ready to execute an agreement upon the basis proposed whenever prepared and submitted to us." It was held that this letter did not constitute a contract. And the court further held that such a letter, in order to constitute a complete contract, must necessarily include all of the elements which were to compose the formal contract, and that such a letter was merely a preliminary step.

In Martin v. Northwestern Fuel Co. 22 Fed. 596, in reply to a proposition made by the plaintiff by telegraph to sell coal at a certain figure, the following telegram was sent: "Telegram received. You can consider the coal sold. Will be in Cleveland next week and arrange particulars." Judge Brewer, in writing the decision, said that the expression, "you may consider the coal sold," was not a natural one when a definite acceptance of an offer was intended, but was merely an acknowledgment that a contract might be easily agreed upon.

The following English cases hold that an agreement subject to the preparation and approval of a formal contract, or any similar language, is not such a contract as can be specifically performed: Crossley v. Maycock, L. R. 18 Eq. 180; Harvey v. Barnard's Inn, 50 L. J. Ch. N. S. 750; Cowley v. Watts, 17 Jur. 172; Honeyman v. Marryatt, 6 H. L. Cas. 112.

The following cases hold that the mere fact that the parties contemplated a formal agreement is strong evidence that the preliminary negotiations were not intended as a binding contract: Bryant v. Ondrak, 87 Hun, 477, 34 N. Y. Supp. 384; Irish v. Pulliam, 32 Neb. 24, 48 N. W. 963; Wharton v. Stoutenburgh, 35 N. J. Eq. 266.

is not enough to determine upon an acceptance, but that determination must be communicated to the other party. This is elementary; but see 9 Cyc. Law & Proc. p. 270, and the cases cited. So, too, it is plain that the telegram cannot be given the effect of an acceptance of the bid of Fisher, and so give rise to contract relations, as contended for by appellants. It served no further purpose than the words thereof import,—to advise Fisher that his bid was lowest, and that further consideration or arrangement awaited his appearance in response to the invitation to come. Not only must there be an acceptance, but it must be unqualified. It has frequently been held that a message similar in wording to the one in question is not sufficient, Leskie v. Haseltine, 155 Pa. 98, 25 Atl. 886; Erving v. New York, 131 N. Y. 133, 29 N. E. 1101; Kirwan v. Byrne, 9 Misc. 76, 29 N. Y. Supp. 287; Havens v. American F. Ins. Co. 11 Ind. App. 315, 39 N. E. 40.

But, if what has been said foregoing were not true, it must be remarked that the evidence fails to make it appear that there was a refusal on the part of Fisher. He was not told when he reached the district that his bid had been accepted. Indeed, it would seem that acceptance was being withheld until a change in the specifications could be considered and agreed upon; and this, notwithstanding the action of the board as reflected by the minutes of the secretary. All we have in the way of evidence is that Fisher communicated the fact of the mistake in his figures to individual members of the board, and the latter communicated to him their desire for a change in the specifications. Thus acting, no agreement was attempted, and none could have been made. The board when in session did not call upon Fisher to contract in accordance with his bid, nor did it give him a chance to refuse to do so. It proceeded summarily to sever all relations with him, and to contract with a third party. Out of such a situation it was not possible for a forfeiture to arise. Moreover, there was no provision for a forfeiture, and the law will not hasten to imply that such was intended. And, even if damages were recoverable, it could not be upon the basis as contended for by counsel for appellants, that is, the difference between the bid of Fisher and the price at which the contract was let to a nonbidding party. And this must be true because the board thus proceeded without authority. It should have accepted one of the bids made, or, if all were rejected, readvertise for bids. Code, § 2779; Weitz v. Independent District, 79 Iowa, 423, 44 N. W. 696.

In any view, the judgment of the trial court was correct, and it is affirmed.

4 L.R.A.(N.S.)

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BANK OF HAVELOCK, Plff. in Err.,

v.

WESTERN UNION TELEGRAPH COMPANY.

(141 Fed. 522.)

Telegraph—care in taking message.

1. In the absence of notice of facts or circumstances which would awaken inquiry and arouse suspicion in the mind of a person of ordinary prudence and intelligence in a like situation regarding the authority to send it, of the party who presents a message for transmission, the exercise by a telegraph company and its operators of reasonable care to receive and transmit genuine and authorized messages only does not require them to investigate or ascertain the identity, or authority to send it, of the person who tenders a message for transmission, whether that message is in writing, or is spoken directly to the operator, or is communicated to him by telephone.

But, when such facts or circumstances come to the notice of the company, or of its acting operator, the exercise of reasonable care to transmit genuine and authorized messages only requires the party who receives the notice either to investigate and ascertain the authority of the sender before transmitting the message, or to communicate the facts and circumstances and

Headnotes by SANBORN, Circuit Judge.

Case Note.—Telegraph; duty of company to ascertain identity or authority of sender of message.—There are but few authorities upon the question of the duty of a telegraph company to ascertain the identity or authority of the sender of telegraphic messages.

In Western U. Teleg. Co. v. Schriver, 141 Fed. 538, and Western U. Teleg. Co. v. Totten, 141 Fed. 533, the facts were similar to those in BANK OF HAVELOCK v. WESTERN U. TELEG. CO., reported above, and in both these cases it was held that a telegraph company owes the duty to exercise reasonable care to receive and transmit authorized messages only. In the Totten Case the headnote in BANK OF HAVELOCK v. WESTERN U. TELEG. Co. is quoted in full.

In Western U. Teleg. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1, it was held that where there is nothing to create suspicion in the minds of the agents of the telegraph company, it is for the sendee to ascertain for himself whether the sender is the person he professes to be.

In Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140, it was said that "the sending of such a message in the name of the cashier of a bank, at the request of the party, who was thereby held out as entitled to credit for a large amount, without any evidence of his authority to use the

the inquiry or suspicion to the addressee at or before its delivery.

Same—reliance on message.

2. Action by mortgagees against a telegraph company for loss of their lien on cattle worth $3,500, caused by the receipt over the telephone, from one whose voice was not known to the operator and who had no authority to send it, and the transmission to the plaintiffs, to whom it was addressed, of this telegram: "We will pay Barnes's draft for thirty-five hundred. Bank of Denison." Held:

(1) The telegram was not so indefinite that reliance and action might not lawfully be based upon it.

(2) The loss of the lien upon the cattle was not an unnatural or improbable effect of the delivery of the telegram, and the damages resulting from this loss were not too remote to warrant a recovery.

(3) A draft by Barnes was not essential to the maintenance of the plaintiff's action for the false representation embodied in the telegram and the resulting damage.

Mortgage—loss of lien—remedy.

3. It is no defense to an action by mortgagees against a stranger for causing the loss of their lien upon some of the mortgaged property that it still covers an amount sufficient to secure the payment of the mortgage debt.

Directed verdict—grounds.

4. When a verdict is directed on specific but untenable grounds, it may not be affirmed on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated if they had been called to the attention of the defeated party at the time the verdict was rendered.

But, when the defeated party has introduced at the trial all the legal evidence he offered, and has rested his case, he has thereby estopped himself from denying that he can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in his favor; and if the bill of exceptions contains all the evidence, and it is clear beyond doubt that it would not sustain a verdict in his favor, an instruction by the court to return a verdict against him upon some other, but untenable, ground, is error without prejudice, and no ground for reversal.

Trial of issues tendered.

5. The trial of issues tendered by a pleading as though they had been properly made, in the absence of any plea, answer, or replication which raises them, estops the parties from subsequently denying that the issues were duly made, and from taking any advantage of the lack of the plea, answer, or replication.

(November 16, 1905.)

ERROR to the Circuit Court of the United States for the Northern District of Iowa to review a judgment in favor of defendant in an action brought to hold defendant responsible for a loss suffered by plaintiff through a spurious telegram. Affirmed.

The facts are stated in the opinion.

Argued before Sanborn, Circuit Judge, and Philips and Carland, District Judges.

Messrs. **F. H. Helsell, Thomas D. Healy, M. F. Healy, Robert Healy,** and **D. M. Kelleher,** for plaintiff in error:

The telegraph company was negligent in transmitting and delivering a spurious and forged despatch relating to an important commercial transaction.

Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140; McCord v. Western U. Teleg. Co. 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 N. W. 315; Bank of California v. Western U. Teleg. Co. 52 Cal. 280; Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto, 54 L.R.A. 711, 48 C. C. A. 413, 109 Fed. 369; Strause v. Western U. Teleg. Co. 8 Biss. 104, Fed. Cas. No. 13,531; Western U. Teleg. Co. v.

name of the cashier, . . . was an act of gross negligence."

In Bank of California v. Western U. Teleg. Co. 52 Cal. 280, the Elwood Case was cited with approval and in support of the proposition that "one receiving a despatch from a telegraph company has the right to rely upon the exercise of ordinary care and prudence by the agent of the company who transmitted the message, in discharging his duty of deciding whether the sender was the person he represented himself to be. Where a valuable message is sent, the identity of the sender must be determined by the appropriate agent of the company, and, if the agent is guilty of negligence in failing to ascertain such identity, the telegraph company is liable."

In Western U. Teleg. Co. v. Uvalde Nat. Bank, 97 Tex. 219, 65 L.R.A. 805, 77 S. W. 603, where a wire was tapped and a fraudulent message sent over the telegraph company's line, which it received and delivered as a genuine message, it was held that, by delivering the telegram, the company did not vouch for its authenticity, but that it was its duty, in the conduct of its business, to exercise a degree of foresight and care adequate to give reasonable protection to the immense interests daily dependent on the reliability of the intelligence which it carries; and that it should have adopted some method to prevent its being imposed upon and made the medium through which false representations could be made to others.

In McCornick v. Western U. Teleg. Co. 38 L.R.A. 684, 25 C. C. A. 35, 49 U. S. App. 116, 79 Fed. 449, it was said that a telegraph company owed a duty to the sender and sendee to exercise care that the telegram should be authentic; but this was a mere *dictum*.

Uvalde Nat. Bank (Tex. Civ. App.) 72 S. W. 232, 97 Tex. 219, 65 L.R.A. 805, 77 S. W. 603.

If one of two innocent persons must suffer loss by the fraud of a third, he who puts it in the power of a third person to do the wrong should be compelled to sustain the loss occasioned by its commission.

Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto, *supra;* Western U. Teleg. Co. v. Uvalde Nat. Bank (Tex. Civ. App.) 72 S. W. 232; Friedlander v. Texas & P. R. Co. 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570; Walters v. Western & A. R. Co. 56 Fed. 369.

Where a telegraph company delivers a despatch apparently authorizing the receiver to take some action respecting a commercial transaction involving any considerable sum, the telegraph company is liable as for false representation if the purported sender of such message, whose name appears to be signed thereto, never in fact sent or authorized the sending of the message.

May v. Western U. Teleg. Co. 112 Mass. 90; Fererro v. Western U. Teleg. Co. 9 App. D. C. 455, 35 L.R.A. 548.

Wherever a promise is made to honor or to accept a draft or bill, such promise may be relied upon as an acceptance, and a third person, who parts with money or property upon the faith of such promise to accept, is entitled to hold the promisor.

Coolidge v. Payson, 2 Wheat. 66, 4 L. ed. 185; Boyce v. Edwards, 4 Pet. 123, 7 L. ed. 803; State Nat. Bank v. Young, 14 Fed. 889; Wilson v. Clements, 3 Mass. 1; Exchange Bank v. Rice, 98 Mass. 288; Central Sav. Bank v. Richards, 109 Mass. 413; Putnam Nat. Bank v. Snow, 172 Mass. 569, 52 N. E. 1079; Woodard v. Griffiths-Marshall Grain Commission Co. 43 Minn. 260, 45 N. W. 433; Fowler v. McPhee, 13 Colo. App. 185, 56 Pac. 1118; James v. E. G. Lyons Co. 134 Cal. 189, 66 Pac. 210; Steman v. Harrison, 42 Pa. 49, 82 Am. Dec. 491; Union Bank v. Shea, 57 Minn. 180, 58 N. W. 985.

The property having been parted with on the faith of the despatch, it is not material that the plaintiff in error relied also on subsequently obtaining from Barnes a draft within the terms of the despatch.

Sioux Nat. Bank v. Norfolk State Bank, 5 C. C. A. 448, 12 U. S. App. 347, 56 Fed. 139; Safford v. Grout, 120 Mass. 20; Strong v. Strong, 102 N. Y. 69, 5 N. E. 799; Dashiel v. Harshman, 113 Iowa, 283, 85 N. W. 85; Braley v. Powers, 92 Me. 203, 42 Atl. 362; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; Roberts v. French, 153 Mass. 60, 10 L.R.A. 656, 25 Am. St. Rep. 611, 26 N. E. 416; Morgan v. Skiddy, 62 N. Y. 319; Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1, 40 Atl. 1046; Marshall v. Buchanan, 35 Cal. 264, 95 Am. Dec. 95; Modern Woodmen v. Union Nat. Bank, 47 C. C. A. 667, 108 Fed. 753.

Messrs. **Craig L. Wright** and **Asa F. Call**, for defendant in error:

The act of the defendant in delivering the despatch was not the proximate cause of the plaintiff's loss of security. There was another efficient, intervening cause in the acts of Barnes.

First Nat. Bank v. Western U. Teleg. Co. 30 Ohio St. 555, 27 Am. Rep. 485; 2 Parson, p. 257; Lowery v. Western U. Teleg. Co. 60 N. Y. 198, 19 Am. Rep. 154; Bodkin v. Western U. Teleg. Co. 31 Fed. 134.

The plaintiff has lost nothing by reason of the spurious character of the despatch, for if it had been genuine, the bank of Denison would not have been liable upon it, for the reason that no draft was taken in due course of business for value, in reliance upon it.

Overman v. Hoboken City Bank, 30 N. J. L. 68; 2 Randolph, Com. Paper, § 621; Zane, Banks, § 215; Union Bank v. Coster, 3 N. Y. 211, 53 Am. Dec. 280; Exchange Bank v. Hubbard, 10 C. C. A. 295, 26 U. S. App. 133, 62 Fed. 112; Coolidge v. Payson, 2 Wheat. 66, 4 L. ed. 185; Central Sav. Bank v. Richards, 109 Mass. 414; Boyce v. Edwards, 4 Pet. 122, 7 L. ed. 803; State Nat. Bank v. Young, 5 McCrary, 12, 14 Fed. 889.

Messrs. **John F. Dillon, Rush Taggart,** and **Henry D. Estabrook,** also for defendant in error:

If the telegraph operator acted according to a long-continued custom, he could not be charged with negligence.

Butterfield v. Forrester, 11 East, 60; Beach, Contrib. Neg. § 9; New York v. Bailey, 2 Denio, 433; 1 Thompson, Law of Negligence, § 31; Aldrich v. Monroe, 60 N. H. 118.

It was not defendant's duty to identify the sender of the message.

Western U. Teleg. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1; Western U. Teleg. Co. v. Ferguson, 57 Ind. 495.

Sanborn, Circuit Judge, delivered the opinion of the court:

The plaintiffs constituted a copartnership under the title of the "Bank of Havelock," and they sued the Western Union Telegraph Company, a corporation, for damages in the sum of $3,500, because it received by telephone from someone at Denison, in the state of Iowa, who had no right to send

it, and delivered to the plaintiffs, this telegram:

Dated Denison, Iowa, Feb. 28, 1902.
To the Bank of Havelock: We will pay Barnes's draft for thirty-five hundred.
Bank of Denison.

At the time this telegram was received the plaintiffs had a chattel mortgage on some cattle of the value of $3,500, which Barnes had bought, and they were induced by the telegram to lose their lien upon and to surrender the cattle to him. On March 25, 1902, Barnes made a draft on the Bank of Denison in favor of the plaintiffs for $3,500, but the drawee refused to pay it. The Bank of Denison was a copartnership, composed of Leslie M. Shaw and Carl M. Kuehnle. These partners, Charles E. Voss, the cashier, and A. B. Lorenson, were the only persons who had authority to send such a telegram, or to act for the bank in any way. E. G. Lyman was the operator of the defendant at Denison, who received the telegram over the telephone and sent it to the plaintiffs. He had been in his position from February 5, 1902. He did not know the voice of the person who gave him the telegram, but took it for granted that it was the voice of someone who had the right to send it. He knew Voss, the cashier, and did not think that the voice was his. He subsequently became acquainted with Barnes, but could not say that he recognized the voice as that of Barnes. He did not know who gave him the message, because he did not recognize the voice which communicated it to him. The foregoing facts were proved at the trial, and there was no evidence tending to prove any other facts which were material to the decision of the case before us.

At the close of the evidence counsel for the defendant made a motion, which the court granted, for an instruction to the jury to return a verdict for their client upon the specific grounds that plaintiffs had never taken or expended anything for any draft in reliance upon the telegram, that the telegram was so indefinite that they had no right to rely upon it, and that the plaintiffs had no right to recover for the surrender of the cattle, or for the loss of their lien upon them, because the telegram contained no agreement to indemnify them against any such loss, nor was the release of such security within the contemplation of the parties. This ruling is assigned as error. It is true that the plaintiffs never paid out or lost anything by taking or relying upon any draft of Barnes, and that they were not entitled to recover at the trial upon that ground. But the Bank of Denison refused to pay the draft of Barnes on March 25, 1902, and it would not have paid it at any time after the telegram was delivered, if it had been presented. The telegram was not so indefinite or uncertain that reliance and action might not have been lawfully founded upon it. It contained a direct promise to pay Barnes's draft for $3,500, and if it had been authorized by the Bank of Denison, and the plaintiffs had procured and paid value for a draft of Barnes for that amount, within a reasonable time after they received the telegram, they would have had a perfect cause of action against the Bank of Denison for its amount. Coolidge v. Payson, 2 Wheat. 66, 4 L. ed. 185; State Nat. Bank v. Young, 5 McCrary, 12, 14 Fed. 889.

While the plaintiffs parted with no property in reliance upon the draft, they were induced by the telegram to surrender the cattle and to lose their lien by mortgage upon them, and they thereby lost $3,500 of their security for their claim against their debtor. Why were they not entitled to recover back this amount? Counsel for the telegraph company answer (1) because the plaintiffs surrendered the security of the cattle in reliance upon the promise of Barnes to make his draft on the Bank of Denison, and not in reliance upon the telegram; (2) because the failure of Barnes to make his draft was, and the telegram was not, the proximate cause of the loss; and (3) because the plaintiffs had ample security for their debt after the loss of their lien upon the cattle bought by Barnes, so that they never sustained any damage. The evidence, however, does not sustain these positions. It is that the plaintiffs refused to surrender the cattle or their lien upon them for the promise of Barnes to make his draft, or for the draft itself, and that they were induced to lose their lien by the telegram in evidence only. The failure of Barnes to make his draft was not the proximate or other cause of the loss of the plaintiffs, because the proof is that they would not have surrendered the cattle or their lien upon them upon the faith of it, and that the Bank of Denison would not have paid it in any event, so that its execution and presentation would have been nothing but one of those idle ceremonies which the law never requires. The proof is clear and convincing that the telegram was the proximate cause of the loss. Without it the plaintiffs would never have lost their lien upon the cattle without payment of their purchase price, and would never have suffered the damages they claim.

It is conceded that, if the telegram had been genuine, the plaintiffs could not have recovered of the Bank of Denison, unless

they had purchased or discounted a draft of Barnes upon that bank for value. This, however, is because their cause of action against that bank would have arisen upon contract, if at all, and that contract would not have been made until the plaintiffs had accepted the offer tendered by the telegram, according to its terms. The action in hand, however, against the telegraph company, is not an action upon a contract, but is an action for a tort. The gravamen of this suit is false representation and resulting damage, and the acceptance of the apparent offer which the Bank of Denison never made neither conditioned nor limited it. The facts that the telegraph company, in violation of its duty of reasonable care, falsely represented to the plaintiffs that the Bank of Denison had promised to pay the draft of Barnes for $3,500, and that the plaintiffs, in reliance upon the truth of that representation, surrendered its lien upon cattle of the value of $3,500, constituted a perfect cause of action, and entitled the plaintiffs to a judgment. One who wrongfully deceives or misleads another, to whom he owes the duty of truthful statement, to his damage, is liable for the natural and probable consequences of his act. The natural and probable effect of the false telegram was the expenditure or the loss by the addressee of $3,500 upon the faith of it, and this loss by the surrender of the cattle, or of a lien upon them, was not so remote as to be either an unnatural or improbable effect of it. Marshall v. Buchanan, 35 Cal. 264, 95 Am. Dec. 95; Benton v. Pratt, 2 Wend. 385, 20 Am. Dec. 623; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30.

Nor can the defendant escape judgment for the loss inflicted because the plaintiffs have other security sufficient to satisfy their claim against the mortgagor. They had the right, as against the telegraph company, to all the security which they had obtained, and the depreciation or abstraction of any part of it by the latter was wrongful. It does not lie in the mouth of the telegraph company, after it has depreciated the security of the plaintiffs' $3,500, to say that it is not liable to make compensation for the loss because the plaintiffs have the power to inflict it upon the mortgagor. It is no answer to a suit by a mortgagee against a stranger for the removal of timber or houses or other valuable property from mortgaged lands, or for the conversion of mortgaged chattels, that the claim of the mortgagee is amply secured without the timber or houses taken or the chattels converted. And it is no defense to an action by a mortgagee for the loss of security caused by false representations that the plaintiff's claim is amply secured, notwithstanding the loss. A mortgagee is entitled to recover of a wrongdoer the value of the mortgaged property he has taken from the lien of the mortgage, although that lien still holds sufficient to secure the debt, and he is not required to inflict the loss upon the mortgagor. Shapard v. Hynes, 52 L.R.A. 675, 45 C. C. A. 271, 104 Fed. 449; Allen v. Butman, 138 Mass. 586, 587; Stevenson v. Lord, 15 Colo. 131, 25 Pac. 313. The result is that the motion for a directed verdict should not have been granted for any of the reasons stated therein.

But counsel for the defendant insist that there was not sufficient evidence of the negligence of the defendant in the receipt of the telegram to sustain a verdict against it, and that the ruling of the court, if erroneous, was error without prejudice, and therefore no ground for reversal. The first paragraph of the argument of counsel for the plaintiffs is devoted to a discussion of the law and a citation of the authorities upon this question, but in their reply brief they insist that the sufficiency of the evidence of negligence is not open for consideration at this time (1) because that question was not presented by the motion or considered by the trial court, and (2) because after the defendant had answered the original petition, and had denied its material averments, the plaintiffs amended it by modifications of, and additions to, some of its allegations, and by adding to it a second count, wherein they set forth the same cause of action pleaded in the original petition in different and somewhat broader terms, and no answer to this amended petition was ever made. The presumption is that error produces prejudice, and it is only when it is clear beyond doubt that none resulted, or could have resulted, from an erroneous ruling, that the judgment may be lawfully affirmed. Deery v. Cray, 5 Wall. 795, 807, 808, 18 L. ed. 653, 657; United States v. Gentry, 55 C. C. A. 658, 663, 119 Fed. 70, 75. Hence, when a verdict is directed on limited, but untenable grounds, it may not stand on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated if they had been called to the attention of the defeated party at the time the motion was made. Peck v. Heurich, 167 U. S. 624, 42 L. ed. 302, 17 Sup. Ct. Rep. 927; Currier v. Dartmouth College, 54 C. C. A. 430, 433, 117 Fed. 44, 47. But where parties have produced all their evidence, and the court has received it, and they have rested their case at the trial, they have thereby admitted, and in that way estopped themselves from denying, that they can do no more to overcome the

objection that the evidence is insufficient to sustain a verdict in their favor, because the question of the sufficiency of the evidence always arises in every case before its submission to a jury, and it is the province and duty of the court to determine it. Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 602, 124 Fed. 113, 122; Brady v. Chicago & G. W. R. Co. 57 L.R.A. 712, 52 C. C. A. 48, 52, 53, 114 Fed. 100, 105; Chicago, St. P. M. & O. R. Co. v. Belliwith, 28 C. C. A. 358, 362, 55 U. S. App. 113, 83 Fed. 437, 441; Marion County v. Clark, 94 U. S. 278, 284, 24 L. ed. 59, 61; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 733, 31 L. ed. 287, 288, 8 Sup. Ct. Rep. 266; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569. In W. B. Grimes Dry Goods Co. v. Malcolm, 164 U. S. 483, 491, 41 L. ed. 524, 527, 17 Sup. Ct. Rep. 158, 7 C. C. A. 426, 427, 19 U. S. App. 229, 58 Fed. 670, 671, the trial court directed a juror to consent to a verdict because he had once agreed to it, although he protested that it was not his verdict before the court had received it. But the Supreme Court and this court held that the error was not prejudicial, and affirmed the judgment, because the record clearly showed that the evidence warranted a peremptory instruction and would not have sustained any other verdict, although that question had not been presented to the trial court by motion or suggestion, and it had submitted the case to the jury. When a defeated party has been permitted to present, and has introduced, all the legal evidence which he offered, has rested his case, and the court has instructed the jury to return a verdict against him upon a specified, but untenable, ground, its action is error without prejudice, and will not warrant a reversal of the judgment, where it is clear beyond doubt from a bill of exceptions, which contains all the evidence, that it would not sustain any other verdict. Smiley v. Barker, 28 C. C. A. 9, 13, 55 U. S. App. 125, 83 Fed. 684, 687; Moffat v. Smith, 41 C. C. A. 671, 101 Fed. 771; Baker v. Kaiser, 61 C. C. A. 303, 305, 126 Fed. 317, 319. A consideration of the sufficiency of the evidence, therefore, cannot be avoided because this was not one of the reasons for the directed verdict specified in the motion.

Nor does the absence of an answer to the amended petition relieve us from this duty. The material averments of the original petition were denied in due time by a proper answer. The amended petition pleaded the same cause of action. The failure to answer it entitled the plaintiffs to judgment by default. They never applied for such a judgment. They never suggested the absence of an answer, or the admission of the averments of the amended petition by the defendant, until their counsel filed their reply brief in this court. They appeared in the court below, introduced evidence and tried this action as though the averments of the amended petition had been denied by a formal answer, and it is now too late for them to insist upon its absence for the first time in this court. Their silence upon this subject induced the defendant and the court below to expend time and labor in the trial of issues which they tendered in their amended petition in the belief that these issues were raised by the pleadings and that it was their duty to try them, and they are now estopped from denying that these conclusions were correct. The trial of issues tendered by a pleading, in the absence of a plea, answer, or replication which raises them, as though they had been thus presented, estops the parties from subsequently denying that the issues were properly made, and from taking any advantage of the absence of such a plea, answer, or replication. J. S. Keator Lumber Co. v. Thompson, 144 U. S. 434, 437, 36 L. ed. 495, 496, 12 Sup. Ct. Rep. 669; North Chicago Street R. Co. v. Burnham, 42 C. C. A. 584, 586, 102 Fed. 669, 671; Schuster v. Carson, 28 Neb. 612, 615, 44 N. W. 734; Wright v. Waddell, 89 Iowa, 350, 354, 56 N. W. 650; Anderson v. Independent School District, 78 Fed. 750, 751; Loomis v. Riley, 24 Ill. 307, 309; Clark v. Austin, 38 Minn. 487, 38 N. W. 615. The record in this case contains all the evidence at the trial, and the question therefore becomes instant and unavoidable whether or not it is clear beyond doubt that the evidence of the negligence of the telegraph company was insufficient to sustain a verdict against it.

The question is essentially one of law. The action is for damages caused by the false representation of the defendant, contained in the telegram, that the Bank of Denison sent it. There was no actual intent by the defendant to deceive the plaintiffs, and the sole basis of the action is that the deceit and damage were caused by the breach of the duty of the defendant and of its operator, Lyman, to exercise reasonable care to ascertain whether or not the person who spoke the telegram to the operator over the telephone was authorized by the Bank of Denison to do so. The facts are undisputed. There were three persons, Kuehnle, Voss, and Lorenson, who had lawful authority to telephone the message to the operator in the name of the bank, or to empower others to do so. Lyman subsequently became acquainted with Barnes, and could not say that the despatch was communicated by his voice. He knew Voss,

and thought that the message was not spoken by his voice. It might have been lawfully communicated by the voice of Kuehnle or of Lorenson, or of some other person whom one of them or the cashier directed to do so. Lyman did not recognize the voice of the person who sent it, and did not know whose it was. But he took it for granted that it was the voice of someone who had the right to communicate it and to direct its transmission. This is all the testimony upon this subject, and it discloses nothing in the situation or transaction to warn the operator, or to arouse his suspicion, that the telegram was not spoken to him by one who had the legal authority to send it on behalf of the bank. It presents this question: Does the discharge of the duty which a telegraph company owes to the addressee of a message to exercise reasonable care to receive and transmit it correctly and speedily, so that it will represent the truth, require its operators to investigate and ascertain the identity or authority of those from whom they receive messages by telephone or otherwise?

Our attention has been challenged to §§ 2161-2164 of the Code of Iowa of 1897, Section 2161 provides that, if the proprietor of a telegraph company refuses to transmit messages "with fidelity and without unreasonable delay," it shall no longer have the right of eminent domain, or be protected by the laws relating to corporations. Section 2162 requires every person employed in transmitting messages by telegraph to do so "with fidelity and without unreasonable delay," and imposes a penalty for failure to do so and for "wilfully and wrongfully" taking or receiving any such message. Section 2163 provides that the proprietor of a telegraph line "is liable for all mistakes in transmitting or receiving messages, made by any person in his employment, or for any unreasonable delay in their transmission or delivery, and for all damages resulting from failure to perform the foregoing or any other duty required by law."

Section 2164 declares that in any action against any telegraph company for damages caused by erroneous transmission of a message, or by unreasonable delay in delivery of a message, negligence on the part of the telegraph company shall be presumed upon proof of erroneous transmission or delivery. These provisions of the statutes are significant, both in what they contain and what they omit, and they indicate the true boundaries of the duties of telegraph companies. They prescribe their duty to exercise reasonable care to receive, transmit, and deliver messages speedily and without mistakes, and they impose penalties for failures to do so. But they do not charge upon such companies the duty to ascertain the identity or authority of those who tender messages to send them, nor do they impose any liability or penalty for a failure to do so. They recognize the fact that the business, and hence the duty, of telegraph companies, is to speedily and correctly transmit the messages presented to them, not to investigate, ascertain, or guarantee their truth, or the identity or the authority of those who send them. The act or the alleged neglect of which the plaintiffs complain in this case is not one of those denounced in these statutes, and they have no farther relevancy in this action. The defendant's alleged neglect is not a failure to transmit speedily or correctly, or to receive without mistake, the message tendered to the operator at Denison. The testimony is clear and undisputed that he received and transmitted without mistake the message which was spoken to him over the telephone. Did he fail to discharge his duty because he did not ascertain the authority of the person who spoke it to send it in the name of the bank?

The great purpose of telegraphy is the quick transmission of messages from senders to addressees. In the conduct of this business all other considerations are subordinate. The telephone furnishes the most speedy and convenient means of communicating these messages from the senders to the offices of the telegraph companies, and from these offices to the addressees of the messages. For this reason its use for this purpose has become general throughout the land. The persons who operate the telephones are not generally the business men or officers of corporations in whom the authority to send the telegrams is vested in the first instance, but young men and women to whom this authority is delegated by parol, frequently through several intermediaries. An inquiry and decision by telegraph operators of the identity and authority of those who speak the messages over the telephone are utterly incompatible with their rapid receipt and transmission, and a new duty to investigate and determine this authority before sending the messages—a duty which would be so deleterious to the prime object of the business of telegraphy—ought not to be imposed without great hesitation. It is true that the use of new inventions often creates new rights and imposes new duties. But the duty was never imposed upon telegraph companies before the use of telephones to ascertain the genuineness of the signatures to written messages, and the authority of

those who presented them to direct their transmission, and no reason occurs to us why a duty of this nature should now be imposed upon them in receiving messages by telephone.

Moreover, the imposition of such a duty by the decision, which counsel for the plaintiffs seek, that the exercise of reasonable care in the receipt of messages by telephone requires inquiry and determination of the identity and authority of those who communicate them, would be violative of the basic principle of business and judicial action. Such a rule must be founded upon the erroneous presumption that men are generally deceitful and dishonest, and it would be destructive of itself. If the telegraph operator must presume that one, with whose voice he is not familiar, who speaks a message to him over the telephone or otherwise, is deceitfully impersonating another, or is without authority to send it, then by the same mark he must presume that the statements of those who identify the sender, or vouch for his authority, are also false and fraudulent, and his investigation would be both tedious and futile. The truth is that the great majority of private citizens and public officials alike are honest and truthful, and that the entire civic fabric rests upon the fundamental presumption that they are so. Business cannot be transacted, contracts cannot be made and enforced, the rights of citizens cannot be measured and protected by the courts, upon any other presumption than that men and women are honest, truthful, and innocent of wrong until the contrary appears. The telegraph company and its employees may, like all others, safely rely upon this presumption in receiving messages either in writing or by parol. In the absence of notice of facts or circumstances which would suggest or arouse suspicion in the mind of a person of ordinary caution of false impersonation, or of want of authority, the exercise of reasonable care by a telegraph operator to receive messages from those only who have authority to send them does not require him to investigate the identity or authority of those who present them, whether the messages are in writing, or are spoken directly or over the telephone by unfamiliar voices. He may take it for granted that those who present them have the right to send them. Western U. Teleg. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1. A care which would delay messages presented to the operator by a person, or by a voice unknown to him, until he could inquire and ascertain the identity and authority of the persons who present them, would not be ordinary, but extraordinary, care, for it would be a care which persons of ordinary caution and intelligence do not exercise in similar situations. It would not be reasonable, but unreasonable, care, because it would prevent the speedy transmission of messages and thwart the main purpose of telegraphy.

But notice of facts and circumstances which would put a person of ordinary caution upon inquiry is notice of all the facts to which a reasonably diligent inquiry would lead. And whenever facts or circumstances come to the notice of a telegraph company, or of its operators, which would arouse the suspicion of a person of ordinary prudence and intelligence in a like situation, and would suggest to his mind that the party who presents the message is not authorized to send it, the exercise of reasonable care requires them either to investigate and ascertain his authority before transmitting it, or to communicate the facts and circumstances and the suspicion to the addressee at or before the delivery of the message. Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140; McCord v. Western U. Teleg. Co. 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 N. W. 315; Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto, 54 L.R.A. 711, 48 C. C. A. 413, 109 Fed. 369; May v. Western U. Teleg. Co. 112 Mass. 90; Bank of California v. Western U. Teleg. Co. 52 Cal. 280.

Many authorities have been cited and considered in reaching these conclusions. Cases which involve mistakes in the transmission of messages, like Strause v. Western U. Teleg. Co. 8 Biss. 104, Fed. Cas. No. 13,531, and Fererro v. Western U. Teleg. Co. 9 App. D. C. 455, 35 L.R.A. 548, have little relevancy to the question here in hand, because the law is well settled that it is the duty of a telegraph company to exercise reasonable care to correctly communicate the messages it receives to those to whom they are addressed. Nor is the case of Western U. Teleg. Co. v. Uvalde Nat. Bank (Tex. Civ. App.) 72 S. W. 232, 97 Tex. 219, 65 L.R.A. 805, 77 S. W. 603, 606, either material or persuasive. In that case a telegraph operator gave the call for a certain town to a member of his union, who tapped one of the company's wires and sent such forged messages to a bank that it cashed a worthless draft. The courts of Texas held that the company was negligent, either because the operator gave out the call or because the company had not used some unknown means, that they did not specify, to prevent scoundrels from tapping its wires. If no such means were shown by the record, or were known to, or suggested by, the court, and there was no evidence that telegraph companies had ever used such means, how could it be a lack

of ordinary care to fail to do so? The cases that are pertinent to the question before us have been cited above under the rules which they respectively illustrate. In Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 556, 6 Am. Rep. 140, the operator received and transmitted to a bank a message dated at another station, which held out the person who tendered the message as worthy of credit, and bore the forged signature of the cashier of another bank, who, the operator knew, was not the person who presented the message for transmission. In McCord v. Western U. Teleg. Co. *supra*, and Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto, *supra*, the operators themselves forged and transmitted telegrams which induced the payment of money to those who had no right to it. In Bank of California v. Western U. Teleg. Co. *supra*, the operator employed a subagent to send messages, and he forged and transmitted a message to a bank which induced it to pay $1,200 to himself; and in May v. Western U. Teleg. Co. *supra*, the company delivered a telegraphic order for 325 brass tubes a second time five days after its first delivery, and the addressees filled the order a second time in the belief that it was a second order. These are the strongest cases in support of the contention of counsel for the plaintiffs, and they fall far short of sustaining their position. In three of them the acting operators themselves made the deceitful messages and perpetrated the fraud, and in each of the others the employees of the telegraph company were aware of facts and circumstances which would have led a person of ordinary caution to an inquiry which would have prevented the injury.

On the other hand, in Western U. Teleg. Co. v. Meyer, *supra*, one Max Reis was the nephew of the plaintiff, Meyer, who resided in Selma, Alabama. A person unknown to the telegraph operator at Cincinnati, and who was not Max Reis, presented to him for transmission a message to Meyer, signed "Max Reis," wherein Meyer was requested to send him money by telegraph immediately. Meyer complied with the request, and the telegraph company paid the money to the person who presented the message. Meyer brought an action against the company for the money he had lost, and the supreme court of Alabama denied a recovery upon the ground that the defendant had been guilty of no breach of duty. No decision of any court has been cited or discovered which is inconsistent with the rule that, in the absence of notice of facts or circumstances which would awaken inquiry and arouse suspicion in the mind of a person of ordinary prudence and intelligence in a like situation, regarding the authority of the party who presents a message for transmission to send it, the exercise by a telegraph company and its operators of reasonable care to receive and transmit genuine and authorized messages only does not require them to investigate or ascertain the identity or authority to send it of the person who tenders a message for transmission, whether it is in writing or is spoken directly to the operator, or is communicated to him by telephone; and the conclusion is that this is the law which ought to govern, and which does govern this subject.

Tried by this rule there is no evidence in this case of any negligence of the defendant or of its operator, Lyman. There were three persons who had original authority to send the message, and they had power to direct others to do so. It came to the operator in a voice which he did not recognize, and that he thought was not the voice of the cashier, and that he could not say was the voice of Barnes. There is no evidence that he could have recognized the voices of Kuehnle or Lorenson or of others to whom they might have delegated the power to send the message, and the natural and legal presumption was that it was spoken by some of those who had authority to send it. The operator relied upon that presumption, as he had a right to do, in the absence of suspicious facts or circumstances, and neither he nor the company was guilty of any negligence or breach of duty to the plaintiffs.

The result is that it is clear beyond doubt that no verdict or judgment in favor of the plaintiffs could have been sustained in this case, and, as the erroneous ruling of the court below did not prejudice, and could not have prejudiced, the plaintiffs, the judgment must be affirmed. It is so ordered.

MICHIGAN SUPREME COURT.

THOMAS MARVIN, Admr., etc., of Jacob Bowlby, Deceased,
v.
ELMER E. BOWLBY et al., Appts.

(— Mich.— 105 N. W. 751.)

Heir—distributive share—lien for indebtedness.

The distributive share of the real estate of an heir debtor to the estate of his an-

Case Note.—Indebtedness of heir to estate as counterclaim or set-off against distributive share in proceeds of real estate.—It appears from the case of MARVIN v. BOWLBY,

cestor is not chargeable with such indebtedness, either as land or as the proceeds thereof in the hands of the administrator.

(December 15, 1905.)

APPEAL by defendants from an order of the Chancery Division of the Circuit Court for Shiawassee County overruling demurrers to a bill filed to establish a lien on defendants' distributive share in the estate of Jacob Bowlby, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Lyon & Moinet for appellants Bowlby.

Mr. Almond G. Shepard, *in propria persona.*

Messrs. Dooling & Kelley, with Mr. Fred R. Everett, for appellee:

The administrator may seek the aid of a court of equity to obtain a decree applying the distributive share of an insolvent heir at law, judgment debtor, to the judgments against such heir at law.

New v. New, 127 Ind. 576, 27 N. E. 154; Oxaheer v. Nave, 90 Tex. 568, 37 L.R.A. 98, 40 S. W. 7; Powers v. Morrison, 88 Tex. 133, 28 L.R.A. 521, 53 Am. St. Rep. 738, 30 S. W. 851; Dickinson's Estate, 148 Pa. 142, 23 Atl. 1053; Donaldson's Estate, 158 Pa. 292, 27 Atl. 959; Streety v. McCurdy, 104 Ala. 493, 16 So. 686; Fiscus v. Moore, 121 Ind. 547, 7 L.R.A. 235, 23 N. E. 362; Koons v. Mellett, 121 Ind. 585, 7 L.R.A. 231, 23 N. E. 95; Cowen v. Adams, 24 C. C. A. 198, 47 U. S. App. 439, 78 Fed. 536; Gosnell v. Flack, 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411; Webb v. Fuller, 85 Me. 443, 22 L.R.A. 177, 27 Atl. 346; Batton v. Allen, 5 N. J. Eq. 99, 43 Am. Dec. 630; Howland

and from the cases mentioned below, that the authorities are not in harmony on the question of an heir's indebtedness to the estate as forming a counterclaim or set-off against the debtor heir's distributive share arising from the sale of real property. Some of the leading cases on this subject are cited and discussed by the court in its opinion and need not be commented on in this note. The authorities which do not accept the doctrine of retainer or set-off are based on the theory that the real estate of the intestate descends directly to the heirs upon the death of the ancestor, and vests in them, subject only to the debts of the estate; and, if the real property comes to them by will, the general rule applied is, that, if the testator intends to do so, he may charge the estate devised with the duty of paying any debt which may be due from the devisee to the testator, and his omission to impose such a condition evinces an intention to make the devise unconditional. The cases in which the opposite doctrine finds support are based on statutory provision or proceed on the theory that an heir who is a debtor to the estate stands in the attitude of having received so much from the estate, and if his distributive share in the personal property is not equal to the amount thus received, the real estate ought to be held charged to the payment of the remainder in the division, and he receive that much less.

In the absence of language in a will making the debt of a devisee to the testator a charge on the land devised, such a debt cannot form a counterclaim on partition of the testator's real property among his devisees. La Foy v. La Foy, 43 N. J. Eq. 206, 3 Am. St. Rep. 302, 10 Atl. 266.

But when the testator directs in his will that his executor shall deduct from the value of the estate devised, the amount of money heretofore paid and advanced to or for any of his children, and all moneys and accounts in which they may be indebted to the testator at his death, the right of the executor to deduct the debt of a devisee to the testator from his share of the proceeds of land sold in partition proceedings is superior to the claim of an assignee of such heir's share in the estate. Smith v. Smith, 13 N. J. Eq. 164.

The share in the proceeds of a partition sale of land, inherited by a grandson in lieu of a deceased parent, who would have been entitled thereto if living, is not subject to deduction for the parent's debt to the grandfather, if the grandson receives no property from his parent which would be subject to the latter's debts; but if the son of the intestate had survived his father, and had not paid his debt to the estate, in the adjustment of the equities between him and his coheirs his share would have been set off by the debt, and his portion of the estate would simply have been credited upon his obligation. Powers v. Morrison, 88 Tex. 133, 28 L.R.A. 521, 53 Am. St. Rep. 738, 30 S. W. 851.

In Mann v. Mann, 12 Heisk. 245, it was held that an insolvent son's indebtedness to his father, who died intestate, for the nonpayment of a promissory note, did not constitute a lien upon the son's distributive share in the proceeds of the sale of the real property, and the court also held that if the heir is indebted to the estate in a sum which cannot otherwise be made, the administrator may, by proper proceedings, subject his interest in the realty to its payment; but if, before such proceedings, the heir has bona fide transferred his interest in the estate to an innocent party, the debt not being a lien upon such interest, the latter cannot be subjected to the satisfaction of the former.

The distributive share of an heir in the surplus arising from the sale of an intestate's land under a deed of trust, and remaining in the hands of the trustee, may be claimed by the administrator in discharge of the heir's indebtedness to the estate for various sums paid by the intestate as surety for such heir, and such claim is superior to the rights of a creditor who recovered a judgment against the heir before sale under

v. Heckscher, 3 Sandf. Ch. 519; Brown v. Mattingly, 91 Ky. 275, 15 S. W. 353; 1 Pom. Eq. Jur. § 541; Taylor v. Jones, 97 Ky. 201, 30 S. W. 595; Ruiz v. Campbell, 6 Tex. Civ. App. 714, 26 S. W. 295.

The right of a court of equity to apply the distributive share of an insolvent heir at law upon judgments obtained by the administrator against the said insolvent heir applies not only to a distributive share in personal property, but also as to the real estate in which the heir is interested as such.

New v. New, Oxsheer v. Nave, Powers v. Morrison, Dickinson's Estate, Donaldson's Estate, Fiscus v. Moore, Streety v. McCurdy, Ruiz v. Campbell, Brown v. Mattingly, and Taylor v. Jones, *supra;* Nelson v. Murfee, 69 Ala. 598; Liginger v. Field, 78 Wis. 367, 47 N. W. 613.

Equity has jurisdiction to entertain a bill filed by the administrator to subject distributee's share to payment of judgments.

New v. New, Streety v. McCurdy, and Oxsheer v. Nave, *supra;* Hopkins v. Thompson, 73 Mo. App. 401; Fiscus v. Moore, *supra;* Head v. Spier, 66 Kan. 386, 71 Pac. 833; Dickinson's Estate and Donaldson's Estate, *supra.*

The right of set-off or retainer exists whether the legatee or distributee was indebted to the deceased before his death or contracted the liability to the estate thereafter.

Gosnell v. Flack, *supra;* McGee v. Ford, 5 Smedes & M. 769; Mahon v. Bower, 1

the trust deed. In reaching this conclusion the court recognized that certain authorities, some of which are cited in MARVIN v. BOWLBY, hold that the doctrine of retainer or set-off does not extend to the proceeds arising from the sale of real estate, but denounces the rule applied in those cases on the ground that one heir might receive twice or three times as much as any of the other heirs, and that it should not be in the power of a third person to embarrass the personal representatives in the settlement of an estate by dealing with the heirs upon the supposition that their interest is of a fixed or certain character. Hopkins v. Thompson, 73 Mo. App. 401.

The case of Brown v. Mattingly, 91 Ky. 275, 15 S. W. 353, was one in which a judgment creditor had attached the interest of the debtor heir in the lands of his intestate, and his effort to assert that lien was resisted by the other heirs upon the ground that the debtor heir was, at the time of his ancestor's death, indebted to him in a larger sum than the value of such heir's interest in the real estate. The court held that since the administrator's plea of set-off extinguished the heir's right to any distributive share in the estate, the attachments by the creditor of the debtor heir are not in equity superior to the debt due the estate, since that existed at the time the attachments were obtained.

But in Close v. Van Husen, 19 Barb. 505, the court held that an executor named in a will giving the testator's widow the use of all his real and personal estate during life, and directing that upon her death it be sold and the proceeds divided among his heirs, who sold to one of the heirs a horse at public auction, taking in payment a note with the understanding that, if the note were not paid, the executor might retain the amount from such heir's interest in the estate, cannot apply such heir's distributive share in the proceeds arising from the sale of real estate in payment of the note, and thereby cut off or decrease the claims of one who held a mortgage upon such heir's undivided share of the land, executed before the death of the widow. The court denied the power of the executor under the will to make the sale during the life of the widow, and much less to become a party to a verbal lien upon the share of one of the distributees to secure himself against an improper act, and said that the difficulty with the executor's claim was that, before he had any valid lien upon the property, the mortgagee had acquired a higher one, which was not lost by the subsequent sale.

A portion of a city lot inherited from an intestate is chargeable in partition with the heir's indebtedness for the nonpayment of a note given to the intestate; but the interests in the lot purchased by him from the other heirs are not subject to the payment of the debt. Ruiz v. Campbell, 6 Tex. Civ. App. 714, 26 S. W. 295.

Although there is no personal property which may be used to extinguish an heir's indebtedness to his intestate, growing out of the latter's liability as surety for the former, the interest of such heir in the lands is subject to such indebtedness, on the ground that, to permit one to share in the estate which is diminished by his default, and to the prejudice of those whose rights are equal to his, is inequitable and at variance with the policy defined in a statute providing, in substance, that, if an advancement is made in real estate, the value thereof shall be deducted from the heir's share of the real property, and if that proves insufficient, from his share in the personal property. Keever v. Hunter, 62 Ohio St. 616, 57 N. E. 454. It is evident from this reasoning that the theory of advancement is inclined to, if not adopted, by the court.

Money received by heirs from an intestate, which was evidenced by promissory notes, was construed to be advancements, in Tobias v. Richardson, 26 Ohio C. C. 81, and therefore the debtor heirs, on distribution of the proceeds of the sale of real property, must account for the amount of their debts, under the provisions of the statute just stated in the paragraph above.

How. (Miss.) 275; New v. New, *supra;* Dray v. Bloch, 29 Or. 347, 45 Pac. 772; Baily's Estate, 156 Pa. 634, 22 L.R.A. 444, 27 Atl. 560; Sproul's Appeal, 105 Pa. 442; Hopkins v. Thompson, Streety v. McCurdy, Koons v. Mellett, Taylor v. Jones, Brown v. Mattingly, Nelson v. Murfee, and Fiscus v. Moore, *supra.*

On petition for rehearing.

Decisions from the state of Massachusetts bearing upon the question involved should have no force as precedents, for the reason that the courts of Massachusetts originally had no chancery jurisdiction, but were courts of common law, and the courts of that state, unlike our own, have always declined to entertain a broad view of equity jurisdiction or to enlarge statutory equity jurisdiction by implication.

Black v. Black, 4 Pick. 234; Stone v. Hobart, 8 Pick. 464; Holland v. Cruft, 20 Pick. 321; Whitney v. Stearns, 11 Met. 319; Clark v. Sibley, 13 Met. 210; Walker v. Locke, 5 Cush. 90; Jones v. Newhall, 115 Mass. 251, 15 Am. Rep. 97.

McAlvay, J., delivered the opinion of the court:

Complainant as administrator of the estate of Jacob Bowlby, deceased, filed his bill of complaint against defendants, setting forth that said decedent died in Clinton county, this state, seised and possessed of real estate located in Shiawassee county, and also personal estate of the value of $1,900; that he was indebted in a large amount to creditors, and also as indorser or guarantor upon obligations due and owing by Elmer Bowlby to various creditors; that he, in the exercise of his duties as such administrator, after the allowance of claims, proceeded to pay said creditors, selling the personal property, paying all but a certain mortgage of the State Savings Bank of Ovid, leaving in his hands, after paying his fees and expenses, the sum of $57.05; that all of the heirs, by agreement, joined in a deed to one Theodore May of the land covered by the said mortgage to the savings bank, subject to said mortgage; that all the other lands of said estate have remained in his possession as said administrator; that defendant Elmer Bowlby was indebted to the said estate, for which complainant brought suit and recovered judgment in Shiawassee circuit court, and recovered judgment from said defendant for $3,362.62, and costs taxed at $57.70, which judgment was afterwards affirmed by this court with costs taxed at $61, which judgment, with costs and interest, is still owing to said estate by said defendant Bowlby; that said defendant, as an heir at law of said deceased Jacob Bowlby, is entitled to a distributive share of the estate; that said defendant and his wife have given a mortgage to defendant Almon G. Shepard, for $600 upon their interest in part of the real estate of said decedent to secure attorney's fees and expenses of litigation, with full knowledge of the fact of defendant Bowlby's indebtedness to said estate, and was given and received for the purpose of hindering and delaying said complainant in collecting said indebtedness and that, with the same intent and for the same purpose, said Bowlby and wife gave another mortgage for $1,100 to Wm T. Reed, trustee, upon their interest in certain other lands of said estate; that there are no funds to pay the expense complainant incurred in such litigation and that, the personal estate being exhausted to pay debts it will be necessary to sell the real estate, and said mortgages are a cloud upon the title thereto; that defendant Bowlby is insolvent and has no property to satisfy the said judgments; and that it will be necessary to apply his distributive share in said real estate upon the same. The complainant prays that the aforesaid mortgages be set aside as cloud upon his title and as hindering and delaying the sale of said lands; that the distributive share of said defendant Bowlby in said lands be applied on said judgments and, if necessary, to ascertain the value of such share, said lands may be sold. Defendant Bowlby and wife demurred to said bill, as did also defendant Shepard, alleging as grounds of demurrer that, as a judgment creditor's bill or as a bill in aid of execution, it does not comply with the necessary requirements of law and practice; that it appears that a probate court, and not a court in chancery, has jurisdiction; that no case is made by the bill entitling the complainant to relief in equity. From an order overruling these demurrers, these defendants have appealed.

The bill of complaint does not on its face purport to be either a judgment creditor's bill or in aid of execution. The prayer of the bill based upon its allegations is that certain mortgages be set aside as a cloud upon complainant's title; and that the share of defendant Bowlby, as heir in the real estate of complainant's decedent, be applied upon the judgment in favor of the estate against him, and, if necessary, the real estate be sold for that purpose, the share not being otherwise ascertainable. All the questions raised upon these demurrers depend upon the main proposition,—whether a court in chancery will assume jurisdiction to authorize the application of a judgment obtained by an administrator in favor of an estate against an insolvent

heir at law, against the distributive share of such heir in real estate, and order sale of the real estate for that purpose. This contention is not without force, especially as it is based upon the claim that it is the only way, under circumstances similar to these in this case, that all the heirs of an estate may share equally in the estate of their intestate ancestor. It is also supported by some authority. It is well settled that real estate of the intestate decedent descends directly to the heirs, subject, however, to the payment of debts and expenses of administration. The heir does not take an absolute title to such share of the real estate for the reason that all of the estate is subject to the debts of the decedent. The personal estate must first be exhausted, and then so much of the real estate as may be necessary to satisfy such debts, and the title of the lands which descended to the heir may be completely devested. A mortgagee or grantee of an heir of his interest in such real estate will acquire no greater rights than those possessed by the heir.

It is a recognized doctrine that the distributive share due an heir from personal estate may be applied by the administrator in payment of a debt due the estate by the heir. The case of Fiscus v. Moore, 121 Ind. 547, 7 L.R.A. 235, 23 N. E. 362, is cited in support of complainant's contention in this case, that the same rule extends to the real estate of an heir. In that case all the real estate had been regularly sold by the administrator to pay debts owing by the intestate, and a surplus over remained in his hands for distribution. One of the heirs was indebted to the estate for much more than his distributive share. Moore, the mortgagee of this heir's interest in the real estate, secured an order requiring the administrator to pay him the amount of the mortgage debt out of this heir's share of such proceeds. The majority of the court held that, when land was converted into money, it became, by operation of law, money assets, subject to all the incidents of other assets, regardless of the source from which they arise; that the claim of the mortgagee was not a claim to an interest in the assets of the estate; that the mortgagee had no greater rights than the heir, and that the administrator had the right to apply this heir's interest in this fund upon his indebtedness to the estate; that to hold otherwise would deprive the other heirs of their right to an equal participation in the estate. Koons v. Mellett, 121 Ind. 585, 7 L.R.A. 231, 23 N. E. 95, was a case where the funds arising from the sale of real estate according to the terms of a will were in the hands of the administrator, and the same court, by a majority opinion, held as in the case of Fiscus v. Moore, *supra*. It will be noted that these cases were not in accord with the previous decisions of that court. See Milligan v. Poole, 35 Ind. 64; Spray v. Rodman, 43 Ind. 225; Wilson v. Rudd, 19 Ind. 101; Simonds v. Harris, 92 Ind. 505; Ballenger v. Drook, 101 Ind. 172. In the majority opinion in the first case above cited the court distinguished between cases where the proceeding was to compel the payment of a distributive share from the cash proceeds of the real estate in the hands of an administrator, where the heir is indebted to the estate, and an attempt by a direct proceeding to charge a lien upon the real estate which had descended to the heir. Fiscus v. Moore, 121 Ind. 551, 7 L.R.A. 235, 23 N. E. 362.

The case of New v. New, 127 Ind. 576, 27 N. E. 154, followed the two cases above discussed, and is claimed as an authority supporting the contention of complainant in the case at bar. An extract from the opinion will show what was decided. We quote from pages 586 et seq., 127 Ind., page 157, 27 N. E.: "In the case of Fiscus v. Moore it was held by a majority of this court, and is now the settled law of the state, that a debt due an estate of an intestate from an heir may be retained out of his distributive share of the surplus proceeds of real estate which has been regularly sold in order to make assets to pay debts as against one who took a mortgage pending the settlement of the estate, with knowledge of the indebtedness. If an administrator has the right to apply money due the heir for his share of real estate, which accidentally comes into his hands by reason of the nondivisibility of real estate, so that only a sufficient amount can be sold to pay the debts of the estate, by reason of which indivisibility the administrator is compelled to sell all the land, thereby reserving a surplus from the sale of the real estate, to the payment of a debt due the estate, then the administrator certainly has the right in equity, in case no sale is made of the real estate by which a surplus comes into his hands, to have the interest of the heir applied to the payment of the debt due the estate. In that case it is said: 'The right of heirs to participate equally in the estate of their ancestor is superior to that of a lien holder with notice.' This recognizes the doctrine that there exists a right to have an equal distribution . . . between heirs, devisees, and legatees, and for that purpose there exist, in equity, a lien and right to have such a portion of an estate, whether real or personal, as goes to the heirs, applied to the payment

of a debt due from the heir to the estate. In the case at bar and in like cases, the estate vested subject to the rights of the widow, and the testator contemplated an equal distribution of such portion of his estate as remained at the death of the widow between the legatees, share and share alike. In this case the widow had full power to use such portion of the estate as necessary to supply her wants during her life, and at her death provision was made for an equal distribution of the estate remaining between the three children; before her death one obtains possession of a portion of the funds constituting a part of the estate and executes his note for the same, which becomes a part of the assets of the estate. The portion of the real estate which George W. took by the will was subject to the payment of the judgment taken for the portion of the personal estate which he had obtained, and the executor had the right to have it subjected to sale to pay the debt, or, in a partition of the real estate, the other devisees had the right to have it treated as an advancement, so that the debtor had no interest in the real estate except the amount remaining in excess of the amount of the judgment. The executor having the right to subject the land to the payment of the judgment, the assignee also had the same rights." The assignee in this instance was one of the heirs, who, by order of the proper court, took this judgment as part of his distributive share of the estate. Although the doctrine contended for is laid down in the opinion above quoted without qualification as a logical sequence to the decision in the case of Fiscus v. Moore, yet the decision seems to be based upon the right of the executor to subject the land to the payment of the judgment, and also the right of the other heirs, in a partition of the real estate, to have this debt treated as an advancement. In Indiana, by statute, a judgment duly entered becomes a lien upon the real estate of the debtor.

In Streety v. McCurdy, 104 Ala. 493, 16 So. 686, it is held that the heirs of an estate have an equitable lien upon the distributive share in real estate of an heir who is indebted to an estate, and this lien is superior in equity to all liens of grantees or creditors of said heir, and may be enforced in equity by the other heirs, or the administrator. That court says: "This view is apparently at war with the current authority in the other states."

In Oxsheer v. Nave, 90 Tex. 568, 37 L.R.A. 98, 40 S. W. 7, the court recognizes also the conflict among authorities upon the proposition. This case was for the partition of community property owned by plaintiff and his deceased wife, against his children, and asking to offset the indebtedness of a son to said community estate against his interest therein. It was held that the distributive share of an insolvent debtor heir in the real estate could be applied upon his indebtedness to the estate. The court said: "Under our statutes, the real and personal estate of an intestate descend alike to the heirs, charged with the payment of debts, and subject to administration for that purpose. Both the real and personal property, when administered, are subject to distribution among the heirs in one proceeding. The debt of one of the heirs to the estate is a part of the general mass of property subject to distribution, and, if such heir fail to pay it, if more than his share, so much of it as amounts to the value of his share should be set apart to him; if less than his share, it should be taken by him in satisfaction of that share so far as it will go. The principle was applied in Re Akerman [1891] 3 Ch. 212." In this case the court, in answer to the argument that the rule would not apply to real estate of a debtor heir which had not been converted into money, said: "We apprehend that this makes no difference in principle, for the reason that the equity of requiring the debtor distributee is the same whether the mass to be distributed consists of property or money; and it is within the power of courts of equity to enforce the equity as well in the one case as in the other. Under our statutes in relation to the estates of deceased persons, a conversion of the property, both real and personal, may become necessary upon either of two contingencies: 1, for the payment of debts; and 2, in order to bring about equality in the final distribution. In principle we perceive no sound distinction between the two cases."

Donaldson's Estate, 158 Pa. 292, 27 Atl. 959, was an appeal from a decree dismissing exceptions to an auditor's report in partition of an estate. The court held that the equity of payment of an heir's debt to an estate runs with the land, and the amount of the heir's indebtedness may be charged upon his share as against an execution creditor with notice that the same would be charged against said share as for an advancement. In Gosnell v. Flack, 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411, where a trustee of an insolvent heir claims the distributive share by right of his deed of trust, it was held that "the right to a distributive share is subordinate from the beginning to the distributee's indebtedness to the estate. If he is charged with the indebtedness, as he should be, he can only receive in the way of a distributive share what remains after deducting that indebtedness. In other

words, his right to claim any portion of the estate is limited to that portion, if any, which is in excess of what he owes to the estate;" and that the trustee was entitled to no greater rights than his grantor In this case the proceeds of this estate were in the administrator's hands for distribution.

The foregoing are the leading authorities to which our attention has been called, or which we have been able to find, supporting, or tending to support, complainant's contention. The leading cases holding the contrary doctrine are:

La Foy v. La Foy, 43 N. J. Eq. 206, 3 Am. St. Rep. 302, 10 Atl. 266, which holds that the debt of a devisee is not a charge on lands devised to him by the testator, in the absence of language in the will making such debt a charge. The court says: "The devisee of lands occupies no such relation to the executor as that which exists between legatee and executor. No act is necessary on the part of the executor to put the devisee in full enjoyment of the estate devised. The opportunity, therefore, could not arise for the executor to retain the debt of the devisee to the testator out of any demand which the devisee might seek to enforce against the executor. If such a charge attaches against the land devised, it would be necessary for the executor to establish it by proceedings in which he is the actor. After diligent search, I have been unable to find a case in which an attempt has been made to charge a devisee of lands with a debt due from the devisee to the testator, in the absence of language in the [testator's] will manifesting the purpose of the testator to do so. . . . In the absence of language in the testator's will to that effect, there is no authority for charging the devisee's debt upon land devised to him."

In Smith v. Kearney, 2 Barb. Ch. 533, real estate had been sold to carry out the valid provisions of a will, and funds were in the hands of the executor. The creditors and assignees of an heir who was indebted to the estate, and who had acquired rights in the land before sale, claimed the distributive share of such debtor heir in such fund. After indorsing the well-settled doctrine that as to legacies the distributive share of a legatee debtor to the estate in the hands of an executor may be applied upon his indebtedness, the learned chancellor said: "But in relation to the proceeds of that portion of the real estate which descended to John C. Lendining . . . as one of the heirs at law of the father, this principle of equitable retainer does not apply. That fund was not placed in the hands of the executors by the will of the testator, as personal estate, but its conversion was merely accidental. . . . It is, in equity, therefore, still to be considered as real estate, and as in no way connected with the fund which came to the hands of the complainant for the purposes of the will."

The same rule has always obtained in Massachusetts. A leading case is Dearborn v. Preston, 7 Allen, 192, where an ancestor devised his real estate equally to his three sons. One of these sons afterwards conveyed his interest to the other two, and one of these conveyed his interest to a third party, who thereby became owner of an undivided one-half interest in said real estate, and by petition asked partition thereof. The son who held the other one-half interest claimed that his brother, when he conveyed to petitioner, did not own a one-half interest, that the interest devised to him was chargeable with an indebtedness he owed his ancestor at the time of his decease. The court says: "The rule of law upon the subject is so well known and established that there can be no doubt of the legal right of a devisee of real estate to take and hold it absolutely, free from any lien or charge of encumbrance as security for anything which he owed to the testator and may still owe to his legal representatives. It was very early determined that, in the division among the heirs of the real estate of a person who died intestate, no deduction would be made from the share of any one of them for or on account of any debt due from him to the intestate; and that there was no lien or charge in any form subsisting upon such share as security for such debt, or which could in any way be enforced towards the payment of it. Procter v. Newhall, 17 Mass. 93. The judgment of the court in the case of Hancock v. Hubbard, 19 Pick. 167, declared and reaffirmed the same doctrine. And these decisions have never been doubted or brought into question, but, ever since they were promulgated, have been uniformly received and recognized as true and undoubted expositions of the law. The rights of devisees to real estate, or to any share or interest therein specifically devised to them, depend, and are obviously to be determined, upon the same principle. . . . The testator may prescribe at his own pleasure the terms of his gift, and, if he desires and intends to do so, he may charge and encumber the estate devised with the duty and obligation of paying any debt which shall remain due from the devisee to the testator at the time of his decease. His omission to impose any such condition unequivocally evinces an intention to make his gift absolute and uncondi-

tional. And it is a plain and unavoidable consequence of an unrestricted and absolute devise that the estate devised comes to the devisee entirely free from any encumbrance or liability to be in any part appropriated to the payment or discharge of any debt which was due from him to the testator."

The doctrine that such indebtedness is no lien or charge upon the real estate of the debtor heir is applied in Tennessee; but, in order to make it a lien, the administrator must become an actor in a proper proceeding. Mann v. Mann, 12 Heisk. 245; Towles v. Towles, 1 Head, 601. See also Sartor v. Beaty, 25 S. C. 293.

It is a recognized doctrine that the distributive share derived from personal property of an heir indebted to an estate may be retained by the administrator in payment of such debt. This same doctrine has also been applied to a debtor legatee by an unbroken line of authorities from the earliest English decisions to the present time. The doctrine is founded upon principle as well as upon authority. It is, in fact, the collection of a debt due the estate. Personal estate is assets in the hands of the administrator. He is required by law to convert personal property into money, to collect all debts due the estate from all debtors, including heirs. The heir has no title or claim to personal estate except a distributive share in the surplus after payment of debts and expenses of administration.

No such doctrine has prevailed as to real estate. The title to the real estate vests in the heir at the date of the death of the ancestor. Real estate is not assets in the hands of a personal representative, and, unless otherwise charged by the terms of a will, is subject only to the contingency of a sale of so much thereof as may be necessary to pay the debts of the estate in case there is not sufficient personal estate for that purpose. This statutory contingency is a modification of the common law, and no sale of real estate to pay debts of the estate could be made before this modification. It has been held repeatedly, not only that no sale of real estate can be made except for this purpose, but also that only so much of the real estate can be sold as may be necessary for that purpose, and that where, because of the indivisibility of real estate, the whole must be sold, the surplus, by the doctrine of equitable conversion, is considered as real estate, and as such goes to the heirs. There is one recognized exception to the general rule above stated. Indebtedness of the heir to the estate which may be held as an advancement may be considered in the division of real estate among heirs. The recent cases cited as supporting complainant's contention are not based upon authority. The Texas case is the only one which goes to the full extent claimed by complainant, and that case is based upon the argument in the Case of Akerman, *supra*, wherein the court expressly stated: "I am not deciding a case where there is a mere gift of real estate. . . . But here I am dealing with a case such as I have mentioned,—with a general fund made up of proceeds of sale of real estate, and proceeds of conversion of personal estate." The other cases relied upon are where surplus from the real estate has been in the hands of the personal representative for distribution, and the doctrine of equitable conversion has not been recognized, or where some statutory provision has influenced the decision. The great weight of the authorities holds the contrary doctrine. We therefore hold that the distributive share of the real estate of an heir, debtor to the estate of his ancestor, is not chargeable with such indebtedness, either as against the land or the proceeds of the sale thereof in the hands of the administrator; that such indebtedness is to be collected by proceedings brought the same as for collecting any other indebtedness due the estate.

The demurrers were well taken, and the order overruling the same is set aside, and a decree will be entered in this court sustaining the demurrers and dismissing complainant's bill for want of equity, with costs to defendants of both courts.

Petition for rehearing denied.

WASHINGTON SUPREME COURT.

THOMAS DOUGLAS, Respt.,
v.
BADGER STATE MINE, Appt.

(—Wash.—, 83 Pac. 178.)

Appeal bond—form.

1. That an appeal bond prepared on a printed form, the penalty of which is the minimum provided for an appeal merely, contains words making it a supersedeas bond also, will not vitiate it, where no at-

Case Note.—Judgment; reliance upon receiving notice from opposing counsel as excuse for default.—In O'Toole v. Phœnix Ins. Co. 39 Wash. 688, 82 Pac. 175, defendant's attorney relied upon the promise of plaintiff's attorneys that they would notify him when the case should be called for trial. They sent notice by telegraph to a town where they had good reason to believe de-

tempt has been made to use it as such, but the latter words will be rejected as an inadvertence.

Default—opening.

2. It is an abuse of discretion for a trial court to refuse to open a default and permit the filing of an answer, where defendant's attorneys, living a long distance from the place of trial, presented a motion to make the complaint more definite, accompanied by an argument, and relied upon plaintiff's counsel to notify them of the result of the motion, which was not done, so that the default was incurred, immediately after which an affidavit of meritorious defense and excusable neglect and an answer were tendered.

(Rudkin and Dunbar, JJ., dissent. Fullerton, J., dissents from proposition 2.)

(December 28, 1905.)

APPEAL by defendant from a judgment of the Superior Court for Chelan County in plaintiff's favor in an action brought to enforce a laborer's lien on a mining claim. Reversed.

The facts are stated in the opinion.

Messrs. Smith & Cole for appellant.

Messrs. Frank Reeves and Reeves & Reeves, for respondent:

The bond is insufficient.

Pierce v. Willeby, 20 Wash. 129, 54 Pac. 999; Sumner v. Rogers, 21 Wash. 361, 58 Pac. 214; Galloway v. Tjossem, 22 Wash. 103, 60 Pac. 129; Graham v. American Surety Co. 28 Wash. 735, 69 Pac. 365; Winchester v. Morris, 33 Wash. 706, 74 Pac. 861.

Appellant had no legal right to be served with a copy of the order before default could properly be entered against it.

Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423; Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798; Yancey v. National Benev. Asso. 122 Cal. 676, 55 Pac. 604; Pennie v. Visher, 94 Cal. 323, 29 Pac. 711; Helena v. Brule, 15 Mont. 429, 39 Pac. 456, 852; Thomas v. Chambers, 14 Mont. 423, 36 Pac. 814; Williams v. Miller, 1 Wash. Terr. 88; Western U. Teleg. Co. v. Griffin, 1 Ind. App. 46, 27 N. E. 113; Brooks v. James, 16 Wash. 335, 47 Pac. 751; White Crest Canning Co. v. Sims, 30 Wash. 374, 70 Pac. 1003; Spokane & V. Gold & Copper Co. v. Colfelt, 30 Wash. 628, 71 Pac. 196.

Inattention of counsel to their case is no reason for vacating a default.

Myers v. Landrum, 4 Wash. 762, 31 Pac. 33; Sanborn v. Centralia Furniture Mfg. Co. 5 Wash. 150, 31 Pac. 466; Haynes v. Schwartz Co. 5 Wash. 433, 32 Pac. 220.

It was counsel's duty to advise themselves of the ruling of the court and to watch their case with diligence.

Black, Judgm. § 341; Bailey v. Taafe, 29 Cal. 423; Sanborn v. Centralia Furniture Mfg. Co. *supra*.

On petition for rehearing.

The case having been tried in the court below on the theory that appellant had a legal right to notice of the ruling of the court on its motion to make the complaint more definite and certain before a default could be legally taken against it, the ruling of this court must be based on this theory also.

Sanders v. Stimson Mill Co. 34 Wash. 358, 75 Pac. 974; Riverside Land Co. v.

fendant's attorney was, but he had returned to the town in which he lived, and never got the notice. Trial was had and verdict rendered in the absence of defendant or its attorney. It was held that the judgment entered thereon was the result of mistake, inadvertence, and excusable neglect on the part of the defendant, and should be vacated upon payment of costs.

In Council Bluffs Loan & T. Co. v. Jennings, 81 Iowa, 470, 46 N. W. 1006, it was held that the trial court did not err in granting a new trial to the party whose attorney relied upon the verbal agreement of the attorney of the adverse party that he would give timely notice of the time of trial, but who, contrary to the terms of the agreement, called the cause to trial in the absence of the party and his attorney.

In Harbers v. Tribby, 5 Ill. App. 411, where counsel agreed that the cause should be tried at a certain hour, and, if reached before that hour, notice was to be given to defendant's counsel, and the cause, having been reached before that hour, was tried in the absence of defendant's attorney, and without notice to him, it was held that such conduct was fraudulent, and that a party should not be allowed to profit by a judgment obtained by such means.

In Field v. Fowler, 62 Tex. 65, it was held that judgment by default should be set aside where it was taken upon the application of an attorney who had promised that he would take no action in the case without giving notice, though he actually gave the notice, but it was given so short a time before the judgment taken that the party, after receiving the notice, could not reach the courthouse in time to prevent its being entered.

In Exchange Bank v. Elkan, 72 Ga. 197, it was held that an agreement between counsel that a case should not be heard until they had been advised was not binding unless in writing. And in Council Bluffs Loan & T. Co. v. Jennings, *supra*, it was held that a disputed verbal agreement of this character could not be proved by the testimony of the adverse party, but it could be proved by the statements of the attorney who made it for the person against whom it is sought to be established, or by his written agreement filed in the case.

Pietsch, 35 Wash. 211, 77 Pac. 195; Normile v. Thompson, 37 Wash. 465, 107 Am. St. Rep. 728, 79 Pac. 1095; Standard Furniture Co. v. Anderson, 38 Wash. 582, 80 Pac. 813.

The default could not properly be opened.

Haynes v. Schwartz Co. 5 Wash. 433, 32 Pac. 220; Sanborn v. Centralia Furniture Mfg. Co. 5 Wash. 150, 31 Pac. 466; Livesley v. O'Brien, 6 Wash. 553, 34 Pac. 134; Bailey v. Taafe, 29 Cal. 423; Brophy v. Brunswick, 2 Wyo. 86; Spokane Falls v. Curry, 2 Wash. 541, 27 Pac. 477; Myers v. Landrum, 4 Wash. 762, 31 Pac. 33.

It resulted from a mistake concerning the law, for which there is no relief.

Chase v. Swain, 9 Cal. 130; Black, Judgm. § 340; Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423; Phelps v. Osgood, 34 Ind. 150.

Mere neglect of counsel is no ground for setting aside a default.

Bosbyshell v. Summers, 40 Mo. 172; Fliedner v. Rockefeller, 9 Ohio Dec. Reprint, 266; Wilson v. Scott, 50 Mo. App. 329; Norman v. Burns, 67 Ala. 248; Walsh v. Walsh, 114 Ill. 655, 3 N. E. 437; Williams v. Wescott, 77 Iowa, 332, 14 Am. St. Rep. 287, 42 N. W. 314; Hayne, New Trial & Appeal, § 76; Harper v. Mallory, 4 Nev. 447; Reiher v. Webb, 73 Iowa, 559, 35 N. W. 631; Butler v. Morse, 66 N. H. 429, 23 Atl. 90; Schultz v. Meiselbar, 144 Ill. 26, 32 N. E. 550; Van Aernam v. Winslow, 37 Minn. 514, 35 N. W. 381; Caughey v. Northern P. Elevator Co. 51 Minn. 324, 53 N. W. 545; Kamman v. Otto, 17 Ky. L. Rep. 1367, 34 S. W. 1070; Burke v. Stokely, 65 N. C. 569; Horn v. United Securities Co. (Or.) 81 Pac. 1009; Yancey v. National Benev. Asso. 122 Cal. 676, 55 Pac. 605; Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423; Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798; Pennie v. Visher, 94 Cal. 323, 29 Pac. 711; Helena v. Brule, 15 Mont. 429, 39 Pac. 456, 852; Thomas v. Chambers, 14 Mont. 423, 36 Pac. 814; Western U. Teleg. Co. v. Griffin, 1 Ind. App. 46, 27 N. E. 113.

Root, J., delivered the opinion of the court:

At the threshold of this case we are confronted with a motion to dismiss the appeal, for the reason that the undertaking is conditioned as both an appeal and supersedeas bond, while in the sum of only $200. The appeal sought to be taken was from a judgment and decree foreclosing a laborer's lien in the sum of $1,475, with $300 attorney fees and costs, upon certain mining claims of appellant. The trial court was not asked to, and did not, fix the amount of any supersedeas. Appellant maintains that the bond was not intended as a stay bond, but that a printed form was used containing the supersedeas clause, which was unnoticed at the time. It is not claimed by respondent that the undertaking was ever used or sought to be used as a supersedeas bond. In fact, it was stated in the briefs and orally at the argument, and not denied, that after the giving of the bond respondent's attorneys wrote to appellant's attorneys, threatening to have execution issue unless a supersedeas bond should be given. A copy of said letter appears in an affidavit on file herein, and is undenied. This would seem to show that both parties treated the instrument as an appeal bond only. But it is suggested that this court must look solely to the instrument itself, and not consider extrinsic matters. How about examining the trial court's order fixing a stay bond? Without conceding ourselves to be thus restricted, let us see what this bond reveals when scrutinized.

We find two of its parts inconsistent with each other. The penalty is stated in the sum of only $200, the lowest possible sum sufficient for any bond on appeal,—a sum inadequate for any other than a mere appeal bond. Then, turning to another portion of the bond, we find words commonly found in an appeal and supersedeas bond. Consequently, one part indicates an intention that it should be merely an appeal bond. The other part indicates that it was intended for both an appeal and supersedeas. When a written instrument has two portions inconsistent with each other, what is the duty of a court? It is the province of the court to examine the entire instrument, and, from a consideration of all its parts, give a construction that shall effectuate the evident intention of the makers of the instrument. Where one item of an instrument is absolutely inconsistent with another, it is evident that one or the other of said items was placed, or left, in such instrument inadvertently. It is not to be presumed that parties would intentionally incorporate in a document two irreconcilable expressions. The writing is to express the intention of the makers. It is inconceivable and unthinkable that the maker of a written instrument should intend two things, one of which is diametrically opposed to the other; or that he endeavored to express two purposes, the existence of one of which would necessarily destroy the other. As the sum of $200 could in no manner and under no circumstances constitute the penalty of an appeal and supersedeas bond, we must find that it was incorporated inadvertently, if we believe appellant intended the bond to be both an appeal and supersedeas. On the other hand, if we believe appellant to have in-

tended merely an appeal bond, then we must conclude that the supersedeas words were placed or left in the bond by mistake or oversight. In preparing a bond on appeal, into which error would an attorney be most likely to fall, that of writing the penalty only $200 when he intended it to be $3,300 or more, sufficient to constitute both appeal and supersedeas, or in leaving in the supersedeas words when only an appeal was intended? It seems to us that the leaving in of the unnecessary supersedeas clause might be a very natural oversight; but that any attorney would write or leave in a bond the words or figures "$200," when he meant $3,100 or some larger sum, would be a very unusual mistake. Then the mention of the amount of the judgment shows plainly that there was no lack of intention to write in the amount of the bond as $200. In fact, there is nothing to show that the writing of the amount as $200 was unintentional, or an inadvertence. It is perfectly evident that appellant intended the penalty to be, and to be written therein as, $200. This being true, it follows that it could not have intended the supersedeas words, the effect of which, if given any, would be to squarely contradict the significance of the language expressing the penalty as $200. If the penalty were any sum in excess of $200, a different question would be presented. But, in this case, the fact of the bond expressing the minimum penalty fixed by the statute, in the absence of any showing of its having been used, or attempted to be used, as a stay bond, precludes the idea that it was ever intended for any purpose other than that of an appeal bond. Respondent cites several decisions of this court in support of his motion. But in all of those cases the bonds were clearly intended as both appeal and supersedeas bonds; and in some, if not all, they actually performed the functions of stay bonds before being challenged here. In the first of said cases (Pierce v. Willeby, 20 Wash. 129, 54 Pac. 999) the trial court, upon application of appellant, fixed the amount of the supersedeas bond in the sum of $200. The appellant then executed an undertaking in the form of an appeal and supersedeas bond, making the penalty, however, only $200. A stay was actually obtained under said bond. The appellant having used it as a stay bond to supersede the judgment, this court held it to be merely a supersedeas bond, and insufficient to effect an appeal. In the case at bar no intention, attempt, or purpose to make or use a supersedeas bond appears. The contrary is affirmatively shown. This case is clearly distinguishable from all those cited. The motion to dismiss the appeal is denied.

Appellant, defendant below, is a corporation having its principal office at Seattle, King county, Washington. This action was commenced in the superior court in and for Chelan county. Appellant's attorneys reside and have their offices in Seattle. The office of respondent's attorneys is in Wenatchee, Chelan county. To the complaint appellant interposed a motion to make more definite and certain. This motion was noticed to be heard before the superior court in Chelan county, on the 5th day of December, 1904. The judge of that court presides over the superior courts of four counties, and his time is consequently divided among said counties. Not knowing whether or not the judge would be at Wenatchee on the said 5th day of December, appellant's attorneys did not go over to Wenatchee, but prepared and sent to the court a written argument upon the motion. As a matter of fact the judge was not in Wenatchee on said 5th day of December, but arrived the next day and proceeded to consider the motion, and denied the same. Appellant's attorneys, not being informed of the court's ruling upon their motion, failed to plead over within ten days. On December 17th, eleven days after the court's said ruling, respondent moved for an order of default against appellant for not pleading over. Notice of this was received by appellant's attorneys on December 19th, and they forthwith prepared an affidavit of meritorious defense and tending to show excusable neglect, and also tendered an answer. These were served and filed December 20, 1904. Respondent moved to strike these, and his motion was set for hearing January 9, 1905; but the judge again being away, the motion was not heard until January 16, 1905, at which time the answer was ordered stricken and the default entered. Findings, conclusions, and decree were signed January 20, 1905. On January 23d, appellant filed and served a petition to vacate the judgment and for a new trial. This petition was denied, and the decree confirmed on March 1, 1905. From said judgment and decree this appeal is prosecuted.

Appellant's attorneys contend that they relied upon respondent's attorneys to notify them of the court's ruling upon the motion to make more definite. They urge that, owing to the long distance of the place of trial (some 200 miles) from their home, and the uncertainty of the judge being there, it was unnecessary for them to be personally present; that they had faith in said motion, and expected in any event that respondent's attorneys would notify them of the court's ruling when it should be

made. They maintained that their neglect, under all of the circumstances, was only such as is contemplated and covered by the statutory provisions permitting relief from "inadvertence" and "excusable neglect." Respondent contends that it was appellant's duty to be represented or to have arrangements made whereby it would have been promptly notified of the court's ruling. Conceding this to be correct, did the omission of appellant's attorneys constitute neglect that was inexcusable? That was the question presented to the trial court and now presented for our consideration. Appellant's attorneys say that they expected respondent's attorneys to notify them when the court should come and pass on the motion; that they expected this as an act of courtesy such as ordinarily obtains among practitioners. Respondent contends that his attorneys were required by no statute, rule of court, or law to notify appellant's attorneys. This is perhaps true; but if attorneys recognize no obligations toward brother attorneys except such as are imposed by statute, rule of court, or law, what becomes of that professional courtesy which has been cherished and observed by the profession from time immemorial? If an attorney extends to another nothing but what that other may demand as a strict matter of law and right, there is no courtesy about it; it is but the mere performance of a legal duty. Those engaged in the active practice of the law must encounter many difficulties and annoyances at the best; and were it not for the generous acts of courtesy and kindly consideration that commonly characterize the dealings of attorneys with one another, the drudgery would often become well nigh intolerable. In the case at bar, the motion of appellant was not merely for delay. It presented a substantial question. It is a serious question whether or not the ruling of the trial court was correct in denying the same. But we are not called upon to pass upon this. We merely mention it to show that it was manifestly interposed in good faith. Had respondent's attorneys notified appellant's attorneys of the court's ruling and thereby given them a chance to plead further, it would certainly have been a courteous and commendable action on their part and in accord with the common practice obtaining among attorneys. Now, because appellant's attorneys relied upon them as attorneys who would practice such courtesies, we do not think they should be humiliated and their client mulcted because of their misplaced confidence and reliance.

Now, let us go a step further. A motion for default was made within a few days. To this appellant responded with an affidavit of excuse and merits. It also tendered an answer which set forth a perfect and complete defense to respondent's complaint. All of this was done promptly and evidenced a good-faith intention to defend. When this was done, respondent, instead of withdrawing his motion for default, insisted upon it, thereby indulging in a practice which, we are glad to say, obtains only to a very limited extent in this state. The action of the trial court in sustaining the motion for default under these circumstances was not only an abuse of discretion, but was violative of both the letter and the spirit of our Code, which requires that all rules of practice shall, so far as practicable and where a different course is not arbitrarily prescribed by statute or established rule of decision, be construed and applied so as to accomplish substantial justice. 2 Ballinger, Anno. Codes & Statutes, §§ 4953, 4957, 5091. A portion of said § 4953 says that the court "may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." By the imposition of costs and reasonable terms upon appellant, respondent and his attorneys could have been fully compensated for any expenses, delay, and inconvenience occasioned them by appellant's neglect to timely plead over. This should have been the course pursued by the trial court. A portion of said § 4957 reads as follows: "The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party." Here was a defendant with an answer presenting a just and meritorious defense; but, because its attorneys had been guilty of slight neglect, its defense is excluded. The statutory provision regarding "excusable neglect" was enacted for some purpose. That attorneys are not infallible, but subject to the same shortcomings that characterize humanity in general, is recognized by the law, and should be by the courts. If judges who are asked to deal drastically with the interests of litigants whose attorneys make slight mistakes would indulge in a little retrospection, they would probably recall experiences in their own practice that would help to clarify their vision, encourage commendable forbearance, and suggest a course better calculated to subserve the ends of justice and right. The function of a court is to adjudicate the differences existing between litigants, and mete out that which is right and lawful so far as such

a consummation may be approximted under the forms of law. They are not institutions where the rights of suitors are to be determined by the prowess, skill, or sharp practice of attorneys on the one side, or by the inconsequential errors, omissions, and oversights of the opposite counsel. Technicalities, forms, and rules must not be permitted to defeat the highest purpose of courts,—the dealing out of substantial justice,—unless, in a given case, an arbitrary statute or established rule of decision positively so requires. Westland Pub. Co. v. Royal, 36 Wash. 399, 408, 78 Pac. 1096; Bloomingdale v. Weil, 29 Wash. 611, 621-623, 70 Pac. 94. Our observations herein are not intended as a censure of respondent's attorneys, who, owing to their standing, we are inclined to believe were actuated in their course herein by hasty and ill-considered counsel rather than by any deliberate purpose to ignore the ethics of the profession. But we have spoken freely for the reason that we do not wish the bar of this state to feel that there is any disposition on the part of this court to sanction the lowering of the high standard of professional ethics which has always been recognized and maintained by said bar. The traditions, ideals, and proprieties of the profession require nothing less at our hands.

The judgment of the honorable Superior Court is reversed, and the cause remanded, with instructions to permit appellant to file its answer, and for further proceedings according to law. In lieu of the imposition of terms by the trial court, it is ordered that appellant do not recover costs on this appeal.

Mount, Ch. J., and Hadley and Crow, JJ., concur.

Fullerton, J., dissenting:

I concur in that part of the foregoing opinion which holds the bond sufficient to sustain the appeal. I do not do so, however, on the ground that this bond can be distinguished from others that this court had held insufficient, but because I believe the cases announcing the doctrine that a bond conditioned both as an appeal and supersedeas bond, but sufficient in amount only as an appeal bond, is not good as either, are wrong in principle and should be overruled. In my judgment, a bond sufficient in condition and amount as an appeal bond is good as an appeal bond regardless of any conditions looking to the stay of the judgment it may contain. Notwithstanding the statute says they may be included in one instrument, the appeal bond and stay bond are inherently distinct. The appeal bond must be given in any event. It is made necessary by statute in order to perfect the appeal. The appeal cannot be heard without it. But the stay bond may be given, or not, as the appellant chooses. If he wishes to prevent execution of the judgment pending the appeal, he may do so by giving a stay bond as provided by statute. But his rights on the appeal are in nowise affected by his failure so to do. Every question open to him will be heard and adjudged whether he gives it or does not give it. Moreover, these bonds may be given in separate instruments. The sureties need not be the same on each. And, when separately given, the one is not affected by the other. Indeed, no court so far as I have been able to ascertain, has ever held that an appeal bond sufficient in itself to perfect the appeal, and good if standing alone, is rendered nugatory by the filing of an insufficient stay bond. Why, then, should the appeal bond be affected by the stay bond when both are included in the same instrument? I confess my utter inability to find any reason for the distinction, and, finding none, I believe the holdings of the court to the effect that there is a distinction are wrong.

I must, however, disagree with the opinion on the merits of the case. I find nothing in the record which warrants this court in censuring either the trial judge or counsel for the respondent. The trial court, in adjudging that the showing made by the appellant was insufficient to authorize it to set aside the judgment it had theretofore rendered, acted upon a matter within its discretion, which this court can set aside only for manifest abuse. It is not enough for us to say that if we had been personally present and the question had been submitted to us we would have decided it differently, but we must be able to say that the decision is so far wrong that a reasonable mind, acting without prejudice, and having in view the just rights of all of the parties, would not have decided it that way. The record in my judgment does not enable us to do this. Personally, I cannot even hold that it ought to have been decided differently.

In my opinion, therefore, the motion to dismiss should be overruled, and the judgment affirmed.

Rudkin, J., dissenting:

In Pierce v. Willeby, 20 Wash. 129, 54 Pac. 999, decided more than seven years ago, this court held that a bond on appeal, conditioned as both a cost and a supersedeas bond, which was not sufficient for both purposes, was not sufficient for any purpose, and dismissed the appeal. In that case the trial court fixed the amount of the supersedeas in the sum of $200, and a bond

in that amount, conditioned both as a cost and a supersedeas bond, was filed. Such a bond was declared insufficient, and I am unable to distinguish that case from the case at bar. An appeal bond comes before this court without issues and without proofs. We must ascertain the intention of the parties, and determine the character of the instrument from what appears within the four corners of the bond. The appeal bond before us is clearly both a cost and supersedeas bond, and complies with all the requirements of the statute governing such bonds, except as to the amount. The argument of the majority, based on the amount of the bond, would apply with equal force in the case of Pierce v. Willeby, The latter case has been followed in numberless cases since the decision was rendered, and it should be followed now or overruled. I do not feel called upon to approve or criticize the ruling in that case It relates exclusively to a question of practice, and, so long as the rule established is uniform, it is as easy to comply with the statute as there construed as with any other construction this court might now adopt. However, if the court desires to overrule Pierce v. Willeby and the long line of cases following it, I will interpose no objection; but they should not be followed in one case and distinguished away in the next.

I also dissent from what is said on the merits. The majority concede that the appellant was in default, and that the only excuse for such default was the failure of counsel for respondent to notify counsel for appellant of the ruling of the court on a motion to make the complaint more definite and certain. The majority further concede that counsel for respondent were under no legal obligation to give such notice. The trial court held that this was not a case of excusable neglect, and denied an application to open the default and for leave to answer. Applications of this kind are addressed to the sound discretion of the trial court, and I am not prepared to say that an abuse of discretion is shown here. Professional courtesy, undefined and unregulated by law, is a very uncertain guide, and cannot safely be adopted as a rule of practice in the courts. In the broad sense in which that term is discussed in the majority opinion, it belongs in the domain of morals rather than of law.

I think the appeal should be dismissed, or the judgment affirmed.

Dunbar, J., concurs in what is said by **Rudkin, J.**

Petition for rehearing denied.

WISCONSIN SUPREME COURT.

JOSEPHINE ABBOTT, Respt.,
v.
MILWAUKEE LIGHT, HEAT, & TRACTION COMPANY, Appt.

(126 Wis. 634, 106 N. W. 523).

Eminent domain—interurban railway.

1. An interurban electric street railroad, when attempting to acquire the rights of abutting owners in the highway, is upon the same plane with commercial railroads generally.

Same—measure of damages.

2. The measure of damages to which a property owner is entitled for the construction, in the adjoining highway, of an interurban street railroad, is the difference in value of the property free from and subject to the burden.

(January 9, 1906.)

Case Note.—Interurban trolley road as additional burden.—In considering the question whether an interurban trolley road constitutes an additional burden on the highway or streets over which it passes, the test to be applied—as in case of any other use of a highway or street—is whether or not such use of the road is compatible with the purpose for which the highway was originally intended. This is the criterion set up in West Jersey R. Co. v. Camden, G. & W. R. Co. 52 N. J. Eq. 31, 29 Atl. 423, where the court, in discussing the future possibilities of the ordinary electric railway, said: "It may readily be conceived that the greater motive power it possesses may some time induce an attempt to use the highways by trains of cars or by rails and cars of such character and size as to practically work all the evils of the steam railway, and that there will be inaugurated systems of through cars in furtherance of rapid transit, with distant points, which will crowd and burden the street to the inconvenience and obstruction of its other uses, without any accommodation to the ordinary local use of the street, and thus the degree of incompatibility with the common use may be so raised that the courts will be obliged to distinguish between methods of use, and declare against some as creating an additional servitude of the land occupied by the highway; the crucial test for that distinction being whether the use contemplated is compatible with the purpose for which the common highway was originally designed."

That street railways in city streets do not constitute an additional burden on the fee is almost universally acknowledged, since they tend to further the purposes for which the street was dedicated, rather than to interfere with them, as they facilitate travel about the city, and thus relieve the sidewalks of foot passengers and the roadway of vehicles. But it cannot be denied

APPEAL by the railway company from a judgment of the Circuit Court for Waukesha County fixing the damages to be paid by it for the right to run its cars in a public highway. Affirmed.

Statement by Siebecker, J.:

This is a condemnation proceeding, instituted by the defendant company for the purpose of permanently acquiring the right of way for an interurban railroad over the property described in the petition. It appears that the defendant is a corporation duly organized under the laws of Wisconsin, and authorized to construct, maintain, and operate "by electricity or other power, street railways for the transportation of passengers, mail, express, merchandise, and other freight," in the state of Wisconsin. As such corporation, by grant from the city of Waukesha, it acquired the right to construct, maintain, and operate a street railroad upon Lincoln avenue, a street of this city, and to operate an interurban street railroad business over this street. Under the rights so granted, the defendant built a single street car track upon Lincoln avenue in 1898, and thereafter maintained and operated a combined city and interurban street railroad business thereon until the year 1900, when, under authority and license duly granted by the city of Waukesha, it changed the railroad from a single track to a double track road. It also appears that the city street railroad service con-

that there is a marked difference between the uses to which a city street is put and the uses for which a country highway is designed, and that which furthers the legitimate use of the former may seriously interfere with the purposes for which the latter was intended. And the character and mode of operation of the interurban roads generally differs materially from that of the ordinary street railway. The rails, instead of being level with the road, as in the case of the city street railway, frequently project a considerable distance above the ground, and are often laid upon ties like the tracks of an ordinary steam railroad. The cars are usually larger, and frequently run in trains. The speed at which they travel is greater. Altogether, the interurban roads seem designed to meet the demand for rapid transportation between distant points rather than for the accommodation of the residents along their line, and they seem to be constantly approximating more closely to the character of the commercial or steam railway, and to be rapidly losing the characteristics of the ordinary street railway from which they have developed. As said in Zehren v. Milwaukee Electric R. & Light Co. 99 Wis. 83, 41 L. R. A. 575, 67 Am. St. Rep. 844, 74 N. W. 538: The urban railway has developed into the interurban railway, and threatens soon to develop into the interstate railway. The small car which took up passengers at one corner and dropped them at another has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through, with an occasional local passenger picked up on the highway. The purely city purpose which the urban railway subserved has developed into, or been supplanted by, an entirely different purpose; namely, the transportation of passengers from city to city over long stretches of intervening country. When this train or car, with its load of through passengers, is passing through a country town, it is clearly serving no township purpose, save in the most limited sense. It is very difficult to say that this use of a country highway is not an additional burden. It is built and operated mainly to obtain the through travel from city to city, and only incidentally to take up a passenger in the country town. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam railroad, and would not use the highway at all. Thus, the operation of this newly developed street railway (so called) upon the country road is precisely opposite to the operation of the urban railway upon the city street. It burdens the road with travel which would otherwise not be there, instead of relieving it by the substitution of one vehicle for many. However we regard this development of the urban into the interurban railway, it seems utterly impossible and illogical to say that it is essentially the same in its purpose or effects as the mere street railway." The court in this case therefore concluded that such a railroad constituted an additional burden on a country highway, and could not be built without the consent of the abutting owner and the payment of compensation. And, while the law is still in a formative state and there is some conflict among the authorities, the present trend of the decisions seems to be in harmony with this view.

Thus, an electric railway in a village street, which forms part of a connecting line between cities for transporting merchandise, personal baggage, mail and express matter, as well as passengers, is held to constitute an additional servitude upon the lands of abutting owners. Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co. 95 Wis. 561, 37 L.R.A. 856, 60 Am. St. Rep. 136, 70 N. W. 678.

So, an electric railroad forming part of an interurban system, authorized to carry freight as well as passengers, baggage, mail, and express, is held to be a commercial railroad, and to constitute an additional burden on the fee of a city street. Wilder v. Aurora, D. & R. Electric Traction Co. 216 Ill. 493, 75 N. E. 194.

sisted in running interurban cars or trains over the tracks, carrying interurban passengers, and that the same cars, at the regular fare for doing a city street railroad business, afforded transportation to persons within the limits of the city. The cars made regular stops at crossings, as required by the charter, and no other cars than interurban cars were used for the transportation of passengers within the city limits, and none of such cars were at any time devoted exclusively to the street railroad business within the city. The petition alleges that this proceeding is instituted "to condemn and permanently appropriate all the rights of property which would entitle the owners or persons interested in the lots fronting and abutting upon said Lincoln avenue . . . to damages by reason of the construction,

And an electric interurban railway constructed by laying ties and placing thereon T rails, such as are employed in the construction of steam railroads, to be built along the side of a public highway, between the lands of an abutting owner and the traveled part of the roadway, the company having authority to run an unlimited number of cars for the carrying of passengers, freight, express matter, and government mail, is an additional servitude on the highway, and an interference with the easements therein of abutting owners. Schaaf v. Cleveland, M. & S. R. Co. 66 Ohio St. 215, 64 N. E. 145.

Again, an electric railway for the transportation of passengers, freight, mail, and express, along the streets and highways of a county, is held, in Goddard v. Chicago, M. & St. P. R. Co. 104 Ill. App. 533, to increase the burden resting upon the owner of the fee by virtue of the dedication of his land to the purposes of the country highway. The court, in this case, lays considerable stress upon the fact that the railroad was not for the carriage of passengers only, but for the carriage of freight and express; and said that this imposed upon the owner of the fee in a country highway burdens not incident to a mere street railway for the carriage of passengers.

So, an electric railway connecting widely separated cities and towns is held in Pennsylvania R. Co. v. Montgomery County Pass. R. Co. 167 Pa. 62, 27 L. R. A. 766, 46 Am. St. Rep. 659, 31 Atl. 468, to impose an additional servitude on public roads outside of municipal boundaries.

To the same effect is Fidelity Ins. Trust & S. D. Co. v. Philadelphia & B. Pass. R. Co. 6 Pa. Dist. R. 737, holding that an electric passenger railway upon a public highway in the country is an additional burden upon the land of the owner.

And in Pennsylvania R. Co. v. Montgomery County Pass. R. Co. *supra*, where it is held that an electric railway traversing country roads and connecting different cities and towns constitutes an additional burden on property abutting on a township road, the court says: "The carriage of passengers through the township on their journey from one city or borough to another by rail is in no sense a township purpose, and whether these passengers make their journey in cars drawn by a locomotive over a steam railroad, or in those propelled by electricity over tracks laid upon the highways is immaterial, both to taxpayers and to landowners along the route traveled."

That an electric railway to be operated between two cities in different states and carry passengers and freight is not a street railway, but a commercial or trunk railway, is declared in Diebold v. Kentucky Traction Co. 117 Ky. 146, 63 L. R. A. 637, 77 S. W. 674. But no question of additional servitude was involved in this case.

On the other hand, in Canastota Knife Co. v. Newington Tramway Co. 69 Conn. 146, 36 Atl. 1107, an electric railway forming part of a through railroad from one city to another was held not to impose a new servitude on the highway. In this case the court, in distinguishing a street railway from a steam railroad, said that a street railway was an incident of the street, its main purpose being to facilitate and further the use of every street through which it passes, and that this would be no less true if it should run over a thinly-settled country road between two cities; that highways are for through travel as fully as for local travel.

So, in Heilman v. Lebanon & A. Street R. Co. 146 Pa. 23, 23 Atl. 389, Affirming 10 Pa. Co. Ct. 241, the court after stating that the operation of street railways in city streets is a legitimate use thereof, said that it would seem that this must be the case whether the road be upon a street within the limits of the city or upon a turnpike road without, but adjacent to, the city limits; and held that the question was not so free from doubt as to warrant the court, at least before final hearing, in granting an injunction to restrain the construction of an electric street railway on the turnpike.

And that the construction and operation of an electric railway upon a county road does not impose an additional burden or servitude is also declared in Lonaconing Midland & F. R. Co. v. Consolidation Coal Co. 95 Md. 630, 53 Atl. 420; Ehret v. Camden & T. R. Co. 61 N. J. Eq. 171, 47 Atl. 562; and Ranken v. St. Louis & B. Suburban R. Co. 98 Fed. 479.

That the construction upon a highway of a horse passenger railroad from a certain city to a village is not a new and distinct servitude, entitling an abutting owner to compensation, is declared in Peddicord v. Baltimore, C. & E. Mills Pass. R. Co. 34 Md. 463.

maintenance, and operation on said avenue . . . of the double track railroad authorized by your petitioner's said articles of incorporation and said franchise, and as the same has been heretofore constructed and operated." Appraisers were duly appointed under this proceeding, and they, as required by law, filed a report on September 19, 1904, of their award of damages with the clerk of the circuit court. Both parties appealed from such award to the circuit court for Waukesha county, where a trial was had before a jury upon the issues presented on such appeal, and a verdict was rendered awarding plaintiff the sum of $512.50 damages. Judgment was accordingly entered on January 27, 1905, adjudging that plaintiff recover from the defendant the sum of $614.46, as damages and for costs and disbursements. From this judgment defendant appeals, alleging that the court erred in receiving evidence which was objected to by it, and in giving to the jury an incorrect rule of law under which the damages were to be found by them.

Messrs. **Ryan, Merton, & Newberry** and **Clarke M. Rosecrantz**, for appellant:

The basis of damages is the operation of interurban trains or cars over the tracks; and it is not proper to consider any damage for the laying of the tracks in the streets in front of the property in question.

Younkin v. Milwaukee Light, Heat, & Traction Co. 120 Wis. 482, 98 N. W. 215.

Messrs. **Tuller & Lockney**, for respondent:

The operation of this newly developed street railway upon the country road is precisely opposite to the operation of the urban railway upon the city street.

Zehren v. Milwaukee Electric R. & Light Co. 99 Wis. 83, 41 L. R. A. 575, 67 Am. St. Rep. 844, 74 N. W. 538.

If the acts done under color of the ordinance or the statute be found to be an unlawful infraction of the rights of private property, an action will lie in which neither the ordinance nor the statute will be a justification.

Nellis, Street Surface Railroads, p. 144; Costigan v. Pennsylvania R. Co. 54 N. J. L. 234, 23 Atl. 810.

This railway being interurban in its character, the plaintiff has the right to compensation for the placing of the tracks, etc., in front of her premises.

Lange v. La Crosse & E. R. Co. 118 Wis. 558, 95 N. W. 952; Wilder v. Aurora, D. & R. Electric Traction Co. 216 Ill. 493, 75 N. E. 194; Schaaf v. Cleveland, M. & S. R. Co. 66 Ohio St. 215, 64 N. E. 145; Carli v. Stillwater Street R. & Transfer Co. 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205.

Siebecker, J., delivered the opinion of the court:

The principal contention of appellant is that the only ground, if any, upon which respondent can recover, is for damages she has suffered, as an abutting property owner, on account of the running of interurban trains or cars over the street railroad tracks placed on Lincoln avenue. As shown in the statement of facts, appellant has been and is now operating an interurban street railroad, extending from the city of Milwaukee to and into the city of Waukesha over the street in question, and by this proceeding it undertakes to condemn, and permanently appropriate, all the rights of property which entitle persons interested in property along the right of way to damages caused by the operation and maintenance of an interurban street railroad business, on its double track railroad upon this public highway. It is claimed that in this proceeding no damages for the taking and appropriating of a portion of the street as a right of way for the location of its tracks should be allowed the property owners affected, since the city has granted the right to defendant to lay such tracks within the street, for conducting a city street railroad business, and because such occupation of the street by the tracks is not a servitude additional to those contemplated by the original dedication or taking of the land for the purposes of a public highway. This claim is not well founded. It fails to distinguish between the appropriation by a private corporation of a part of a street for the purpose of conducting a transportation business, and the general uses of a highway "to accommodate the public travel, (and) to afford citizens and strangers an opportunity to pass and repass, on foot or in vehicles, with such movable property as they may have occasion to transport." Carli v. Stillwater Street R. & Transfer Co. 28 Minn. 375, 41 Am. Rep. 290, 10 N. W. 205.

This court has held that the operation and maintenance of street railroads upon the streets within the limits of a city, for the purposes of accommodating the public travel by aiding in transporting persons from place to place on such streets, is a burden contemplated by the original taking of the lands for street purposes, and that the owner of the land occupied by the street is not entitled to damages additional to those awarded to him for the original taking of it for the purposes of a public highway. Hobart v. Milwaukee City R. Co. 27 Wis. 194, 9 Am. Rep. 461; La Crosse City

R. Co. v. Higbee, 107 Wis. 399, 51 L. R. A. 923, 83 N. W. 701. This use of the streets is classed as one incident to the public easement, and is not deemed to be an appropriation of any portion of the street or soil within its boundaries for any purposes other than those to which it is devoted by the public generally. It is also well recognized that the grant to a person or corporation of a right to occupy the land within a street for any public purpose, whereby it is devoted to purposes other than those of a public highway, is an additional servitude upon the soil, for which the owner is entitled to compensation. Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co. 95 Wis. 561, 37 L. R. A. 856, 60 Am. St. Rep. 136, 70 N. W. 678, and cases cited; Zehren v. Milwaukee Electric R. & Light Co. 99 Wis. 83, 41 L. R. A. 575, 67 Am. St. Rep. 844, 74 N. W. 538; La Crosse City R. Co. v. Higbee, *supra*. Within the scope of this principle it was held that defendant's right to maintain and operate an interurban street railroad business upon the street in question constituted a right different from the right of passage by the public, and that such grant gave it the exclusive privilege, conformably to its grant and the regulations prescribed by the municipality, of using the portion of the street necessary for the conduct of its business, and that for this it would be required to make compensation to the several abutting property owners. Younkin v. Milwaukee Light, Heat, & Traction Co. 120 Wis. 477, 98 N. W. 215. Since this use is in no way predicated on the public right to the use of the street, defendant can so occupy it under no other authority than the one granted to it as an agency for conducting a transportation business, in accordance with which it may condemn property to secure a right of way. In these respects its rights and liabilities are like those of a commercial railroad, and when, to conduct its interurban railroad business, it appropriated the street in front of plaintiff's property, it was a taking of plaintiff's private property for a public purpose, for which she is entitled to compensation under the rules governing the exercise of this right by commercial railroads. The extent of such rights and liabilities is established in many decisions of this court, among which may be cited: Ford v. Chicago & N. W. R. Co. 14 Wis. 609, 80 Am. Dec. 791; Pomeroy v. Milwaukee & C. R. Co. 16 Wis. 640; Buchner v. Chicago, M. & N. W. R. Co. 60 Wis. 264, 19 N. W. 56. In its legal effect the proceedings instituted by the defendant company is an assertion by it, as an interurban street railroad, of the rights granted by §§ 1862 and 1863a, Rev. Stat. 1898, under which, pursuant to the privileges granted by the city of Waukesha to occupy the street in question, it may acquire the right of way for its road, and thus, for the purpose of conducting its transportation business, obtain a perpetual interest in the real estate of the plaintiff. It is obvious that this action of the defendant is not based on any rights or privileges which have been bestowed on it by the city for affording facilities to persons to pass and repass on the streets as a public highway, but that it is taking property under the power of eminent domain, for which it must indemnify plaintiff. This conclusion negatives the main contention of the defendant on this appeal.

Error is assigned upon the admission of testimony bearing on the measure of damages, and on the giving of an instruction to the effect that the measure of damages was the difference between the market value of plaintiff's abutting property just before the defendant commenced conducting its interurban business upon the street, and its market value in September, 1904, when the award of damages was made by the commissioners. The defendant commenced operating this railroad in 1898. The true rule is as claimed, that the measure of damages is the difference, if any, at the time of the filing of the commissioners' award, between the market value of the premises with the road located upon it, and the market value at that time freed from the use and burden of the road. The erroneous statement of the rule by the court to the jury and the admission of evidence of value in 1898, did not, however, prejudice defendant under the circumstances shown, for the reason that the market value of the property, as shown by the evidence covering the period prior to the filing of the award, was substantially the same as it would have been in September, 1904, without the burden of the railroad. Lyon v. Green Bay & M. R. Co. 42 Wis. 538; West v. Milwaukee, L. S. & W. R. Co. 56 Wis. 318, 14 N. W. 292; Milwaukee & M. R. Co. v. Eble, 3 Pinney (Wis.) 334.

It is also claimed that under the directions given the jury they probably included whatever damages plaintiff suffered by reason of the operation of a city street railroad in this street. An examination of the instructions reveals that the court expressly and repeatedly instructed the jury that plaintiff was not entitled to any damages due to the conduct of such street railroad business. It must be presumed that the jury followed the instructions of the court

in this particular. We do not consider the damages to be excessive, as claimed by the defendant. The evidence adduced abundantly supports the verdict.

A large number of instructions requested by defendant, and covering a number of distinct propositions, were refused by the court; to these refusals a general exception was taken. Under such circumstances the exception does not avail to present questions for review. Lowe v. Ring, 123 Wis. 370, 101 N. W. 698. The exceptions taken to the instructions given, and preserved and argued on this appeal, are hereinbefore sufficiently covered in so far as they require specific consideration. They have been examined, and we find no prejudicial error in the record.

Judgment affirmed.

PENNSYLVANIA SUPREME COURT.

J. R. COOLBAUGH, Admr., of Milton Dana, Deceased, Appt.,
v.
LEHIGH & WILKES-BARRE COAL COMPANY.

(213 Pa. 28, 62 Atl. 94.)

Judgment—lien—interest in mining lease.

The lien of a judgment will reach the interest in the coal remaining in place, of a landowner who has leased at a certain yearly rental the right to mine a specified amount of coal from the land each year, the contract to terminate when the coal shall all have been removed or the conditions of the lease are broken, and excess payments in any year to entitle the lessee to take out a corresponding additional amount of coal at any time within six years; and the sale thereunder will carry the incidental right to the rent or royalty under the lease.

(Mestrezat, J., dissents.)

(October 9, 1905.)

APPEAL by plaintiff from an order of the Court of Common Pleas for Luzerne County discharging a rule for judgment for want of a sufficient affidavit of defense in an action brought to recover the rent or royalty alleged to be due under a mining lease. Affirmed.

The facts are stated in the opinion.

Messrs. **F. C. Sturges** and **F. M. Nichols** for appellant.

Messrs. **S. J. Strauss, A. H. McClintock,** and **Arthur Hillman** for appellee.

Brown, J., delivered the opinion of the court:

On August 30, 1870, Milton Dana and others, owners of coal lands in Luzerne county, entered into an agreement with the Wilkes-Barre Coal & Iron Company, granting, demising, and leasing unto it, its successors and assigns, all the coal in said lands. The appellee succeeded to all the rights of the original lessee. The demise or lease, as the agreement is termed by the parties, was to date from January 1, 1870,

Case Note.—While the opinion in Denniston v. Haddock, 200 Pa. 426, 50 Atl. 197, which is quoted at length in the foregoing opinion, regards the prescription, by the agreement or instrument conferring the right to mine and remove coal of a limited term of years for the exercise of such right, as bearing strongly against the view that such instrument or agreement is an absolute sale or conveyance of coal in place, as distinguished from a lease or a conditional sale, it does not make the prescription of such a term necessarily decisive of the character of the instrument or agreement. Again, it is apparent from the case of COOLBAUGH v. LEHIGH & W. B. COAL & I. Co. that the absence of such a prescription is not decisive of the character of the instrument or agreement as an executed sale or conveyance of coal in place as distinguished from a lease or a conditional sale. In other words, the statement in the Denniston Case, that the rules applicable to sales are not to be applied indiscriminately, but each instrument is to be construed, like any other contract, by its own terms, seems to be applicable even to an instrument which prescribes a limited term for the removal of the coal, and the effect of the prescription of such term to characterize the instrument as a lease or conditional sale, as distinguished from an executed sale or conveyance, may be overcome by other provisions indicating a contrary intention.

In presenting the following cases, which have characterized particular instruments or agreements conferring the right to mine and remove coal either as absolute sales or conveyances, or as leases or conditional sales, an attempt has been made to indicate such of their terms as were significant of their character, and especially to indicate whether or not they prescribed a limited term for the removal of the coal. And, since the value as a precedent of a case which characterizes a particular instrument in this respect is largely dependent upon the question whether the decision upon the specific point involved in the case was necessarily dependent upon the particular character assigned to the instrument, the nature of that point has also been indicated.

In Lillibridge v. Lackawanna Coal Co. 143 Pa. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544, 22 Atl. 1035, the ultimate decision that the party to whom the right to mine and remove coal beneath the surface was conveyed was also the owner of the chamber or space left by the removal of the coal, and had the legal right to transport coal from the adjoining tract through it, seems to have been re-

and "to determine and end when all the minable (and) anthracite coal shall have been mined and removed from the demised premises, unless the term be sooner ended under provisions" thereinafter contained. The lessee covenanted to pay to the lessors the annual rental of $20,000, in quarterly instalments of $5,000 each, in consideration of which it is permitted annually to mine and remove 80,000 tons of coal. There is a further provision that, "if the said party of the second part shall pay said $20,000 rent in any one year, as is hereinbefore provided, and during that year less than 80,000 tons of coal, of the pounds aforesaid, be mined and removed, the said party of the second part may, in any subsequent year within six years thereafter, during the continuance of this lease, mine and move sufficient coal to make up the deficiency." On default in the payment of "an instalment of rent, or any part thereof," for a period of sixty days, it was covenanted and agreed that the lessors, in their option, might declare the term of the "lease" at an end, and the "lease" was thereupon to absolutely cease and determine. Dana received his share of the payments made for the coal mined and removed up to April 1, 1880. On April 3, 1880, on an execution upon a judgment against him, the sheriff of the county sold to Joseph Birbeck and Alexander H. Van Horn all his "right, title, and interest in and to all the coal in and under" the land embraced in the lease. Since the sale and delivery of the sheriff's deed to these vendees

garded as dependent upon, or at least a deduction from, the characterization of the instrument by which the right to mine and remove the coal was transferred as an absolute sale of all the merchantable coal underlying the tract of land in question, thereby dissevering the title to the surface and to the coal beneath the surface. The instrument so characterized, in terms, " 'granted, demised, leased, and to mine-let, unto the' defendant 'its successors or assigns, all the merchantable coal, together with the sole and exclusive right to mine and remove the same, under the' tract of land [in question], . . . to have and to hold the coal in and under said land unto the said party of the second part, its successors, or assigns, until the exhaustion thereof, under the terms of this indenture." The party of the second part covenanted to pay the party of the first part specified royalties by the ton of mined coal, paying for at least 1,500 tons of coal each year, "until such time as the coal under said tract shall become so far exhausted that it is impossible to mine so large an amount in any one year." The instrument did not prescribe any fixed term for the removal of the coal, but provided for a forfeiture in certain events.

In Lehigh & W. B. Coal Co. v. Wright, 177 Pa. 387, 35 Atl. 919, an instrument which in consideration of the payment of a royalty per ton, "leased" to plaintiff "all the coal upon and under" a certain tract, to have and to hold "for and until such time as all the merchantable coal shall have been mined and removed," was held to be a sale of the coal in place. The specific question involved was as to the construction of a clause allowing the plaintiff to make up in any subsequent year during the time of the "lease" any deficiency due to the failure in any previous year to mine coal to the amount of the minimum. It was not clear that the construction of this clause was necessarily dependent upon the character of the instrument as a sale, and the point is probably not important, as it would seem that the instrument involved might properly be characterized as a sale, even under the doctrine of the Denniston Case.

In Kingsley v. Hillside Coal & I. Co. 144 Pa. 613, 23 Atl. 250, the decision that the occupation of the surface was not an adverse possession as against the lessee or grantee of the coal was deduced from the characterization of the instruments in question as an absolute sale of coal in place. The original agreement between the parties was called a lease, and stipulated for the execution by the lessor of such further instruments as might be deemed necessary to secure the lessee, "his heirs and assigns," the enjoyment of the premises as a coal field; in the performance of this stipulation the former executed to the latter a deed whereby he "granted, bargained, sold, aliened, and enfeoffed, released, conveyed, and confirmed" unto the other party, "his heirs and assigns," the right to possession of the coal field for a term of one-hundred years for the purpose of mining, removing, and selling coal, subject to the payment of the annual rent of $1 a year. In reply to the contention of counsel that the creation of a term, within which the right was to be exercised thoroughly stamped the transaction as a lease, the court said: "Where a fair interpretation of the written agreement shows that a sale was intended by the parties, and a right to mine and remove all the coal is conferred by it in express terms or by plain and necessary implication, it will constitute a sale notwithstanding a term is created within which the coal is to be taken out." The criticism in the Denniston Case of the use of the expression that a conveyance of coal in place, even by a lease for a limited term, is a sale, seems to have a pointed application to the language just quoted; though the criticism was, perhaps, not intended to extend to a case where the lease was for a long term of ninety-nine years, as in Hope's Appeal, 1 Sadler (Pa.) 307, 29 W. N. C. 365, 3 Atl. 23, or one-hundred years as in the Kingsley Case.

In Plummer v. Hillside Coal & I. Co. 160 Pa. 483, 28 Atl. 853, the decision that there had been such a severance of title to the surface and underlying coal that the continued occupancy of the surface by the vendor was not hostile to the owner of the coal was de-

of Dana's interest the payments for the coal mined and removed have been made to them. The affidavit of defense, in addition to the allegation of Birbeck's and Van Horn's ownership of interest in the coal and their right as the sheriff's vendees to receive payments for the same as mined, avers that the payments were made to them in the lifetime of Dana with his knowledge and consent; that since his death they were made without protest or objection from any of his heirs or personal representatives; that there has arisen a complete and final presumption of law that Birbeck and Van Horn acquired the title for a full consideration, and have paid for the same to the said Dana or the persons who, on his behalf, were entitled to receive the rentals; and therefore his administrator, who brings this suit, is estopped from asserting a right to recover.

The questions raised by the statement and affidavit of defense are properly stated by the court below to be: "(1) Whether the sheriff's sale to Birbeck and Van Horn passed to them the right of the execution defendant Dana to receive 'rentals' or royalties under the coal lease. (2) If not, then is the administrator of his estate estopped from now asserting the right to recover from the defendant company royalties already paid to the sheriff's vendees or their representatives? (3) Would the facts averred, if proved, raise a presumption of a grant by Milton Dana to said vendees, of his right to receive such royalties?" Having been of opinion that the first of these

duced from the characterization as a sale of an instrument which purported, in consideration of a gross sum and a further sum upon condition that the coal proved extensive and abundant, "to lease and to farm-let" certain land for the term of one-hundred years; possession to extend only to the use of the land as a coal field, and the lessee to have full power and possession to search for coal anywhere on the leased premises.

In Lazarus's Estate, 145 Pa. 1, 23 Atl. 372, the ultimate decision that "rentals" maturing after the death of the grantor were payable as purchase money to his administrators, and distributable as personal property, was deduced from the characterization of the transaction as a sale of the coal, giving to the grantees an absolute and exclusive right to take all of the available coal in the tract. The instrument so characterized, in terms, "demised and leased" all the anthracite coal under certain lands, with the privilege of mining and removing the same; "the grantees to have and to hold the said anthracite coal . . . for and during the term of ninety-nine years," and to pay a fixed rate per ton for coal mined, but not less than a stipulated sum each year.

The decision in Gardner's Estate, 199 Pa. 524, 49 Atl. 346, that royalties accruing after death went to the executor, and not to the heirs, was based upon the characterization of the instrument as an absolute sale and conveyance of the mineral. By the instrument so characterized the decedent, in consideration of the sum of $1, and the further sum of 25 cents for each car load of satisfactory limestone taken and shipped from the land, "granted, bargained, and sold" to the other party, his heirs and assigns, all the limestone in and under a certain described tract of land, to have and to hold the same for a period of ten years from date, and for such additional time thereafter as limestone could be quarried and mined with profit.

In Fairchild v. Fairchild, 6 Sadler (Pa.) 231, 9 Atl. 255, the decision that the husband of the deceased lessor was not entitled to curtesy in the royalties was deduced from the general proposition that a demise of all the coal under the surface of a specified piece of land was a sale of coal in place. The terms of the instrument involved in this case are not set out, and the general proposition seems to be obnoxious to the criticism made in the Denniston Case upon the indiscriminate application of the rules applicable to sales.

In Hosack v. Crill, 204 Pa. 97, 53 Atl. 640, the decision that royalties for coal mined after the death of the owner of the land were distributable as part of his personal estate, and did not pass to the devisee of the surface, was deduced from the holding that a sale of coal in place was effected by an instrument which purported to "bargain, sell, and convey all the mineral coal in, upon, and under" a certain tract, and to grant the right to enter upon the land and to search for and remove coal, in consideration that the other party, if he should find coal of sufficient thickness, quantity, and quality to justify the opening and working of mines, should pay a stipulated sum annually and a further sum as royalty upon each ton of coal mined. The instrument did not prescribe a fixed term of years for the removal of the coal.

The instrument passed upon in Sanderson v. Scranton, 105 Pa. 469 (cited in the opinion in COOLBAUGH v. LEHIGH & W. B. COAL & I. Co.), was again passed upon with the same result in Delaware, L. & W. R. Co. v. Sanderson, 109 Pa. 583, 58 Am. Rep. 743, 1 Atl. 394.

In Delaware & H. Canal Co. v. Hughes, 183 Pa. 66, 38 L.R.A. 826, 63 Am. St. Rep. 743, 38 Atl. 568, the court said: "If the owner grants to another the right or privilege of taking coal from his lands, this grant, if not an exclusive one, is not the grant of an interest in land, but of an easement or incorporeal right which leaves the title to the coal in place remaining in the grantor. But a grant of all the coal, or of the exclusive right to mine the coal, is a sale of the coal in place." The criterion here stated appears to be obnoxious to the criticism made in the Denniston Case, since it fails to take any account of the fact whether or not the right to remove the

three questions should be answered in the affirmative, and having so answered it, the court below deemed the discussion of the other two unnecessary.

Though the agreement of August 30, 1870, is called by the parties to it a demise or lease, we have, from Hope's Appeal, 1 Sadler (Pa.) 307, 29 W. N. C. 365, 3 Atl. 23, down through a long line of cases, called it a sale of coal in place as land. Sanderson v. Scranton, 105 Pa. 469; Delaware, L. & W. R. Co. v. Sanderson, 109 Pa. 583, 58 Am. Rep. 743, 1 Atl. 394; Lillibridge v. Lackawanna Coal Co. 143 Pa. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544, 22 Atl. 1035; Kingsley v. Hillside Coal & I. Co. 144 Pa. 613, 23 Atl. 250; Lazarus's Estate, 145 Pa. 1, 23 Atl. 372; Denniston v. Haddock, 200 Pa. 426, 50 Atl. 197. In the last case cited the lease was for twenty years, and provided for the payment of a minimum royalty. It was executed on September 27, 1870, by Margaret Denniston and others to Charles Hutchinson, whose interest became vested in Haddock, the appellant. It appeared that Hutchinson and his successors in title had paid royalty during the whole term of the lease, but, on account of strikes and other circumstances were prevented from mining coal to the full extent of the minimum paid. On September 22, 1891, the lessors executed a new lease, to take effect from October 1, 1891. Haddock, the lessee, had been continuously in possession of the property during the terms of both the old and the new lease and the period between them. He claimed to defalk the overpayments under the old lease, amounting to $15,000, from the royalties due under the new lease, and, in affirming the judgment of the court below, refusing to allow such set-off, what was said by the present chief justice may now be very properly quoted at length as supporting appellee's contention: "It has been said in a number of cases that a conveyance of the right to mine and remove all the coal in a given tract of land is a sale of the coal in place, although the conveyance may be called a lease. The expression is unfortunate; for, while it may have produced no erroneous result in the cases where it is used, it tends to substitute the general rules appertaining to sales for the rules properly applicable to the particular contract that may be under consideration by the court. Thus, for example, in Hope's Appeal, *supra*, which is practically the starting place of the error, the agreement, though called a lease, was a purchase of the coal at a fixed price per acre, making a liquidated gross sum, which was payable absolutely in instalments ending within thirteen years, though the lessee had a nominal term of ninety-nine in which to remove the coal. It was justly said by the learned court below, whose decision was affirmed here, that it

coal must be exercised within a limited term of years, or of any other provisions peculiar to the particular instrument under consideration. The point, however, was not involved in this case, as the instrument in question was a conveyance of the whole of the land, including the soil and the minerals.

In Gartside v. Outley, 58 Ill. 210, 11 Am. Rep. 59, an instrument which conveyed premises for the purpose of mining coal "so long as there is coal to mine therein," and which provided for a payment of bank rents, and with a forfeiture clause in case of noncompliance with the terms of the instrument, was held to be a lease.

In Manning v. Frazier, 96 Ill. 279, it was held that a vendor's lien for the purchase money, enforceable by a sale of the coal and mineral not taken from the ground, attached under an instrument by which the owner of land in consideration of a certain royalty per ton "bargained, sold, and conveyed" all of the coal in, upon, and under certain land, with an express license to the grantee, his heirs and assigns, to enter and search for the coal and to mine and remove the same.

An agreement giving the exclusive right to mine coal, to use 5 acres of the surface of the land for buildings, to build railroads upon and flow water over the land, and providing for a royalty not to fall below a fixed amount per year for the coal mined, payable as rent, was held, in Lacey v. Newcomb, 95 Iowa, 287, 63 N. W. 704, to create a relation giving a landlord's lien for "rent" and not a sale of the coal in place.

An instrument which purported to "lease and convey for the term of twenty years all of the coal under" a certain tract of land in consideration of the payment of an annual sum of money was held, in Austin v. Huntsville Coal & Min. Co. 72 Mo. 535, 37 Am. Rep. 446, to be a lease authorizing the lessee to take out all the coal he could mine on the premises during the term, and not an absolute grant of the coal in place. The ultimate decision in this case was that the instrument in question did not prevent the first party from maintaining an action of trespass against a third party for mining and removing the coal, there being no one in possession under the lease.

In Hobart v. Murray, 54 Mo. App. 249, an agreement purporting, in consideration of stipulated royalties, to lease lands for mining purposes only and subject to the limitation that the grantor's rights should not be interfered with, reserving the right of occupation for the purposes of cultivation to the grantor, was held not to be a lease, as it had no "determinate period." It was further held that it operated as a transfer of all mineral within the land, and as an exclusive grant of the rights to mine therefor, and not a mere license.

In Genet v. Delaware & H. Canal Co. 136 N. Y. 593, 19 L.R.A. 127, 32 N. E. 1078, it is

was 'manifest that the parties contemplated an actual sale of the coal, and not a lease in the ordinary use of that word.' In Sanderson v. Scranton, *supra*, the lease was expressly made 'perpetual until all the coal under the tract is mined,' and it was held that this was such a complete severance that the taxes of the city of Scranton on the coal in place were chargeable to the lessee, and not the lessor. So in Kingsley v. Hillside Coal & I. Co. *supra*, it was again held that there was such a severance that occupation of the surface was not an adverse possession, even against a lessee who had not opened up or entered on actual possession of the coal. With the decisions in these cases no fault can be found; but the expression that a conveyance of coal in place, even by a lease for a limited term, is a sale, is inaccurate as a general proposition of law, and unfortunate from its tendency to mislead, which is apparent in some of the subsequent cases. Whether it would be better to call such an instrument accurately what it certainly was at common law, a lease without impeachment of waste, or to endeavor to reconcile all the decisions by calling it a conditional sale, is not necessary at present to discuss. The point to be noted is that the rules applicable to sales are not to be applied indiscriminately to such instruments, but each is to be construed, like any other contract, by its own terms. The defense in the present case is an ingenious misapplication of the principle of a sale. Appellant, in compliance with his obligation under the lease, paid a minimum royalty each year, and at the end of his term had paid more royalty than would have been required by the coal actually mined. He remained in possession of the land for a year under arrangement with one of the owners, and then took a new lease, under which the royalties now sued for accrued. He now claims to defalk the overpayments under the old lease, on the ground that he had paid for the coal and was entitled to it without further charge, because under his continued possession he could take it away without a trespass. The defect of this view is in the assumption that he had paid for the coal. He had not. He had paid his rent on the stipulated terms, but he had paid nothing for the coal in place. His sole claim and title to that was to mine it during the term of the lease. As to it he was in the position of a lessee of a house, bound to pay rent whether he occupied it or not. The fact that he paid without occupying it would not excuse his liability for further rent if he accepted a new lease. Appellant admits that if he had gone out of possession at the termination of his lease he would have had no further claim to the coal, but his reason assigned is not the correct one.

held that a sale of the bulk or body of the coal in place as a severed portion of the land was not affected by an agreement certifying that the parties of the first part have "leased" to the party of the second part "all the coal contained in, on, or under" a certain parcel of land; it being further stipulated, however, that the liability of the party of the second part to mine, take, and pay for the coal shall cease if the coal shall not prove to be of a merchantable quality, or if it becomes impracticable to mine the same in consequence of extraordinary expenses in mining or cleaning the coal, or in case the land shall become so far exhausted as to render it impracticable or unprofitable to mine the stipulated quantiy in any one year. The contract, on the other hand, was held to be an executory one, and its character in that respect largely influenced, if it did not determine, the decision that there was an implied agreement that the party of the second part would not wilfully or negligently incapacitate itself from taking out more than the minimum quantity of coal per year.

In Edwards v. McClurg, 39 Ohio St. 41, the decision that no interest in the minable coal as land remained in the grantor was deduced from its characterization as an absolute sale or conveyance of an instrument whereby the first party "agreed to sell, and does hereby give, grant, bargain, sell, and convey," to the second party, their heirs and assigns, "all the stone coal lying and being in, under, and upon certain premises," in consideration of 30 cents per ton on all coal when mined; the second party stipulating to mine at least 3,000 tons annually; and it being further stipulated that the latter should have the right to abandon the contract at any time when, in his judgment, the coal was no longer minable with economy and profit.

In Plummer v. Hillside Coal & I. Co. 43 C. C. A. 490, 104 Fed. 208, a present conveyance of coal in place, and not a lease, was held to be created by an instrument under seal which purported to "lease" a certain tract of land for the term of one hundred years for a gross sum and an annual rental of $1, upon condition that the lessee's possession shall extend only to the use of the premises as a coal field, with the right to search for coal anywhere on the leased premises, to raise the same when found from the beds, and to sell the same for his own benefit and profit. It was accordingly held in this case that the continued occupation of the surface of the land by the lessor and those claiming under him did not create title in them to the coal by adverse possession or by limitation.

Cases bearing upon the distinction between a lease and license for the mining and removal will be found in a note to the case of Heywood v. Fulmer, 18 L.R.A. 492.

The right to remove the coal would have ended, not because the lessee had forfeited or abandoned his property in it, but because he had never acquired any such property; his right to do so being expressly limited to the term covered by the lease." In Delaware, L. & W. R. Co. v. Sanderson, *supra*, the question was as to who should pay the taxes on the coal as land, the lessor or lessee under a coal lease, and Trunkey, J., distinctly stated that no question arose "respecting the grantors' security for the purchase money, nor of their power to subject their right under the deed to the lien of a mortgage."

Here the question is as to the power of the grantor, Dana, to subject to the lien of a judgment the interest remaining in him under the agreement with the Wilkes-Barre Coal & Iron Company. If the lessee had paid the rental of $20,000 for the first year, but had mined no coal, and in the second year, on its default in payment of a quarter's rent, the lessors had, in accordance with the terms of the lease, declared it terminated and resumed possession under the forfeiture clause, the lessee could not thereafter have mined and removed any coal because it had paid $20,000 for the first year. This is the clear meaning and intent of the contract. That sum would have been retained simply as rent paid, and received as such, for the right to occupy and use the land by removing the coal therefrom for one year. Lehigh & W. B. Coal Co. v. Wright, 177 Pa. 387, 35 Atl. 919; Lehigh Valley Coal Co. v. Everhart, 206 Pa. 118, 55 Atl. 864. It is only "during the continuance of the lease"—that is, before the rights of the lessee have terminated by a forfeiture of them—that it can, during any six years following an annual payment of $20,000, appropriate to the payment of coal mined so much of that sum as has not been appropriated in any prior year to the payment of coal mined. After the expiration of six years no such appropriation can be made, and the minimum royalty is to be retained purely as rent for the year's occupancy of the land. The agreement of the parties is that the minimum rental of $20,000 may be applied by the lessee on account of the purchase money of the coal, provided it will actually purchase and acquire title in the manner pointed out in the agreement, *viz.*, by mining it within six years. Until it is so mined the legal title remains in the lessors, and if not taken from them within six years during the continuance of the lease in the manner stated, the money paid them belongs to them as rental for their land which had been occupied by the lessee, though not used and appropriated by it as it had the right to do. This was just the situation when the interest of Dana in the coal land was seized and sold under the execution against him. If the coal had all been mined, the worked-out space would have reverted to him, and what had not been worked out was under a continuing contingency of reverting to him by a forfeiture of the lease. He still had an interest in the coal as land, title to portions of which, and in the end to all of which, he had agreed should pass from him and become vested, not only equitably, but legally, in the lessee, as from time to time it acquired the legal title to the coal by mining and removing it. But until the legal title was so taken from him it remained in him, as in the case of any vendor of real estate. This is the title that was still in him when it was sold from him by the sheriff to Birbeck and Van Horn, and, having acquired it, they are now entitled to all the rights under it. The one involved in this case is the right to the royalties, which, under the agreement of August 30, 1870, are to be regarded as *pro tanto* purchase-money payments for the coal in place, if mined and removed within a stipulated time. The title thereto is acquired by using these royalties within the stipulated period of six years during the continuance of the lease as payments for coal actually taken out and away.

As the question raised on this appeal did not arise in any of the cases holding a lease like the present to be a sale of coal in place as land, they are not to be regarded as in conflict with the view here expressed. Though expressions in some of them are apparently irreconcilable with it, it is to be remembered, as is said in Denniston v. Haddock: "The rules applicable to sales are not to be applied indiscriminately" to these leases; and when, as here, the question is as to the right of the grantor or lessor to subject the interest in the land which remains in him to the lien of a judgment or mortgage, no other doctrine than the one announced by the court below can accord with reason or the authorities relating to the interest retained by a vendor under an agreement for the sale of his land.

The order of the court below discharging the rule for judgment is affirmed.

Mestrezat, J., dissents.

NEBRASKA SUPREME COURT.

CHRISTOPHER B. E. STROEMER, Plff. in Err.,

v.

JOSIAH A. VAN ORSDEL.

(— Neb. —, 103 N. W. 1053.)

Attorney—contract to procure legislation.

1. A contract between an attorney and

client for services to be rendered by the former is not necessarily invalid because a part of the services to be rendered is the procurement of legislative action, nor because such contract provides for a contingent fee.

Same—enforcement of.

2. Such contract will be enforced, unless it appears that it contemplates the use of unlawful or improper means, or that such means were employed in pursuance thereof to attain the object for which the contract was made.

Contract—enforcement—public policy.

3. While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent on the enforcement of contracts which are lawful, and contravene none of its rules.

(June 8, 1905.)

ERROR to the District Court for Gage County to review a judgment in favor of plaintiff in an action brought to recover compensation for services alleged to have been rendered to defendant. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. L. M. Pemberton, for plaintiff in error:

The contract was a lobbying contract, and therefore illegal.

Richardson v. Scott's Bluff County, 59 Neb. 400, 48 L.R.A. 294, 80 Am. St. Rep. 682, 81 N. W. 309; Clippinger v. Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519; Coquillard v. Bearss, 21 Ind. 479, 83 Am. Dec. 362; Marshall v. Baltimore & O. R. Co. 16 How. 315, 14 L. ed. 953; Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623; Providence Tool Co. v. Norris, 2 Wall. 45, 17 L. ed. 868; McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; Owens v. Wilkinson, 20 App. D. C. 51; Chippewa Valley & S. R. Co. v. Chicago, St. P. M. & O. R. Co. 75 Wis. 224, 6 L.R.A. 601, 44 N. W. 17; Houlton v. Dunn, 60 Minn. 26, 30 L.R.A. 737, 51 Am. St. Rep. 493, 61 N. W.

Headnotes by ALBERT, C.

Case Note.—Validity of contract to procure legislative action.—In an exhaustive note in 30 L.R.A. 737, on the subject above stated, to which note reference is made for the earlier decisions, the editor summarizes judicial opinion on the question as follows: "The line of demarcation between contracts for procuring legislation which are upheld and those which are condemned seems to be well drawn. All contracts for legitimate professional services for a fixed compensation are enforced, while those for a contingent fee, or which require personal influence, personal solicitation of members, or any trickery or underhanded means to secure the legislation, are not enforced. . . . There are many expressions in opinions of the courts which would lead to a general condemnation of all contracts to procure legislation, and some decisions tending, also, in that direction. But those expressions are not intended to apply to cases of legitimate services, and the decisions are usually in cases where some evil tendency or influence was apparent. There seems to be no case in which legitimate services for a fee payable absolutely have been condemned."

These conclusions are further supported by the cases subsequently decided, in spite of an inclination manifested in some quarters to disregard (as in Chesebrough v. Conover, 140 N. Y. 382, 35 N. E. 633, and cases following it), or to abandon (as in STROEMER v. VAN ORSDEL), what may be styled the contingent-fee test.

Employment to procure the passage of ordinances for paving streets and alleys at a compensation, which, except for a monthly allowance, is contingent upon success in obtaining the necessary ordinances and in securing the paving contracts consequent thereon, is void on grounds of public policy. Critchfield v. Bermudez Asphalt Paving Co. 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552.

A contract by which a person agrees to draft a bill, have it introduced in a legislature, explain it to, and make arguments in its favor before, committees of the legislature, and do all things needful and proper to secure its passage, such party to receive no compensation unless the passage of the bill (an appropriation act) is procured, if successful the fees not fixed, but to be liberal, is vicious, illegal, and void; and, in the event of the passage of the bill, there can be no recovery of a fee in a suit upon the contract, nor as upon an implied contract, nor a *quantum meruit* for the services performed. Richardson v. Scott's Bluff County, 59 Neb. 400, 48 L.R.A. 294, 80 Am. St. Rep. 682, 81 N. W. 309.

In Colusa County v. Welch, 122 Cal. 428, 55 Pac. 243, it is held, *obiter*, that a contract for a fixed compensation to secure, by means of personal solicitation and private interview of members of the legislature and by means of lobbying, the defeat of a bill, is void as against public policy.

An agreement by an attorney to obtain the allowance of a claim against the government, the services contemplated to be rendered consisting mainly in the procurement of legislation by Congress, and in personal solicitation of members for that purpose, will not be enforced by the courts, although no improper or unlawful means were used or intended to be used. Owens v. Wilkinson, 20 App. D. C. 51.

An agreement to locate a person upon a valuable quarter section of pine land which had been long withdrawn from market for railroad purposes, and to instruct him as to what he should do as to such settler, and to do all that was necessary or could be done to bring the land into the market and enable defendant to acquire title thereto under the homestead or pre-emption laws of the United States, in pursuance and performance of

898; Spalding v. Ewing, 149 Pa. 375, 15 L.R.A. 727, 34 Am. St. Rep. 608, 24 Atl. 219; Gil v. Williams, 12 La. Ann. 219, 68 Am. Dec. 767; Powers v. Skinner, 34 Vt. 274, 80 Am. Dec. 677; Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746; Wood v. McCann, 6 Dana, 366; Mills v. Mills, 40 N. Y. 543, 100 Am. Dec. 535; Fuller v. Dame, 18 Pick. 479; Edgerly v. Hale, 71 N. H. 146, 51 Atl. 679; Veazey v. Allen, 173 N. Y. 359, 62 L.R.A. 362, 66 N. E. 103; Sweeney v. McLeod, 15 Or. 330, 15 Pac. 275; Crichfield v. Bermudez Asphalt Paving Co. 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552.

Messrs. Griggs, Rinaker, & Bibb, and Hazlett & Jack for defendant in error.

Albert, C., filed the following opinion:

We shall use the terms "plaintiff" and "defendant" with reference to the title of the cause in the district court. The plaintiff alleges that he entered into an oral contract with the defendant whereby he was employed by the defendant as his agent and attorney to take such action and render such services in the way of collecting facts, preparing and submitting to the Indians and the proper authorities of the Federal government arguments on the merits of the

which agreement the promisor attended several sessions of Congress, and appeared before the Secretary of the Interior and the committees of the Senate and House of Representatives, and employed counsel to urge the passage of a bill declaring said lands forfeited to the government, and providing that parties who had settled on the land in good faith should have the preference to enter the same under the homestead laws when the same should be restored to the market, for a contingent compensation, is void as against public policy. Houlton v. Dunn, 60 Minn. 26, 30 L.R.A. 737, 51 Am. St. Rep. 493, 61 N. W. 698.

The foregoing decision was criticized as being rested, not so much on the contract, as on what was done under it, and done before it was entered into, in Houlton v. Nichol, 93 Wis. 393, 33 L.R.A. 166, 57 Am. St. Rep. 928, 67 N. W. 715, which sustains a similar contract on the ground that it was not for the performance of an act illegal *per se*, or to do something of itself of a corrupting tendency, or by its terms or by necessary implication contemplating a resort to improper means, such as personal solicitation or influence, but that it was merely for the presentation of the legal status of certain public lands with a view to having them thrown open to settlement under existing laws, not as a favor, but as a right to which all persons similarly situated were entitled.

In Dunham v. Hastings Pav. Co. 56 App. Div. 244, 67 N. Y. Supp. 632, 57 App. Div. 426, 68 N. Y. Supp. 221, it is held that a contract to "use and make all reasonable, honest, and lawful efforts to secure the right from the city of New York to make bids for laying such pavement or paving blocks upon the streets of the city of New York" will not necessarily be rendered invalid by the doing of illegal acts thereunder; but such acts are to be considered merely as evidence bearing on the question whether the parties, by their contract, contemplated the doing of such acts.

The case of Davis v. Com. 164 Mass. 241, 30 L.R.A. 743, 41 N. E. 292, in holding that the legislature may authorize the employment of an agent to prosecute claims on behalf of the state which requires the procurement of legislation for a fee contingent upon its success, rests on the peculiar ground that the legislature had, in that particular case, by sanctioning such a contract, precluded the court from declaring it void as against public policy.

The courts apply the same rules where a contract, though not directly for the procuring of legislative action, contemplates the procurement of such action.

Thus, in Le Tourneux v. Gilliss (Cal. App.) 82 Pac. 627, a note given for money advanced for the expenses of a person to enable him to engage in the business of lobbying was held not enforceable.

A contract to share the profits of a "short" sale of the stock of a corporation, the shares to meet which are to be purchased at a decline anticipated because of a legislative investigation of its affairs, with one about to bring such affairs to the attention of the legislature with the intention of impairing the reputation of the corporation for the protection of his own business, in consideration of his furnishing advance information as to the probable course and development of the investigation, is void as contrary to public policy. Veazey v. Allen, 173 N. Y. 359, 62 L.R.A. 362, 66 N. E. 103.

An agreement to sell a tract of land at a specified price if the offer should be accepted within the time mentioned is unenforceable, as contrary to public policy, where made in part consideration of services rendered before and after the making of the agreement, in bringing the property to the attention of committees of Congress as a suitable and appropriate site for a hall of records, although the actual services rendered may have been legitimate. Hazelton v. Sheckells, 202 U. S. 71, 50 L. ed. 939, 26 Sup. Ct. Rep. 567.

On the other hand, a contract providing for the sale of certain municipal franchises after such franchises have been amended by the mayor and council of the municipality, and which contract contains no provision requiring the action of either party further than to agree upon the amendment desired before the same is introduced for the consideration of the mayor and council, is not void as against public policy, although dependent for its enforcement upon legislative action. Baumhoff v. Oklahoma City Electric & Gas & P. Co. 14 Okla. 127, 77 Pac. 40.

claims of those holding lands purchased under the act of Congress approved March 3, 1881, providing for the sale of the remainder of the reservation of the confederate Otoe and Missouri tribes of Indians in the states of Nebraska and Kansas, as in the judgment of plaintiff might be necessary and proper to secure from the Federal government and said Indians a reduction in the amount which, under the laws of the United States as they then stood, was necessary to pay to satisfy the unpaid balance due the government by the defendant and other purchasers under said act; that for said services the defendant undertook and agreed to pay the plaintiff a sum equal to 10 per cent of whatever such reduction might be obtained. Among other allegations in the petition of acts done and services performed by the plaintiff in pursuance of said contract, is the following: "That thereafter the plaintiff went to Washington city, District of Columbia, and went before the Secretary of the Department of the Interior, and there presented the interests and claims of the defendant and other purchasers of lands under the said act of Congress for a rebate and reduction in the amounts still owing to the government for the said lands. And plaintiff urged upon the Secretary of the Department of the Interior his approval of the consent of said Indians to the said rebate and reduction made by the said Indians as aforesaid. That, as a result of the plaintiff's presentation of the matter aforesaid to the said Secretary, the said Secretary prepared a bill for an act of Congress, and recommended the passage of the same by Congress, which said bill was an act approving and ratifying the said action of the said Indians in consenting to the reduction aforesaid, and authorizing the said Secretary to accept payment for said lands in accordance with the reduced terms consented to by the said Indians as aforesaid. That the plaintiff appeared before the committee of the Senate of the United States on Indian affairs, and also before a similar committee of the House of Representatives, and there again presented the interests of the defendant and other purchasers of lands sold under the said act of Congress hereinbefore first mentioned, and urged the claims of the defendant and other purchasers of said lands for a reduction in and a rebate of the amounts due to the government for the lands purchased as aforesaid; that, as a result of plaintiff's efforts and services as aforesaid, favorable reports were made by the said committees to their respective bodies upon the said bill, and the same was duly enacted by the Congress of the United States, and approved by the President thereof, and became a law of the United States April 4, 1900; and thereafter and pursuant to said law the government of the United States accepted from the defendant in full payment for the land occupied by him, as hereinbefore stated, the reduced amount hereinbefore alleged." It is further alleged that, by reason of said services performed by the plaintiff in pursuance of said contract, he obtained for the defendant a reduction of $2,307.83, and that, by reason of the premises, there is now due and owing to the plaintiff from the defendant on said contract the sum of $230.78. There was a verdict and judgment for the plaintiff, and the defendant brings error.

The principal contention of the defendant is that the contract is illegal, and contrary to public policy, in that it was a contract to pay a contingent fee for influencing legislation. In order to understand this contention, it is necessary to refer to some of the circumstances which gave rise to the contract, and what was done by plaintiff in pursuance of it. By the provisions of the act of March 3, 1881, above referred to, with the consent of the Otoe and Missouri tribes of Indians expressed in open council, the Secretary of the Interior was authorized to survey and to sell the lands of those Indians lying in Nebraska and Kansas. After being surveyed, the lands were to be appraised by three commissioners, of whom one was to be selected by the Indians and two by the Secretary of the Interior. After such survey and appraisal the Secretary of the Interior was authorized to offer it for sale through the land office at Beatrice in tracts not exceeding 160 acres, to actual settlers or purchasers, who should make oath before the register or receiver at the land office that they intended to occupy the land, for authority to purchase which they made application, and who should, within three months after such application, make a permanent settlement upon the same. These sales were to be for cash, or one fourth in cash to become payable at the expiration of three months from the date of filing the application, one fourth in one year, one fourth in two years, and one fourth in three years from the date of sale. No land was to be sold for less than the appraised value thereof, and in no case for less than $2.50 per acre. There was no provision in the act that the land should be sold at public auction. It was similar to a former act of Congress for the sale of a portion of the same Indian reservation in pursuance of which the lands had been sold at private sale. and the settlers proceeded on the theory that the sales under the subsequent act would be conducted in the same manner as those under the former act. But for some reason the officer charged with the sale of the land put it up

for sale at auction to the highest bidder. That his action in this respect was unauthorized, and a hardship thereby entailed on the settlers and purchasers, is shown by a report made by the committees on Indian affairs to Congress, from which we take the following: "In the total disregard not only of the spirit and letter of the law, but the official assurances, . . . after the survey and appraisement of the lands had been completed, to the complete surprise of the intending settlers, the General Land Office issued an order for a public sale. That the lands were awarded to the highest bidders therefor at prices greatly in excess of the appraised value. That the sale was controlled by a mob of disorderly, intoxicated, and irresponsible persons; and the intending settlers seeking to secure lands of their selection, and on which they had previously made settlement in accordance with the spirit and purpose of the law, were brought into unfair competition and serious menace from the mob which had gathered for the purpose of speculation and making trouble, and not for the purpose of making actual settlement of the lands through bona fide purchase. The commissioner of the General Land Office was present at the sale, endeavored as best he could to protect the bona fide intending settlers, and assured them in his official capacity that no advantage should be taken of the excessive bidding, and that in the end the government would make a fair and reasonable adjustment, and exact no more from the purchasers than the real and appraised value of said lands. The settlers relied upon these assurances, made the bids necessary to secure the lands, and entered upon them." See Report No. 546, 50th Congress, Committee on Indian Affairs; Report No. 2198, 55th Congress, 3d Session, House Committee on Indian Affairs. After the sales the settlers made some efforts to obtain relief from what was deemed the injustice resulting to them by a sale of the land at public auction instead of at private sale. The merits of their claims were recognized by both the Department of the Interior and by Congress, and on the 3d day of March, 1893, an act of Congress went into effect authorizing and directing the Secretary of the Interior "to revise and adjust, on principles of equity, the sales of lands in the late reservation of the confederated Otoe and Missouri tribes of Indians in the states of Nebraska and Kansas, . . . and, in his discretion, the consent of the Indians first being obtained, . . . to allow to the purchasers of said lands . . . rebates on the amounts respectively paid, or agreed to be paid, by said purchasers." This act also provides that the rebates allowed should not bring the price to be paid for the lands below its appraised value. It was after this act went into effect that the contract sought to be enforced in this action was made. At the time the contract was made it was generally understood, and, we think, properly, that no further legislation was required to enable the settlers to obtain a proper reduction from the amount which they had respectively agreed to pay for the lands.

After the contract was made, the plaintiff, acting on behalf of the defendant and other settlers, negotiated an agreement with the Indians, whereby they consented that certain reductions might be made to the settlers. This agreement was submitted to the Secretary of the Interior by the plaintiff for his approval and enforcement, under and in accordance with the act of Congress approved March 3, 1893. The matter was set for hearing, but before the time for hearing arrived the plaintiff was taken ill, and was confined to his bed by illness for more than two months. During his illness the Secretary of the Interior came to the conclusion that there was some doubt as to his authority to proceed under the authority of the act of March 3, 1893, and prepared and submitted to Congress, with his recommendation that it become a law, a bill for an act approving the settlement which the plaintiff had negotiated with the Indians. This bill became a law April 4, 1900. While it was pending in Congress, the plaintiff, as the attorney of the defendant and other settlers, appeared and made arguments in favor of the proposed bill before the committee on Indian affairs of both Houses. He emphatically denies that he solicited any member of Congress to support the bill, or used or tried to use his personal influence with any of such members to secure its passage. It appears from his testimony, which is uncontradicted, that after his contract with the defendant the only conversations had by him with individual members of Congress in regard to the bill was to inquire on one or two occasions as to its progress, and to answer questions addressed to him by two members as to the nature and object of the bill.

It is insisted that the case falls within the rule announced in Richardson v. Scott's Bluff County, 59 Neb. 400, 48 L.R.A. 294, 80 Am. St. Rep. 682, 81 N. W. 309, which is as follows: "A contract by which a person agrees to draft a bill, have it introduced in a legislature, explain it to and make arguments in its favor before committees of the legislature, and do all things needful and proper to secure its passage, such party to receive no compensation unless the passage of the bill (an appropriation act) is procured,—if successful, the fees not fixed, but to be liberal,—is vicious, illegal, and void;

and in the event of the passage of the bill there can be no recovery of a fee in a suit upon the contract, nor as upon an implied contract, nor a *quantum meruit* for the services performed." On the other hand, it is claimed that there is nothing on the face of the contract to show that it contemplated legislative action; that the facts stated show that such action was not within the contemplation of the parties when the contract was made; and therefore it was not a contract to procure legislation. But we think the plaintiff should be held to the interpretation which he himself placed upon the contract. By the express terms of the contract he was "to render such services in the way of collecting facts and preparing and submitting to . . . the proper authorities of the government of the United States arguments upon the merits of the claim, as, in his judgment, might be necessary and proper," etc. It appears from that portion of the petition hereinbefore quoted that among the services which the plaintiff deemed "necessary and proper" in the premises was to appear before the committees of the two Houses of Congress in support of the proposed bill. It further appears that as a result of his services favorable reports were made by such committees upon the bill, and that it was duly enacted by Congress, and approved by the President. These facts show, we think, that the contract, as construed by the plaintiff, brings it clearly within the rule announced in the Richardson Case, *supra*.

But after a careful examination of the authorities we are of the opinion that the rule in that case is stated too broadly. It is stated more broadly than was necessary to cover the case, the record of which shows a persistent and successful attempt to influence legislation by means of personal influence and solicitation of individual members of the legislature. It is thought a more accurate statement of the rule is to be found in Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623, when it is said: "We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services, is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character." From a comparison of this rule with that stated in the Richardson Case, waiving for the present the question of contingent fees, it will be seen that the latter places all contracts for the employment of agents and attorneys to secure legislation under the ban, while under the former under certain circumstances and within proper limits such contracts are valid. The rule announced in Trist v. Child, *supra*, above set out, has been frequently recognized by the Supreme Court of the United States and by state courts of last resort. Wright v. Tebbitts, 91 U. S. 252, 23 L. ed. 320; Meguire v. Corwine, 101 U. S. 108, 25 L. ed. 899; Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539; McBratney v. Chandler, 22 Kan. 692, 31 Am. Rep. 213; Sedgwick v. Stanton, 14 N. Y. 289; Bremsen v. Engler, 17 Jones & S. 172; Foltz v. Cogswell, 86 Cal. 542. 25 Pac. 60; Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060; Denison v. Crawford County, 48 Iowa, 211. The case last cited, owing to its similarity to the case at bar, deserves more than passing notice. There a contract had been entered into between the plaintiff and the defendant county, providing that the plaintiff should make application to the Federal government for certain swamp lands, or indemnity therefor, which the county claimed it was entitled to receive, and Denison was to receive for his compensation one half of what he thus procured. To effect the object of the contract required an act of Congress. The county received the indemnity contemplated by the contract, and the plaintiff brought suit for his fee under the contract. The contract was upheld by the court in an opinion which states the rule applicable to such cases in substantially the same language as that used in Trist v. Child, *supra*. In most, if not all, of the cases cited, however, the courts add this qualification: That, if the agent or attorney conceals from the members of the legislative body the capacity in which he is acting, or appears to be other than he actually is, legislation procured thereby may be said to have been obtained by improper means, and a contract to pay a compensation therefor is void, as against public policy. In the present case the plaintiff is an attorney at law, and made no attempt to conceal the capacity in which he was acting, or to be other than he actually was. Hence the case does not fall within that qualification.

It has been held in some cases that where the fee is contingent, as in this case, there is a strong temptation on the part of the agent or attorney to make use of improper means to effect the desired end; and for that reason a contract to render services before an executive officer of the government or a legislative body for a contingent fee is contrary to public policy. In the Richardson Case, *supra*, considerable stress is laid on this feature of the contract. We do not share the view that such feature of the contract renders it void as against public policy. If the temptation to resort to improper meth

ods is too strong for an attorney working for a mere fraction of the benefits resulting from his services, it would certainly be far stronger to the real party in interest working in his own behalf and for the whole of the benefits; yet no one questions the right of a party to act in his own behalf in such matters. It would seem to us that to the extent that a contingent fee increases the temptation to the agent or attorney it diminishes the temptation to the client, so that the sum total of the temptation to employ improper means is unaffected by the character of the fee. Besides, the right of an attorney at law to render services in court for a contingent fee is almost universally recognized in this country. The temptation to resort to improper means before the judiciary is just as strong as it is to resort to such means before the legislature or executive branch of the government, and we have no right to assume that such means would be any more effective in one department than in another. The Supreme Court of the United States has held more than once that a contract between an attorney and client is not rendered invalid by a provision for a contingent fee. In Taylor v. Bemiss, 110 U. S. 42, 28 L. ed. 64, 3 Sup. Ct. Rep. 441, passing upon the validity of such contract, the court said: "It was decided in the case of Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983, that contracts by attorneys for compensation in prosecuting claims against the United States were not void because the amount of it was made contingent upon success, or upon the sum recovered. And the well-known difficulties and delays in obtaining payment of just claims which are not within the ordinary course of procedure of the auditing officers of the government justifies a liberal compensation in successful cases, where none is to be received in case of failure. Any other rule would work much hardship in cases of creditors of small means residing far from the seat of government, who can give neither money nor personal attention to securing their rights." A contract whereby an attorney undertakes to procure a pardon for one convicted of crime is not invalid because the compensation is made contingent on success. Moyer v. Cantieny, *supra*. On the validity of such contracts generally, see also Wright v. Tebbitts and Denison v. Crawford County, *supra;* Wylie v. Coxe, 15 How. 415, 14 L. ed. 753; Barber Asphalt Paving Co. v. Botsford, 56 Kan. 532, 44 Pac. 3; Aultman v. Waddle, 40 Kan. 195, 19 Pac. 730; Sedgwick v. Stanton, *supra;* Hunt v. Test, 8 Ala. 713, 42 Am. Dec. 659; Beal v. Polhemus, 67 Mich. 130, 34 N. W. 532; Wildey v. Collier, 7 Md. 273, 61 Am. Dec. 346.

In the light of the authorities cited, we are unable to see wherein the contract in suit contravenes any rule of public policy either as to the nature of the services contemplated by the parties when the contract was made, or those rendered in pursuance of it. It is not sufficient to say that the plaintiff might have resorted to illegal or improper means to attain the end contemplated by the contract. That might be said in any case. But the public interest is not well served by indulging baseless suspicions of wrongdoing. While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent that those which are lawful and contravene none of its rules be duly enforced, and not set at naught or held invalid on a bare suspicion of illegality. Had the defendant done for himself all that is shown the plaintiff did for him in pursuance of the contract, it would have been what is everywhere recognized as a legitimate exercise of his rights as a citizen. If it were competent for the defendant to do those things in his own behalf, we are unable to see why the services of one employed to act for him should be held illegal, or contrary to public policy.

Complaint is made of some of the instructions, but such complaint appears to be disposed of in what has already been said.

It is recommended that the judgment of the district court be affirmed.

Duffie and Jackson, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion the judgment of the District Court is affirmed.

Rehearing having been allowed, **Barnes, J.**, on March 8, 1906, handed down the following additional opinion:

Our original opinion in this case affirms the judgment of the trial court, and holds that the contract on which this action was based is valid and enforceable. A rehearing has been allowed, the case has been presented to the court by oral argument and on printed briefs, and the question now is: Shall we adhere to that opinion? It is stated therein that "the contract in question, as construed by the plaintiff in the court below, is clearly within the rule announced in the case of Richardson v. Scott's Bluff County, 59 Neb. 400, 48 L.R.A. 294, 80 Am. St. Rep. 682, 81 N. W. 309." Using that expression as a foundation for his contention, counsel for the defendant now strenuously insists that our decision is wrong; that it should be set aside, and the judgment of the trial court reversed, because the contract is one to secure legislation,—in other words, is a lobbying contract,—and void as

against public policy. We are convinced, however, that the statement above quoted is incorrect, and is not fully justified by the record. The contract in question set forth in the petition of the plaintiff in the court below is as follows: "The plaintiff and the defendant entered into an oral agreement, whereby the defendant employed the plaintiff to act for the defendant as his attorney and agent, to take such action and render such services (in the way of collecting facts, preparing and submitting to the Indians and proper authorities of the government of the United States arguments upon the merits of the claim of those holding lands purchased from the government as aforesaid for reduction, and upon the justice and advisability of such reduction to and for all concerned) as in the judgment of the plaintiff might be necessary and proper to secure from the government of the United States and the said Indians a rebate or reduction in the amount which, under the laws of the United States, as they then stood, it was necessary to pay to the government of the United States to satisfy and extinguish the unpaid balance due the government of the United States for the said land under the terms of the said sale to the said defendant; that as a part of said agreement, and to induce the plaintiff to undertake the task of securing a reduction of, or rebate upon, the payment required to be made, as aforesaid, for the said land to the government of the United States, the defendant at said time orally agreed with and promised to the plaintiff to pay to the plaintiff a sum of money equal to 10 per cent of the reduction or rebate which the plaintiff might secure of or upon the amount due the government as aforesaid; and the plaintiff at said time, as a part of said agreement, orally promised and agreed to and with the defendant to undertake to secure a rebate upon, or reduction of, the amount remaining to be paid to the government for the said land as aforesaid; that it was further at the said time orally agreed by and between the plaintiff and the defendant that the sum of money to be paid by the defendant to plaintiff as aforesaid should be due and payable from the defendant to the plaintiff as soon as the said reduction or rebate was secured and the government of the United States accepted the reduced amount in full payment for said land."

It is apparent from reading the contract that it is valid on its face, and one that the parties had a right to make. It contains no agreement, in terms, to procure legislative action, and it is quite clear from the record that no such action was considered necessary, or was in any way contemplated, by the parties thereto, at the time it was made. It appears that after the plaintiff below had obtained the consent of the Indians to a reduction of the price of their lands, as contemplated by the agreement, and when such consent was presented by the plaintiff to the Secretary of the Interior for his approval, that officer was also of opinion that he had the power to make the necessary orders to close up the transaction, under the authority of the act of Congress of March 3, 1893, referred to in our former opinion; and it would seem that when the Secretary had approved of the reduction sought by the plaintiff and agreed to by the Indians, the plaintiff had performed (as far as he could) the services contemplated by the parties when the contract was made. That such an agreement was perfectly legitimate, and the services thus performed were proper, there can be no doubt. It is shown that it was the Secretary of the Interior that originated the idea that additional legislation should be had, giving him further power, before making his final order approving of the agreement of the parties and granting the rebate in question. He therefore, on his own motion and without suggestion of the plaintiff, prepared a bill for that purpose and had it submitted to Congress. So it may be said that when, as stated in the contract, "it was agreed that the plaintiff should take such action and render such services as, in his judgment, might be necessary and proper to secure such rebate from the government and the said Indians," it was not within the mind of either of the parties that legislative action would be required, and services of that kind were not intended to be contracted for. In Richardson v. Scott's Bluff County, *supra*, the contract was: To draft a bill, have it introduced in the legislature, explain it to and make arguments in its favor before committees of the legislature, and do all things needful and proper to secure its passage, to receive no compensation unless the passage of the bill (an appropriation act) is procured, the fees not fixed, but to be liberal in case of success. By comparison of the contracts it clearly appears that they are not in the same class. That one is a legitimate contract for professional services, where legislative action is not contemplated or contracted for, while the other is an agreement to procure legislative action, to wit, the passage of an appropriation bill, by drafting the bill itself, having it introduced in the legislature, and doing all things necessary, including lobbying, to procure its passage. That such an agreement is a lobbying contract, is against public policy, and falls within the rule announced by the

courts in the cases relied on by counsel for the defendant, there can be no doubt.

In order to dispose of the whole question it only remains for us to consider the nature of the services performed by the plaintiff in carrying out his part of the agreement. It is insisted by counsel for the defendant that such services were illegal, opposed to considerations of public policy, and were void; that plaintiff cannot recover for such services, and by their performance the contract is brought within the rule last above stated. We are unable to give our assent to this view of the matter. It appears that the services performed by the plaintiff, up to and including the time when he had secured the approval of the Secretary of the Interior to the agreement of the Indians granting a rebate or reduction of the price of the land in question, were strictly legitimate and proper, and were such professional services as were evidently contemplated by the contract. It further appears that it was the Secretary of the Interior who first suggested a desire on his part for additional legislative authority before completing the transaction. The plaintiff did not frame the bill which was presented to Congress, it was drawn by the Secretary of the Interior, who also procured it to be introduced before both Houses of Congress. It appears, however, that thereafter the plaintiff was called, or at least appeared, before a committee of each House, and explained the nature of the bill, and informed them of its purpose and effect. This service he performed in a proper manner, and it is not shown that he influenced, or attempted to influence, any member of Congress in order to secure the passage of the bill. The services thus performed by the plaintiff, it would seem, were purely professional in their nature, and fall within the rule announced in Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623. They are within the category "of preparing and presenting arguments and submitting them to a legislative committee or other proper authority." And, if the contract contained an express agreement to perform such services for a contingent fee, such agreement would not render it void. So we are of opinion that the conclusion announced by our former decision is right, but that the expression that the contract herein "falls fully within the case of Richardson v. Scott's Bluff County" should be, and it is, hereby disapproved. We are satisfied, however, with our modification of the rule in that case, and again give it our approval.

For the foregoing reasons, our former opinion is adhered to.

Judgment accordingly.

MASSACHUSETTS SUPREME JUDICIAL COURT.

GEORGE W. HASKELL
v.
CAPE ANN ANCHOR WORKS.

(178 Mass. 485, 59 N. E. 1113.)

Master and servant—duty to repair appliance.

1. A master does not fulfil his duty to his servants with respect to repairing a broken chain which is part of the permanent equipment for handling bars of iron, by furnishing a competent smith with sufficient materials, but he is bound to use due care in preparing a safe appliance for the servant's use.

Contributory negligence—fall of weight.

2. A servant is not, in all cases, guilty of contributory negligence, as matter of law, in being, in the performance of his duty, under a suspended weight which would crush him if it should fall.

Trial.

3. A judge may state to the jury his memory of the evidence.

(April 4, 1901.)

Subject Note.—Duty of master to furnish safe appliances as affected by fact that defective appliances are prepared by fellow servants.

I. The common-law rule.
 a. In general, 220.
 b. Where the master is bound to furnish the appliance, 222.
 c. Where the servant is bound to furnish the appliance, 224.
 d. Where the master takes it upon himself to furnish the appliance, 228.

II. Effect of employer's liability acts, 229.

I. The common-law rule.

a. In general.

A master's duty to furnish safe appliances is not affected by the fact that defective appliances were prepared by fellow servants. When it is once shown that the master was bound to supply the appliance by which his servant was hurt, his liability is established, and it makes no difference how high or low the grade of employment may have been of the servant who prepared the defective appliance. The rule is that the master cannot delegate his duty to furnish safe appliances, and, if he does, no matter how humble the servant may be to whom it is delegated, he is not in that respect the fellow servant of the injured employee at all, but the representative of the master.

If the appliance is one that the servants are bound to furnish as part of, or as a detail of, their work, then the fellow-servant rule applies, unless the master takes this

EXCEPTIONS by defendant to rulings of the Superior Court for Essex County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence which resulted in a verdict in plaintiff's favor. Overruled.

The facts are stated in the opinion.

Messrs. William H. Moody and Joseph H. Pearl, for defendant:

The defendant was not obliged to see that the plaintiff selected a chain that was not defective, when it had furnished a sufficient number of suitable materials.

Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339; Harkins v. Standard Sugar Refinery, 122 Mass. 400; Zeigler v. Day, 123 Mass. 152; Colton v. Richards, 123 Mass. 484; Holden v. Fitchburg R. Co. 129 Mass. 268, 37 Am. Rep. 343; McDermott v. Boston, 133 Mass. 349; Johnson v. Boston Tow-Boat Co. 135 Mass. 209, 46 Am. Rep. 458; McGee v. Boston Cordage Co. 139 Mass. 445, 1 N. E. 745; Moynihan v. Hills Co. 146 Mass. 586, 4 Am. St. Rep. 348, 16 N. E. 574.

The defendant had supplied a sufficient quantity of chains for doing the work, and two bridle chains which would seem to have been much better fitted for the work, and, if the plaintiff saw fit, as he did, to take the first chain that he found, without examination, he cannot recover on the ground that the defendant was negligent, for it had performed its full duty in providing a sufficient number of proper instrumentalities for do-

duty upon himself. If he does he must answer to the same extent as if it were his duty to furnish the appliance in the first instance.

The general rule is that an employer must furnish machinery and appliances reasonably suitable and safe for the employee to do his work. And where that rule applies the duty to furnish such machinery and appliances is one which the employer owes personally to the employed; and he cannot escape that duty by intrusting it to an employee, who negligently performs it. Burns v. Sennett, 99 Cal. 363, 33 Pac. 916.

In Higgins v. Williams, 114 Cal. 176, 45 Pac. 1041, the court said that the rule of law was well settled in California that it was the duty of an employer to furnish his employees reasonably suitable and safe machinery and appliances with which to do the work required of them, and that it was a duty which could not be delegated to another so as to exonerate the employer from liability to an employee who was injured by the omission to perform the duty, or by its negligent performance.

It was said, *obiter*, in Baltimore & P. R. Co. v. Elliott, 9 App. D. C. 341, that the doctrine stated and reaffirmed by the supreme court was that, while an employer was not responsible to a servant for injuries caused by the negligence of a fellow servant, yet it was his duty to furnish the servant reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done by the servant: and that the employer might not escape liability by delegating to another the work of furnishing such safe tools, appliances, and machinery.

In Neutz v. Jackson Hill Coal & Coke Co. 139 Ind. 411, 38 N. E. 324, 39 N. E. 147, the court said that one line of distinction between vice principals and coemployees was in the duty, in one instance, to supply or maintain instrumentalities of the service, and, in the other, of using the instrumentalities supplied. Negligence in the first, though that of a servant, was the master's negligence, while in the second the negligence was that of a fellow servant.

In Kelley v. Ryus, 48 Kan. 120, 29 Pac. 144, the court said it was the duty of an employer in all cases to furnish his employees with reasonably safe instruments or tools with which to work, and that if he delegated this duty to another the latter became a vice principal, for whose acts the principal was responsible.

In Ryalls v. Mechanics' Mills, 150 Mass. 190, 5 L.R.A. 667, 22 N. E. 766, the court said that in 1887 it was settled law in Massachusetts that masters were personally bound to see that reasonable care was used to provide reasonably safe and proper machinery; so that, if the duty was intrusted to another, and was not performed, the fact that the proximate cause of the damage was the negligence of a fellow servant, was no defense.

But where the making of the appliances is part of the work for which an injured servant and his fellow employees are hired, the master is not liable for an injury due to the defective appliance prepared by a fellow servant. Callan v. Bull, 113 Cal. 593, 45 Pac. 1017.

Where the master leaves the duty of furnishing or adapting appliances by which the work is to be done to the workmen themselves, and this work is assumed by them within the scope of their employment, he is not liable for their negligence if suitable materials are furnished by him and suitable workmen are employed by him. Kelley v. Norcross, 121 Mass. 508.

In Arkerson v. Dennison, 117 Mass. 407, it was held that whether a particular structure or appliance was one for which the master was responsible to his servant might depend upon circumstances, including the nature and scope of the employment of those engaged in its preparation and use. It might depend upon the question whether the direction and charge of the work was confided to the workmen, or some of them, or retained by the employer, or left unprovided for. If the employer directed his workmen to do certain work, leaving it for them to provide the structures and appliances required for its prosecution, he might be responsible only for care in selection of

ing the work. There was no evidence that any other chains were defective.

Johnson v. Boston Tow-Boat Co. and McGee v. Boston Cordage Co. *supra;* Thyng v. Fitchburg R. Co. 156 Mass. 13, 32 Am. St. Rep. 425, 30 N. E. 169; Young v. Boston & M. R. Co. 168 Mass. 219, 46 N. E. 624; Ellsbury v. New York, N. H. & H. R. Co. 172 Mass. 130, 70 Am. St. Rep. 248, 51 N. E. 415; Miller v. New York, N. H. & H. R. Co. 175 Mass. 363, 56 N. E. 282; McKay v. Hand, 168 Mass. 270, 47 N. E. 104; Harnois v. Cutting, 174 Mass. 398, 54 N. E. 842.

The plaintiff placed both of his hands upon the steel ingot, and stood directly under it, and did this knowing that there was liability that the chain might break and the ingot come down.

A man of eighteen years' experience, who does this, must be held, as a matter of law, not to be in the exercise of due care, and must also be held to have assumed the risk.

Kilroy v. Foss, 161 Mass. 138, 36 N. E. 746; Goddard v. McIntosh, 161 Mass. 253, 37 N. E. 169; La Belle v. Montague, 174 Mass. 453, 54 N. E. 859; Carroll v. Western U. Teleg. Co. 160 Mass. 152, 35 N. E. 456.

Messrs. John J. Flaherty and Samuel T. Sears, for plaintiff:

It was competent for the jury to find (1) that the defendant furnished the chain with the ring and hook attached as a finished appliance for slinging ingots, and that the appliance as originally furnished was not a suitable one; (2) that it was not worn out or rendered defective by being used; (3)

the men and material assigned for it. But if he simply employed them to work under his direction, giving them no charge or responsibility in regard to the result to be accomplished, or the appliances to be used, that responsibility remained with him. The negligence of fellow workmen for which the master is held to be exempt from liability is negligence in respect to that which the workmen undertook or were set to do.

b. Where the master is bound to furnish the appliance.

Whether an appliance is permanent or temporary, if it is the duty of the master to furnish it his liability, as before stated, remains unchanged by the fact that it was prepared by a fellow servant of an injured employee.

In Sanborn v. Madera Flume & Trading Co. 70 Cal. 261, 11 Pac. 710, when a sawmill was nearly completed it was discovered that there was no "sword," an appliance for entering the cut made by the saw to keep it from closing up and pinching the saw as the timber moved through. A temporary sword was put in by the orders of the master's superintendent. This was unsuitable and caused a servant to be hurt. The defense that the appliance was put in by a fellow servant of the injured employee was not sustained. The court said the master could not devest himself from liability for not furnishing safe machinery by leaving the performance of that duty to his servants.

In Nixon v. Selby Smelting & Lead Co. 102 Cal. 458, 36 Pac. 803, a workman was burned by acid through the breaking of a defective waste hose extemporized by his foreman for temporary use. It was held that, although otherwise a fellow servant of the injured workman, in so far as he was authorized and employed to prepare and furnish the machinery or appliance with which other servants were to work, the foreman represented the master, and his negligence in the performance of these services was the negligence of the master.

In Burns v. Sennett, 99 Cal. 363, 33 Pac. 916, a stevedore was injured by the breaking of a rope used in fastening up a hoisting apparatus, the break being due to the fact that the rope was improperly protected from chafing. It was held to be a question of fact for the jury whether the temporary adjustment of the gear and tackle used for discharging and loading ships was the duty of the master stevedore, or whether the master undertook to furnish only suitable rope, blocks, and other material for that purpose.

In McNamara v. MacDonough, 102 Cal. 575, 36 Pac. 941, the master was held liable for injury to a brick layer, due to the falling of a defective scaffold erected by a carpenter in the pay of the master. The court said that the law of fellow servants had no proper application to the carpenter who, in constructing the scaffold, represented the master, whose duty it was to exercise ordinary care in furnishing for the injured servant safe machinery and appliances with which he was to work; and that the carpenter's relation to the master while constructing the scaffold was that of vice principal, and not that of a fellow servant with the injured employee, even though his work promoted the erection of the building.

In Higgins v. Williams, 114 Cal. 176, 45 Pac. 1041, a trench digger was hurt by a defective hoisting machine prepared by his foreman, who had authority to direct and discharge the men employed in the work. It was urged that the plaintiff was injured through the fault of a fellow servant, and therefore could not recover. The court held that, in preparing the machine, the foreman was not the fellow servant of the injured employee, but the representative of the master, who was responsible for his negligence.

In Pullman Palace Car Co. v. Laack, 143 Ill. 242, 18 L.R.A. 215, 32 N. E. 285, a servant was injured through failure of the master to provide a stopcock in an oil pipe to cut off the flow of oil in case of fire. The fact that the pipes were prepared by the fellow servants of the injured workman was held not to relieve the master from liability. If they were fellow servants in their ordinary work, they were held not to be servants

that the only appliance provided for the work the plaintiff was doing was the 5-8 chains; (4) that the defendant did not furnish a sufficient supply of suitable appliances for the work the plaintiff was then doing; or, (5) if the appliance was not furnished as a completed whole, that the defendant failed to furnish suitable materials out of which to make it.

Clark v. Soule, 137 Mass. 380; Spicer v. South Boston Iron Co. 138 Mass. 426; Moynihan v. Hills Co. 146 Mass. 586, 4 Am. St. Rep. 348, 16 N. E. 574; Twomey v. Swift, 163 Mass. 273, 39 N. E. 1018; Graham v. Badger, 164 Mass. 42, 41 N. E. 61; Brady v. Norcross, 172 Mass. 331, 52 N. E. 528.

It is no defense to this action to say that the defective condition of this appliance, or of the others which were furnished, was due to the negligence of Cordoza in making and adapting them for use in the defendant's business because the jury might have found otherwise, and, even if it was due to that, Cordoza, in doing this work, was not a fellow servant of the plaintiff, but a servant of the defendant, for whose conduct it is responsible.

Moynihan v. Hills Co. *supra*.

Whether the plaintiff, under all the circumstances, exercised due care, was for the jury to decide.

Spicer v. South Boston Iron Co. and Graham v. Badger, *supra;* Crowley v. Cutting, 165 Mass. 436, 43 N. E. 197.

in the preparation of the particular appliance. The court said that the liability of the master did not depend upon who performed the duty, but upon the existence of the duty itself, which the master must perform; and that he could not, by delegating it to another, absolve himself from liability for its nonperformance.

In Donnelly v. Booth Bros. & H. I. Granite Co. 90 Me. 110, 37 Atl. 874, it was held that where it was the duty of a master to furnish a safe platform for loading a vessel he could not escape liability for injury to a servant, caused by the falling of the platform, although the accident was due to defective rigging put up by fellow servants of the injured employee.

In Lawless v. Connecticut River R. Co. 136 Mass. 1, it was said to be the duty of a railroad company to furnish its employees with a suitable engine, and that it did not necessarily discharge that duty by intrusting it to suitable servants or agents, but was responsible for the negligence or want of ordinary care of such servants or agents in the performance of the duty required of them. Such servants or agents, in the performance of this duty, were not the fellow servants of the injured employee, but were charged with the duty required of the master.

In Moynihan v. Hills Co. 146 Mass. 586, 4 Am. St. Rep. 348, 16 N. E. 574, the master, who was not a mechanic, and who knew nothing of machinery, left the rebuilding of certain machines entirely to his head machinist. After their completion an employee, while running one of the machines, was hurt by the breaking of a defective rod, which had been made in the reconstructed machine to carry double the weight intended by the original maker. It was held that the reconstruction of the machines was part of the master's duty, for the negligent performance of which he could not escape liability by employing another person to represent him.

In White v. William H. Perry Co. 190 Mass. 99, 76 N. E. 512, a servant engaged in loading a car with rails was hurt through the slipping of a sleeper which formed part of a temporary platform for his use while working on the job. The platform was negligently put up under the direction of the master's superintendent or foreman. The plaintiff recovered, and the court said it was competent for the jury to find that the platform, though temporary in its nature, was an appliance provided by the master through its superintendent, for the use of the men engaged in loading the car.

In Kelly v. Erie Teleg. & Teleph. Co. 34 Minn. 321, 25 N. W. 706, the court, upholding a verdict against a master in favor of a servant hurt by the fall of a telegraph pole improperly set in the ground under the direction of the master's foreman, said that a servant to whom the master left the duty of furnishing safe machinery or instrumentalities for other servants to work with was not, in the matter of performing that duty, a fellow servant of such other servants, in the sense that would prevent them recovering from the master for injuries sustained in consequence of negligence of a fellow servant.

In Jones v. St. Louis, N. & P. Packet Co. 43 Mo. App. 398, the master was held liable to a servant for an injury due to a gangway defectively constructed by his fellow servants. The duty to furnish safe appliances was held to be absolute in its nature and personal to the master, to the extent of using due care to accomplish that end. It was therefore immaterial to what grade of servants he delegated its performance, as the particular agent, employee, or servant to whom he delegated it became for that reason, and as to it, his vice principal, and was taken out of the category of fellow servants in respect to any other servants who were injured through the defectiveness of the appliance.

In Cole v. Warren Mfg. Co. 63 N. J. L. 626, 44 Atl. 647, a certain support to a permanent scaffold was not replaced upon the reconstruction of a mill in which it was used, and in consequence a servant was hurt. The court held that, even if in the reconstruction of the mill the element of common employment existed, it would not help the master, as his duty to furnish a safe scaffold was one that could not be delegated.

was bound to do when it furnished a competent smith with sufficient materials, and that making a link was one of those transitory adjustments which the defendant had no personal duty to see carefully performed. The judge was right in ruling the other way and making the defendant personally responsible for the use of due care in preparing a safe appliance for the plaintiff's use. The chain was a permanent instrumentality, intended and provided for the very purpose for which it was used when it broke. The plaintiff was not applying it to a special, temporary use which might have been in excess of even its expected powers. Harnois v. Cutting, 174 Mass. 398, 54 N. E. 842. The chain was not one of those small things that would be going through a rapid course of wearing out and replacement, as to which it might and would be left to the judgment of the plaintiff and his fellow servants to decide, when one was to be discarded, so long as the defendant kept a stock of sound ones within reach. Miller v. New York, N. H. & H. R. Co. 175 Mass. 363, 56 N. E. 282; Harnois v. Cutting, *supra*. This was a more important matter. In a practical and business sense the chain used was, or might be found to have been, the only one within reach. It was not worn out, but broke in consequence of inherent defects that could and should have been avoided in the manufacture, and that could not be found out later. As to permanent appliances in general, of course the fact that the proximate cause of the damage was

painters as a completed structure, but left the making of it to the painters themselves, he is not liable for the killing of a painter through the breaking of a defective rope used by a fellow servant of the intestate. Adasken v. Gilbert, 165 Mass. 443, 43 N. E. 199.

In Brady v. Norcross, 172 Mass. 331, 52 N. E. 528, a painter was hurt by a fall, due to a defective bracket, of part of a temporary staging on which he was at work, and which had been put up by a carpenter on the same job. The court held that the master could not be held liable where the evidence did not show that he had furnished the staging as a structure; or that he assumed to exercise any control or supervision as to how it should be built, or kept, or adapted for the work; or that he had failed to furnish a sufficient quantity of suitable materials, or had employed improper workmen.

In Hoar v. Merritt, 62 Mich. 386, 29 N. W. 15, carpenters built a scaffold for their own use in the erection of a building, and, after they got through with it, painters employed in the same building went upon it in the performance of their work, when it gave way causing one of them to be hurt. The master was held not liable. The court said that the master had not undertaken to build this scaffold for the use of the painters, and had not invited them to go upon it. It was there for another purpose, and it was the duty of the painters to ascertain if it would answer their purpose, and of this they were better qualified to judge than the master.

In Beesley v. F. W. Wheeler & Co. 103 Mich. 196, 27 L.R.A. 266, 61 N. W. 658, the erection of scaffolding for temporary use in the building of a ship was held to be part of the work undertaken by the artisans themselves; so that the master was not liable to a servant for an injury due to its defective construction.

In Landowski v. Chapoton, 137 Mich. 429, 100 N. W. 564, the master was held not liable for injury to a brick carrier, due to the negligence of a fellow servant in putting together a scaffold for the use of workmen.

In Marsh v. Herman, 47 Minn. 537, 50 N. W. 611, a master was held not liable for an injury to a servant, due to the breaking of a scaffold defectively put up by a fellow servant, where it was part of the work of the servants themselves to erect the scaffold.

In Oelschlegel v. Chicago G. W. R. Co. 73 Minn, 327, 76 N. W. 56, 409, the master was held not liable for injury to a servant caused by the breaking of a defective board in a scaffold put up for the purpose of stripping a locomotive, the master having furnished a sufficient quantity of safe materials. The erection of the scaffold was held to be part of the work of the employees themselves, for which the master was not responsible.

In Maher v. McGrath, 58 N. J. L. 469, 33 Atl. 945, a master was held not liable to a servant for an injury due to the fall of a temporary scaffold negligently built by masons who were his fellow servants, the platform being intended to be raised from time to time by the workmen themselves as their needs required, and as their work on the building in which it was used progressed.

In Olsen v. Nixon, 61 N. J. L. 671, 40 Atl. 694, the master was held not liable for an injury to a ship carpenter caused by the fall of a scaffold negligently put up by his fellow servants for carrying on their work. The evidence showed that the master had not undertaken to furnish the scaffold or supervise its construction, but that its erection and adjustment to the needs of the work was a part of the service exacted of the carpenters by the master, and which they were accustomed to perform in the regular line of their duty.

In Pfeiffer v. Dialogue, 64 N. J. L. 707, 46 Atl. 772, the master was held not responsible for the negligent construction of a temporary scaffold by fellow servants of an injured employee.

In Judson v. Olean, 116 N. Y. 655, 22 N. E. 555, it was held error to refuse a nonsuit where an action for damages was brought for an injury to a servant, due to the fall of a scaffold put up for mason work, by fellow servants.

In Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017, a master was held not liable for

the negligence of a fellow servant in making them is no defense. Ryalls v. Mechanics' Mills, 150 Mass. 190, 194, 5 L.R.A. 667, 22 N. E. 766.

It is argued, also, that the plaintiff did not use due care. As to his not getting a double chain enough has been said. So far as could be told by inspection this chain was as good as any other single chain. Moreover it was the only one conveniently accessible. It is complained that the plaintiff did not use a tag rope, but, apart from the evidence that there was no tag rope there, there was evidence that the way adopted by the plaintiff was the only practical way of doing just what the plaintiff was ordered to do. The fact that a plaintiff was under a suspended weight which would crush him if it fell does not establish negligence as matter of law in all cases. Spicer v. South Boston Iron Co. 138 Mass. 426; Graham v. Badger, 164 Mass. 42, 41 N. E. 61. In this case the plaintiff would have been safe if the link had been made of new iron, as on the plaintiff's evidence it should have been. The defendant excepted to the statement by the judge in his charge that tnere was no evidence which showed, or had to his mind any tendency to show, that there was any neglect on the part of the plaintiff in the selection of this instrumentality. As we have said, this was a perfectly correct statement of the testimony so far as expressly directed to that point, and we do not think it necessary to say more than that the judge immediately added that that, of course, was a question for the

injury to a servant, caused by the negligence of a fellow servant in the construction of staging about a ship, where the building of the staging was a detail of the servant's work.

In Kimmer v. Weber, 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 860, Reversing 81 Hun, 599, 30 N. Y. Supp. 1103, the master was held not liable for the death of a mason, who, with others, made use of an unsafe scaffold previously put up by plumbers for their own use, which broke and let him fall.

In McCone v. Gallagher, 16 App. Div. 272, 44 N. Y. Supp. 697, it was held that a master was not liable for injury to a carpenter, caused by a faultily constructed scaffold which had been put up by other carpenters before he went to work. The court held that, as the master did not undertake to furnish his employees a completed scaffold, he had discharged his duty to them by providing safe materials out of which it might be built.

In Richards v. Hayes, 17 App. Div. 422, 45 N. Y. Supp. 234, the court said that the duty to furnish proper and safe implements and appliances existed wherever, from the nature of the work to be done, or from the position that was required to be taken by the employee in doing the work, it was necessary that such appliances should be furnished to the employee before he could do the work or perform the services which he was employed to do or perform. But where it appeared that, as a part of, or an incident to, the work which the employee was to do, such employee was required to erect a scaffold or other appliance necessary to do the work, neglect in the erection of such scaffold was not a neglect to perform a duty that the employer owed to his employee.

In Swain v. Brooklyn Alcatraz Asphalt Co. 57 App. Div. 56, 68 N. Y. Supp. 50, the master was held not liable for injury to a servant, due to the fall of a defectively constructed scaffold used in the work of tearing down and reconstructing a building. The building of the scaffold was held to be a detail of the servant's work, as to which the foreman, in directing and assisting in its building, was a fellow servant of the injured employee.

In Banzhaf v. Ludwig, 28 Misc. 496, 59 N. Y. Supp. 535, Reversing 27 Misc. 821, 57 N. Y. Supp. 828, the master was held not liable for injury to a carpenter, caused by the falling of a temporary scaffold negligently constructed by fellow workmen, on the ground that it was not the duty of the master to furnish a completed structure as an appliance for the work upon which the carpenters were engaged, but that his duty was fulfilled when he had furnished safe materials, the erection of the scaffold being merely a detail of the work of the carpenters.

In McCormack v. Crawford, 4 N. Y. S. R. 835, a master having furnished safe materials was held not liable for the negligent construction of scaffolding by his servants as part of their work in laying a sewer.

In Thompson v. Libbey, 46 N. Y. S. R. 324, 19 N. Y. Supp. 680, it was held that a carpenter could not recover from the employer for injuries due to the fall of a platform negligently constructed inside a grain bin by a fellow servant, where it was part of the duty of the carpenters to build it.

In a charge to a jury in Davies v. Griffith, 27 Ohio L. J. 180, the court said that the liability of the master for the defective construction of a scaffold for use of carpenters in the erection of a building depended upon whether the servant whose negligence caused the injury was a superior of the injured employee, or was his fellow servant. In the first instance the master would be liable, and in the second he would not. The court also said that, if the jury should find that the negligence of the master in providing and keeping in use insufficient scaffolding directly contributed to the servant's injury, it would be no defense that the negligence of a fellow servant jointly contributed with such negligence of the defendant to cause such injury, or that a fellow servant of the injured employee might, by the exercise of ordinary care or caution, have prevented the injury.

In Keystone Bridge Co. v. Newberry, 96 Pa. 246, 42 Am. Rep. 543, a servant was hurt by the breaking of an apparatus called a

jury upon all the facts. He recurred to and reinforced the same instruction later.

A similar answer may be made to an exception to the judge's saying to the jury that no evidence had been introduced to his recollection that there was any other tag rope on the premises, apart from the one belonging with this apparatus in use by the plaintiff, as to which it was in dispute whether the rope was there or in condition to be used. The whole matter was left to the jury. Moreover, a judge has a perfect right, to say the least, to state his memory of the evidence to the jury. Sewall v. Robbins, 139 Mass. 164, 168, 29 N. E. 650; Porter v. Sullivan, 7 Gray, 441, 449. We have examined all the exceptions and the defendant's brief, but do not find anything further that calls for special remarks.

Exceptions overruled.

trussed plank, which was used in the work of putting up the roof of a building. It was made under the direction of a gang boss, who was a fellow servant of the injured employee. The master was held not liable on the ground that the construction of the apparatus was merely a detail of the work of the servants themselves.

In Ross v. Walker, 139 Pa. 42, 23 Am. St. Rep. 160, 21 Atl. 159, the master was held not liable for injury to a bridge builder, due to a defectively constructed scaffold. The work was said to belong exclusively to the servants, and that the grade of the servant to whose negligence the accident was due made no difference.

In Lambert v. Missisquoi Pulp Co. 72 Vt. 278, 47 Atl. 1085, the master was held not liable to a carpenter for injury caused by the fall of a staging improperly constructed by workmen before the injured carpenter went on the job. It was said to be an instrumentality to be provided by the workmen themselves for carrying on their work.

And where part of a staging was constructed by the master, but the servant was hurt by the fall of another part of it, which was built by the servants themselves, the master was held not liable. Garrow v. Miller, 72 Vt. 284, 47 Atl. 1087.

A master, not having undertaken to furnish scaffolding in an adjusted condition, is not liable to a servant for injury caused by its negligent construction by a fellow servant. Metzler v. McKenzie, 34 Wash. 470, 76 Pac. 114.

In Ferguson v. Galt Public School Board, 27 Ont. App. Rep. 480, a master was held not liable for injury to a laborer engaged in carrying mortar to a mason, where he was hurt by the falling of a gangway negligently put up by the mason. Under the common law the mason and his helper were said to be fellow servants, for the negligence of whom the master was not answerable.

In Callan v. Bull, 113 Cal. 593, 45 Pac. 1017, a master was held not liable for injury to a servant due to a defective bent used in constructing a jetty, where he and his fellow servants were hired to build the jetty.

In Leishman v. Union Iron Works (Cal.) 83 Pac. 30, it was held that where a contract of employment required that flasks for making castings should be constructed by employees of a molding department, and the master had furnished safe materials with which to do the work and competent servants to do it, he was not liable for an injury due to a defective flask put together by a fellow servant of the injured employee.

In Harkins v. Standard Sugar Refinery, 122 Mass. 400, a master was held not liable where a servant was hurt through the breaking of a defective rope furnished by a rigger, who was his fellow servant, and who, under the terms of his contract, was to furnish his own rigging.

In Lindvall v. Woods, 41 Minn. 212, 4 L.R.A. 793, 42 N. W. 1020, a common laborer was hurt by the falling of a badly constructed temporary trestle used in grading a railroad. The parts of the trestle were made by one of the workmen under the direction of a foreman, who had charge of the whole work. The master was held not liable on the ground that the building of the trestle was as much a part of the construction of the road as the grading itself, and the master's duty therefore ended with the furnishing of safe materials.

Another action was afterwards brought on the same facts in the Federal courts, and the opposite conclusion was reached in Woods v. Lindvall, 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. 62. In the latter case it was held that the master had not left the construction of the trestle to the laborers themselves, but had intrusted it to the care of the foreman, who was in this respect his representative, and not a fellow servant of the injured employee. In other words, the courts simply differed on the question whether it was the master's duty to furnish the trestle as a completed appliance, and not as to the effect upon the rule of the fact that the defective appliance was prepared by a fellow servant, where it was not the duty of the master to furnish the appliances.

In Fraser v. Red River Lumber Co. 45 Minn. 235, 40 N. W. 785, a lumber scaler was hurt by the breaking of a defective board projecting from a pile of lumber as a step for use of workmen in ascending the lumber pile. These and similar steps were made by the men while piling the lumber. The master was held not liable on the ground that these steps were made by fellow servants of the scaler as an incident of their work.

In Fukare v. Kerbaugh (N. J. L.) 61 Atl. 376, a master was held not responsible to a servant for the negligent construction, by a fellow servant, of a temporary platform upon a trestle work used in making a railroad embankment.

d. Where the master takes it upon himself to furnish the appliance.

Sometimes the master undertakes to fur-

nish his servants a completed appliance, which ordinarily he is not bound to do. If he does not leave such a detail of the servant's work to the servants themselves, he is responsible to an employee for an injury caused by the negligence of a coemployee in the construction of the appliance.

In Sims v. American Steel Barge Co. 56 Minn. 68, 45 Am. St. Rep. 451, 57 N. W. 322, a master employed a gang of scaffold builders, who were hired for no other purpose. He was held liable for their negligence in the construction of a scaffold which was the cause of an injury to an employee whose work required him to use it. The scaffold builders were held not to be fellow servants of the injured employee.

In a dissenting opinion in Blomquist v. Chicago, M. & St. P. R. Co. 60 Minn. 426, 62 N. W. 818, Canty, J., said that the court, in the last-mentioned case, simply held that the servants employed by the same common master in different departments of the same works were not fellow servants, and that the master was liable for the negligence of a servant in one department, resulting in injury to the servant in another department. The court, he said, had often repudiated that doctrine.

In Blomquist v. Chicago, M. & St. P. R. Co. *supra*, it appeared that a common laborer was sent upon a temporary platform to turn the handle of a derrick. The platform had been faultily put together under the direction of a foreman in charge of the work, and toppled over under the weight attempted to be lifted by the derrick. The injured servant had no part in the building of the platform. The master was held liable on the ground that he had withdrawn all discretion from the men composing the derrick crew as to where and how the derrick should be erected, and had invested the foreman with full power to devise plans for the structure, and complete control over the whole matter. The place, the plan, and the manner of putting up the appliances had been especially and unconditionally delegated to the foreman, which distinguished the case from Lindvall v. Woods, 41 Minn. 212, 4 L.R.A. 793, 42 N. W. 1020, *supra*, c. In a dissenting opinion Canty, J., took the position that the master's liability depended upon the question whether the foreman was vice principal or not,—not upon the question whether the master had undertaken to furnish the appliances,—and whether he was vice principal depended upon the fact whether there was a disparity between him and the injured servant, either of knowledge or skill; if there was a disparity, he was vice principal, for whose acts the master was liable, if not, he was a fellow servant, in which case the master would not be responsible. The existence of such disparity of either or both kinds was a question of fact for the jury, the burden being upon the party asserting the disparity to prove it.

In Arkerson v. Dennison, 117 Mass. 407, it was held that, when the preparation of the appliances was neither intrusted to, nor assumed by, workmen, the master might be held guilty of negligence if defective appliances were furnished, even though the workmen themselves were employed in the preparation of them. In such case, negligence appearing, it was a question of fact for the jury whether that negligence was in respect of what was done or undertaken by the fellow workmen, or was the negligence of the master. It was held to be a question of fact whether the erection of staging used by bricklayers was left to the bricklayers themselves, or whether the master kept this work within his own control. In the former case the court said he would not be liable for negligence of a fellow servant of the injured employee; in the latter case he would.

In Colton v. Richards, 123 Mass. 484, the court said that, where the master undertook the business of furnishing a completed staging for the use of his workmen, it might be true that the exercise of due care in selecting men and materials would not always satisfy the obligation assumed. It might still be his duty, especially when he superintended the work himself, to see that the completed structure was in itself reasonably safe and fit for the uses to which it was devoted.

II. Effect of employer's liability acts.

It is intended in this note only to refer to employer's liability statutes modifying the common-law rules, above discussed, where such statutes have been construed by the courts. These statutes are held not to take away the common-law remedy, but to enlarge the employer's responsibility in certain instances, giving the employee a statutory action. In Ferguson v. Galt Public School Board, 27 Ont. App. Rep. 480, a master was held not liable for injury to a mason's helper, caused by the falling of a gangway negligently put up by the mason. It was sought to hold the employer liable under the workmen's compensation for injuries act (Ont. Rev. Stat. chap. 160), which makes him responsible for an injury caused to a workman (§ 3, subsec. 1), by reason of any defect in the condition or arrangement of the ways, work, machinery, plant, buildings, or premises connected with, intended for, or used in the business of, the employer; or ("subsec. 2) by reason of the negligence of any person in the service of the employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence." The gangway, however, was held not to be a "way" within the meaning of the act, and the mason not to be a person whose orders in respect to the building of the gangway the helper was bound to obey.

In Ryalls v. Mechanics' Mills, 150 Mass. 190, 5 L.R.A. 667, 22 N. E. 766, it was said that, by § 1 of the English employers' liability act (43 & 44 Vict. chap. 42), providing that when "personal injury is caused to a workman (1) by reason of any defect in the condition of the . . . machinery

. . . used in the business of the employer, . . . the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work;" and by § 2, which goes on to say that he shall not be entitled, "under this act," to any right of compensation or remedy against the employer; and by subsec. 1 of § 1, which declares that, "unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the . . . machinery . . . [was] in proper condition,"—it was not intended to codify, as well as to enlarge, a rule of the common law, and to make all actions by workmen for defects in machinery statutory. It purported, at most, only, among other things, to do away with the defense that the defect was due to the negligence of the person intrusted by the master with the supervision of the machinery, and that he was the plaintiff's fellow servant.

The Massachusetts employers' liability act of 1887, chap. 270, which provides that, when personal injury is caused to an employee, who is himself in the exercise of due care, etc., by reason of any defect in the condition of the machinery, etc., "which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or any person in the service of the employer and intrusted," etc., the employee shall have the same right of compensation and remedies against the employer as if he were not an employee, etc.,—does not take away or abridge the servant's common-law right of action. The purport of the whole is only to abolish, perhaps, the defense of implied assumption of risks, and certainly that of negligence of a fellow servant. Ryalls v. Mechanics' Mills, *supra*.

In Prendible v. Connecticut River Mfg. Co. 160 Mass. 131, 35 N. E. 675, it was held competent for the jury to find that a movable staging, put up by the side of a wood-pile to enable workmen to pile up wood, was, when erected, a part of the ways, works, or machinery of the master within the meaning of the employers' liability act 1887, chap. 270, § 1, cls. 1, 2; and, as it appeared that it was negligently constructed under orders of a superintendent, the master was held liable for a resulting injury to a wood piler. The clauses referred to impose liability on the master for injury to workmen. "Subsec. 1. By reason of any defect in the condition of the ways, works, or machinery connected with, or used in the business of, the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or, subsec. 2, by reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence; [or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer]." The bracketed words were inserted by Mass. Stat. 1894, chap. 499, § 1.

In Copithorne v. Hardy, 173 Mass. 400, 53 N. E. 915, it was held that, under the employers' liability act of 1887, chap. 270, a master was liable for injury to a servant by a fall of shafting defectively fastened up by a carpenter, who attended to that kind of work under the orders of the master's superintendent. The court said that this case did not belong to that transitory class for which the master was not responsible beyond furnishing a choice of proper materials or instrumentalities, and that the jury was warranted in finding that it was one of those permanent arrangements, as to which the duty of the employer could not be delegated according to the well-known common-law distinction, or under the statute; that, if it was a defect, it was a defect in the ways, works, and machinery.

In Hutton v. Holdrook, C. & D. Contracting Co. 139 Fed. 734, the court said that under the labor law of New York, chap. 415, Laws 1897, § 18, which provides that "a person employing or directing another to perform labor of any kind in the erection, repairing, altering, or painting of a house, building, or structure, shall not furnish or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, unsuitable, or improper, and which are not so constructed, placed, and operated as to give proper protection to the life and limb of a person so employed or engaged;" and § 19, which provides that "all swinging and stationary scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom, or placed thereon, when in use," etc.,—there was no doubt that a positive prohibition was laid upon the master, without exception on account of the carelessness of his servant; but that the act did not require the master, after furnishing a safe scaffold, to see that his servants used proper care in removing it and in re-erecting it.

A scaffolding used to enable a servant to hang shafting is not used "in the erection, repairing, altering, or painting of a house, building, or structure," within the meaning of the statute. Schapp v. Bloomer, 181 N. Y. 125, 73 N. E. 563.

In Stokes v. New York L. Ins. Co. 98 N. Y. Supp. 135, a servant, who was one of a corps of men hired to clean and keep a building in repair, was hurt by the falling of a temporary platform, an appliance negligently put up on horses by fellow servants. It was held that he could not recover under §§ 18 and 19, chap. 415, Laws of 1897, under the ruling of the last-mentioned case.

The labor law of 1897, chap. 415, §§ 18 and 19, enlarged the duty of the master or employer, and extended it to responsibility for

the safety of the scaffold itself, and thus for the want of care in the details of its construction. Section 18 is a positive prohibition laid upon the master, without exception on account of his ignorance or the carelessness of his servants. Stewart v. Ferguson, 164 N. Y. 553, 58 N. E. 662.

The rule that the duty of a master to his servants, where the details of the construction of a scaffold for their use have been intrusted to his servants, is fully performed by the furnishing of proper materials for the construction of a scaffold, has been changed by § 18 of the labor law. Holloway v. McWilliams, 97 App. Div. 360, 89 N. Y. Supp. 1074.

H. C. S.

MINNESOTA SUPREME COURT.

RE MILLERS' & MANUFACTURERS' INSURANCE COMPANY.

G. W. PARSONS, et al., Claimants, Appts.

(— Minn. —, 106 N. W. 485.)

Insurance—title—leasehold.

1. A fire insurance policy for $3,000 issued January 21, 1903, for a gross premium, was apportioned upon a building, stock, office supplies, etc. Neither written application nor oral representation was made by the applicant, and no inquiries were made by the company. The policy, as delivered and retained, provided: "This policy . . . shall be void . . . if the interest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple."

The building stood on leased ground. A fire occurred August 21, 1903, and the loss was apportioned upon the building, stock, machinery, boiler, and engine house. The company first learned that the building stood on leased ground on September 16, 1903, and never offered or refused to return the premium which had been paid. The company became insolvent, and, in an action against the receivers, the trial court denied the plaintiff any relief, but directed the receivers to return the premium.

Held, (1) that the provision with reference to ownership and title applied to the existing conditions, and not to future changes in title.

Same—duty to disclose.

2. It was incumbent upon the applicant to disclose the nature of his title.

Same—conditions—notice.

3. The insured, by accepting the policy in question, is charged with notice of its contents, and is bound by its conditions.

Same—waiver.

4. The company, by issuing the policy without inquiry, did not waive the conditions as to title and ownership.

Same—facts known.

5. An insurance company cannot take advantage of a condition in its policy to avoid payment of a loss, when the facts which by its terms invalidate the policy were known to it or its agent when it issued the policy. But this rule has no application when the facts were not known. What is not known cannot be waived.

Same—failure to attach—return of premium.

6. When a policy of insurance never attaches, and no risk is assumed, the insured may recover back the premiums, unless he has been guilty of fraud, or the contract is illegal and he is *in pari delicto*. But the insurer is not obliged to return, or offer to return, the premiums which have been paid voluntarily before notice of the fact that the policy is not in force, as a condition precedent to availing itself of its defense to an action on the policy.

Same—entire contract.

7. The contract is entire, and the increase of moral hazard, caused by the condition of the title to the land upon which the building stood, affected the entire property which was destroyed.

(January 12, 1906.)

APPEAL by claimants from an order of the District Court for Hennepin County disallowing their claim against the assets of an insolvent insurance company. Affirmed.

The facts are stated in the opinion.

Messrs. W. A. Kerr and Brown & Kerr, for appellants:

The condition of the policy, in the absence of any written application or inquiry or representation as to title, does not apply to

Headnotes by ELLIOTT, J.

Case Note.—Conditions in policy with respect to title as affected by failure of insurer to make inquiries, in the absence of representations by the insured.—The discussion of the question of the effect of the failure of the insurer to make inquiries, on conditions in the policy with respect to title in the absence of representations by the insured, in the opinion in the case in hand, is so full, and the citation of decisions therein is so copious, that any annotation of the subject would involve needless repetition.

The choice to be made between the conflicting views of the courts that, on the one hand, the insurer will be presumed to have written the policy on its own knowledge and hence to have waived the conditions which would invalidate the policy, and that, on the other hand, in issuing the policy without inquiry it is to be deemed to rely on such conditions to protect its interests, depends on the extent to which each commends itself to the individual idea of justice.

conditions existing at the time of issuing the policy.

McMaster v. New York L. Ins. Co. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10; Thompson v. Phenix Ins. Co. 136 U. S. 287, 54 L. ed. 408, 10 Sup. Ct. Rep. 1019; First Nat. Bank v. Hartford F. Ins. Co. 95 U. S. 673, 24 L. ed. 563; Hoose v. Prescott Ins. Co. 84 Mich. 309, 11 L.R.A. 346, 47 N. W. 587; Hall v. Niagara F. Ins. Co. 93 Mich. 184, 18 L.R.A. 135, 32 Am. St. Rep. 497, 53 N. W. 728; Dooly v. Hanover F. Ins. Co. 16 Wash. 155, 58 Am. St. Rep. 26, 47 Pac. 507; Morotock Ins. Co. v. Rodefer, 92 Va. 747, 53 Am. St. Rep. 848, 24 S. E. 393; Manhattan F. Ins. Co. v. Weill, 28 Gratt. 389, 26 Am. Rep. 364; Philadelphia Tool Co. v. British American Assur. Co. 132 Pa. 236, 19 Am. St. Rep. 596, 19 Atl. 77; Western & A. Pipe Lines v. Home Ins. Co. 145 Pa. 346, 27 Am. St. Rep. 703, 22 Atl. 665; Miotke v. Milwaukee Mechanics' Ins. Co. 113 Mich. 166, 71 N. W. 463; Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302, 25 Am. Rep. 386; Manchester Fire Assur. Co. v. Abrams, 32 C. C. A. 426, 61 U. S. App. 276, 89 Fed. 932; Morrison v. Tennessee M. & F. Ins. Co. 18 Mo. 262, 59 Am. Dec. 299; Hanover F. Ins. Co. v. Bohn, 48 Neb. 743, 58 Am. St. Rep. 719, 67 N. W. 774; Quarrier v. Peabody Ins. Co. 10 W. Va. 507, 27 Am. Rep. 582; Wright v. Fire Ins. Co. 12 Mont. 474, 19 L.R.A. 211, 31 Pac. 87; Sharp v. Scottish Union & Nat. Ins. Co. 136 Cal. 542, 69 Pac. 253, 615; Lancashire Ins. Co. v. Monroe, 101 Ky. 12, 39 S. W. 434; Wood, Ins. ¶ 212, p. 517; May, Ins. ¶ 207; Vankirk v. Citizens' Ins. Co. 79 Wis. 627, 48 N. W. 798; German Mut. Ins. Co. v. Niewedde, 11 Ind. App. 624, 39 N. E. 534.

The insurer is held to have known and waived the conditions relied on by way of defense.

Clark v. Manufacturers' Ins. Co. 8 How. 235, 12 L. ed. 1061; O'Brien v. Ohio Ins. Co. 52 Mich. 131, 17 N. W. 726; Insurance Co. of N. A. v. Bachler, 44 Neb. 549, 62 N. W. 911; Vankirk v. Citizens' Ins. Co. *supra;* Washington Mills Emery Mfg. Co. v. Weymouth & B. Mut. F. Ins. Co. 135 Mass. 503; Philadelphia Tool Co. v. British American Assur. Co. and Manchester Fire Assur. Co. v. Abrams, *supra.*

By failing to tender back the premium promptly upon learning the condition of the title the insurer waived the condition it relies upon.

First Nat. Bank v. Manchester Fire Assur. Co. 64 Minn. 99, 66 N. W. 136; Schreiber v. German-American Hail Ins. Co. 43 Minn. 367, 45 N. W. 708; First Nat. Bank v. Lancashire Ins. Co. 65 Minn. 462, 68 N. W. 1; Phœnix Ins. Co. v. Spiers, 87 Ky. 285, 8 S. W. 456; Phenix Ins. Co. v. Covey, 41 Neb. 724, 60 N. W. 12; Kalmutz v. Northern Mut. Ins. Co. 4 L.R.A.(N.S.) 186 Pa. 571, 40 Atl. 816; Moffitt v. Phenix Ins. Co. 11 Ind. App. 233, 38 N. E. 835; Commercial Assur. Co. v. New Jersey Rubber Co. 61 N. J. Eq. 446, 49 Atl. 155; Joliffe v. Madison Mut. Ins. Co. 39 Wis. 111, 20 Am. Rep. 38; New York L. Ins. Co. v. Eggleston, 96 U. S. 572, 24 L. ed. 841; Lyon v. Travelers' Ins. Co. 55 Mich. 141, 54 Am. Rep. 354, 20 N. W. 829; Mississippi Home Ins. Co. v. Dobbins, 81 Miss. 623, 33 So. 505.

Mr. H. V. Mercer, for respondents:

The insured must himself disclose the title if it be not as covenanted.

Wierengo v. American F. Ins. Co. 98 Mich. 621, 57 N. W. 833; Diffenbaugh v. Union F. Ins. Co. 150 Pa. 270, 30 Am. St. Rep. 805, 24 Atl. 745; Waller v. Northern Assur. Co. 2 McCrary, 637, 10 Fed. 232; Syndicate Ins. Co. v. Bohn, 27 L.R.A. 614, 12 C. C. A. 531, 27 U. S. App. 564, 65 Fed. 165; Columbian Ins. Co. v. Lawrence, 2 Pet. 25, L. ed. 35; Carpenter v. Providence Washington Ins. Co. 16 Pet. 495, 10 L. ed. 1044; New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; Fuller v. Phœnix Ins. Co. 61 Iowa, 350, 16 N. W. 273; Waller v. Northern Assur. Co. 64 Iowa, 101, 19 N. W. 865; Henning v. Western Assur. Co. 77 Iowa, 319, 42 N. W. 308; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Collins v. St. Paul F. & M. Ins. Co. 44 Minn. 440, 46 N. W. 906; Pelican Ins. Co. v. Smith, 92 Ala. 428, 9 So. 327; Weed v. London & L. F. Ins. Co. 116 N. Y. 106, 22 N. E. 229; Liberty Ins. Co. v. Boulden, 96 Ala. 508, 11 So. 771; Brown v. Commercial F. Ins. Co. 86 Ala. 189, 5 So. 500; Phœnix Ins. Co. v. Public Parks Amusement Co. 63 Ark. 187, 37 S. W. 959; Dumas v. Northwestern Nat. Ins. Co. 12 App. D. C. 245, 40 L.R.A. 358; Orient Ins. Co. v. Williamson, 98 Ga. 464, 25 S. E. 560; Crikelair v. Citizens' Ins. Co. 168 Ill. 309, 61 Am. St. Rep. 119, 48 N. E. 167; Geiss v. Franklin Ins. Co. 123 Ind. 172, 18 Am. St. Rep. 324, 24 N. E. 99; Rosenstock v. Mississippi Home Ins. Co. 82 Miss. 674, 35 So. 309; Westchester F. Ins. Co. v. Weaver, 5 L.R.A. 478, 17 Atl. 401, 18 Atl. 1034; Citizens' F. Ins. Secur. & Land Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360; Barnard v. National F. Ins. Co. 27 Mo. App. 26; Grigsby v. German Ins. Co. 40 Mo. App. 276; Hinman v. Hartford F. Ins. Co. 36 Wis. 159; McFetridge v. Phenix Ins. Co. 84 Wis. 200, 54 N. W. 326.

Where the contract has the provisions contained in this policy the contract can be waived only as provided therein.

Johnson v. American Ins. Co. 41 Minn. 396, 43 N. W. 59; Goldin v. Northern Assur. Co. 46 Minn. 471, 49 N. W. 246; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133.

Elliott, J., delivered the opinion of the court:

This is an appeal from an order of the district court approving and confirming the action of the receivers of the Millers' & Manufacturers' Insurance Company in disallowing the claim of Parsons, Rich, & Company against the insolvent corporation. The facts upon which the claim against the company arose are practically agreed upon by the parties. The policy was issued June 21, 1903, and by its terms insured the firm of Parsons, Rich, & Company against loss or damage by fire upon the property described therein in the sum of $1,000 from the date thereof until May 20, 1904. On February 20, 1904, the insurance company became insolvent, and Freeman P. Lane and Hugh V. Mercer were appointed receivers. A fire occurred on August 21, 1903, and the property covered by the policy was partially destroyed. A claim was duly made and filed with and disallowed by the receivers. It is conceded that if there is any liability on the part of the company or the receivers it is for the sum of $830.

The policy in question covered a brick and frame building and additions thereto, located upon certain lots in Newton, Iowa, and used by the insured in connection with its manufacturing business. It also covered the stock and machinery described in detail in the policy. The policy contained the following provisions: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss. . . . This entire policy, unless otherwise provided by agreement indorsed thereon, or added thereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple. . . . This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreement, or condition as may be indorsed thereon, or added thereto, and no officer or agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

No written application was made for the insurance, and no written or oral representations of any kind or character were made by the applicant. When the policy was issued, and until the time of the trial, the title to the lots upon which the insured building was situated was not in Parsons, Rich, & Company, but was in George W. Parsons. This fact was not known to the insurance company or to any of its agents or representatives until after the loss. The fire occurred August 21, 1903, and it appears from a letter written by the adjuster of the company that the actual condition of the title was known to the company on September 16, 1903. The company and the receivers refused to pay the loss, but never returned, or offered to return, or expressed a willingness to return or account for, the amount of the premiums which had been paid by the claimant. On appeal to the district court the action of the receivers was approved and confirmed, but the court directed that the receivers return to the claimant the amount which the company had received as premium under the contract.

The appellant contends: (1) That, in the absence of any inquiry or application or representation, the condition in the policy as to title and ownership did not apply to the then existing condition of the title, but referred only to subsequent changes in the title. (2) That under the circumstances the insurer should be held to have known of the actual condition of the title, and to have waived the provisions of the policy with reference to sole title and ownership at the time of the issuance of the policy. (3) That the policy was at the most only voidable at the option of the insurer, and if it elected to declare it void the declaration must relate back to the inception of the contract and be accompanied by a return or tender of the premium which had been received; that by failing to promptly tender back the premium upon learning the condition of the title the insurance company waived its right to insist upon the condition. (4) That the condition is ambiguous, and not applicable to a policy which covers both stock and buildings.

1. The policy provides that "this entire policy . . . shall be void . . . if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." There are some authorities which hold that

this provision refers only to subsequent changes in the title, but they rest upon an unnatural construction of the language of the policy. The words used refer to the present, and not to the future, and the conditions relate to facts as they exist at the date of the policy. Rosenstock v. Mississippi Home Ins. Co. 82 Miss. 678, 35 So. 309; Liverpool & L. & G. Ins. Co. v. Cochran, 77 Miss. 34, 78 Am. St. Rep. 524, 26 So. 932; Manhattan F. Ins. Co. v. Weill, 28 Gratt. 389, 26 Am. Rep. 364; Collins v. London Assur. Corp. 165 Pa. 298, 30 Atl. 924. The entire policy is not set out in the record, but we presume that it contains the usual provisions with reference to the effect of alienation and change of title. The contract was made in Iowa, and the form commonly in use in that state provides that it "shall be void if any change or diminution other than by the death of the insured take place in the interest, title, or possession of the subject of the insurance." The legal effect of future changes in the title is provided for by this provision, and the provisions relating to title and ownership refer to conditions at the time of the inception of the contract. It will be noted that in Hoose v. Prescott Ins. Co. 84 Mich. 309, 11 L.R.A. 340, 47 N. W. 587, cited by appellant, the condition was that the policy should be void "if any change take place in the title," etc. The court held that the language of the policy itself referred the condition to matters arising after the insurance went into effect.

2. The form of policy now in common use requires the insured to disclose the extent and nature of his interest in the property, as it is a matter which largely influences underwriters in taking or rejecting risks and estimating and figuring premiums. Therefore a provision that the policy shall be void if the insured is not the sole and unconditional owner of the property is reasonable and will be given full force and effect, unless it is waived by some act on the part of the insurer. Phœnix Ins. Co. v. Public Parks Amusement Co. 63 Ark. 187, 37 S. W. 959; East Texas F. Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713; Dow v. National Assur. Co. 26 R. I. 379, 67 L.R.A. 479, 106 Am. St. Rep. 728, 58 Atl. 999. But it is contended that, where the policy is issued by an insurance company without a written application, the company must be held to have waived the condition of the policy as to title and ownership. This does not appear to be an open question in this jurisdiction, as we have in two instances held contrary to the appellant's contention.

In McFarland v. St. Paul F. & M. Ins. Co. 46 Minn. 519, 49 N. W. 253, the policy was issued without a written application, and without inquiry by the agent of the insurance company or representations by the insured. It contained a provision to the effect that, if the insured should keep or use gasolene upon the premises without the written permission of the insurer, the policy should be void. It was contended that, when an insurance company issues a fire policy without inquiry or without application or representations, it waives knowledge as to any existing use of the property which it could have ascertained by reasonable investigation although by the terms of the policy such a use is expressly prohibited, and there is nothing about the description of the property which necessarily implies or indicates that it may be used in a prohibited way. But the court said: "The defendant insured the plaintiff's dwelling house upon an express condition that the use of gasolene should terminate the contract. . . . The general rule is well stated to be that where there is no application the insured is bound by the conditions found in the policy, which he has accepted and retained without objection. Swan v. Watertown F. Ins. Co. 96 Pa. 37; May, Ins. § 167. Exceptions may be found to this rule, but there are none which can be of service to appellant; for the policy alone, unmodified by representations or in any other manner, was the contract existing between the parties. The conclusive effect of a condition in an insurance policy under like circumstances was in fact determined in the recently decided case of Collins v. St. Paul F. & M. Ins. Co. 44 Minn. 440, 46 N. W. 906." In the case cited, the policy contained a condition precisely like that in the one now under consideration. The action was brought to reform the policy. "Even if so reformed," said Chief Justice Gilfillan, "no recovery could be had, for the policy provides that the company shall not be liable 'if the interest of the assured in the property is not one of absolute and sole ownership:' and it appeared beyond controversy that the plaintiff had only a life interest in the property. Of course she had an insurable interest, but that interest was not insured. The policy expressly excluded from its operation any interest other than the absolute and sole ownership." In the McFarland Case attention was called to the fact there was no attempt on the trial of the Collins Case to show that the plaintiff's application for insurance contained any questions or answers in respect to the title. The right to the recovery was successfully resisted by the insurance company solely on the conditions of the policy.

It is claimed that the company waived the right to insist upon the breach of condition by issuing the policy without making full inquiries as to the true facts. We are unable to see any grounds for either a waiver

or an estoppel in the facts disclosed by this record. A waiver means the intentional relinquishment of a known right. Dawson v. Shillock, 29 Minn. 191, 12 N. W. 526; Fraser v. Ætna L. Ins. Co. 114 Wis. 510, 523, 90 N. W. 476. As said in Stackhouse v. Barnston, 10 Ves. Jr. 466, a mere waiver signifies nothing more that an expression of an intention not to insist upon a known right. In Warren v. Crane, 50 Mich. 300, 15 N. W. 465, it was said that waiver is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted on. Both intent and knowledge, actual or constructive, of the facts, are therefore essential elements. Schreiber v. German-American Hail Ins. Co. 43 Minn. 367, 45 N. W. 708; Pence v. Langdon, 99 U. S. 578, 25 L. ed. 420. The intent may be inferred from facts and circumstances, as well as found in declarations of the parties, and the knowledge may also be either actual or constructive. Fraser v. Ætna L. Ins. Co. 114 Wis. 510, 90 N. W. 476. But, as said in St. Paul F. & M. Ins. Co. v. Parsons, 47 Minn. 352, 50 N. W. 240: "Nor, in general, where the facts do not constitute an estoppel, should one who neither knows the fact of the forfeiture nor is chargeable with fault in not knowing it be held to have waived the same by acts or conduct not intended to have such an effect."

There are many cases relating to insurance in which waiver has been, either intentionally or through a failure to distinguish between two entirely different things, confused or identified with estoppel. Indeed, some writers seem to imply that the words "waiver" and "estoppel" lose their legal meaning as soon as they are invoked in cases between the parties to a contract of insurance. Mr. Justice Field in Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387, said: "The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it; and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions." See also May, Ins. §§ 469, 507. Waiver and estoppel are treated as the same thing in Union Nat. Bank v. Manhattan L. Ins. Co. 52 La. Ann. 36, 26 So. 800. In Grabbs v. Farmers' Mut. F. Ins. Asso. 125 N. C. 389, 34 S. E. 503, it was said that an implied waiver is in the nature of an estoppel *in pais*. In Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 339, 46 L. ed. 213, 226, 22 Sup. Ct. Rep. 133, 144, the court quoted the following language of Justice Sharswood from Elliott v. Lycoming County Mut. Ins. Co. 66 Pa. 22, 5 Am. Rep. 323: "Undoubtedly, if the company, after notice or knowledge of the over insurance, treated the contract as subsisting by making and collecting assessments under it from the assured, they could not afterwards set up its forfeiture. It would be an estoppel, which is the true ground upon which the doctrine of waiver in such cases rests." In Rice v. Fidelity & D. Co. 43 C. C. A. 270, 278, 103 Fed. 427, Judge Sanborn said: "But a waiver is either the result of an intentional relinquishment of a known right or an estoppel from enforcing it. To constitute a waiver there must be an intention to relinquish the right, or there must be words or acts calculated to induce the other contracting party to believe, and which deceived him into the belief, that the holder of the right has abandoned it; and the party deceived must have acted on his belief, so that an assertion of the right will inflict upon him a loss he would not have sustained if its holder had not appeared to relinquish it."

In some cases it is said that while a waiver of forfeiture need not be based on a technical estoppel, yet, in the absence of an express waiver, some of the elements of estoppel must exist. Armstrong v. Agricultural Ins. Co. 130 N. Y. 565, 29 N. E. 991; Ronald v. Mutual Reserve Fund Life Asso. 132 N. Y. 378, 30 N. E. 739; Germania F. Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 922, 66 N. E. 1003; Gibson Electric Co. v. Liverpool & L. & G. Ins. Co. 159 N. Y. 418, 54 N. E. 23. Again, it has been said that a waiver must be supported by an agreement founded on valuable consideration, or the act relied upon must be such as to estop a party from insisting upon the performance of a contract or forfeiture of the condition. Ripley v. Ætna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362; New York Cent. Ins. Co. v. Watson, 23 Mich. 486; McFarland v. Peabody Ins. Co. 6 W. Va. 430; Merchants' Mut. Ins. Co. v. Lacroix, 45 Tex. 168; Northwestern Mut. L. Ins. Co. v. Amerman, 119 Ill. 329, 59 Am. Rep. 799, 10 N. E. 225.

This court has always recognized the distinction between waiver and estoppel, and holds that a waiver need not be based either upon a new agreement or an estoppel. Thus in Mee v. Bankers' Life Asso. 69 Minn. 210, 72 N. W. 74, it was said: "The law seems to be well settled, and has frequently been acted upon, that if, in negotiations or transactions with the assured after knowledge of the forfeiture, the insurer recognizes the continued validity of the policy, or does acts based thereon, the forfeiture is, as a matter of law, waived, and such waiver need not be based on any new agreement or on estoppel."

Mr. Justice Clopton also quotes with approval the following language from Queen Ins. Co. v. Young, 86 Ala. 424, 11 Am. St. Rep. 51, 5 So. 116: "Though a waiver may be in the nature of an estoppel and maintained on similar principles, they are not convertible terms. The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture. A waiver may be created by acts, conduct, or declarations, insufficient to create a technical estoppel."

In the present case it is not claimed that there is any evidence even tending to show that any agent or officer of the insurance company had any information as to the condition of the title to the real estate before the policy was issued. We are asked to presume that the insurer, by issuing the policy without investigation on its part, intended to waive facts and conditions of which it had neither actual nor constructive notice. The great weight of authority supports the rule that an insurance company will not be permitted to take advantage of a condition contained in a policy to avoid payment of a loss, when the facts rendering the policy void by its terms were known to the insurer directly or through its agent at the time it issued the policy and accepted the premium. This doctrine rests upon the ground that facts made known to an agent of the company, when acting as such, are in law known to the principal, and that a fraud would be perpetrated if an insurance company, through its agent, was allowed to deliver its policy and accept the premium with knowledge of facts which, under its provisions, rendered it void *ab initio*, and thereafter assert its invalidity. Brandup v. St. Paul F. & M. Ins. Co. 27 Minn. 393, 7 N. W. 735; Wilson v. Minnesota Farmers' Mut. F. Ins. Asso. 36 Minn. 112, 1 Am. St. Rep. 659, 30 N. W. 401; First Nat. Bank v. American Cent. Ins. Co. 58 Minn. 492, 60 N. W. 345; Anderson v. Manchester Fire Assur. Co. 59 Minn. 182, 195, 28 L.R.A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; Otte v. Hartford L. Ins. Co. 88 Minn. 423, 97 Am. St. Rep. 532, 93 N. W. 608; Andrus v. Maryland Casualty Co. 91 Minn. 358, 98 N. W. 200; Hartley v. Pennsylvania F. Ins. Co. 91 Minn. 382, 103 Am. St. Rep. 512, 98 N. W. 198; Dwelling House Ins. Co. v. Brodie, 52 Ark. 11, 4 L.R.A. 458, 11 S. W. 1016; Forward v. Continental Ins. Co. 142 N. Y. 382, 25 L.R.A. 637, 37 N.E. 615; Hamilton v. Dwelling House Ins. Co. 98 Mich. 535, 22 L.R.A. 527, 57 N. W. 735; Michigan Shingle Co. v. State Invest. & Ins. Co. 94 Mich. 389, 22 L.R.A. 319, 53 N. W. 945; Dailey v. Preferred Masonic Mut. Acci. Asso. 102 Mich. 289, 26 L.R.A. 171, 57 N. W. 184, 60 N. W. 694; Reed v. Equitable F. & M. Ins. Co. 17 R. I. 785, 18 L.R.A. 496, 24 Atl. 833; Home Ins. Co. v. Mendenhall, 164 Ill. 458, 36 L.R.A. 374, 45 N. E. 1078; Virginia F. & M. Ins. Co. v. Cummings (Tex. Civ. App.) 78 S. W. 716; Mesterman v. Home Mut. Ins. Co. 5 Wash. 524, 34 Am. St. Rep. 877, 32 Pac. 458; Independent School District v. Fidelity Ins. Co. 113 Iowa, 65, 84 N. W. 956; Fireman's Fund Ins. Co. v. Norwood, 16 C. C. A. 136, 32 U. S. App. 490, 69 Fed. 71; Northern Assur. Co. v. Grand View Bldg. Asso. 41 C. C. A. 207, 101 Fed. 77 (Reversed in 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, on the ground that the waiver could only be effected in writing as provided for in the policy); Hartford Ins. Co. v. Haas, 87 Ky. 531, 2 L. R.A. 64, 9 S. W. 720; Hartford F. Ins. Co. v. Redding (Fla.) 67 L.R.A. 518, 37 So. 62; 4 Current Law, p. 202.

In all these cases there was evidence tending to show that the insurance company or its agent had knowledge of the facts and conditions before and at the time the policy was issued. The rule meets with our entire approval. But in the present case neither the company nor its agent had knowledge of the conditions, nor are there any facts upon which to base a waiver, unless they are to be presumed from the mere fact that the policy was issued. We are aware that there are cases decided by courts of high standing to the effect that this alone is sufficient to justify the inference that the insurer acted on its own knowledge and issued the policy with all the information it considered important for it to acquire. A strong statement of this view is found in Manchester Fire Assur. Co. v. Abrams, 32 C. C. A. 426, 61 U. S. App. 276, 89 Fed. 932, where it is said: "Where the assured has an insurable interest in the property, and in good faith applies for insurance upon the same, and makes no actual misrepresentation or concealment of his interest therein, and the insurance company refrains from making inquiry concerning his interest, and issues a policy to him, and accepts and retains his premium, the company must be presumed to have knowledge of the condition of his title and to assure the property with such knowledge." So, in Philadelphia Tool Co. v. British American Assur. Co. 132 Pa. 236, 19 Am. St. Rep. 596, 19 Atl. 77, it was said that "we ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer, and intended to cover in good faith the interest which the insured had in the building." This general proposition is supported to a greater or less extent by the decision or by general language used in Hoose v. Prescott Ins. Co. 84 Mich. 309, 11 L.R.A. 346, 47 N. W. 587; Hall v. Niagara F. Ins. Co. 93 Mich. 184, 18 L.R.A. 135, 32 Am. St.

Rep. 497, 53 N. W. 727; Miotke v. Milwaukee Mechanics' Ins. Co. 113 Mich. 166, 71 N. W. 463; Dooly v. Hanover F. Ins. Co. 16 Wash. 155, 58 Am. St. Rep. 26, 47 Pac. 507; Union Assur. Soc. v. Nalls, 101 Va. 613, 99 Am. St. Rep. 926, 44 S. E. 896; Morotock Ins. Co. v. Rodefer, 92 Va. 747, 53 Am. St. Rep. 846, 24 S. E. 393; Manhattan F. Ins. Co. v. Weill, 28 Gratt. 389, 26 Am. Rep. 364; Morrison v. Tennessee M. & F. Ins. Co. 18 Mo. 262, 59 Am. Dec. 299; Hanover F. Ins. Co. v. Bohn, 48 Neb. 743, 58 Am. St. Rep. 719, 67 N. W. 774; German Ins. & Sav. Inst. v. Kline, 44 Neb. 395, 62 N. W. 857; Phenix Ins. Co. v. Fuller, 53 Neb. 811, 40 L.R.A. 408, 68 Am. St. Rep. 539, 74 N. W. 269; Farmers' & M. Ins. Co. v. Mickel (Neb.) 100 N. W. 130; Wright v. Fire Ins. Co. 12 Mont. 474, 19 L.R.A. 211, 31 Pac. 87; Sharp v. Scottish Union & Nat. Ins. Co. 136 Cal. 542, 69 Pac. 253, 615; Lancashire Ins. Co. v. Monroe, 101 Ky. 12, 39 S. W. 434; German Mut. Ins. Co. v. Niewedde, 11 Ind. App. 624, 39 N. E. 534; Glens Falls Ins. Co. v. Michael (Ind.) 74 N. E. 964; Allesina v. London Ins. Co. 45 Or. 441, 78 Pac. 392; Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 213, 15 S. E. 562; Arthur v. Palatine Ins. Co. 35 Or. 27, 76 Am. St. Rep. 450, 57 Pac. 62; Com. v. Hide & Leather Ins. Co. 112 Mass. 136, 17 Am. Rep. 72; Georgia Home Ins. Co. v. Holmes, 75 Miss. 390, 65 Am. St. Rep. 611, 23 So. 183; Peet v. Dakota F. & M. Ins. Co. 1 S. D. 462, 47 N. W. 532; German Ins. Co. v. Davis, 6 Kan. App. 268, 51 Pac. 60; New Jersey Rubber Co. v. Commercial Union Assur. Co. 64 N. J. L. 580, 46 Atl. 777, 779. See 3 Cooley, Briefs on Insurance, p. 2630; Wright v. Fire Ins. Co. 12 Mont. 474, 19 L. R. A. 211, 31 Pac. 87; Neher v. Western Assur. Co. (Wash.) 82 Pac. 166 (two judges dissenting), and Manchester Fire Assur. Co. v. Abrams, 32 C. C. A. 426, 61 U. S. App. 276, 89 Fed. 932, supporting the appellant's contention. A careful examination of many of these cases will show that they are not in point. In some of them it appears that the company, through its agent, had actual knowledge of the condition of the title before the policy was issued, and this, of course, distinguishes them from the present case. Others rest upon the general doctrine of concealment, which has no application when the defense rests upon a breach of a condition precedent contained in the policy. In Glens Falls Ins. Co. v. Michael, *supra*, there is a strong dissenting opinion by Mr. Justice Gillett, and in Sharp v. Scottish Union & Nat. Ins. Co. *supra*, Beatty, Ch. J., filed a dissenting opinion in which he said: "The doctrine quoted was applied in cases where it was affirmatively proved and expressly found that the material fact was known to the insurer. Here it is extended to a case in which the insurer knew nothing of such fact, upon the ground, apparently, that it should have made inquiry as to the truth of the claim implied in the request of McBride that the company would insure his house. This is a wholly unwarranted extension of a doctrine sufficiently liberal as heretofore applied, and is against the decided weight of authority."

The Michigan court approves the doctrine in general language, but it will be noted that in Hoose v. Prescott Ins. Co. *supra*, the agent had full and actual knowledge of the fact that the building insured stood on leased ground. In Hall v. Niagara F. Ins. Co. *supra*, there was a waiver of the condition as to the title by consent of the agent subsequently given to a transfer of the policy to a person who had acquired the fee-simple title. In Miotke v. Milwaukee Mechanics' Ins. Co. *supra*, the insured was an ignorant foreigner who had not sufficient knowledge of the English language to enable him to fill out the blank in the application. The solicitor for the insurance company left the answer to the question blank and informed his superior, the agent of the company, of the fact, before the policy issued, and was told that he would "fix it up." The solicitor, who was the agent of the company, had full information as to the condition of the plaintiff's title, and it was very properly held that to permit the company to assert the forfeiture under such circumstances would be a fraud upon the insured. There were ample facts upon which to base an estoppel. In Morotock Ins. Co. v. Rodefer, *supra*, it was held that the condition relating to the sole and unconditional ownership of the property was not broken by the fact that there was a mortgage on the property at the time the policy was issued. Such condition was said to refer, not to the legal title, but to the interest of the insured in the property. In Manhattan F. Ins. Co. v. Weill, *supra*, the agent of the insurance company knew that the property stood upon leased ground. Philadelphia Tool Co. v. British American Assur. Co. *supra*, in general language supports the theory contended for the appellant. In Western & A. Pipe Lines v. Home Ins. Co. 145 Pa. 346, 27 Am. St. Rep. 703, 22 Atl. 665, the court said: "It is not even pretended that there was any fraudulent concealment of ownership of the property, or that any untruthful representation was made upon the faith of which the policy was issued; nor is it claimed that the defendant company was not fully aware of the exact situation and ownership of the oil when it accepted the risk." In Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302, 25 Am. Rep. 386, the insured stated the fact that the property stood on leased ground to the agent of the insurance

company, but neglected to make it appear in the policy; and, as said by the court, "it would be monstrous to hold that the company might make such an omission, whatever the purpose, deliver it to an illiterate and ignorant person who relied upon the fairness and integrity of the agents of the company, to defeat the assured, because they failed in good faith to insert information fairly given." Morrison v. Tennessee M. & F. Ins. Co. 18 Mo. 262, 59 Am. Dec. 299, merely states the general rule that a failure to disclose matters with reference to which no inquiries are made, when not fraudulent, is not in itself fraudulent concealment which will invalidate a policy. In Quarrier v. Peabody Ins. Co. 10 W. Va. 507, 27 Am. Rep. 582, it was held that the existence of a deed of trust did not violate the condition as to sole and unconditional ownership. The insured simply said that the property was his, and the mere fact that there was a lien upon it did not prevent it from being his or render the statements untrue. In Georgia Home Ins. Co. v. Holmes, *supra*, it appeared that the appellant asked the agent of the company to furnish an application, and to inspect the property. The agent did not comply with these requests, but answered that he knew the property. Woods, Ch. J., said: "This is a case, then, in which no application—no formal application—was made, because the agent held it unnecessary, inasmuch as he knew about the condition of the property; and a case in which appellee did not know there was any anti-mortgage clause contained in the policy until after the loss; and the question is whether the company shall now be permitted to repudiate its contract made, not upon any misrepresentations, or even representations of the insured, but upon its own knowledge of the condition of the property." Vankirk v. Citizens' Ins. Co. 79 Wis. 627, 48 N. W. 798, applies the general doctrine of concealment. German Mut. Ins. Co. v. Niewedde, 11 Ind. App. 624, 39 N. E. 534, was apparently overruled by Sisk v. Citizens' Ins. Co. 16 Ind. App. 565, 45 N. E. 804, which in turn was overruled by the recent case of Glens Falls Ins. Co. v. Michael (Ind.) 74 N. E. 964, in which a divided court held that, in the absence of a written application, where no questions are asked and no statements made, it will be presumed that the insurer had knowledge of the condition of the insured's title and, by issuing the policy with knowledge thus imputed, waived the provisions requiring sole and unconditional ownership in fee simple.

Short v. Home Ins. Co. 90 N. Y. 16, 43 Am. Rep. 138, seems to have been largely controlled by the fact that the agent of the insurance company testified that it was his habit to make inquiries regarding the condition of the property upon which he was asked to place insurance. The court said: "The agent of the defendant [company] testified that, for the purpose of making out the policy when no written application is presented, he makes inquiries and memoranda of such matters as he deems important and to suit himself, and that he did so in this case. . . . It was a question of fact, for the jury to determine, whether the defendant's agent knew the condition of the premises, or regarded it as of any consequence whether the premises were occupied or otherwise, and made the insurance without any reference whatever to the subject of occupation." Washington Mills Emery Mfg. Co. v. Weymouth & B. Mut. F. Ins. Co. 135 Mass. 503, rests upon the general doctrine of concealment. This is also true of Lancaster Ins. Co. v. Monroe, 101 Ky. 12, 39 S. W. 434. But from the language used in this case, and in Fireman's Fund Ins. Co. v. Meschendorf, 14 Ky. L. Rep. 757, it is apparent that the Kentucky court accepts the doctrine contended for by the appellant.

On the other hand, the rule established by this court in the Collins and McFarland Cases is approved and applies in Syndicate Ins. Co. v. Bohn, 27 L.R.A. 614, 12 C. C. A. 531, 27 U. S. App. 564, 65 Fed. 165; Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705; Georgia Home Ins. Co. v. Rosenfield, 37 C. C. A. 96, 95 Fed. 358; Rosenstock v. Mississippi Home Ins. Co. 82 Miss. 674, 35 So. 309; Orient Ins. Co. v. Williamson, 98 Ga. 464, 25 S. E. 560; Ætna Ins. Co. v. Holcomb, 89 Tex. 404, 34 S. W. 915; Phœnix Ins. Co. v. Public Parks Amusement Co. 63 Ark. 187, 37 S. W. 959; Hebner v. Palatine Ins. Co. 55 Ill. App. 275; Dumas v. Northwestern Nat. Ins. Co. 12 App. D. C. 245, 40 L.R.A. 358; Phenix Ins. Co. v. Searles, 100 Ga. 97, 27 S. E. 779; Barnard v. National F. Ins. Co. 27 Mo. App. 26; Mers v. Franklin Ins. Co. 68 Mo. 127; Fitchburg Sav. Bank v. Amazon Ins. Co. 125 Mass. 431; Waller v. Northern Assur. Co. 2 McCrary, 637, 10 Fed. 232; Dude v. Home Ins. Co. 20 Pa. Super. Ct. 244 ("The question is not whether the insured had an insurable interest, but whether he had the interest described in the policy"), distinguishing Philadelphia Tool Co. v. British American Assur. Co. 132 Pa. 236, 19 Am. St. Rep. 596, 19 Atl. 77; Brown v. Commercial F. Ins. Co. 86 Ala. 189, 5 So. 500; Liberty Ins. Co. v. Boulden, 96 Ala. 508, 11 So. 771; Hinman v. Hartford F. Ins. Co. 36 Wis. 159; Geiss v. Franklin Ins. Co. 123 Ind. 172, 18 Am. St. Rep. 324, 24 N. E. 99: Allesina v. London Ins. Co. 45 Or. 441, 78 Pac. 392; Weed v. London & L. F. Ins. Co. 116 N. Y. 166, 22 N. E. 229. In Syndicate Ins. Co. v. Bohn, 27 L.R.A. 614, 12 C. C. A.

531, 27 U. S. App. 564, 65 Fed. 165, the United States circuit court of appeals for this circuit said: "It is contended that the contracts in these policies, which exclude the Bohns from insurance under them upon any interest but that of unconditional ownership, are without binding force, because no inquiry respecting their title was made by the companies, and no statement concerning it was made by the Bohns, when these policies were issued. But neither inquiry nor statement before the issue of the policies was requisite to the validity of these contracts. The policies themselves containing, as they did, the contracts that they should be void if the interest of the assured had not been truly stated to the company, or if it was not truly stated in the policy, or if it was not the sole and unconditional ownership, and a description of it was not indorsed on the policy, were pointed inquiries of the assured whether their interest was the sole and unconditional ownership of the property described, and their silence and acceptance of the policies was the answer. The policies themselves were notice to the Bohns that the companies deemed their interest that of unconditional ownership, that they insured them against loss to that interest only, and that they expressly excluded every other interest from the insurance unless the Bohns immediately notified them that they held a different interest, and caused a true description of it to be written into or indorsed upon the policies. The silent acceptance of the policies by the Bohns closed these contracts, and bound them to the agreement tendered by the policies, that every interest of theirs but that of unconditional ownership was excluded from the promised indemnity. Columbian Ins. Co. v. Lawrence, 2 Pet. 25, 49, 7 L. ed. 335, 344; Waller v. Northern Assur. Co. *supra;* Collins v. St. Paul F. & M. Ins. Co. 44 Minn. 440, 46 N. W. 906; Lasher v. St. Joseph F. & M. Ins. Co. 86 N. Y. 423, 427; Weed v. London & L. F. Ins. Co. 116 N. Y. 106, 113, 22 N. E. 229; Diffenbaugh v. New Hampshire F. Ins. Co. 150 Pa. 274, 24 Atl. 746; Fuller v. Springfield F. & M. Ins. Co. 61 Iowa, 350, 16 N. W. 273; Waller v. Northern Assur. Co. 64 Iowa, 101, 19 N. W. 865; Mers v. Franklin Ins. Co. 68 Mo. 127, 132; McFetridge v. Phenix Ins. Co. 84 Wis. 200, 54 N. W. 326; Henning v. Western Assur. Co. 77 Iowa, 319, 42 N. W. 308; Scottish Union & Nat. Ins. Co. v. Boulden, 96 Ala. 508, 11 So. 771; Pelican Ins. Co. v. Smith, 92 Ala. 428, 9 So. 327."

In Orient Ins. Co. v. Williamson, *supra*, Chief Justice Simmons said: "The acceptance by the insured of a policy containing the stipulation above quoted amounted to a representation on her part that she had truly stated therein her interest in the property insured, and that her interest was that of unconditional and sole ownership; and if, at that time, the title of the property was in another, to whom she had conveyed it by deed in fee simple, the representation was untrue, and according to the terms of the contract the policy was void." In answer to the claim that the condition referred to would not render the policy void unless inquiry as to the title was made of the insured, the court quoted with approval the language of Judge Sanborn in Syndicate Ins. Co. v. Bohn, *supra*, and said: "It is true that where an insurance company issues a policy with knowledge of the true state of title it cannot avail itself of the defense which the company in this case was seeking to set up by the amendment to its answer; such knowledge being held to amount to a waiver. . . . But the knowledge here referred to is actual knowledge." The language of Mr. Justice Morris in Dumas v. Northwestern Nat. Ins. Co. *supra*, may very well be referred to the case we have under consideration. The insured did not make any fraudulent concealment of the facts and the insurer asked for no information. The court said: "This is not a case of representation or misrepresentation, of failure to give information, or failure to elicit it by proper inquiry. The parties have deliberately put it into their contract, and have made it an essential condition of that contract, that the contract itself should not be binding if there was any mortgage on the property or the title was not that of unconditional ownership. There was no inhibition by law against the insertion of such a condition in the contract; and it may well be that its insertion was a matter of precaution, to guard as well against the negligence or failure of agents to elicit proper information as against the negligence or failure, not fraudulent, of persons seeking insurance to give such information. The condition is not illegal and does not contravene any rule of public policy; and even if its practical effect should be held to be to throw upon the insured party the burden of giving voluntarily the information which otherwise the insurer would have been required to elicit by proper inquiry, we know of no rule of law that would preclude parties from contracting to that effect, if they so desire."

The views expressed in these cases are in conformity with the previous decisions of this court, and we find no reasons for departing therefrom. In the case now under consideration there was no written application, no questions were asked by the agent, and no representations, other than by implication, were made by the applicant in regard to the ownership of the property or the

condition of the title; and there is nothing to show that the agent had any knowledge of the actual facts. The policy in question, having been issued to Parsons, Rich, & Company without the company or its agent having any information or knowledge of the fact that the title of the lots upon which the insured building stood was not in the insured, was void *ab initio* by its own terms, and is unenforceable unless the insurer, after the loss, waived its right to assert the forfeiture. The difficulty with the cases which support the appellant's contention is that they raise an estoppel or imply a waiver from conditions of which the insurer had no knowledge. The waiver rests on an implication arising out of an assumption. If the insurer had knowledge, actual or implied, through its agent, when the policy issued, that the existing conditions created a ground of forfeiture under the terms of the policy, a basis for waiver would have existed, and the insurer could not thereafter have claimed a forfeiture. Issuing the policy with such knowledge would have been inconsistent with an honest intention to claim a forfeiture for a breach of the condition.

We are not inclined to restrict the application of the doctrine of waiver as heretofore applied by this court to the conditions contained in insurance contracts. It has been an efficient means by which to prevent insurers from treating the contract as valid when it is to their interest, and repudiating it when called upon to respond to its burdens, thus playing fast and loose with the insured. But the rule contended for seems to us to require an unreasonable extension of the doctrine. The written contract says, in language plain and unambiguous, that it shall be of no force and effect unless certain conditions then exist, and the existing facts are necessarily known to the insured. It is argued that the law must assume that all such conditions were known to the company, and, after having assumed this material and essential fact, again presume that it intended to waive any results arising therefrom to its advantage. But the insured knew the condition of his title, and, when he received the policy, must, if he read it, have known that the insurer had entered into the contract upon the understanding that the applicant had full ownership and a fee simple title to the lots upon which the building stood. The modern fire insurance policy is practically free from the stipulations, conditions, and provisions set in infinitesimal type and hidden away in elusive locations, which served as traps for the guileless and unwary of the past generations of insured. But the most of these objectionable features have been effectually eliminated by the courts or legislatures, and there seems to be no good reason why the present insurance contracts, even while giving the insured the benefit of the doubt when ambiguous language is used, should not be treated like other written contracts between responsible parties. Kollitz v. Equitable Mut. F. Ins. Co. 92 Minn. 234, 99 N. W. 892; Quinlan v. Providence Washington Ins. Co. 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31.

Unless he has been misled by some act of the insurer, a person who accepts and retains the possession of an insurance policy is bound to know its contents. McFarland v. St. Paul F. & M. Ins. Co. 46 Minn. 519, 49 N. W. 253; Bostwick v. Mutual L. Ins. Co. 116 Wis. 392, 67 L.R.A. 705, annotated, 89 N. W. 538, 92 N. W. 246; Blunt v. Fidelity & C. Co. 145 Cal. 268, 67 L.R.A. 793, 104 Am. St. Rep. 34, 78 Pac. 729. The reason for this rule is nowhere better stated than in Wierengo v. American F. Ins. Co. 98 Mich. 621, 57 N. W. 833. "In this case," said Mr. Justice Grant, "where there was no written application nor any terms of the policy agreed upon by parol except the amount, the insured must be charged with knowledge that the policy he receives contains the contract binding upon him as well as the insurer. He must know that the policy, which is the contract, contains the usual terms of such instruments. He may not lay it aside without reading, and when he seeks to recover upon it, and finds that under its plain provisions he cannot recover, say: 'I did not read it. The insurer did not tell me what it contained. I did not know that it was necessary to tell him about the title and condition of my property and therefore I am not bound by its terms.' . . . Certainly the insured must be held to some degree of diligence in obtaining knowledge of the contracts to which they are parties. Ignorance will not relieve a party from his contract obligations. The law only relieves him therefrom in cases of fraud, mistake, waiver, or estoppel. An insurer is not required by the law to inquire into the condition of the title to the property insured, or to inform him . . . of all the conditions and terms of the policy to be issued, or to read it to him, or inform him of its contents. When received and accepted without objection, he must be held bound by its terms, unless these terms are waived by the insurer. This is the law of contracts, and there is no reason or authority for holding that an insurance contract is an exception thereto. A deed is the contract between the grantor and the grantee, although the grantee does not sign it. Its terms and conditions are binding upon the grantee, and he cannot avoid them, except for one of the reasons above stated. If he accepts a deed without read-

ing it, and there is no fraud on the part of the grantor or mutual mistake as to its terms, he is bound by it. If a mortgagee accepts a mortgage without a covenant against prior encumbrances, or if it contains an express provision that it is subject to prior encumbrances, it is binding upon him, unless the covenant against encumbrances was omitted by fraud or mistake. The same rule applies to insurance contracts."

3. The fact that the building in question stood upon leased ground was not known to the insurance company until after the loss. The fire occurred on the 21st of August, 1903, and it appears that the adjuster of the company knew of the condition of the title at least as early as the 16th of the following September. The action to recover on the policy was commenced a year later, and, as far as the evidence shows, the company never returned, offered to return, or refused to return, the premium it had received. The trial court held that the contract of insurance was void, and that the plaintiffs were not entitled to recover the amount of the loss, but directed that the receivers of the company return to the plaintiffs the entire amount which they had paid as premium. It is claimed that the defendant waived the right to avail itself of its defense because of its failure to return the premium within a reasonable time after it learned that the policy was not in force. We think this contention rests upon a misconception of the duty of the insurer and of the application of the doctrine of waiver and estoppel. Georgia Home Ins. Co. v. Rosenfield, 37 C. C. A. 96, 95 Fed. 358. The most that can properly be claimed is that the retention of the premium is evidence of an intention not to claim that the policy is invalid. As said in Fraser v. Ætna L. Ins. Co. 114 Wis. 510, 90 N. W. 476, the mere retention of the money does not under all circumstances indicate an intention to waive the forfeiture. See also Lewis v. Phœnix Mut. L. Ins. Co. 44 Conn. 72. This intention to recognize the contract conclusively appears when the insurer asserts a claim to premiums after it has learned of the breach of condition, or after it has acquired such knowledge retains money which it has forced the insured to deliver to it. Schreiber v. German American Hail Ins. Co. 43 Minn. 367, 45 N. W. 708; First Nat. Bank v. Manchester Fire Assur. Co. 64 Minn. 96, 66 N. W. 136; Stylow v. Wisconsin Odd Fellow Mut. L. Ins. Co. 69 Wis. 224, 2 Am. St. Rep. 738, 34 N. W. 151.

The contract was by its terms void *ab initio;* that is, it never went into effect. This does not mean that the contract was illegal and incapable of adoption or ratification. Upon the breach of the condition precedent, the contract by the force of its own terms became at once of no force and effect. Austin v. Mutual Reserve Fund Life Asso. 132 Fed. 555. This nullity resulted, not from any subsequent act of the company, but from facts which existed when the policy was issued. The facts which prevented it from attaching were at all times known to the insured, and when they became known to the insurer it was not called upon to do anything to invalidate the policy. The only duty which then rested upon the insurer was to do nothing, actively or otherwise, which would mislead the other party to the contract to his material injury. Whether it is the duty of the insurer to return the premiums is determined by various considerations. If the policy is wrongfully terminated by the insurer, it must return the premiums. McCall v. Phœnix Mut. L. Ins. Co. 9 W. Va. 237, 27 Am. Rep. 558. So, when the company becomes insolvent, unearned premiums are a claim against the insolvent estate. Smith v. National Credit Ins. Co. 65 Minn. 283, 33 L.R.A. 511, 68 N. W. 28; Re Minneapolis Mut. F. Ins. Co. 49 Minn. 291, 51 N. W. 921; Clark v. Manufacturers' Mut. F. Ins. Co. 130 Ind. 332, 30 N. E. 212. If the policy is illegal the premiums cannot be recovered (Howard v. Refuge Friendly Soc. 54 L. T. N. S. 644; Lowry v. Bourdieu, 2 Dougl. K. B. 468, 14 English Ruling Cases, 533), unless the parties are not *in pari delicto.* Harse v. Pearl Life Assur. Co. 73 L. J. K. B. N. S. 373; American Mut. L. Ins. Co. v. Bertram, 163 Ind. 51, 64 L.R.A. 935, 70 N. E. 258.

If the policy is not illegal, and once attaches, and the risk is assumed, the entire premium is earned, and if a forfeiture results from a breach of a promissory warranty or of a condition subsequent the insurer cannot be required to return any part of the premium. It is all earned when the risk attaches. Home F. Ins. Co. v. Kuhlman, 58 Neb. 488, 76 Am. St. Rep. 111, 78 N. W. 936; United States L. Ins. Co. v. Smith, 34 C. C. A. 506, 92 Fed. 503; A. M. Todd Co. v. Farmers' Mut. F. Ins. Co. 137 Mich. 188, 100 N. W. 442; Alabama State Mut. Assur. Co. v. Long Clothing & Shoe Co. 123 Ala. 667, 26 So. 655; Fulton v. Lancaster Ohio Ins. Co. 7 Ohio, pt. 2, p. 5; Merchants' Ins. Co. v. Clapp, 11 Pick. 56; Phœnix Ins. Co. v. Stevenson, 78 Ky. 150; Mutual L. Ins. Co. v. Kelly, 52 C. C. A. 154, 114 Fed. 268; Dickerson v. Northern Mut. L. Ins. Co. 200 Ill. 270, 65 N. E. 694; Home Ins. Co. v. Daubenspeck, 115 Ind. 306, 17 N. E. 601; Pearlstine v. Westchester F. Ins. Co. 70 S. C. 75, 49 S. E. 4; Norris v. Hartford F. Ins. Co. 55 S. C. 450, 74 Am. St. Rep. 765, 33 S. E. 566; Medley v. German Alliance Ins. Co. 55 W. Va. 342, 47 S. E. 101; Harris v. Scrivener (Tex. Civ. App.) 78 S. W. 705. But, if the

policy never attaches because of a breach of a condition precedent, the insurer never assumes any risk of loss, and never earns any part of the premium. While there is some conflict of authority, we think that under such conditions the proper rule is that the insured, if he has not been guilty of fraud, is entitled to recover back what he has paid to the insurance company. As said in 2 May, Ins. 3d ed. § 567: "If a policy be void *ab initio*, or if the risk never attaches and there is no actual fraud on the part of the insured, and the contract is not against law or good morals, though there may have been misrepresentation or breach of warranty, he may recover back all the premiums he may have paid, either in an action for them alone, or on a count for money had and received, coupled with a count on the policy in an action for the loss." Tyrie v. Fletcher, 2 Cowp. 666; Feise v. Parkinson, 4 Taunt. 641, 14 English Ruling Cases, 530; Stevenson v. Snow, 3 Burr. 1240; Foster v. United States Ins. Co. 11 Pick. 85; Clark v. Manufacturers' Ins. Co. 2 Woodb. & M. 472, Fed. Cas. No. 2,829; Connecticut Mut. L. Ins. Co. v. Pyle, 44 Ohio St. 19, 58 Am. Rep. 781, 4 N. E. 465; Jones v. Insurance Co. of N. A. 90 Tenn. 604, 25 Am. St. Rep. 706, 18 S. W. 260; Mulvey v. Gore Dist. Mut. F. Assur. Co. 25 U. C. Q. B. 424; Georgia Home Ins. Co. v. Rosenfield, 37 C. C. A. 96, 95 Fed. 358; Fowler v. Scottish Equitable L. Ins. Soc. 28 L. J. Ch. N. S. 225; Delavigne v. United Ins. Co. 1 Johns. Cas. 310. See Rochester Ins. Co. v. Martin, 13 Minn. 59, Gil. 54, and authorities cited in Taylor v. Grand Lodge A. O. U. W. (Minn.) 105 N. W. 408.

In the case at bar the court ordered the receivers to return the premiums which had been paid, and the plaintiff thus received the full benefit of the rule. But it does not follow that it is the duty of the insurer to take affirmative action to find the insured and tender back the amount of the premiums which had been paid voluntarily before the insurer had knowledge of the breach of condition. Georgia Home Ins. Co. v. Rosenfield, *supra;* Austin v. Mutual Reserve Fund Life Asso. 132 Fed. 555; Houdeck v. Merchants' & B. Ins. Co. 102 Iowa, 303, 71 N. W. 354. As noted in Taylor v. Grand Lodge A. O. U. W. *supra*, the case of Schrieber v. German-American Hail Ins. Co. 43 Minn. 367, 45 N. W. 708, is not an authority for the rule that the mere retention of the premium paid before notice of a breach of condition is conclusive evidence of an election to treat the policy as valid. Neither do the cases incidentally referred to by Chief Justice Gilfillan in that case sustain this proposition. In Fishbeck v. Phenix Ins. Co. 54 Cal. 422, there was present every element of a technical estoppel. The point is not decided in Harris v. Equitable Life Assur. Soc. 64 N. Y. 196. In Baker v. New York L. Ins. Co. 77 Fed. 550, it appeared that the insurance company for a full year after knowledge of all the facts treated the policy as in force. Jones v. Insurance Co. of N. A. 90 Tenn. 604, 25 Am. St. Rep. 706, 18 S. W. 260, was an action by the insured to recover the premiums. See comment upon these cases, and Home Mut. Life Asso. v. Riel, 1 Monaghan (Pa.) 615, 17 Atl. 36, in Georgia Home Ins. Co. v. Rosenfield, 37 C. C. A. 96, 95 Fed. 358, 361. In some states statutes have been enacted which require an insurance company to return all premiums which it has received, as a condition precedent to interposing a defense on the ground that the policy was obtained by misrepresentations. Mo. Rev. Stat. 1879, § 5977; New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; Cal. Civ. Code, § 2617; and Va. Acts 1897, 1898, chap. 601, p. 638 (Va. Code 1904, p. 638); Vance, Ins. 245.

Virginia F. & M. Ins. Co. v. Cummings (Tex. Civ. App.) 78 S. W. 716, and Metropolitan L. Ins. Co. v. Moore, 117 Ky. 651, 79 S. W. 219, sustain the appellant's contention; but they rest upon what seems to us an erroneous theory. The rule there applied would be properly applicable in an action by an insurance company against the insured for the purpose of having the contract rescinded. Neither is appellant's contention sustained by Mississippi Home Ins. Co. v. Dobbins, 81 Miss. 623, 33 So. 504. In that case the premium was paid after the agent of the company had notice of the loss; and after notice of the additional insurance the company furnished blanks and allowed the insured to make proofs of loss. It was held that, under the circumstances and the terms of the policy with reference to the return of premiums upon cancelation of the policy, the company was estopped by its failure to return the unearned premium. Commercial Assur. Co. v. New Jersey Rubber Co. 61 N. J. Eq. 446, 49 Atl. 155, was a suit by the insurer to cancel the policy.

In this case the insurer is not asking to have the contract rescinded. The premium came into its possession lawfully under color of what was assumed to be a valid contract, and it cannot properly be placed in a position of withholding it until repayment has been demanded. It seems to us that it would be as reasonable to require the insured, when he learns that the insurer claims that the policy is invalid, to either accept the situation and demand a return of his payments or stand on what he assumes to be his rights and attempt to enforce them. A somewhat similar principle was applied in American Mut. L. Ins. Co. v. Bertram, 163 Ind. 51, 65 L.R.A. 935, 70 N. E. 258. If he

does not do this, it should not lie in his mouth to assert that the other party cannot be heard on its defense until it has tendered to him what he asserts that he has no right to receive, and will not or cannot accept without abandoning his entire claim for indemnity. The only logical course is to leave the parties where they are until their respective rights are determined. If the defendant prevails the plaintiff should have judgment for the return of his premiums. But the insurance company must be consistent. If it claims that the contract is not in force, it must not expressly or impliedly recognize it as effective. If the insured demands the return of what he has paid as premiums, it must comply with the demand if it claims that the risk never attached. If it refuses to return the money it places itself in a position which is inconsistent with an honest intention to avail itself of the breach of condition, and recognizes the contract as in force just as effectively as it would by accepting and retaining assessments or premiums after it had acquired knowledge that there had been a forfeiture. Having thus made its election, it will be held to have subjected itself to all the liabilities which attach thereto. Even when knowledge of the breach of a condition is acquired before a loss occurs, the company is not, under our decisions, required to do any affirmative act.

In Johnson v. American Ins. Co. 41 Minn. 396, 43 N. W. 59, where the insured procured other insurance in violation of a condition which provided that the policy should be void if other insurance was obtained "without notice to and consent of this company in writing hereon," the court, through Mr. Justice Dickinson, said: "By the plain terms of the policy, other insurance without the consent of the company would *ipso facto* avoid the contract; and in case of a contract thus avoided it would not be obligatory upon the insurer to repay any of the unearned premium, nor would he be required to give notice that he should insist upon and avail himself of the proper legal effect of the agreement. It required no affirmative act of election on the part of the company to make operative the clause avoiding the contract whenever the specified conditions should occur. Its obligations ceased, unless, being informed of the fact, it consented to the additional insurance, or in some manner waived the forfeiture." To the same effect is Betcher v. Capital F. Ins. Co. 78 Minn. 240, 80 N. W. 971. There is even stronger reason for holding that this is the rule when the insurer does not learn of the breach of conditions until after a loss. The rights of the parties have then been determined and fixed by the occurrence of the event insured against. The policy at the time of the loss was either null or in full force and effect. If it was not in force, the insurer is not liable for the loss, unless it prefers to remain silent and accept liability for reasons of general business policy. As the contract is not illegal, it is enforceable unless the insurer avails itself of its defense. If it simply remains silent and inactive, the claimant must then become the active party and assert his claim. The company must not, on the peril of creating an estoppel, mislead him, nor demand anything from him, or any action on his part, which it has no right to demand on any theory other than that the contract is in force. It need not tender back the premium unless it is demanded; but if the contract is not illegal or fraudulent, and the premium is demanded and not returned, its retention is an election to consider the policy in force and the company is liable thereon.

4. We are unable to agree with the appellant's contention that the provisions of the contract are ambiguous and thus come within the principle applied in Central Montana Mines Co. v. Fireman's Fund Ins. Co. 92 Minn. 223, 99 N. W. 1120, 100 N. W. 3. The case turns upon two provisions, stated conjunctively in the policy. The entire contract shall be void (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of the insurance be a building on ground not owned by the insured in fee simple. The breach of either of these conditions invalidates the entire policy unless it can be held that the contract is divisible. There are many conflicting cases on this question, but Plath v. Minnesota Farmers' Mut. F. Ins. Asso. 23 Minn. 479, 23 Am. Rep. 697, established the rule in this state that, where the insurance is for a gross sum and a single consideration, the contract is entire, although the amount of the insurance is distributed over several distinct items of property. A contract of insurance of this character is entire and indivisible. The sole effect of the apportionment of the amount of the insurance upon the separate and distinct items of property named in the policy is to limit the extent of the insurer's risk as to each of such items to the sums specified. See Southern F. Ins. Co. v. Knight, 111 Ga. 622, 52 L.R.A. 70, 78 Am. St. Rep. 216, 36 S. E. 821; Pratt v. Dwelling House Mut. F. Ins. Co. 130 N. Y. 206, 29 N. E. 117; and note to Wright v. Fire Ins. Asso. 19 L.R.A. 211. The policy considered in the Plath Case contained a provision that, in case the insured should mortgage the property without notifying the secretary of the company, "then . . . the insured shall not be entitled to recover from the association any loss or damage

which may occur in or to the property hereby insured or any part or portion thereof." The amount of the insurance was apportioned on a dwelling house, household furniture, carriages, farm implements, harvester, seeder, and threshing machine. Without notice to the company, as required by the policy, the insured placed a chattel mortgage on the harvester, seeder, and threshing machine. All the property was destroyed, and it was held that, as the contract was entire and indivisible, there could be no recovery for the loss of any part thereof. The case was cited with approval in Funke v. Minnesota Farmers' Mut. F. Ins. Asso. 29 Minn. 347–355, 43 Am. Rep. 216, 13 N. W. 164, and its application to this case disposes of the appellant's contention adversely. Central Montana Mines Co. v. Fireman's Fund Ins. Co. *supra*, turned upon the construction to be given the ambiguous use of the word "property" in the contract. The policy covered certain mining property, and a gross amount of insurance was apportioned upon different items of the property. The policy provided that it should become void if the "property" therein described should become unoccupied, inoperative, or vacant. The quartz mill only became vacant, and all the other buildings were occupied and used. It was held that, as the language was ambiguous, the word "property" should be construed to mean the whole plant.

There is another line of cases which apply the rule that a policy which insures various kinds of property, describes each class separately, and apportions different amounts upon each class, is not avoided by a breach of the contract as to any property included therein, except that affected by the forfeiture clause, unless the contract was induced by fraud, is contrary to public policy, or the breach of the condition in question increases the risk on the whole property. Where there is neither illegality, fraud, nor increase of risk, a recovery is, under these cases, permitted as to all the property not thereby directly affected. See Phenix Ins. Co. v. Pickel, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E. 546; McGowan v. People's Mut. F. Ins. Co. 54 Vt. 211, 41 Am. Rep. 843; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 30 L.R.A. 633, 51 Am. St. Rep. 457, 33 Atl. 429; Stevens v. Queen Ins. Co. 81 Wis. 335, 29 Am. St. Rep. 905, 51 N. W. 555; Loomis v. Rockford Ins. Co. 77 Wis. 87, 8 L.R.A. 834, 20 Am. St. Rep. 96, 45 N. W. 813; Havens v. Home Ins. Co. 111 Ind. 90, 60 Am. Rep. 689, 12 N. E. 137; Miller v. Delaware Ins. Co. 14 Okla. 81, 65 L.R.A. 173, 75 Pac. 1121; Republic County Mut. F. Ins. Co. v. Johnson, 69 Kan. 146, 105 Am. St. Rep. 157, 76 Pac. 419; Taylor v. Anchor Mut. F. Ins. Co. 116 Iowa, 625, 57 L.R.A. 328, 93 Am. St. Rep. 261, 88 N. W. 807. But the plaintiff in this case cannot recover on the policy in question even under this rule. The contract was not illegal, neither was it induced by fraud, but the character of the property and its location brings it clearly within one of the recognized exceptions. The condition with reference to the title affected the building, and its breach increased the moral hazard of the risk. It is stipulated that the loss was on stock, machinery, boiler, and engine house. The buildings stood on leased ground. The stock and machinery were in the "building and additions" thereto. The boiler and engine house were apparently situated upon the same leased land, and adjacent to the main building. It is thus apparent that whatever increased the risk to the building inevitably increased the risk on all the other property that was destroyed. It thus comes clearly within the rule applied in Agricultural Ins. Co. v. Hamilton, and Stevens v. Queen Ins. Co. *supra*.

The order appealed from is affirmed.

NORTH DAKOTA SUPREME COURT.

J. D. BACON, Appt.,
v.
ROBERT MITCHELL et al., Respts.

(— N. D. —, 106 N. W. 129.)

Attorney—presumption of authority.

1. The legal presumption is that an attorney has authority to appear for the person for whom he assumes to act.

Same—repudiation of authority.

2. A suitor who does not disclaim the authority of an attorney who assumes to represent him in an action, when it is his duty to do so, may not do so afterwards. He cannot take the hazard of a trial, and,

Headnotes by Young, J.

Case Note.—Power of attorney to discontinue suit.—An attorney may discontinue or dismiss a suit without prejudice, since he has power, by virtue of his retainer or employment, to manage the cause in which he is engaged, and do all things incidental to the prosecution of the suit which affect the remedy only, but he has no implied authority to do any act which affects the cause of action itself. Davis v. Hall, 90 Mo. 659, 3 S. W. 382; Barrett v. Third Ave. R. Co. 45 N. Y. 628; Weeks, Attorneys at Law, §§ 217–220.

In Gaillard v. Smart, 6 Cow. 385, the court ordered a discontinuance to be entered pursuant to a statement to defendant's attorney, by the attorney for the plaintiff, that the cause was discontinued, and held that the attorney for the plaintiff does not require special authority to do so ordinary

when unsuccessful, allege as ground for vacating the judgment that the attorney who conducted the trial had no authority.

Same—right to dismiss action.

3. Under his general authority, an attorney has the exclusive control of the remedy, and he may discontinue the action by a dismissal without prejudice, and his client is bound by his act.

Same—mistake.

4. An attorney's mistake of judgment as to the law, or his ignorance of facts which he ought to have known, is not sufficient ground for vacating a judgment of dismissal, entered upon his motion.

(October 13, 1905.)

APPEAL by plaintiff from an order of the District Court for McHenry County refusing to vacate a judgment of dismissal alleged to have been entered by plaintiff's attorney without authority. Affirmed.

The facts are stated in the opinion.

Messrs. **A. M. Christianson** and **C. J. Murphy**, for appellant:

An attorney cannot delegate his authority.

Johnson v. Cunningham, 1 Ala. 249; Hitchcock v. M'Gehee, 7 Port. (Ala.) 556; Hendry v. Benlisa, 37 Fla. 609, 34 L.R.A. 283, 20 So. 800; Morgan v. Roberts, 38 Ill. 65; Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899; Cornelius v. Wash, 1 Ill. 63, 12 Am. Dec. 145; Buckley v. Buckley, 45 N. Y. S. R. 827, 18 N. Y. Supp. 607; Crotty v. Eagle, 35 W. Va. 143, 13 S. E. 59; Clegg v. Baumberger, 110 Ind. 536, 9 N. E. 700; McDowell v. Gregory, 14 Neb. 33, 14 N. W. 899; Antrobus v. Sherman, 65 Iowa, 230, 54 Am. Rep. 7, 21 N. W. 579; Danley v. Crawl, 28 Ark. 95; Kellogg v. Norris, 10 Ark. 18; Dickson v. Wright, 52 Miss. 585, 24 Am. Rep. 677; O'Conner v. Arnold, 53 Ind. 203; Masecar v. Chambers, 4 U. C. Q. B. 171; Hoover v. Greenbaum, 61 N. Y. 305; Atkinson v. Howlett, 11 Ky. L. Rep. 364; Hurste v. Hotaling, 20 Neb. 178, 29 N. W. 299; Robson v. Eaton, 1 T. R. 62.

A party dealing with an agent is bound, at his peril, to ascertain both the fact of agency and its extent.

Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Fargo v. Cravens, 9 S. D. 646, 70 N. W. 1053.

An attorney acting under a general employment has no implied power or authority to dismiss or compromise an action.

Bigler v. Toy, 68 Iowa, 687, 28 N. W. 17; Luce v. Foster, 42 Neb. 818, 60 N. W. 1027; Erskine v. McIlrath, 60 Minn. 485, 62 N. W. 1130; Mayer v. Sparks, 3 Kan. App. 602, 45 Pac. 249; Porter v. Elizalde, *supra;* Kilmer v. Gallaher, 112 Iowa, 583, 84 Am. St. Rep. 358, 84 N. W. 697; 3 Am. & Eng. Enc. Law, 2d ed. p. 358; Flannagan v. Elton, 34 Neb. 355, 51 N. W. 967; Rhutasel v. Rule, 97 Iowa, 20, 65 N. W. 1013; Steinkamp v. Gaebel, 1 Neb. (Unof.) 480, 95 N. W. 684; Hallack v. Loft, 19 Colo. 74, 34 Pac. 568; Mechem, Agency, § 813; Weeks, Attorneys at Law, § 219; 2 Freeman, Judgm. 4th ed. § 463; Dickerson v. Hodges, 43 N. J. Eq. 45, 10 Atl. 111; Isaacs v. Zugsmith, 103 Pa. 77; Davidson v. Rozier, 23 Mo. 387; Vail v. Conant, 15 Vt. 314; Wadhams v. Gay, 73 Ill. 415.

an act of practice as the discontinuance of the cause.

In Simpson v. Brown Bros. 1 Wash. Terr. 247, the court sustained the power of the attorney for a party, who intervened in a pending suit, to indorse a stipulation for dismissal on the petition of intervention, and held that the rights of the parties are not concluded by such a course,—especially where the judgment dismissing the case expressly recited that it was "without prejudice to the rights of either party."

Under a statute providing that the plaintiff in any suit may dismiss such suit in vacation of the court upon the payment of all the costs that may have accrued therein, the attorney for the plaintiff may dismiss an ejectment action in vacation with the same effect as though the plaintiff had done so in person. Davis v. Hall, *supra.*

And under a statute which gives an attorney authority to bind his client in any of the steps of an action by his agreement in writing when entered upon the minutes of the court, the attorney for the plaintiff has power to enter into a written discontinuance of an action as to certain defendants who are not served, and as to part of the land involved in an ejectment suit. McLeran v. McNamara, 55 Cal. 508.

An attorney's clerk has no power to discontinue an action without the knowledge or consent of his employer. Irvine v. Spring, 35 How. Pr. 479.

The only cases in which a contrary doctrine is applied are mentioned but briefly by the court in BACON v. MITCHELL. In the first one, Rhutasel v. Rule, 97 Iowa, 20, 65 N. W. 1013, it was held that an attorney, under a general employment to prosecute an action for replevin, has no authority to withdraw the case against the wishes of his client who desires a determination on the merits.

And in Steinkamp v. Gaebel, 1 Neb. (Unof.) 480, 95 N. W. 684, the court relying upon the Rhutasel Case, held that an attorney employed to prosecute an assault case which remained untried for a year and a half could not, on the day his services were discontinued, file a written dismissal of the action and sign it as attorney for plaintiff.

An attorney cannot enter a *retraxit* or a discontinuance when it would operate to conclude the client's rights, except upon express authority.

3 Am. & Eng. Enc. Law, 2d ed. p. 360; Crotty v. Eagle; Flannagan v. Elton; Steinkamp v. Gaebel; and Hallack v. Loft,—*supra*.

On petition for rehearing.

The appellant was entitled to be relieved from the judgment, for the reason that the dismissal was entered under a mistaken belief as to what the facts were.

Palace Hardware Co. v. Smith, 134 Cal. 381, 66 Pac. 474; Sheehan v. Osborne (Cal.) 69 Pac. 842; Bonds v. Hickman, 29 Cal. 461; Porter v. Holt, 73 Tex. 447, 11 S. W. 494; Keens v. Robertson, 46 Neb. 837, 65 N. W. 897; Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227; Dalton v. West End Street R. Co. 159 Mass. 221, 38 Am. St. Rep. 410, 34 N. E. 261; Ladd v. Stevenson, 112 N. Y. 326, 8 Am. St. Rep. 748, 19 N. E. 842; McClure v. Sheek, 68 Tex. 426, 4 S. W. 552; 20 Enc. Pl. & Pr. p. 664.

Messrs. **W. R. Garrett** and **Le Sueur & Bradford** for respondents.

Young, J., delivered the opinion of the court:

Action upon a promissory note. Issue was joined by service of answer November 27, 1901. In March, 1903, by leave of court, an amended answer was served. The case came on for trial regularly before a jury at Towner, McHenry county, at a regular term of the district court of that county, on June 27, 1903. At the request of C. J. Murphy, an attorney at law, residing in the city of Grand Forks, who was plaintiff's attorney of record, one A. M. Christianson, an attorney, residing in Towner, appeared and conducted the trial for plaintiff. After introducing considerable evidence, both oral and documentary, but before the case was formally submitted, Christianson moved to dismiss without prejudice, a course which was induced by the imperfect condition of certain depositions which he deemed essential to establish the plaintiff's case, and judgment of dismissal was duly entered. Thereafter an order was issued to defendants to show cause why the judgment should not be set aside and the case reinstated for trial. The grounds of the motion were set out in a number of affidavits made by Christianson, Murphy, and others, in which it was made to appear that the plaintiff did not engage Christianson to try the case; that he was merely engaged by Murphy, and had, therefore, as plaintiff's counsel contend, no legal authority to act for plaintiff or to move to dismiss; and that, unless the judgment of dismissal is set aside, and the case reinstated, the statute of limitations will be a complete defense to another action on the note. The motion to vacate was denied, and plaintiff appeals from the order.

We are of opinion that the court did not err in making the order in question. In reaching this conclusion, it is unnecessary to discuss the extent of an attorney's authority to employ a substitute or subordinate. Upon the facts of this case, the correctness of the order does not turn upon that question. The real question is whether the plaintiff can be heard to say that Christianson was without authority to represent him. We are agreed that he cannot. Christianson is a regularly licensed attorney. Presumptively an attorney has authority to represent the person whom he assumed to represent. Weeks, Attorneys at Law, § 196, and cases cited. Also, 4 Cyc. Law & Proc. p. 928, and cases cited. The business of the courts is transacted upon this assumption. It is not necessary, in the first instance, for the court or counsel for the adverse party to demand proof of the authority of an attorney to act. "The burden is upon the person denying the authority." In this case it was upon the plaintiff. He did not disclaim Christianson's authority, but permitted the case to proceed to trial without objection to his appearance. The trial judge and defendant's counsel assumed that he had authority to represent the plaintiff. They had a right to rest upon the presumption of authority. The plaintiff instituted the action and invoked the jurisdiction of the court. The case was regularly reached for trial. The record does not show affirmatively that the plaintiff was present at the trial. That fact, however, is not material. It was his duty to attend the trial in person, or by an authorized representative. A failure to appear is deemed an election to become nonsuit. Thompson, Trials, § 2229; Nordmanser v. Hitchcock, 40 Mo. 179. If Christianson had, in fact, no authority to appear for him, it was his duty to disclaim his assumption of authority. He cannot be permitted to say, after taking the hazard of a successful issue of a trial, that the attorney who assumed to represent him had in fact no authority. See Bingham v. Guthrie, 19 Pa. 418, 424; Christman v. Moran, 9 Pa. 487. He is in no worse position than he would have occupied had Christianson not assumed to represent him.

It is also urged that the general authority of an attorney does not include the power to discontinue the action, and that the judgment of dismissal without

prejudice, which was entered on Christianson's motion, should therefore be set aside. This contention is based upon an erroneous view of an attorney's general authority. True the cause of action itself is under the control of the client. Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533. But the attorney "has the free and full control of a case in its ordinary incidents. . . . He has the exclusive control of the conduct and management of the suit. He cannot give a release or discharge the cause of action; but he has exclusive control of the remedy, and may continue or discontinue it." Weeks, Attorneys at Law, § 220. "He may discontinue an action because that relates to the conduct of the suit and is within his retainer, and not to the cause of action." Barrett v. Third Ave. R. Co. 45 N. Y. 628, 635; Gaillard v. Smart, 6 Cow. 385; McLeran v. McNamara, 55 Cal. 508; Simpson v. Brown, 1 Wash. Terr. 248; Nightingale v. Oregon C. R. Co. 2 Sawy. 338, Fed. Cas. No. 10,264. The supreme court of Iowa, in Rhutasel v. Rule, 97 Iowa, 20, 65 N. W. 1013, said that authority to dismiss must be specially conferred; and in Steinkamp v. Gaebel, 1 Neb. (Unof.) 480, 95 N. W. 684, the language of the Iowa court was quoted with approval. In our opinion that view is unsound in principle and against the weight of authority. The question as to whether an action shall be dismissed relates to the conduct of the suit and to the remedy,—a question frequently arising in all courts, and is one peculiarly addressed to the skill, knowledge, and judgment of the attorney. When the alternative is presented of a probable defeat upon the merits, as in this case, or a dismissal without prejudice, thus saving the cause of action, it is for the attorney to decide, as one of the incidents of the trial, and in the performance of his duty to his client, which course to pursue. In this case the attorney elected to dismiss. In doing so he did not destroy his client's cause of action. The fact that the statute of limitations has run, if that is the fact, and may be pleaded in another action, does not affect the question. The plaintiff's cause of action is intact. The statute of limitations relates solely to the remedy, and does not destroy the cause of action. Colonial & United States Mortg. Co. v. Northwest Thresher Co. 13 N. D. —, 70 L.R.A. 814, 103 N. W. 915, 918. Even if the dismissal was in fact ill advised, and was made without a realization on Christianson's part that the evidence he had offered and had at hand was sufficient to prove the plaintiff's case, and in ignorance of the fact that the statute of limitations would be available as a bar in another action, as stated in the moving affidavits, still this does not furnish sufficient reason for vacating the judgment. It merely presents a mistake of judgment as to the law or ignorance of facts which he ought to have known. The following language of the supreme court of Wisconsin in Juneau County v. Hooker, 67 Wis. 322, 30 N. W. 357, a similar case, in denying an application to reinstate, is directly applicable and meets our full approval: "It was ignorance of either the law or of a fact that the learned counsel of the respondent ought to have known, and might have readily known, before the discontinuance of the action. Suppose a plaintiff should voluntarily discontinue his suit because at the time he should be of the opinion that he could not maintain it, and he afterwards had formed a different opinion, would such a reason be a good one for reinstating the action, and for the court to treat the defendant 'as being in court and out of court at the same time,' and for the court 'to suffer its proceedings to be trifled with, even if parties were disposed to back and fill and to vacillate in the conduct of the suit.' as the present chief justice said in his opinion in the above case in 12 Wis.?"

In moving to dismiss without prejudice an attorney acts within his authority, and the client is bound by his act. If the client is injured, his remedy, if any he has, is against the attorney alone. Weeks, Attorneys at Law, § 220, and cases cited at note 5. We find no abuse of discretion in the refusal to vacate the judgment.

The order appealed from is accordingly affirmed.

All concur.

Petition for rehearing denied January 5, 1906.

CALIFORNIA SUPREME COURT.

LAURA C. LYON, Respt.,
v.
UNITED MODERNS, Appt.

(— Cal. —, 83 Pac. 804.)

Denial of nonsuit—error—waiver.

1. Error in denying motion for nonsuit at the close of plaintiff's evidence is cured

Case Note.—Previous rejection by benefit association as declination or refusal of insurance within meaning of application for life insurance.—An important factor in determining the truth or falsity of a statement in an application for life insurance is the construction given the word "company," "association," or "society," as used in the

by the introduction of evidence by defendant which supplies defects in plaintiff's proof.

Mutual benefit certificate—validity of claim.

2. A provision in a mutual benefit certificate that the amount should be paid within a certain time after satisfactory proof of the validity of the claim does not require proof of the validity of the certificate.

Same—omission of information.

3. A mutual benefit certificate is not avoided by the fact that the medical examiner omits to insert in the application information material to the risk, which is given him in good faith by the applicant.

Same—question as to rejection of applicant.

4. A beneficial association issuing death benefit certificates is not within the meaning of a question in an insurance application as to whether or not applicant has ever been rejected by any company.

Instruction—assumption of fact.

5. An instruction is properly refused which assumes a fact which, under the evidence, is an issue for the jury to decide.

(January 17, 1906.)

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County in plaintiff's favor in an action brought to recover the amount alleged to be due on a mutual benefit certificate. Affirmed.

The facts are stated in the opinion.

Mr. J. W. McKinley, for appellant:

All of the statements contained in the application constitute warranties, and plaintiff has no right to recover if any of them are untrue.

Cobb v. Covenant Mut. Ben. Asso. 153 Mass. 176, 10 L. R. A. 666, 25 Am. St. Rep. 619, 26 N. E. 230; Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587, 60 Am. St. Rep. 661, 9 Atl. 766; Schmitt v. National Life Asso. 84 Hun, 128, 32 N. Y. Supp. 513; Dwight v. Germania L. Ins. Co. 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654; Boland v. Industrial Ben. Asso. 74 Hun, 385, 26 N. Y. Supp. 433; Barteau v. Phœnix Mut. L. Ins. Co. 67 N. Y. 595; Vose v. Eagle Life & Health Ins. Co. 6 Cush. 42; Provident Sav. Life Assur. Soc. v. Llewellyn, 7 C. C. A. 579, 16 U. S. App. 405, 58 Fed. 940; Brady v. United L. Ins. Asso. 9 C. C. A. 252, 20 U. S. App. 337, 60 Fed. 727; Schultz v. Mutual L. Ins. Co. 6 Fed. 672; Sladden v. New York L. Ins. Co. 29 C. C. A. 596, 58 U. S. App. 482, 86 Fed. 102; Jeffries v. Economical L. Ins. Co. 22 Wall. 47, 22 L. ed. 833; Ætna L. Ins. Co. v. France, 91 U. S. 510, 23 L. ed. 401; Hubbard v. Mutual Reserve Fund Life Asso. 40 C. C. A. 665, 100 Fed. 719; Roberts v. Ætna Ins. Co. 58 Cal. 83; May, Ins. § 156; 1 Bacon, Ben. Soc. 194; Weil v. New York L. Ins. Co. 47 La. Ann. 1405, 17 So. 853; O'Connor v.

interrogatory with reference to prior application and rejection.

The policy involved in Fidelity Mut. Life Asso. v. Miller, 34 C. C. A. 211, 63 U. S. App. 717, 92 Fed. 63, required the applicant to state whether he had ever made application for insurance to any other company, association, or society on which a policy had been denied, to which he gave a negative answer, and the court held that his previous rejection by the Royal Arcanum was not within the scope of the question, since the words "company, association, or society" refer to one and the same thing, namely, a regular insurance company, and do not contemplate applications for insurance in secret, social, or beneficial societies having life-insurance features.

On the contrary, it was held in Bruce v. Connecticut Mut. L. Ins. Co. 74 Minn. 310, 77 N. W. 210, that the Royal Arcanum was within the scope of the question, "Has any company or association ever declined or postponed granting or delivering insurance on your life, either for any particular amount or in any particular form?" and that a negative answer was a breach of warranty of the truth of the statements by the applicant. The court further held that, while the constitution and by-laws of the Royal Arcanum may provide for local lodges with pass words, grips, and signs,—secret societies in fact in which the social feature is made prominent,—yet the real object of the organization is to provide insurance on the lives of its members, and to build up the insurance department, and not to create a fraternal or charitable institution.

In White v. National L. Ins. Co. 11 Ohio Dec. Reprint, 857, it was held that a negative answer to the question "Has any company or association declined to grant a policy on your life?" is not a breach of warranty of the truth of the statements of the assured in his application, where it appears that a certificate of membership had been denied by the People's Mutual Benefit Association, for the reason that a refusal to grant a certificate of membership in such association is not a refusal to grant a policy on the life of the assured within the meaning of the question.

In Newton v. Southwestern Mut. Life Asso. 116 Iowa, 311, 90 N. W. 73, a statement that no company had ever refused to grant insurance on the applicant's life, when in fact he had been rejected by a benefit association, was held not to avoid the policy, on the ground that there is a clear distinction between mutual benefit associations and insurance companies, and that the question referred only to the latter.

And in Equitable L. Ins. Co. v. Hazlewood,

Grand Lodge, A. O. U. W. 146 Cal. 484, 80 Pac. 688; Aloe v. Mutual Reserve Life Asso. 147 Mo. 561, 49 S. W. 557; McCollum v. Mutual L. Ins. Co. 55 Hun, 103, 8 N. Y. Supp. 249, 124 N. Y. 642, 27 N. E. 412; United Brethren Mut. Aid Soc. v. O'Hara, 120 Pa. 256, 13 Atl. 932; Cummings v. Kennebec Mut. L. Ins. Co. 89 Me. 37, 35 Atl. 1032; Mengel v. Northwestern Mut. L. Ins. Co. 176 Pa. 280, 35 Atl. 197; Day v. Mutual Ben. L. Ins. Co. 1 MacArth. 41, 29 Am. Rep. 565; Roche v. Supreme Lodge, K. of H. 21 App. Div. 599, 47 N. Y. Supp. 774; Wall v. Royal Soc. of G. F. 179 Pa. 355, 36 Atl. 748; Kelly v. Life Ins. Clearing Co. 113 Ala. 453, 21 So. 361; Hambrough v. Mutual L. Ins. Co. 72 L. T. N. S. 140; Kelley v. Mutual L. Ins. Co. 75 Fed. 637; Modern Woodmen v. Von Wald, 6 Kan. App. 231, 49 Pac. 782; Elliot v. Mutual Ben. Life Asso. 76 Hun, 378, 27 N. Y. Supp. 696; Stuart v. Mutual Reserve Fund Life Asso. 78 Hun, 191, 28 N. Y. Supp. 944; McCormick v. United Life & Acci. Ins. Asso. 79 Hun, 340, 29 N. Y. Supp. 364; Glutting v. Metropolitan L. Ins. Co. 50 N. J. L. 287, 13 Atl. 4; March v. Metropolitan L. Ins. Co. 186 Pa. 629, 65 Am. St. Rep. 887, 40 Atl. 1100; Fidelity Mut. Life Asso. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635; Mutual L. Ins. Co. v. Arhelger, 4 Ariz. 271, 36 Pac. 895; Sternaman v. Metropolitan L. Ins. Co. 49 App. Div. 473, 63 N. Y. Supp. 674; White v. Provident Sav. Life Assur. Soc. 163 Mass. 108, 27 L.R.A. 398, 39 N. E. 771; Numrich v. Supreme Lodge, K. & L. of H. 24 N. Y. S. R. 287, 3 N. Y. Supp. 552; 2 Joyce, Ins. § 1882; Northwestern Masonic Aid Asso. v. Bodurtha, 23 Ind. App. 121, 77 Am. St. Rep. 414, 53 N. E. 787; May, Ins. § 156; McKenzie v. Scottish Union & Nat. Ins. Co. 112 Cal. 555, 44 Pac. 922; Burritt v. Saratoga County Mut. F. Ins. Co. 5 Hill, 188, 40 Am. Dec. 345; Selby v. Mutual L. Ins. Co. 67 Fed. 490; Daniels v. Hudson River F. Ins. Co. 12 Cush. 416, 59 Am. Dec. 192; Mutual Ben. L. Ins. Co. v. Miller, 39 Ind. 475.

Oral testimony that goes to contradict the statements made in the application is not admissible.

Jenkins v. Quincy Mut. F. Ins. Co. 7 Gray, 370; Barrett v. Union Mut. F. Ins. Co. 7 Cush. 175; Thomas v. Commercial Union Assur. Co. 162 Mass. 29, 44 Am. St. Rep. 323, 37 N. E. 672; McCluskey v. Providence Washington Ins. Co. 126 Mass. 306; Batchelder v. Queen Ins. Co. 135 Mass. 449; Southern Mut. Ins. Co. v. Yates, 28 Gratt. 585; Cooper v. Farmers' Mut. F. Ins. Co. 50 Pa. 299, 88 Am. Dec. 544; Ryan v. World Mut. L. Ins. Co. 41 Conn. 168, 19 Am. Rep. 490; Holmes v. Charlestown Mut. F. Ins. Co. 10 Met. 211, 43 Am. Dec. 428; Lee v. Howard F. Ins. Co. 3 Gray, 583; Glendale Woolen Mfg. Co.

75 Tex. 338, 7 L.R.A. 217, 16 Am. St. Rep. 893, 12 S. W. 621, mutual benefit societies, such as the Legion of Honor, were not regarded as insurance companies within the meaning of the question, "Has a policy ever been applied for which was not thereafter issued?" the court holding that lodges which furnish insurance to their members may perform other functions, and that a rejection by one of them would not necessarily be predicated on unfitness for insurance. The real question, however, involved in this case was the admissibility of evidence to show that the agent had stated to the applicant that mutual benefit associations were not regarded as insurance companies.

But in Alden v. Supreme Tent, K. of M. 178 N. Y. 535, 71 N. E. 104, the court held that there is no reason why information as to the rejection of an applicant by a fraternal beneficiary society would not be as important to the insurer as rejection by any other form of insurance company or association, and for that reason a fraternal beneficiary society, incorporated under the laws of another state and doing a life insurance business in New York state on the assessment plan, and requiring all applicants to pass a medical examination, is a life insurance company or association within a New York statute providing, in substance, that any corporation, association, or society which issues any certificate or policy, whereby, upon the decease of a member, aid is to be paid to his beneficiary, which aid is derived from dues or assessments collected from members, shall be deemed to be engaged in the business of life insurance; and, further, such fraternal beneficiary society is considered an insurance company within the scope of the question, "Have you ever been rejected by any insurance company or association?" a negative answer to which is a fraud avoiding the policy, when in fact the applicant had been rejected by another division or tent of the same society.

And where the insured answered "No" to the question in the application, "Has any other insurance company declined to grant a policy on your life?" when in fact he had made an application to a mutual benefit association which had been rejected, it was held that such false statement vitiated the policy, although the court did not discuss the question whether such other application was to a life insurance company, but assumed that it was. Kemp v. Good Templars' Mut. Ben. Asso. 46 N. Y. S. R. 429, 19 N. Y. Supp. 435.

The question whether a benefit association is an insurance company is discussed at length in a note to the case of Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L.R.A. 33.

v. Protection Ins. Co. 21 Conn. 19, 54 Am. Dec. 309.

Messrs. **Frank James and Bernard Potter** for respondent.

Angellotti, J., delivered the opinion of the court:

This is an appeal from an order denying defendant's motion for a new trial, in an action brought by plaintiff to recover on a benefit certificate of membership of her deceased husband, issued by defendant corporation. Defendant is one of the many fraternal mutual beneficial associations existing in this country which pay benefits to the beneficiaries named in the certificate of membership, upon the death of a member, in such amount as may be set forth in the certificate. Deceased became a member of one of the subordinate lodges of defendant in September, 1901, when a certificate of membership was issued, under the terms of which it was agreed that $3,000 should be paid plaintiff within ninety days after "satisfactory proof of the death of said member, and of the identity and right of claimant and of the validity of the claim," provided of course, that such certificate remained in force at the time of his death. Deceased died December 29, 1901. It was, in effect, admitted on the trial that the certificate was in full force at the date of his death, if it was not void in its inception by reason of alleged misrepresentations made by the deceased in his application for membership.

1. The first point made by defendant for a reversal of the order is that the court erred in denying its motion for a nonsuit, made at the close of plaintiff's evidence, upon the ground that plaintiff had not shown that satisfactory proof had been made to defendant of her right, or the validity of her claim. Without considering the question as to whether the admissions made by defendant in its answer, and its stipulation at the commencement of the trial, sufficiently showed such compliance with this requirement as was necessary to make a prima facie case for plaintiff, we think there is nothing in the point made. Defendant did not rest its case upon the denial of the notion for nonsuit, but introduced evidence in its own behalf. So far as the evidence introduced by defendant supplied any defects in plaintiff's proof, any error in denying the motion for nonsuit was waived. Scricani v. Dondero, 128 Cal. 31, 32, 60 Pac. 463; Russell v. Pacific Can Co. 116 Cal. 527, 530, 48 Pac. 616; Schlessinger v. Mallard, 70 Cal. 326, 334, 11 Pac. 728.

Defendant introduced in evidence the proofs of death which were in fact made. These proofs were made on blanks furnished by the defendant, and, in accordance with the laws of defendant, by officers of the subordinate lodge of which deceased was a member, and, concededly, prima facie fully established the right of plaintiff to payment, except for one reason. The proofs were written on forms prepared by the defendant for that purpose, and in answer to certain questions propounded thereon the claimant and physician stated that deceased had, nearly one year before making his application for membership, been treated by a physician "for cold and a slight touch of pleurisy," while in the medical examiner's report, which was made a part of his application for membership, in answer to a question as to whether he had ever had any of 45 enumerated "diseases," including "pleurisy," the answer, "No," had been written after each named disease. Concededly, by virtue of certain provisions of the contract, the certificate was void, if the deceased had, on his application, made material misrepresentations in his answers to the questions propounded on the application blank. It is now claimed that the blank showed such a misrepresentation, and that hence the proofs furnished as to the validity of the claim were not "satisfactory." The real point thus appears to be that, under the terms of the certificate, no action could be maintained by plaintiff on this certificate until she made to the company such a showing as ought reasonably to satisfy defendant's officers that the defendant had no good defense against the claim on the ground of misrepresentation made in the application for membership. We are satisfied that the contract required no such proof on the part of the claimant as a prerequisite to the maintenance of an action. The words "and of the identity and right of claimant and of the validity of the claim" all have reference solely to her claim that she is the beneficiary named in the certificate, and entitled to recover thereon if the certificate was in force at the death of the insured, and cannot reasonably be construed as requiring a showing as to the validity of the certificate issued to the deceased. Proof of death and proof of the claimant's right and identity to such benefit as was stipulated by the certificate were the only requisites. If the proof showed facts of which defendant might avail itself as a defense to an action on the certificate, this would not derogate from the sufficiency of the proofs in either respect, or bar the bringing of an action. Charter Oak L. Ins. Co. v. Rodel, 95 U. S. 232-237, 24 L. ed. 433, 434.

2. The medical examiner's report showed, as already indicated, the answer, "No," to

the question: "(3) Have you ever had any of the following diseases? Answer yes or no in each space, and give particulars under the head of remarks: . . . Pleurisy." Some 45 so-called diseases were here enumerated. It further showed the following question and answer, *viz.*: "(6) Have you consulted or been advised by any physician regarding your health within the last five years? If so, whom, when, and for what ailment? A. Grippe, 1900. Dr. La Doux." It appeared from the evidence that all the answers in this very lengthy report were written by the medical examiner of defendant in the presence of the applicant, and as the result of his inquiry of the applicant, and that the applicant was then called upon to sign, and did sign a statement at the end, to the effect that he warranted the "answers as written to the above questions put by the medical examiner are full, complete, and true, and the same shall be made a part of the herein-referred-to application for membership." In the application proper was a similar warranty followed by this statement: "And I do hereby acknowledge and consent and agree that any untrue statement made herein by me or on my behalf, or to any medical examiner, whether written by my own hand or not, or any concealments of facts by me or anyone else, shall forfeit and cancel all rights to any benefit under the above-named application." The certificate recited that it was issued "in consideration of the statement made in the application for beneficiary certificate, and in answer to questions asked in the medical blank (the truth of which said member guarantees)." There was evidence tending to show that during, or while convalescing from, the attack of "grippe" referred to in the medical report, the deceased had a pleural pain "not so very, very severe." The attending physician testified, "but a little touch of pleurisy." The physician further testified that there was not much inflammation, hardly any fever, that it was not "regular pleurisy," just "the very first symptoms of pleurisy," and "it terminated there" at once. The evidence in regard to the matter is such that a jury might well have been warranted in concluding that the applicant had never had the "disease" of "pleurisy," within the meaning of the question relative thereto, and that the written answer was therefore not false. But, in view of evidence admitted and instructions of the trial court, we are not able to determine that they so concluded. The plaintiff was allowed, over defendant's objection, to show what took place between the medical examiner and the applicant at the time the medical report was written. Under this ruling plaintiff testified that all the medical examiner asked the applicant as to diseases was whether "he had ever been sick any," and that the applicant answered that he had never had anything but smallpox and typhoid fever, "until January, 1901, he had the grippe and a slight attack of pleurisy," and that the examiner did not say anything, but simply apparently wrote down the answers. The only other testimony regarding this interview was that of the examiner, who admitted that plaintiff was present during at least a portion of the interview, and who said he had no recollection of the applicant saying anything about pleurisy, and that he could not say as to whether he asked the applicant as to each of the diseases enumerated on the blank; that it was his custom so to do, and always to write down the full reply.

Upon this matter the court instructed the jury, in effect, that if the applicant had, prior to the application, been afflicted with the disease of "pleurisy," and that, when asked whether he had ever had such disease, answered, "No," his statement would be a misrepresentation of a material fact, which would avoid the policy; and that if, on the other hand, he told the examiner that he had "an attack, slight or otherwise, of pleurisy, and the medical examiner either neglected or omitted to write the answer in his report," the insured was not responsible for such omission or neglect, unless he had actual knowledge of the fact that the answer had been imperfectly or incorrectly written. There was no pretense that he had any actual knowledge of the contents of said report, or that he had been asked to read the same, or to do anything but sign his name to the statement at the end thereof. There was no error in the action of the court in admitting this evidence, or in giving this instruction. In volume 3, Cooley's Briefs on the Law of Insurance, p. 2594, it is said: "From an examination of the cases the following propositions may be regarded as established by the weight of authority: Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, though it is so stipulated in the application or policy."

An examination of many of the authorities satisfies us that, while there is some conflict in the cases on some of the matters included in this statement, the great weight of authority is with the statement, as a whole, where the insured acts in good faith, and is himself without fault. This court has already indicated its support of the rule enunciated. In Menk v. Home Ins. Co. 76 Cal. 50, 53, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117, a fire insurance case, it said: "The only point in the offered testimony was that if the agent, knowing all the essential facts, made out the application for plaintiff, the company cannot take advantage of defective statements contained in it as not complying with the requirements of the company; nor would misstatements be fatal to the claim of plaintiff which the agent well knew to be false when he made out the application, received the money of the applicant, and issued the policy. The tendency of the decisions is plainly to hold all those conditions waived which, to the knowledge of the agent, would make the policy void as soon as delivered. Otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud." See also Wheaton v. North British & M. Ins. Co. 76 Cal. 415, 419–421, 9 Am. St. Rep. 216, 18 Pac. 758; Maxson v. Llewelyn, 122 Cal. 195, 199, 54 Pac. 732; Bayley v. Employers' Liability Assur. Corp. 125 Cal. 345, 349, 58 Pac. 7; Parrish v. Rosebud Min. & Mill. Co. 140 Cal. 635, 645, 74 Pac. 312. In Maxson v. Llewelyn, *supra*, it is pointed out, quoting approvingly from Union Mut. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617, that this principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing was procured under such circumstances by the other side as estop that side from using it, or relying on its contents,— not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it. The rule is as applicable to life and accident insurance as it is to fire insurance, and, where the applicant is not a member until after the making of his application, to mutual fraternal societies, as it is to what is known as "regular insurance."

3. On the application proper the answers to the printed questions were written by an officer of defendant, and the paper, when so completed, was handed to the applicant for signature and signed by him. The following question was contained thereon, *viz.*: "(7) Has any proposal or application to insure your life ever been made to any company, or agent, or medical examiner, upon which a policy has not been issued? If so, state full particulars." The written answer was, "No." The defendant sought to show that in December, 1900, deceased had applied for membership in, and a death benefit certificate from, the "Woodmen of the World," a well-known fraternal association, which, as a part of its plan, issued death benefit certificates similar, in all particulars material to the question here presented, to those of this defendant, and that his application had been disapproved by the "head physician" of the order, and no certificate had ever been issued thereon. The trial court sustained the objection made to all such testimony, and this ruling is assigned as error. We are of the opinion that the "Woodmen of the World" was not a "company," within the meaning of the question on the application blank, and that therefore the offered evidence was not material. There is some conflict in the cases as to whether a question of the general character of the one under consideration should be held to refer to any organization other than regular insurance companies, or whether it also includes fraternal associations organized for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money on the death of the members; but, where the question stated on the application blank is as uncertain in its terms as the one under consideration, the better reasoning appears to be in favor of excluding all except regular insurance companies.

It must be recognized that the rule applicable in the construction of insurance contracts, of construing the contract in favor of the assured and against the insurer where it is reasonably susceptible of such construction, is applicable in such cases; and therefore, as said in one of the cases, "where an insurance company or association seeks to avoid a policy or certificate of membership on the ground of falsity in answer to a question which is, by the terms of the contract, made material, the court will construe the question and answer strictly as against the company, and liberally with reference to the insured;" and, "if any construction can reasonably be put on the question and the answer such as will avoid a forfeiture of the policy on the ground of falsity of the answer, that construction will be given, and the policy will be sustained." Newton v. Southwestern Mut. Life Asso. 116 Iowa, 311, 90 N. W. 73. The law of this state recognizes a distinction between regular insurance companies and such associations, which are not

conducted for profit, by declaring the associations "not to be insurance companies in the sense and meaning of the insurance laws of this state," and exempting them from the provisions of such insurance laws (Civ. Code, § 461; Marshall v. Grand Lodge A. O. U. W. 133 Cal. 686, 691, 66 Pac. 25); and there is such a difference between the two classes as to reasonably justify one in concluding that an association or order of the class mentioned is not an "insurance company" within the general acceptation of that term. If this be so, the applicant here was justified in concluding that only regular insurance companies were meant by the question, and we must construe the question as calling for nothing more. If the association wanted anything more, it would have been a simple matter for it to have framed the question, on its carefully prepared blank, in terms so precise and definite as to have left no room for doubt. Again, quoting from Newton v. Southwestern Mut. Life Asso. *supra:* "When an applicant for insurance answers categorically the questions asked, and his answers are correct in any view of the question which can be reasonably taken, then the insurance company or association, as the case may be, ought not to be allowed to escape its liability on the ground that the answer is false." See also Fidelity Mut. Life Asso. v. Miller, 34 C. C. A. 211, 63 U. S. App. 717, 92 Fed. 63; Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L. R. A. 70, 19 C. C. A. 286, 72 Fed. 413; 3 Cooley, Briefs on Insurance, p. 2079.

A contrary view of this matter has been taken by the New York court of appeals in Alden v. Supreme Tent, K. of M. 178 N. Y. 535, 71 N. E. 104, where the question was: "Have you ever been rejected by any life insurance company or association?" and also by the supreme court of that state. McCollum v. Mutual L. Ins. Co. 55 Hun, 103, 8 N. Y. Supp. 249. It will be observed that the question in the New York court of appeals case included the word "association," as well as "company," which might reasonably be held to indicate more to the applicant. In Bruce v. Connecticut Mut. L. Ins. Co. 74 Minn. 310, 77 N. W. 210, the question was: "Has any company or association ever declined or postponed granting or receiving insurance on your life, either for any particular amount, or in any particular form," and it was held that the question included fraternal associations issuing death benefit certificates. Here, again, the question was so unlike the one involved in this case as to present an entirely different question. We are of the opinion that, where the question asked is materially the same as the one we are considering, the other line of authorities is supported by the better reasoning.

4. Complaint is made that the trial court refused to give to the jury the following instruction, *viz.:* "The burden rests upon each party to establish by preponderance of evidence affirmative allegations of its pleading. In this case the plaintiff claims that the fact that James B. Lyon had had pleurisy was communicated to defendant, and the burden rests upon plaintiff to show that such fact was communicated to defendant." Regardless of the question as to where the burden lay to show the facts constituting an estoppel, we are of the opinion that the court was justified in refusing the requested instruction, for the reason that it assumed a fact that, under the evidence, was in issue and for the jury to decide, *viz.*, that the applicant had suffered from the disease of "pleurisy." As we have already shown, the evidence was such as to warrant a conclusion that he had not had such disease, within the meaning of the printed question, but had had only the first symptoms thereof,—had only been threatened with the same. The question as to whether he had the disease was one of the questions submitted to the jury for decision by the charge of the court. The requested instruction in effect declared it to be a fact that the deceased had the disease, and that the answer, as written on the medical examiner's report, was false. We are also satisfied that, under the circumstances shown by the record, the defendant could not have been prejudicially affected by the absence of any specific instruction as to where the burden of proof rested to show an estoppel in the respect designated.

5. Various other rulings of the trial court in the matter of instructions are complained of, but we find none that require special mention. As to defendant's other requested instructions, so far as proper, they appear to have been fully covered by other instructions given, and those portions of the charge of the court that are complained of were in accord with the views we have already expressed in discussing the question as to the right of the plaintiff to show that the answers given by the applicant to the medical examiner were correct, and the question as to whether the "Woodmen of the World" was an insurance company, within the meaning of the phrase used in the printed application.

The order appealed from is affirmed.

We concur; Shaw, J.; McFarland, J.

Petition for rehearing denied February 15, 1906.

NEBRASKA SUPREME COURT.

FREMONT, ELKHORN, & MISSOURI VALLEY RAILROAD COMPANY, Plff. in Err.,

v.

AXSEL HAGBLAD.

(— Neb. —, 101 N. W. 1033.)

Petition—sufficiency.

1. Petition examined, and held not to state a cause of action *ex contractu* against a common carrier, nor a cause of action at common law for the carrier's negligence.

Same.

2. Petition further examined, and held not to set forth facts sufficient to constitute the plaintiff a passenger so as to bring him within the provisions of § 10,039, chap. 47, p. 2876, Cobbey's Anno. Stat. 1903.

Carrier—person on platform—care.

3. A railroad company owes only ordinary care to persons impliedly invited upon its platform who are not passengers.

Same—when a passenger.

4. In order to bring a person within the station house or upon the platform of a railroad station within the protection of the legal duties owing by a common carrier to its passengers, a person intending to become a passenger must go to the station at a reasonable time before the time fixed for the departure of the train upon which he intends to take passage, in a proper manner, and there, either by the purchase of a ticket or in some other manner, indicate to the carrier his intention to take passage, and thus place himself in the carrier's charge.

Same—statutory duty.

5. In order to state a cause of action upon the statutory duty of a railroad company to a passenger who has not actually taken passage upon the train, it is necessary that the facts stated show that the person suing is one of a class of persons to whom the remedy is afforded by the statute. To plead that he is a passenger in a case where the existence of such relation to the carrier is at issue, pleads a mere conclusion of law, and is not sufficient.

Headnotes by LETTON, C.

Same—passenger "being transported."

6. From the time a passenger, as defined herein, places himself under the charge of the carrier as he begins his journey, until he is afforded the opportunity to leave the premises of the carrier at its termination, he is "a passenger being transported," unless by some act not attributable to the carrier the relation ceases.

(December 7, 1904.)

ERROR to the District Court for Holt County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. **Benjamin T. White, James B. Sheean,** and **R. R. Dickson** for plaintiff in error.

Messrs. **A. F. Mullen** and **M. F. Harrington,** for defendant in error:

Plaintiff was entitled to be protected from injury at the hands of the defendant while on the station platform of the defendant.

Exton v. Central R. Co. 62 N. J. L. 7, 56 L.R.A. 508, 42 Atl. 486; Louisville, N. A. & C. R. Co. v. Treadway, 142 Ind. 475, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794; Smith v. St. Paul City R. Co. 32 Minn. 1, 50 Am. St. Rep. 550, 18 N. W. 827; Illinois C. R. Co. v. Treat, 179 Ill. 576, 54 N. E. 290; Norfolk & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935; Shannon v. Boston & A. R. Co. 78 Me. 52, 2 Atl. 678; Dodge v. Boston & B. S. S. Co. 148 Mass. 209, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373.

Whenever a passenger is injured by any act or omission of the carrier the law immediately raises the presumption that the act was negligently done, and the burden of overcoming this presumption of negligence is upon the carrier.

Philadelphia & R. R. Co. v. Anderson, 94

Case Note.—Meaning of phrase "a passenger being transported," in statute defining duty and liability of carriers to passengers.—Outside of Nebraska the courts of record seem to have had no occasion to construe this phrase. In that state it was first called in question in the Sattler Case, cited and quoted in FREMONT, E. & M. VALLEY R. Co. v. HAGBLAD.

In the more recent case of Hicks v. Union P. R. Co. (Neb.) 107 N. W. 798, it was held that the plaintiff was not "a passenger being transported," within the meaning of the statute, where he had not presented himself in the railway company's passenger station or upon its platform or other place for the reception of passengers, and had said or done nothing to indicate to the company's agents or employees that he intended becoming a passenger, nor in any way committed himself to the care and control of the company, or placed himself in its custody. In this case it appeared that the plaintiff was eating at a restaurant near the passenger station when a bystander announced that the train upon which he desired to take passage had arrived and was about to depart, whereupon he left hurriedly and ran past the station in the direction of his train which stood upon a side track. Without looking in the direction of an approaching train upon the main track he ran directly in front of it and was injured.

Pa. 357, 39 Am. Rep. 787; Simson v. London General Omnibus Co. L. R. 8 C. P. 390; Roberts v. Johnson, 58 N. Y. 613; Robinson v. New York C. & H. R. R. Co. 9 Fed. 877; Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; White v. Boston & A. R. Co. 144 Mass. 404, 11 N. E. 552; Eagle Packet Co. v. Defries, 94 Ill. 598, 34 Am. Rep. 245; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Ficken v. Jones, 28 Cal. 618; Kaples v. Orth, 61 Wis. 531, 21 N. W. 633; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565; Kendall v. Boston, 118 Mass. 234, 19 Am. Rep. 446; Rose v. Stephens & C. Transp. Co. 20 Blatchf. 411, 11 Fed. 438; Illinois C. R. Co. v. Phillips, 49 Ill. 234; Baltimore & O. R. Co. v. State, 63 Md. 135; Cleveland, C. C. & I. R. Co. v. Walrath, 38 Ohio St. 461, 43 Am. Rep. 433; Memphis & O. River Packet Co. v. McCool, 83 Ind. 392, 43 Am. Rep. 71; Central Pass. R. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. Rep. 309, 6 S. W. 441.

Plaintiff was a pasenger being transported within the meaning of the statute.

Chicago, R. I. & P. R. Co. v. Sattler, 64 Neb. 646, 57 L.R.A. 890, 97 Am. St. Rep. 666, 90 N. W. 649; Dodge v. Boston & B. S. S. Co. and Shannon v. Boston & A. R. Co. *supra*.

Lettom, C., filed the following opinion:

This action was brought by Axsel Hagblad, defendant in error, hereinafter styled "the plaintiff," against the Fremont, Elkhorn, & Missouri Valley Railroad Company, plaintiff in error, hereinafter styled "the defendant." Judgment was rendered for the plaintiff below, and the defendant below brings error to this court.

The sole error assigned is that the trial court erred in overruling the defendant's motion for a judgment on the pleading *non obstante veredicto*. The defendant, by a general demurrer, by seasonable objection to the introduction of evidence upon that ground, by motion for an instruction, and by motion for judgment *non obstante veredicto*, at every stage of the case challenged the sufficiency of the allegations of the petition to state a cause of action against the defendant. The parts of the petition which are necessary to be set forth in order to state the question involved are as follows: "(1) The plaintiff, for cause of action, alleges that the defendant is a corporation duly organized under the laws of the state of Nebraska, and has been such corporation for ten years last past. That the defendant is a corporation engaged in the railroad business, and for ten years last past it has been a common carrier of passengers for hire upon its railroad, and has owned and operated a line of railroad in the counties of Madison, Antelope, and Holt, in the state of Nebraska. That Norfolk and Meadow Grove are stations upon the defendant's line of railroad in Madison county where it receives and delivers passengers on and from its train, and that the defendant, on the 28th day of December, 1902, was a common carrier carrying passengers from Norfolk to Meadow Grove, and that the station at Norfolk where such passengers are received is commonly known as Norfolk Junction. (2) That on the 28th day of December, 1902, the plaintiff purchased from the defendant at Norfolk, Nebraska, a ticket entitling him to a safe passage on the defendant's train from Norfolk to Meadow Grove, and insuring him against injury while a passenger on said train, and while a passenger on the defendant's premises at Norfolk. That while plaintiff was standing on the defendant's station platform at Norfolk on the evening of said day, and after he had purchased and paid the defendant for said ticket, and while he was a passenger on the defendant's premises, and while he was waiting for the arrival of the defendant's train which was to carry him from Norfolk to Meadow Grove, he was struck by an engine and cars run and operated upon the defendant's railroad track at Norfolk, and which train was under the direction, and with the knowledge, approval, and consent, of the defendant. That by being struck by said engine and said cars the defendant was thrown down, mangled, bruised, and injured, and sustained the following injuries."

It will be observed that the petition does not allege that any act was negligently done. If the action had been brought against an individual for damages occasioned by his negligence which resulted in the injuries complained of, it would be essential to allege that the injuries were occasioned by the negligence of the defendant, either by setting forth facts which would constitute negligence as a matter of law, or by pleading generally that the defendant was negligent in performing, or omitting to perform, the acts complained of as constituting negligence. Omaha & R. Valley R. Co. v. Wright, 49 Neb. 456, 68 N. W. 618.

The allegations of the petition under consideration do not set forth that the act by which the plaintiff was injured was done negligently, and no fact is alleged which constitutes negligence as a matter of law under the common law, nor by statute unless the plaintiff was one of a class embraced under the provisions of § 10,039,

chap. 47, p. 2876, Cobbey's Anno. Stat. 1903, relating to injuries to persons while being transported over railroads in this state.

Since the petition was assailed at every stage in the progress of the cause, the pleader will be presumed to have stated his case as fairly to himself as the facts will warrant, and the familiar rule applied that the allegations in the petition, and all presumptions arising therefrom, will be construed against the pleader, and no presumptions in his favor indulged in. Having these rules in mind, therefore, it will be observed that the only allegations of the petition which show the manner in which the plaintiff was injured are that, while plaintiff was standing on defendant's station on the platform at Norfolk on the evening of December 28, 1902, he was struck by an engine and cars run and operated upon the defendant's railroad track, which train was run under the direction, and with the knowledge, approval, and consent, of the defendant. That, by being struck by said engine and cars, the plaintiff was injured. Taking these allegations alone, without the aid of any presumptions, they appear to be somewhat inconsistent. The plaintiff, while standing on the platform, was struck by the engine and cars operated upon the track. The plaintiff stood presumably upon a safe and properly constructed platform, and engine and cars were presumably properly constructed and properly operated, and the track was presumably in good condition for the purpose of its construction. If we accept these facts as true, then, unless the plaintiff was so situated at the time of the accident that, though he was standing upon the platform, his body projected over the track in such manner that properly constructed and operated engine and cars might strike him, no injury could result. This being the case, the inference must be drawn that, presuming that the defendant was operating its trains with due care and caution, the plaintiff placed himself in a position that common knowledge would show to be one of danger. We conclude, therefore, that the petition fails to disclose any facts which constitute negligence on the part of the defendant as a matter of law irrespective of the statute, and does not state a cause of action if based upon a common-law liability of the defendant.

The plaintiff contends that the petition states a good cause of action upon three grounds: First, it states a breach of contract to safely convey the plaintiff from the point where he purchased the ticket to the point of destination; second, it states a cause of action under the statute hereinbefore alluded to; third, it states a cause of action on the ground of negligence by stating facts which, as a matter of law, constitute negligence on the part of the defendant.

As to the first contention, we think it clear that this petition is not based upon contract. No promise, and no consideration therefor, have been alleged. The petition alleges that the plaintiff purchased a ticket. While it is true that a railroad ticket is evidence of a contract between the carrier and the purchaser thereof, still the plea that the plaintiff purchased a ticket for a passage from Norfolk to Meadow Grove, without alleging that the defendant agreed to carry him between these points in consideration of the sum paid, and alleging further a breach of the contract, does not set forth an action *ex contractu*. 15 Enc. Pl. & Pr. p. 1125, and notes. "There is a class of cases arising out of contract, where, by reason of the contract, the law raises a duty, for the breach of which duty an action on the case may be maintained; and in such cases the contract, being the basis and gravamen of the suit, must be alleged and proved. . . . But when the gist of the action is a breach of duty and not of contract, and the contract is not alleged as the cause of action, and when, from the facts alleged, the law raises the duty by reason of the calling of the defendant,—as in case of innkeepers and common carriers,— and the breach of duty is solely counted upon, the rules applying to action *ex delicto* determine the rights of the parties." Frink v. Potter, 17 Ill. 412; Wright v. Geer, 6 Vt. 151, 27 Am. Dec. 538; Bank of Orange County v. Brown, 2 Wend. 158; M'Call v. Forsyth, 4 Watts & S. 179. We conclude, therefore, that the gist of this action under the allegations of the petition is a breach of duty arising from the obligations imposed by law upon common carriers, and that it is not an action upon the contract of carriage.

We have already considered the third ground upon which the plaintiff asserts the petition is sufficient, and decided that his position as to this is unsound. There remains, however, to be considered the contention that the petition states a cause of action under § 10,039, chap. 47. p. 2876, Cobbey's Anno. Stat. 1903, and this presents an important point for consideration. Section 10,039 is as follows: "Every railroad company as aforesaid shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road ac-

tually brought to his or her notice." The plaintiff contends that under the allegations of the petition he was a passenger, and was injured while being transported over the defendant's railroad, and that, since this fact appears upon the face of the petition, the liability of the company for damages sustained by him is fixed, unless, by proper pleading and proof as to the plaintiff's criminal negligence or violation of some rule or regulation actually brought to his notice, it relieves itself from the burden, and from the conclusive presumption of negligence which is placed upon it by the statute. On the other hand, the defendant insists that a purchaser of a railroad ticket, while standing on a station platform waiting for the arrival of a train on which he intends to take passage, does not come within the class of passengers protected by the statute, and that such a person is not a "passenger being transported" over the carrier's road. And in this connection the defendant calls attention to the fact that the petition does not allege that the plaintiff was injured while attempting to alight from or board his train, or that he had begun his journey by taking passage on the train. It is obvious, therefore, that the determination of the question presented rests upon the inquiry whether a person who has bought a ticket and is upon a station platform awaiting the arrival of a train upon which he intends to take passage is a passenger being transported over its road.

Defendant argues that the common law recognized two classes of passengers, those being transported and those not being transported, and established different degrees of care, and, in case of injury, different rules as to the burden of proof. That, as to the first class, the carrier was bound to exercise the highest degree of care which human skill and foresight could devise, and that an injury done to one of this class, arising from defective roadbed, equipment, or management, was presumed to have been caused by the negligence of the carrier. That, as to the second class, those not being actually transported, the carrier was only bound to exercise ordinary care, and from an injury to one of this class no presumption of negligence was raised against the carrier. As to the first proposition, there is no difference of opinion worthy of mention. The doctrine that the carrier must exercise the highest degree of care is accepted as the settled rule in nearly all jurisdictions, the reason for this rule being well stated by the Supreme Court of the United States in an early case, Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14 L. ed. 502 (decided in 1852): "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.' . . . Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safety." As to the second proposition, however, the authorities are not uniform, one class of cases following the doctrine as laid down in Shearman & Redfield on Negligence, 5th ed. § 501, as follows: "When Ordinary Care only Required.—The requirement of extraordinary care, being founded upon the special risk of human life involved in the business of carrying passengers, is not to be extended to incidents of the business which do not involve such risk, and in which the carrier stands in the same relation to the passenger as do other business men from whom such peculiar care is not required. Hence, while a carrier must use ordinary care to make the means of approach and departure and other accessories safe for the use of passengers, he is not required to use any higher degree of care with reference to these things. Therefore, with regard to platforms, stairs, waiting rooms in a station, the ground surrounding it, and other premises of a railroad company, its obligation to passengers is only one of ordinary care, in common with that of all other occupants of land or buildings inviting persons to enter thereon for compensation, since passengers are no more endangered in such places than they are on similar premises not belonging to a railroad company." Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 74; Kelly v. Manhattan R. Co. 112 N. Y. 443, 3 L.R.A. 74, 20 N. E. 383; Lafflin v. Buffalo & S. W. R. Co. 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; Falls v. San Francisco & N. P. R. Co. 97 Cal. 114, 31 Pac. 901; Moreland v. Boston & P. R. Corp. 141 Mass. 31, 6 N. E. 225; Jordan v. New York, N. H. & H. R. Co. 165 Mass. 346, 32 L.R.A. 101, 52 Am. St. Rep. 522, 43 N. E. 111; Stokes v. Suffolk & C. R. Co. 107 N. C. 178, 11 S. E. 999; McDonald v. Chicago & N. W. R. Co. 26 Iowa, 124, 95 Am. Dec. 114; Southern R. Co. v. Reeves, 116 Ga. 743, 42 S. E. 1015. The other class of cases holds in the main that the carrier's duty to a passenger is the exercise of the highest care at all times that the relation subsists, from the time that a person becomes a passenger until he ceases

to be such, his journey is completed, and he has left the carrier's premises. A few of the cases holding the carrier to the same degree of care, with reference to a person who has become a passenger from the time he assumes such relation until within a reasonable time after his alighting from the train and departure from the platform or station at his destination, are as follows: Gaynor v. Old Colony & N. R. Co. 100 Mass. 208, 97 Am. Dec. 96; Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667, 3 N. W. 173; Knight v. Portland, S. & P. R. Co. 56 Me. 234, 96 Am. Dec. 449; Warren v. Fitchburg R. Co. 8 Allen, 227, 85 Am. Dec. 700; Webster v. Fitchburg R. Co. 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 165; Dodge v. Boston & B. S. S. Co. 148 Mass. 207, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373; Weston v. New York Elev. R. Co. 73 N. Y. 595; Norfolk & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935; Burke v. Chicago & N. W. R. Co. 108 Ill. App. 565; Krantz v. Rio Grande Western R. Co. 12 Utah, 104, 30 L.R.A. 297, 41 Pac. 717; Johns v. Charlotte, C. & A. R. Co. 39 S. C. 162, 20 L.R.A. 520, 39 Am. St. Rep. 709, 17 S. E. 698.

The question as to which of these two rules governs the liability of railroads for injuries to passengers upon their station platforms or premises in this state, as presented by the pleading in this case, depends upon the proper construction to be given to the phrase "a passenger while being transported over its road." If the intention of the legislature was that this phrase should be construed literally, then a passenger not actually in process of being moved or carried from one point to another would not be within the protection of the statute. This court, however, has recently had occasion to construe this phrase to some extent. In the case of Chicago, R. I. & P. R. Co. v. Sattler, 64 Neb. 636, 57 L.R.A. 890, 97 Am. St. Rep. 666, 90 N. W. 649, this provision is discussed with reference to the facts in that case where a passenger left the train on his own volition for a purpose not incident to the journey. In that case it is said: "We are agreed that the words 'while being transported over its road' is a qualifying phrase, intended to limit liability on the part of the company, and that we must give it the force intended by the legislature. We cannot, however, agree with plaintiff in error that it was intended to exclude all passengers who leave the car provided for them by the carrier. It is well known that many, perhaps most, roads provide eating houses and other accommodations for the comfort or convenience of their patrons, and that regular stops are made for meals, requiring the passengers to leave the car in which they are being transported, and often to cross numerous tracks on their way to and from the car to the dining room or restaurant. In such cases one does not lose his character as a passenger in the course of transportation over the road, or the protection of the statute. The duty of the company to provide him safe egress and ingress for such necessities as are required on his journey, and which the road assumes to furnish, and which it invites him to partake of, is no less stringent than to furnish him safe passage on its cars. While seated in the dining room of the company he is under its control, and must conform to its rules, as fully as while on the train; and while thus subject to the rules and regulations of the company he is their passenger, entitled to like protection from damage from the operating of the road as while seated in the car, proceeding on his journey. We believe and hold that it was intended to include in the words 'while being transported over its road' all passengers actually on the train, whether the same is in motion or standing on any part of the road; and it further includes those passengers leaving the train for any necessary purpose incident to their journey, such as a change of cars, or to procure refreshments at any point where the same are furnished by the company, and where an express or implied invitation is extended to the passengers to leave the car for that purpose." The phrase, then, is not in all cases to be literally construed.

If a person who has left the train for any necessary purpose incident to the journey, such as to procure refreshments at a point where the same is furnished by the company, is, while upon the platform on his way to the eating house, and during his return to the train, "a passenger being transported" within the contemplation of the statute, is not the intending passenger who has purchased his ticket, and who may walk side by side with him upon the station platform on his way to the same coach, equally a passenger being transported? He is upon the company's premises furnished to him for the purpose of procuring his ticket and giving him access to the train, and has begun his journey. Should an injury occur to both, can one rule be applied to an action brought by the passenger who was returning from the dining room to the train, and another rule to the passenger who was walking with him from the waiting room or ticket office to the same train? Further than this, how can a reasonable distinction be drawn between the duty of the railroad company to the passenger sitting in a train about to move from the station, and a passenger upon the platform,

or in the station house, ready to take the train and begin his journey?

It is argued in the defendant's brief that the legislature, in adopting the language of the courts when defining the class of passengers entitled to the highest degree of care, adopted the same meaning and construction as was given to that language by those courts. But, as we have seen, the courts are not uniform in their holdings in this respect, and, from the whole course of legislation and judicial construction within this state, we believe that the legislature, by the use of the language quoted in the section under consideration, intended no more and no less than that every individual to whom the carrier owed the care due a passenger should, as long as the relation existed, be within its terms, but that when the relation ceased, either by voluntary disregard of reciprocal rights and duties of the passenger, as in the Sattler Case, or by disregard of the reasonable rules and regulations of the carrier on the part of the passenger, or by his criminal negligence, the carrier becomes absolved upon his part from the presumption of negligence created by the statute; or, to place the idea in other words, that from the time the intending passenger places himself under the charge of the carrier, as he begins his journey, until he is afforded the opportunity to leave the premises of the carrier at its termination, he is "a passenger being transported," unless, by some act not attributable to the carrier, the relation ceases.

When does the relation of carrier and passenger begin? With but minor differences depending upon the circumstances in each particular case, the courts are generally agreed upon this point. The general rule seems to be that where a person intending to take passage upon a train goes into a station within a reasonable time prior to the hour of departure of the train, in a proper manner, and there, either by the purchase of a ticket or in some other manner, indicates to the carrier his intention to take passage, from that time on, while waiting for his train, he is entitled to all the rights and privileges of a passenger. In Elliott upon Railroads, p. 2459, note 1, it is said that the true doctrine is announced by the supreme court of Massachusetts in Webster v. Fitchburg R. Co. 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 165. In that case a person who held a ten-trip ticket was struck and killed by a train when he was running rapidly from the direction of the public street, across the defendant's premises outside of the passenger station, to the track on which was an incoming train, apparently with a view to take another train which was about to start for Boston on the track beyond. It was contended that, inasmuch as he had previously obtained a ticket, and was on the defendant's premises in a place designed for the use of passengers outside of the station, and was about to take a train, he had become a passenger. The court, however, says: "One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad. A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place, to be carried. It invites everybody to come who is willing to be governed by its rules and regulations. In a case like this, the question is whether the person has presented himself in readiness to be carried, under such circumstances in reference to time, place, manner, and condition that the railroad company must be deemed to have accepted him as a passenger." The rule stated in this case has been approved and cited many times since its announcement, both by text writers and by courts, and we believe the doctrine stated to be sound. If the plaintiff has not brought himself within this rule, he was not a passenger, and never became such in the eye of the law, and unless, by the allegations of his petition, he is within the class, his petition will not state a cause of action. It will be observed that the petition contains no allegation in regard to the time when the train upon which he was intending to take passage was due to depart from Norfolk. It alleges the purchase of a ticket, but that alone does not make a person a passenger.

In Illinois C. R. Co. v. O'Keefe, 168 Ill. 115, 39 L.R.A. 150, 61 Am. St. Rep. 68, 48 N. E. 294, it is said: "One does not become a passenger until he has put himself in charge of the carrier, and has been expressly or impliedly received as such by the carrier. . . . The purchase of a ticket does not make one a passenger, unless he comes under the charge of the carrier and

is accepted for carriage by virtue of it." This case is reported in 61 Am. St. Rep. 68, with a monographic note upon the general subject of who are passengers and when they become such.

In Illinois C. R. Co. v. Laloge, 113 Ky. 896, 62 L.R.A. 405, 69 S. W. 795, the facts were that a passenger went to the railroad station five hours before her train was due, and was assaulted. A statute of Kentucky requires the ticket office and waiting room to be open, lighted, and warmed thirty minutes before train time. The court held that it was the duty of the carrier to provide such facilities for intending passengers within a reasonable time before the departure of its trains; that thirty minutes was a reasonable time, and that, by coming to the station five hours before the schedule time for the departure of the train, the plaintiff did not become a passenger; that there was no obligation upon the railroad to furnish accommodations for the entertainment for an indefinite length of time of those who contemplate in the future becoming its passengers; that there was no invitation, either express or implied, until within thirty minutes before train time; and that, consequently, it owed no duty to the plaintiff other or different from that owing to any ordinary person.

In Phillips v. Southern R. Co. 124 N. C. 123, 45 L.R.A. 163, 32 S. E. 388, the circumstances were that a person went to the railroad station five hours before train time. The carrier had a rule to close its waiting room until thirty minutes before the time of departure of each train. The night was cold, the plaintiff was ejected, and was injured by the contraction of a severe cold and subsequent illness. In the opinion the court says: "A party coming to the railroad station with the intention of taking the defendant's next train becomes, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for departure of said train. To constitute him such passenger, it is not necessary that he should have purchased his ticket, as seems to have been considered by his Honor. 1 Fetter, Carr. Pass. § 288. But the purchase of the ticket would probably be considered the highest evidence of his intention. But still it is his coming to the station within a reasonable time before, with the intention to take the next train, that creates the relation of passenger and carrier."

Another instructive case is Louisville & N. R. Co. v. Reynolds, 24 Ky. L. Rep. 1402, 71 S. W. 516, decided in 1903. The plaintiff had gone to the station to take a train at 11 P. M. His train was late, though he testified he did not know this. While he was standing on the platform, about 15 feet from the track, he was struck by a piece of coal which fell from a train which was passing rapidly by with loaded coal cars, and was severely injured. The court said: "Appellee was . . . rightfully on the platform, and sustained the relation of passenger to the appellant, for he was there to take the train, and, the waiting room being closed, had a right to be on the platform. It was train time, and so he had a right to come to the station at this time to take the train, and, if it be true that he was told the train was late, being at the station, he had a right to remain there and wait for it." With these views we concur.

A railroad company is not bound to furnish a place of entertainment for persons who may intend at some future time to become passengers over its road; and such a person who resorts to its station, or who stands upon its platform exposing himself to such dangers and risks as may naturally and obviously occur at such a place by reason of rapidly moving trains, switching of freight cars, or engines passing by, or by the moving of articles of freight, assumes and takes upon himself the risk of injury, and is entitled to the carrier's protection in no greater degree than any other licensee. Ordinary care under all the circumstances of the time and place is all he is entitled to. The fact that he may have procured a ticket is immaterial.

The relation of carrier and passenger does not begin until within a reasonable time prior to the time fixed for the departure of the train the prospective passenger intends to take, and not until he has in some manner, either expressly or impliedly, placed himself within the carrier's charge. If, within a reasonable time before the departure of the train he intends to take, he goes to the place provided for the reception of intending passengers, and there places himself actually or impliedly within the carrier's care, then, and not until then, the law places around him the protection vouchsafed to passengers, and charges the carrier with the highest degree of care for his safety. To hold otherwise would be to place a most unjust and onerous burden upon the carrier. In this day and age of "limited trains," "lightning expresses," "flyers," "cannon balls," as they are sometimes fancifully designated, many stations and platforms upon main lines of railroad are passed by such trains at rates of speed as high as 60 miles an hour. If a railroad company were held to the same high degree of care to persons who

are not passengers over its road, resorting to its stations to loaf or loiter, it would be compelled to moderate the rate of speed of such trains at every way station along its line, and otherwise would be compelled to interfere with the operation of its trains, and the proper conduct of its business, to preserve the safety and welfare of persons to whom it owed no duty. Such a rule would be intolerable, and has not been enacted by the section under consideration. In order to state a cause of action upon the statutory duty of a railroad company to a passenger, it is necessary that the facts stated show that the person suing is one of a class of persons to whom the remedy is afforded by the statute. To plead that he is a passenger, in a case where the existence of such relation to the carrier is at issue, pleads a mere conclusion of law, and is not sufficient. This rule has been well stated in the case of Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337, where the plaintiff sued in trespass for removal from a railroad station house, and in his replication attempted to establish his right to be and remain at the station. The court sustained a demurrer to the replication, and entered judgment for the defendant. In the syllabus the court says: "Right to enter and remain at railroad station house extends only as far as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars, and, as to what is a reasonable time, will depend upon the circumstances of each particular case." And in the opinion it is said: "It is not alleged that it was the intent of the plaintiff to go upon the then next regular train, or that his ticket was for such train. For aught that is alleged, his ticket may have been for, and his intent to go upon, one of those trains called 'excursion trains,' that are advertised to run at some particular time, and for which tickets are sold many days in advance of the time of departure. In this respect we think the replication is defective. The plaintiff should have alleged that at the time . . . he was at the station awaiting the departure of a train that was expected soon to leave and on which he intended to go. The replication should show that the plaintiff was there intending to go upon a train that was expected to leave within such a short period of time thereafter that, in view of the rule as before laid down, he would have the right of remaining at the station until its departure. This replication, we think, does not show such a state of facts as are necessary to vest such right in the plaintiff, and therefore it is insufficient." So far, then, from having brought himself within the class of "a passenger being transported," as the statute prescribes, plaintiff in this case has not even pleaded facts sufficient to show that he was a passenger under the nonstatute law prescribing the qualifications of the class of persons embraced under that general designation. For these reasons, we are of the opinion that the petition does not state a cause of action under the statute, and that the demurrer and objections to the introduction of evidence should have been sustained.

A bill of exceptions was settled and allowed in the case, but, since the sole question presented is the sufficiency of the petition, we have not examined the same.

We recommend that the judgment of the district court be reversed, and the cause remanded for further proceedings.

Ames and Oldham, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the cause is remanded for further proceedings.

A petition for rehearing having been filed, **Letton, J.**, on March 8, 1906, handed down the following additional opinion:

A rehearing of this case was granted mainly upon the question of whether the proposition laid down in the sixth paragraph of the syllabus of the former opinion (101 N. W. 1033) is a correct statement of the law. This paragraph is as follows: "From the time a passenger as defined herein places himself under the charge of the carrier as he begins his journey, until he is afforded the opportunity to leave the premises of the carrier at its termination, he is 'a passenger being transported' unless by some act not attributable to the carrier the relation ceases." No attack has been made upon the principles laid down in the former opinion as to when the relation of carrier and passenger begins, nor is the applicability of the rule questioned requiring the highest degree of care to be exercised by the carrier for the safety of a passenger; but it is earnestly contended that the proposition above quoted was unnecessary to a decision of the case, and is unsound as a statement of the law. In Chicago, R. I. & P. R. Co. v. Sattler, 64 Neb. 636, 57 L.R.A. 890, 97 Am. St. Rep. 666, 90 N. W. 649, it is said: "We believe and hold that it was intended to include in the words, 'while being transported over its road' all passengers actually on the train, whether the same is in motion or standing on any part of the road; and it further in-

cludes those passengers leaving the train for any necessary purpose incident to their journey, such as a change of cars or to procure refreshments at any point where the same are furnished by the company, and where an express or implied invitation is extended to the passengers to leave the car for that purpose." In our former opinion it was asked whether one rule could be applied to an action brought by a passenger returning from the dining room to the train and another rule to a passenger walking with him from the waiting room or ticket office to the same train, and it was upon this statement in the Sattler Case that the proposition herein attacked was founded. After further argument and upon more mature consideration, we are convinced that there is merit in plaintiff in error's contention, and that, as said in the Sattler Case, we must give the qualifying phrase the force intended by the legislature. The difficulty lies in defining and limiting the class of persons who are "passengers while being transported over its road." When does the act of transportation begin, and when does it end, and when, if ever, during the journey is the passenger not within the protection of the statute? We have held that this section makes railroad companies insurers of the safety of their passengers. Chicago, R. I. & P. R. Co. v. Zernecke, 59 Neb. 689, 55 L.R.A. 610, 82 N. W. 26; Chicago, B. & Q. R. Co. v. Landauer, 39 Neb. 803, 58 N. W. 434; Fremont, E. & M. Valley R. Co. v. French, 48 Neb. 638, 67 N. W. 472. Such an onerous burden should not be imposed to a greater extent than warranted by legislative sanction.

In its brief, plaintiff in error concedes that the statute should apply to passengers who are getting on or off the platform and steps of the cars, and who are actually riding within the cars; but whether this is a proper limitation or not we are not called upon to determine in this case. It would seem, however, that, after a person becomes a passenger as laid down in the former opinion, the carrier is held to his common-law liability alone until the time when the passenger is in the act of journeying, and that from the time that act begins until its termination, and during the necessary incidents of the transportation, he is "being transported." The discussion in the former opinion and at this time upon this point is rather academic than necessary to the decision of the case, and it is only for the purpose of avoiding misconceptions in the future that we thought it necessary to re-examine this question. Whether or not a passenger is a passenger "being transported" depends upon the circumstances of each particular case and until the occasion arises it is difficult, if not impossible, to draw an exact line between the two classes. Upon the whole, since it is unnecessary in this case to pass upon this question, we think it had better be left an open one for future consideration when it becomes necessary to the determination of an actual controversy in which discrimination and distinction between the two classes of passengers must of necessity be made.

The sixth paragraph of the syllabus is therefore disapproved, and the opinion modified accordingly.

FLORIDA SUPREME COURT.

WESTERN UNION TELEGRAPH COMPANY, Plff. in Err.,
v.
T. H. BARLOW.

(— Fla. —, 40 So. 491.)

Complaint—excessive damages.

1. The mere fact that a declaration, or count thereof, may set up elements that do not enter into the measure of damages, or greater damages than the case made

Headnotes by HOCKER, J.

Case Note.—Right to recover against telegraph company the loss sustained upon a commercial transaction entered into in consequence of a breach of its duty.—It is a general rule that a wrongdoer is liable only for the natural and proximate consequences of his wrongful act. The law does not undertake to hold one who is charged with a breach of duty toward another with all the possible consequences of his wrongful or negligent act. Therefore in such cases as WESTERN U. TELEG. CO. v. BARLOW, where a commercial transaction, resulting in loss, is alleged to have been entered into because of the mistake or negligence of the telegraph company, the primary question to be considered is whether there is such a connection between the wrong alleged and the resulting loss that, in contemplation of law, they stand related to each other as cause and effect, so as to give a right of action against the company and make it chargeable with the loss.

Thus, in First Nat. Bank v. Western U. Teleg. Co. 30 Ohio St. 555, 27 Am. Rep. 485, a bank wrote its correspondent in New York asking if certain drafts drawn by one L. would be accepted, and requested an answer within two days by telegraph if the drawees were unreliable or unwilling to accept. Four days later, and two hours after the plaintiff bank had cashed the drafts, the correspondent sent a message, which was never received by the bank. The bank claimed that, if the telegram had been received within a reasonable time, it could

legally entitles the plaintiff to recover, if any damages whatever may be recovered thereunder, though such damages be only nominal, does not make the declaration demurrable. Such questions are properly raised and settled by objections to the testimony at the trial, or by instructions to the jury as to the law applicable to the points raised, or may be cause for reforming the declaration, under § 1043, Rev. Stat. 1892, when calculated to embarrass the fair trial of the case.

Telegram—wrongful delivery—damages.

2. The maxim, *Causa proxima, non remota, spectatur*, applies to suits for breaches of contracts for the delivery of messages by telegraph companies; and where A sends a message from Orlando, Florida, to B at Jensen, Florida, in whose judgment and discretion the former has confidence, in these words, "Wire lowest price of car of pines, good sizes, quick," and a reply is promptly received from Jensen by A in these words, "Average, thirty-three, three hundred crates, price four hundred dollars, immediately," signed by C, and not by B, and A afterwards telegraphs C in these words, "Will take the car; see T. V. Moore [another party]. Have wired him," —and afterwards pays C for the car, through Moore, to whom he sends the money; and it turns out that the car of pineapples is of inferior quality, and A loses money on them,—under the application of the foregoing maxim, A has no cause of action against the telegraph company, because of the nondelivery of the telegram to B, except for the cost of sending the telegram to B, or nominal damages; and, in a suit by A against the company for

have recovered from L. the money it had paid him on the drafts. The court held that the possibility of recovering the money from L. was a contingency too remote on which to base a recovery from the telegraph company on account of its failure to deliver the telegram.

In Postal Teleg. Cable Co. v. Akron Cereal Co. 23 Ohio C. C. 516, plaintiff offered by telegraph to sell 5,000 sacks of grits at 6¾, which, by negligence of the telegraph company, was changed to 6.34, whereupon the sendee answered that he would take 2,000 sacks at 6.34, and plaintiff replied by letter that it had entered the order for 2,000 sacks at 6¾. Not having the grits in stock, plaintiff bought from others, filled the order, and finally settled for 6.34. It was held that the telegraph company was not liable for the difference in price, its negligence not having resulted in a completed contract.

In Lowery v. Western U. Teleg. Co. 60 N. Y. 198, 19 Am. Rep. 154, one B. sent a telegram to plaintiff asking for $500, which by the negligence of the telegraph company was changed to $5,000. Plaintiff sent this latter sum by express to B., who afterward absconded, having appropriated the money to his own use. It was held that the mistake of the telegraph company was the antecedent of the loss sustained by the plaintiff, but not, in a juridical sense, the cause of it; that, though the negligence of the company afforded an opportunity for B. to commit the criminal act, the embezzlement could not reasonably have been expected and did not naturally flow from the wrong of the company, and it was not liable for the loss of the money.

In Western U. Teleg. Co. v. Du Bois, 29 Ill. App. 219, it was held that one who orders goods on the faith of a telegram which, as received by him, erroneously understates the price written in the original, is entitled to recover from the company the excess in price which he has been required to pay, this being the proximate result of defendant's fault. This proposition was affirmed in 128 Ill. 248, 15 Am. St. Rep. 109, 4 L.R.A. (N.S.) 21 N. E. 4, but the judgment was reversed on another ground.

And where one, who orders the goods on the faith of such telegram, pays the shipper (sender of the telegram) the understated price, the telegraph company is liable to the sender for the difference between the prices stated in the telegram as sent and as delivered, this damage being what naturally might be expected to follow the breach of duty; and the victim of such negligence is only required to act in good faith in his effort to extricate himself from the situation in which he has been placed. Pepper v. Western U. Teleg. Co. 87 Tenn. 554, 4 L.R.A. 660, 10 Am. St. Rep. 699, 11 S. W. 783.

But in German Fruit Co. v. Western U. Teleg. Co. 137 Cal. 598, 59 L.R.A. 575, 70 Pac. 658, it was held a proper defense to show that plaintiff (sender of the message) might have avoided the loss; and where the sendee knows that a mistake must have occurred in the transmission of the message, the sender, not being bound by it, cannot voluntarily perform the contract at the incorrect price mistakenly transmitted, and throw the loss on the telegraph company.

In Leonard v. New York, A. & B. Electro Magnetic Teleg. Co. 41 N. Y. 544, 1 Am. Rep. 446, a telegraphic order directing the plaintiff's agent to ship 5,000 sacks of salt was changed in transmission to 5,000 casks of salt, such casks being worth less at the receiving than at the shipping point, it was held that the telegraph company was liable for the difference, with the cost of transportation added, these being the damages resulting directly and proximately from its breach of duty.

In Reed v. Western U. Teleg. Co. 135 Mo. 661, 34 L.R.A. 492, 58 Am. St. Rep. 609, 37 S. W. 904, plaintiff received a telegram from her agent stating that he had been offered $1,900 for her land, whereas the offer as recited in the message given by the agent to the telegraph company was $1,300. After the operator had stated that he had verified the message, plaintiff sent to her agent an acceptance of the offer by telegraph, and the agent, supposing he was au-

damages for such nondelivery, the latter is entitled to an instruction to the jury to this effect.

(February 13, 1906.)

ERROR to the Circuit Court for Orange County to review a judgment in favor of plaintiff in an action brought to recover damages for wrongful delivery of a telegram. Reversed.

Statement by Hocker, J.:

On the 7th day of December, 1903, the defendant in error, T. H. Barlow, filed his declaration against the plaintiff in error, the Western Union Telegraph Company, in the circuit court of Orange county, Florida, which declaration is in the words and figures following:

"Now comes T. H. Barlow, by his attorneys, Beggs & Palmer, and sues the defendant, the Western Union Telegraph Company, a corporation doing business in the state of Florida, for that the said defendant was, on the 22d day of June, 1903, engaged in business of transmitting telegraph messages between the town of Orlando, Florida, to and from the town of Jensen, Florida, in Brevard county; that the plaintiff was, on the said date, engaged in business of buying and selling fruit and vegetables, particularly pineapples; that on the 22d day of June, 1903, the plaintiff delivered to the defendant, and the defendant received from the plaintiff, at its office in Orlando, Florida,

thorized to sell for $1,300, closed the deal. It was held that the negligence of the company was the proximate cause of plaintiff's loss, and that the difference between the actual market value of the land and the price received was the proper measure of damages.

In New York & W. Printing Teleg. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338, a message was given the telegraph company in which the sender requested the sendee, a florist, to send him two hand bouquets, which message when delivered to the florist read "two hundred bouquets," and before the error was discovered he had cut valuable flowers and bought others. For his loss he was allowed to recover from the telegraph company.

In Hollis v. Western U. Teleg. Co. 91 Ga. 801, 18 S. E. 287, it was held that the measure of damages against a telegraph company for deviating from the terms of the message correctly reporting the state of the market for a particular article which the receiver of the message is induced by it to send forward for sale is the difference between the actual state of the market and the terms of the message as erroneously transmitted overstating it, provided the actual loss amounts to that much.

In Western U. Teleg. Co. v. Crawford, 110 Ala. 460, 20 So. 111, it was held that, where plaintiff had cotton stored with factors in Philadelphia, and had instructed them to keep it until it could be sold for a certain price, and, in consequence of the telegraph company's incorrectly transmitting a telegram from the factors quoting an offer made, the plaintiff directed the factors to sell, and within a reasonable time thereafter it could have been sold at the price desired, the plaintiff is entitled to a verdict for the loss sustained, with interest, less the increased expenses to which he would have been put by holding the cotton meantime.

In Washington & N. O. Teleg. Co. v. Hobson, 15 Gratt. 122, plaintiffs sent a telegram to a commercial house in Mobile ordering the purchase of 500 bales of cotton, which, as delivered, read "2,500 bales." It was held that the telegraph company was bound to relieve the plaintiffs of the excess of cotton purchased by their factors, together with all loss or obligation incurred by them on account of the accustomed and reasonable commissions of their factors, charged for effecting the purchase; but the plaintiffs had no right to subject the company to the hazards attendant upon sending the cotton to a foreign market after discovering the error in the telegram as delivered, and should have sold it as it stood in Mobile on shipboard, or under contract of affreightment.

In Tyler v. Western U. Teleg. Co. 60 Ill. 421, 14 Am. Rep. 38, where a telegram directed the sale of 100 shares of stock, but, as delivered, it directed the sale of 1,000 shares; and thereupon the sendee sold that amount, —it was held that, if the sender was compelled to, and did, purchase 900 shares to replace the stock sold by reason of the carelessness of the telegraph company in transmitting the message, and that, in the interval between the sale of 1,000 shares and the purchase of the 900 shares to replace the extra number of shares sold, the price of the stock had advanced, this advance should be the measure of damages in an action against the telegraph company; it being reasonable to suppose that this was what both parties had in view when the message was sent.

In Turner v. Hawkeye Teleg. Co. 41 Iowa, 458, 20 Am. Rep. 605, it appeared that the telegraph company was under contract to furnish plaintiff daily reports of the price of wheat in Chicago, and, pursuant thereto, delivered to him a telegram which erroneously underquoted the market price. Relying upon this telegram, he ordered his commission merchants, by telegraph, to purchase 5,000 bushels to fill a contract calling for the delivery by plaintiff of that amount; and it was held that he was entitled to recover the difference between what his commission merchants actually paid and what he would have paid at the price quoted in the telegram; it appearing that within five days after the receipt of the telegram, and before the expiration of his

and it was its duty to transmit and cause to be transmitted, the following message, addressed and directed to one George Holdin at the said town of Jensen, as representative of the plaintiff:

"2:55 P. M., June 22d, 1903.
"To George Holdin,
Jensen, Florida.
"Wire lowest price of car of pines. Good sizes. Name sizes. Quick.
"[Signed] T. H. Barlow.

"That the defendant accepted the said telegraphic message for transmission and delivery, from this plaintiff to the said George Holdin, and undertook and contracted to promptly transmit and faithfully deliver the same to him, for which service this plaintiff paid the defendant the charges demanded for said service; that the defendant failed and neglected to transmit and deliver the said message to the said George Holdin, in violation of its duty to the plaintiff, but the defendant delivered said message or caused same to be delivered to one James Holmes, a pineapple grower at the said town of Jensen; that by reason of the failure and neglect of the defendant to transmit and deliver the said message to the said George Holdin, according to its contract and undertaking with the plaintiff, and, by reason of the delivery of the message to the said James Holmes, this plaintiff was induced to buy, and did buy, 300 crates of pineapples from the said James Holmes, without said

contract for delivery, he could have purchased wheat at even less than the price quoted in the message as delivered to him.

In Garrett v. Western U. Teleg. Co. 92 Iowa, 449, 58 N. W. 1064, 60 N. W. 644, plaintiff, who was a cattle buyer, had an agreement with a Chicago firm that, if he asked the firm for the state of the market by telegraph, and there was no change since the last report, then no response was to be made by the firm to his inquiry, and he would act upon the last report; however, if there was a change the firm was to answer, indicating the change. Plaintiff obtained from the firm the market price for one day, and the next day delivered to the telegraph company a message to the firm asking for the condition of the market for the next two days, and, this message never having been forwarded to the firm, plaintiff received no answer, and, acting upon the last report sent him by the firm, bought cattle on which he lost money. It appeared that the company had knowledge of plaintiff's business; also that plaintiff did not resort to other sources of information to ascertain the Chicago market. The company was held liable for the loss sustained by plaintiff. On a former appeal of this case, 83 Iowa, 257, 49 N. W. 88, the court said: "The jury should have been directed to determine whether the plaintiff acted upon his advices from the commission men, or, rather, the absence of a message from them, and, if he so acted and made a purchase, his loss was direct and proximate, and not remote and speculative."

However, in Reynolds v. Western U. Teleg. Co. 81 Mo. App. 223, it was held that where a cattle shipper had received from other sources information regarding the bad condition of a certain market, as full as that contained in a telegram from his commission merchant, which the telegraph company negligently failed to deliver to him, and nevertheless he shipped his cattle into that market, the negligence of the company was not the proximate cause of the shipper's damage.

In Western U. Teleg. Co. v. Stevens (Tex.) 16 S. W. 1095, plaintiff owned cattle in Indian territory, and had instructed his agent to ship them to Chicago, but, upon learing that that market was glutted, telegraphed his agent not to ship. The telegram was never delivered, consequently the cattle were shipped and the plaintiff lost money. It was held that the telegraph company was liable for the damages reasonably expected to have resulted from its failure to deliver the telegram, and that the measure of damages was the difference between the market value of the cattle where they were prior to the shipment and the amount for which they sold in Chicago, and that it did not devolve upon plaintiff to purchase cattle and replace those shipped by reason of the company's negligence, even though he could have done so for a less sum than his sold for.

In Western U. Teleg. Co. v. Woods, 50 Kan. 737, 44 Pac. 989, the facts were similar to the preceding case, but, in addition to the damages there allowed, plaintiff was permitted to recover for the cost of shipment, maintenance, and sale of the cattle.

In Western U. Teleg. Co. v. Collins, 45 Kan. 88, 10 L.R.A. 515, 25 Pac. 187, it was held that where a telegraph company neglects to deliver a message to a live-stock shipper as to the state of the market at a certain point, in consequence of which neglect the shipper sends his stock to the next nearest market, at which he receives 10 cents per hundred less than the market price for the same stock at the first point on the same day, the shipper is entitled to recover from the telegraph company the difference between the market prices of the two points, with the difference in freight added.

In Western U. Teleg. Co. v. Landis, 9 Sadler (Pa.) 357, 21 W. N. C. 38, 12 Atl. 467, plaintiff received a telegram which informed him that certain sheep had cost him $5.06 per cwt., whereas the message as sent read $5.60. Relying on the message as received he sold the sheep for $6, instead of $6.50, which he could have gotten had he known they were of a higher grade. It was held that the difference between $6 and $6.50 per cwt. was the correct measure of damages.

fruit being examined or inspected as to its condition and character, in order to protect the interest of this plaintiff, paying therefor the sum of $400, and the plaintiff declares that the said fruit was unsound and inferior when he was induced to buy and did buy the same, and that an examination and inspection such as he undertook to provide for by means of said telegram would have revealed that the said fruit was unsound; that the fruit proved to be unsound and inferior and had to be sold to the great loss and damage of this plaintiff, to wit, the sum of $500, and the plaintiff therefore brings this suit and claims damages in the sum of $500 against the defendant."

On the 4th day of January, 1904, the defendant filed the following demurrer to the declaration after giving the style of the case:

"And now comes the defendant, by John E. Hartridge, its attorney, and says that the plaintiff's declaration is bad in substance."

The question of law to be argued: (1) The declaration does not state any cause of action; (2) the damage claimed does not flow from any breach of duty alleged; (3) the damage claimed is not shown to have been caused by any breach of duty upon the part of the defendant.

On the 22d day of August, 1904, upon a hearing the court made the following ruling on the said demurrer:

"This demurrer is overruled, and defendant excepts, and is allowed to October rule to plead."

The defendant afterwards put in a plea of "not guilty," upon which issue was joined.

On the 24th day of May, 1905, the case was tried, and a verdict was rendered by the jury for the plaintiff Barlow of $222.27, with interest at the rate of 8 per cent from November 2, 1903, to date, and a judgment was rendered against the Western Union Telegraph Company for the said amount and costs.

A motion for new trial was made on the following, among other, grounds:

"(1) The verdict is contrary to the evidence and to the weight of evidence.

"(2) The verdict is contrary to the law of the case.

"(3) The verdict is contrary to the charge of the court."

"(6) The court erred in refusing to give the charges requested by the defendant as follows: 'The evidence having been closed in this case and the argument of counsel concluded, the court instructs you that,

In McCarty v. Western U. Teleg. Co. 116 Mo. App. 441, 91 S. W. 976, plaintiff offered to sell mules at $135, and the buyer telegraphed from another station, "Will give one thirty for mules," which message as delivered read, "Will leave one thirty for mules," whereupon plaintiff, inferring that the message meant that the buyer would leave at 1:30 for the mules, and that he had concluded to buy at the price originally named, wired him to come on, and delivered the mules, which were resold by the buyer before the error was discovered. It was held that the telegraph company was liable to the plaintiff for his loss of $5 on each mule sold, it appearing that their market value was $135 per head.

In Hays v. Western U. Teleg. Co. 70 S. C. 16, 67 L.R.A. 481, 106 Am. St. Rep. 731, 48 S. E. 608, it was held that a change of the stated price in a telegram intended to notify a purchaser of the market price of mules, so as apparently to quote them at $10 a head less than their market price, which results in the sendee's directing the purchase of a certain number on his account, will render the telegraph company liable for the difference between the price paid and that stated in the telegram as delivered, it appearing that, but for the mistake, the plaintiff would have purchased at $10 less per head mules of another size, that would have sold for as much in his own market as those he actually purchased.

In Western U. Teleg. Co. v. Spivey, 98 Tex. 308, 83 S. W. 364, where plaintiff, by telegraph, authorized his agent to buy a stock of goods at 65 per cent of the invoiced price, but 65 was changed to 75 in the transmission of the message, and the agent thereupon offered and bought at 70, the measure of damages against the telegraph company was held to be the actual loss sustained, not to exceed the difference between 65 and 70 cents on the dollar, provided their actual value was less than 70 cents.

In Postal Teleg. Cable Co. v. Schaefer, 110 Ky. 907, 62 S. W. 1119, plaintiff, by telegraph, offered potatoes at $1.70 per barrel, but the telegraph company negligently changed the telegram in transmission so that plaintiff was represented as offering them at $1.07. The buyer accepted the offer, and the potatoes were shipped with bill of lading attached to draft for the amount at $1.70, and, plaintiff having refused to correct the draft, the buyer did not get the potatoes, but sued and recovered judgment against the plaintiff for refusal to deliver at the lower price, in which suit the potatoes were attached, and after partly spoiling were sold for about one half their value when shipped. It was held that plaintiff could not recover from the telegraph company his loss sustained by reason of holding the potatoes until they decayed, nor for the amount of the judgment and expenses in the suit against him by the buyer, because the judgment was erroneous, but that he was entitled to recover for any damages which arose naturally out of the negligence of the telegraph company, and that such damage in this case was the difference between potatoes at $1.70 per barrel and the

under the undisputed facts, the plaintiff can recover only the tolls paid for sending the telegram that is the basis of this suit, to the extent of the amount proved to have been paid to the defendant company as tolls for transmitting the message, together with interest thereon at the rate of 8 per cent per annum from the date the same were paid, and no more.'"

The refusal to give these instructions was properly excepted to by the defendant.

This motion was denied, to which ruling the defendant excepted. The assignments of error are based on the ruling of the court denying the motion for new trial, and a writ of error was sued out from the final judgment to the January term of this court.

Such portions of the evidence as it is necessary to discuss will be given in the opinion.

Messrs. John E. Hartridge & Son, for plaintiff in error:

The damages claimed were not in the contemplation of the parties.

Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Hadley v. Baxendale, 9 Exch. 341; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Western U. Teleg. Co. v. Lively (Tex. App.) 15 S. W. 197; Howard v. Stillwell & B. Mfg Co. 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; Cahn v. Western U. Teleg. Co. 1 C. C. A. 107, 2 U. S. App. 24, 48 Fed. 810; Garrett v. Western U. Teleg. Co. 83 Iowa, 257, 49 N. W. 88; Western U. Teleg. Co. v. Clifton, 68 Miss. 307, 8 So. 746; Barrett v. Western U. Teleg. Co. 42 Mo. App. 542; Western U. Teleg. Co. v. Cornwell, 2 Colo. App. 491, 31 Pac. 393; Thompson, Electricity, chap. 11, art. 1; Shearm. & Redf. Neg. § 605, p. 692; Field, Damages, § 422, p. 356; Sutherland, Damages, 298, 299; Wood's Mayne, Damages, § 14.

Messrs. Beggs & Palmer, for defendant in error:

Defendant was negligent because no excuse whatever for the failure to deliver the telegram is given.

Harkness v. Western U. Teleg. Co. 73 Iowa, 190, 5 Am. St. Rep. 672, 34 N. W. 811.

If the company could not deliver the telegrams to Holdin from Barlow, then it was the duty of the company to hold them and protect the same.

Rev. Stat. § 2734; 3 Sutherland, Damages, pp. 298, 299; Wood's Mayne, Damages, § 14.

The damages sustained by Barlow were properly submitted to the jury.

Western U. Teleg. Co. v. Wilson, 32 Fla.

sum for which they could have been sold in the city to which they were shipped by the plaintiff after definitely learning of the mistake in the telegram by the exercise of ordinary care and diligence,—not exceeding, however, 63 cents on the barrel.

In Ayer v. Western U. Teleg. Co. 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495, the plaintiff, by telegram, quoted laths at "two ten per thousand," and in the message as delivered the word "ten" was omitted. The offer was accepted, but the laths were not shipped until two weeks after the error was discovered. Plaintiff was held to have been bound by the acceptance of the offer as delivered, and entitled to recover the difference between $2 and $2.10 per thousand, the evidence showing that the latter was the market price of laths.

In Western U. Teleg. Co. v. Shotter, 71 Ga. 760, plaintiff sent telegrams to Chicago and Indianapolis offering turpentine at a specified price. The messages as delivered named lower prices. The offers were accepted by wire. Plaintiff shipped the turpentine, and drew on the buyers for the higher price, but payment was refusd and the drafts went to protest, after which plaintiff settled at the lower prices negligently transmitted by the telegraph company. It was held that the measure of damages was not the difference between the higher and lower prices, but was the difference between what he actually got from the buyers and the market price of turpentine at that time in Chicago and Indianapolis, together with the toll for sending the despatches and the cost of exchange.

In Western U. Teleg. Co. v. Flint River Lumber Co. 114 Ga. 576, 88 Am. St. Rep. 36, 40 S. E. 815, it was held that "when one requests another to make an offer for the sale of an article, and the offer is made by telegraph, and the telegram as delivered to the addressee is materially different from the telegram delivered for transmission, the sender . . . may recover from the telegraph company any damages which he has sustained in fulfilling a contract resulting from an acceptance of such proposal."

In Western U. Teleg. Co. v. Richman, 5 Sadler (Pa.) 26, 19 W. N. C. 569, 8 Atl. 171, plaintiff was offered 22 cents a pound for turkeys, but the telegram as delivered to plaintiff read 33. Plaintiff was assured by the operator that there was no mistake, whereupon he bought turkeys at 25 cents a pound and packed and shipped them at a cost of 1 cent a pound, and the buyer refused to pay more than 22 cents. Held, that plaintiff's measure of damages was 4 cents a pound.

In Hughes v. Western U. Teleg. Co. 114 N. C. 70, 41 Am. St. Rep. 782, 19 S. E. 100, it was held that, where plaintiff was misled and deceived by a mistake in the transmission of a telegram, and thus induced to sell stock, he was entitled to no damages above the cost of the telegram, if, when he sold the stock, he got the market value thereof.

As to loss of profits resulting from breach of duty of telegraph company, see note, 53 L.R.A. 91–96.

527, 22 L.R.A. 434, 37 Am. St. Rep. 125, 14 So. 1.

It is the duty of a telegraph company, in all cases where practicable, promptly to notify the sender of a telegram that it has not been delivered.

27 Am. & Eng. Enc. Law, p. 1031; Hendricks v. Western U. Teleg. Co. 126 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 543; Fowler v. Western U. Teleg. Co. 80 Me. 381, 6 Am. St. Rep. 211, 15 Atl. 29; Western U. Teleg. Co. v. Davis (Tex. Civ. App.) 51 S. W. 258.

Hocker, J., delivered the opinion of the court:

The mere fact that a declaration, or count thereof, may set up elements that do not enter into the measure of damages, or greater damages than the case made legally entitles the plaintiff to recover, if any damages whatever may be recovered thereunder, though such damages be only nominal, does not make the declaration demurrable. Such questions are properly raised and settled by objections to testimony at the trial, or by instructions to the jury as to the law applicable to the points raised, or may be cause for reforming the declaration, under § 1043, as calculated to embarrass the fair trial of the case. Borden v. Western U Teleg. Co. 32 Fla. 394, 13 So. 876; Jacksonville, T. & K. W. R. Co. v. Griffin, 33 Fla. 602, 15 So. 336; Tillis v. Liverpool & L. & G. Ins. Co. (Fla.) 35 So. 171; Cline v. Tampa Waterworks Co. (Fla.) 35 So. 8, and cases cited; Muller v. Ocala Foundry & Mach. Works (Fla.) 38 So. 64; Western U. Teleg. Co. v. Wells (Fla.) 2 L.R.A.(N.S.) 1072, 39 So. 838.

The substance of the evidence for the plaintiff Barlow was that he was a dealer in fruits and vegetables, and had his office at Orlando, Florida. George Holdin was a traveling railroad agent, but experienced in fruits and vegetables, and had bought and sold fruits and vegetables for Barlow. On the 22d of June, 1903, Barlow wanted a car load of pineapples for his trade, and sent by the defendant company the following telegram to Holdin, who was supposed by him to be at Jensen, Florida:

To George Holdin,
Jensen, Florida.

Wire lowest price car of pines, good sizes. Quick.

[Signed] T. H. Barlow.

A reply was promptly received, as follows:

T. H. Barlow,
Orlando, Florida.

Average three, three hundred crates. Price four hundred dollars. Immediately.

[Signed] James Holmes.

Barlow claims that he did not read the name "James Holmes," signed to this telegram, but supposed it was from Holdin in answer to his telegram. Barlow again wired George Holdin: "Will let you know as quick as am sure can take car pines." In a few hours he decided to take the car of pines, and had the State Bank of Orlando prepare a telegram to George Holdin stating that a draft on Barlow for $400 would be honored. When Barlow handed this telegram to Miss Norrell, the agent in charge of the Western Union Telegraph Company's office at Orlando, she called his attention to the fact that the telegram from Jensen was signed by "James Holmes," and offered some kind of explanation to Barlow, which is not disclosed by the record. He then decided to send the money, not to George Holdin, but to another party, a Mr. T. V. Moore, and he had the bank to wire the money to Moore.

On June 23, 1903, Barlow wired Moore at Jensen, as follows: "Have bought car from James Holmes. Had bank wire you. See car and have Holmes show message sent me." The bank wired the money to Moore, and Barlow purchased the pines. He lost money on them, and proved them to have been green and of inferior quality. He says he supposed he bought them through George Holdin, and relied on his inspection and packing of the pines to see that they were of proper quality and character, and that the only connection Moore had with the matter was to pay the money to Holmes, and see that the car was properly slatted and routed. Barlow says that when he discovered through Miss Norrell, the agent, that the telegram he received was signed James Holmes, he destroyed the second telegram he had prepared to send Holdin, and sent the telegram to Moore, "a very prominent man in that part of the state, with as much knowledge of pineapples as any man in the state, and a man I [Barlow] had known for some years." Barlow says when he sent the telegram to Moore he had bought the fruit, and supposed the car had been inspected by Holdin, and so supposed when he sent the money, and that it was two months before he knew that Holdin had not bought the car for him. He also says that he somewhat relied on Moore for an inspection, thought Moore would attend to the car, see that it was loaded all right, and slatted up, and billed out. He also says that, by reason of the explanation given him by Miss Norrell, he destroyed the telegram he had prepared to send Holdin, and had the bank change theirs from Holdin to Moore. On June 23d Barlow sent the following telegram to James Holmes, Jensen, Florida:

Will take car. See T. V. Moore. Have wired him.

[Signed] T. H. Barlow.

He also says he did not know Holmes, and had never heard of him before. George Holdin was not at Jensen between the 19th and 24th of June, 1903.

The maxim, *Causa proxima, non remota, spectatur*, applies to suits for breaches of contracts for the delivery of messages by telegraph companies. It is stated in 2 Parsons on Contracts, 9th ed., bottom pages 296, 297, that such companies are only liable for proximate or immediate, and not for distant, consequences. If the telegraph company is in default, but their default is made mischievous to a party only by some other intervening cause, this rule prevents the liability of the company, because their default would be only the *remota*, the remote or removed cause of the injury, and not the *proxima*, or nearest cause. For illustrations of the application of this doctrine, see First Nat. Bank v. Western U. Teleg. Co. 30 Ohio St. 555, 27 Am. Rep. 485; Pegram v. Western U. Teleg. Co. 100 N. C. 28, 6 Am. St. Rep. 557, 6 S. E. 770; Western U. Teleg. Co. v. Cornwell, 2 Colo. App. 491, 31 Pac. 393; Grand Trunk R. Co. v. Ives, 144 U. S. 408, text, 429, 36 L. ed. 485, 493, 12 Sup. Ct. Rep. 679; 7 Am. & Eng. Enc. Law, 2d ed. p. 387; 27 Am. & Eng. Enc. Law, 2d ed. p. 1060, and notes. Applying this doctrine to the facts of the case at bar, we are of the opinion that the *proxima*, or nearest cause, for the damages sustained by the plaintiff Barlow, was not the negligent act of the telegraph company in improperly delivering, or not delivering, the message to Holdin, or in not reporting his absence from Jensen to Barlow, but that the proximate cause was the result of his direct dealing with Holmes. He says that he supposed that Holdin would inspect, or had inspected, the pineapples; but he had no good reason for indulging such a supposition, for shortly after receiving the telegram from Holmes, the signature to which he did not read, he prepared a telegram to Holdin to buy the car of pines, and caused the bank to prepare a telegram to Holdin that it would honor a draft on Barlow for $400, the price of the car of pines. When he took these to Miss Norrell, the agent, she called his attention to the fact the telegram was not signed by Holdin, but by Holmes, and made some suggestions. Barlow destroyed the telegram he had prepared for sending to Holdin, and sent one to T. V. Moore, and got the bank to make a similar change. Why did Barlow make these changes, if he supposed that Holdin was at Jensen, and would inspect the pines for him? The only reasonable interpretation of his conduct is that he knew Holdin was a traveling agent, and that he concluded Holdin was not in Jensen, and it was necessary to get someone else to look after his interests. But, independent of this supposition of Mr. Barlow, the proximate cause, as we have said, for his loss, was not the default of the company, but was the result of an intervening cause, *viz.*, the purchase of the car of pines from Holmes; for, if he had not dealt with Holmes, he would have suffered no loss.

We therefore are of the opinion that the only damages which could be recovered in this suit would be nominal, or, at most, the cost of transmitting the message to Holdin. The instruction requested by defendant should have been given.

The judgment is reversed, with directions for such further proceedings as may be consistent with this opinion.

Taylor and Parkhill, JJ., concur. Shackleford, Ch. J., and Cockrell and Whitfield, JJ., concur in opinion.

KENTUCKY COURT OF APPEALS.

NELLIE D. LEAVELL, Appt.,

v.

WESTERN KENTUCKY ASYLUM FOR THE INSANE.

(— Ky. —, 91 S. W. 671.)

State hospital—liability for tort.

A state hospital established to care for insane persons is not liable for torts committed by a person under its care who is permitted to assist in the work of the institution, notwithstanding the statute provides that it may sue and be sued.

(March 2, 1906.)

Case Note.—Liability of eleemosynary institution maintained by state or municipality for personal tort of agent or servant.—The authorities without exception deny the liability of a charitable or eleemosynary institution supported wholly or in part by the state or a municipality, for personal injuries sustained through the negligence or misconduct of an agent or servant of the institution. The authorities refuse to apply the doctrine of *respondeat superior* in such cases, and base the nonliability on the theory that the functions of such institutions are governmental in character, and, if the funds appropriated for their maintenance are used to pay damages recovered in actions for personal injuries, the purpose and usefulness of the institutions would be wholly or in part defeated. Care in the selection of the agent or servant by the institutions seems not to have been an element in the consideration of these cases by the courts.

APPEAL by plaintiff from a judgment of the Circuit Court for Christian County in defendant's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. **James Breathitt and Downer & Russell** for appellant.

Messrs. **C. H. Bush and Hunter Wood & Son,** for appellee:

There is no authority for bringing this character of case against a charitable institution supported by the state.

Williamson v. Louisville Industrial School, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; Herr v. Central Kentucky Lunatic Asylum, 97 Ky. 458, 28 L.R.A. 394, 53 Am. St. Rep. 414, 30 S. W. 971; Hearns v. Waterbury Hospital, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; Downes v. Harper Hospital, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; Benton v. City Hospital, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495; Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151; Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461.

Settle, J., delivered the opinion of the court:

This action was instituted by appellant in the Christian circuit court to recover from appellee damages in the sum of $10,000 for an injury to her hand. The facts alleged in the petition as constituting appellant's cause of action were, in substance, that, while in the employ of appellee and engaged in ironing clothing in its laundry, a department of the institution in which the clothing of its lunatics in its care is washed and ironed, her hand was, by the act of an irresponsible lunatic in starting in motion an ironing machine through which she was about to pass an article of clothing, caught, mangled, and permanently maimed between the heated rollers thereof, the machine being started by the lunatic without her knowledge or the direction of anyone so to do; that the lunatic by whom her hand was injured was an inmate of appellee asylum

In Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495, it was held that a house of refuge maintained by appropriations made by a city council and donations from the state, for the custody, care, and reformation of vagrants or incorrigible youths, is not liable in an action by an inmate for damages for personal injuries alleged to have been maliciously and wrongfully inflicted by teachers of the institution.

A reform school under the control and oversight of the legislature, which is an agency of the state and maintained by taxation and state aid, is not liable for negligent or malicious injuries to an inmate by its servants or employees. Williamson v. Industrial School, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065. This decision, however, seems to be based chiefly on authorities which relate to the exemption of charitable institutions from such liability, and is not expressly based on the fact that the institution is a public corporation.

A school district supported by appropriations made by the general assembly is merely a public agency in the administration of the great public charity of education, and therefore not liable for the negligence of its janitor in throwing petroleum on a fire he was building in the schoolroom, thereby causing an explosion injuring a pupil. Ford v. Kendall School District, 121 Pa. 543, 1 L.R.A. 607, 15 Atl. 812.

A state hospital which was created and exists for purely governmental purposes, and is under the exclusive ownership and control of the state and supported by it, having no members except directors, who have no interest in its affairs, but are appointed by the governor, and are, in fact, public rather than corporate officials, being liable to fines for any failure to perform their duties, is not liable for an injury to an inmate occasioned by the negligence or misconduct of those in charge of the hospital. Maia v. Eastern State Hospital, 97 Va. 507, 47 L.R.A. 577, 34 S. E. 617.

A poor district supported by the county is not liable for the negligent act of its physican in treating an inmate of the poorhouse. Peasley v. McKean County Poor District, 26 Pa. Co. Ct. 428.

Injuries to an inmate, resulting from a foreman's failure to instruct the former as to the manner of operating a laundry machine, cannot form the basis of an action against an industrial school established as an asylum for the sustenance and education of male orphan children, and partly supported by various sums received from the counties from which magistrates have committed boys, pursuant to statute. Corbett v. St. Vincent's Industrial School, 177 N. Y. 16, 68 N. E. 997.

Nor is an insane hospital, built and supported by the state, liable for damages in an action against it by an employee who was injured in a coal mine operated on the premises of the institution for the purpose of furnishing it with fuel; and the fact that the act incorporating the hospital provides in general terms that it may be sued, is insufficient as a grant of authority that it may be sued for every tort which may be committed by its officers, agents, or servants. White v. Alabama Insane Hospital, 138 Ala. 479, 35 So. 454.

and in its custody, and was, by its permission, allowed to work in and about its laundry; that the lunatic was incompetent to do any work about the laundry, but, by the gross negligence of appellee, was permitted to do so; and that such negligence caused the injury to appellant's hand, complained of. Appellee filed a demurrer to the petition, which the lower court sustained, and, appellant failing to plead further, judgment was entered dismissing the action, and of that judgment appellant now complains.

The question presented by this appeal is: Can the appellee asylum be held responsible for a tort committed by a lunatic of whom it has custody? In our view of the law the question must be answered in the negative. Appellee is purely an eleemosynary institution created by the state and maintained at its expense for the beneficent purpose of caring for such of its citizens as may, by judgment of a court of competent jurisdiction, be declared of unsound mind, and, by reason thereof, disqualified for the duties of citizenship and of caring for themselves. Such institutions are mere instrumentalities of the state government brought into being to aid in the performance of governmental duty; hence the rule of *respondeat superior* does not apply to them. Appellee cannot, therefore, be made to respond in damages for a personal injury inflicted upon another by its servant, or a lunatic in its charge, though such injury results from negligence or malicious act on the part of such servant or lunatic.

In the case of Williamson v. Louisville Industrial School, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065, it was held by this court that an action would not lie against that institution for an assault upon an infant inmate by an employee of the institution. The reasons for so holding are thus stated in the opinion: "The incorporators and their successors are under the control and oversight of the legislature, and are mere instrumentalities of the commonwealth. The state interposed in behalf of neglected and abandoned children within its confines in its capacity of *parens patriæ*, and assumed the guardianship of such children as were committed to the institution. It was an agency of the state and maintained by taxation and state aid. . . . The functions of the institution are governmental. . . . If the funds of these institutions are to be diverted from their intended beneficent purposes by lawsuits and judgments for damages for negligent or malicious servants, their usefulness, indeed their existence, will soon be a thing of the past." An examination of the following authorities will show that they are in entire accord with the case *supra:* Farnham v. Pierce, 141 Mass. 203, 55 Am. Rep. 452, 6 N. E. 830; Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495; Hearns v. Waterbury Hospital, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; Downes v. Harper Hospital, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; Benton v. City Hospital, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461. The doctrine in question has also been held to exempt municipal corporations from liability in like cases, as the following statement of the law in respect to municipalities will show: "The power, or even duty, on part of a municipal corporation to make provision for the public health and for the care of the sick and destitute, appertains to it in its public, and not corporate, or, as it is sometimes called, private, capacity; and therefore, where a city, under its charter and the general law of the state enacted to prevent the spread of contagious diseases, establishes a hospital, it is not responsible to persons injured by reason of the misconduct of its agents and employees therein." Dill. Mun. Corp. §§ 977, 981, 982, 989; Twyman v. Frankfort, 117 Ky. 518, 64 L.R.A. 572, 78 S. W. 446.

There are, however, cases which hold that the municipalities, and even eleemosynary institutions, are liable for creating and maintaining public nuisances which endanger the lives of contiguous residents, or injure their property. But, in respect to property rights, the liability arises from the fact that any injury to real estate without the owner's consent, and which destroys or lessens its value, amounts to a deprivation of his use and enjoyment thereof, and is therefore a taking of such property, in the meaning of §§ 13 and 242, State Const., which prohibit corporations and individuals from taking private property for public or other use, without first making just compensation for the "property taken, injured, or destroyed by them." Ky. Stat. 1903, § 835. The cases of Herr v. Central Kentucky Lunatic Asylum, 97 Ky. 458, 30 S. W. 971; Williamson v. Louisville Industrial School, *supra;* Herr v. Central Kentucky Lunatic Asylum, 110 Ky. 282, 61 S. W. 283; Bank of Hopkinsville v. Western Kentucky Lunatic Asylum, 108 Ky. 357, 56 S. W. 525, and Hauns v. Central Kentucky Asylum, 103 Ky. 562, 45 S. W. 890, relied on by appellant, and also the cases of Clayton v. Henderson, 103 Ky. 228, 44 L.R.A. 474, 44 S. W. 667, and Paducah v. Allen, 111 Ky. 361, 63 S. W. 981, which counsel do not cite,—are all cases belonging to the class last mentioned. But we do not think these cases are in conflict

with Williamson v. Louisville Industrial School, *supra*. Indeed, in the opinions of some of them, the doctrine announced in that case is expressly approved.

It is, however, contended by counsel for appellant that the statute from which appellee derives its corporate life and powers declares that it may sue and be sued, which places it upon the footing of all other corporations with respect to torts committed by those in its care or employ, and for this reason it is not exempt from liability for the injury sustained by appellant. We do not think this contention is sound. There are, it is true, many causes of action for which appellee may sue, and also grounds upon which it may properly be sued. It may, through its officers, make contracts for supplies for its inmates, incur liabilities on that account, and, for the proper maintenance of the institution, it may sue for debts due it, or to enforce any right allowed by law. It may, as in the Herr Case and other like cases, incur liability in damages for creating and maintaining public nuisances which endanger human life, or destroy or injure the land of another, and be sued to enforce such liability. We are of opinion, therefore, that the right given appellee by statute to sue, and to others to sue it, is to be taken in a qualified sense, and should not be so construed or extended as to make it responsible to persons injured, as was appellant, by reason of the misconduct or negligence of its inmates or employees. Whether the policy of thus exempting eleemosynary institutions from liability in such cases be wise, or unwise, it is undoubtedly sanctioned by time and sustained by a long line of authorities, and our attention has been called to no case in which a contrary rule has been announced.

Judgment affirmed.

ILLINOIS SUPREME COURT.

CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, Appt.,
v.
ARTHUR A. WEBER, Admr., etc., of Frederick Weber, Deceased.

(219 Ill. 372, 76 N. E. 489.)

Evidence—copy of paper.

1. A copy of a lease of a railroad, duly certified, is admissible in evidence under a statute providing that the papers of the corporation may be proved by a copy thereof certified by the proper custodian.

Same—lease of railroad.

2. Persons familiar with the facts are competent to testify that at the time of an accident on a railroad the road was being operated by a lessee.

Appeal—review of direction of verdict.

3. Upon a request to direct a verdict for defendant on the ground that it is not the proper party to the suit, a question of law arises, which may be reviewed by the appellate court if the ruling is not supported by the evidence.

Time-table—issued by lessee—effect on lessor.

4. A railroad company is not bound by declarations on a time-table put out by its lessee, where it is not shown to have had any knowledge of it, or to have authorized it in any way.

Process—railroad—service on lessee's agent.

5. The servants or agents of the lessee of a railroad are not the agents of the lessor for the purpose of receiving service of process in actions for personal injuries.

(Magruder, J., dissents.)

(December 20, 1905.)

APPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Adams County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of his intestate. Reversed.

Statement by **Ricks**, J.:

On September 29, 1903, appellee, as the administrator of the estate of Frederick Weber, sued appellant in an action on the case for an injury resulting in the death of his decedent by such decedent being struck by a locomotive and train of cars on appellant's railroad near Quincy, at the crossing of a public highway. The declaration counts directly upon the negligence of appellant and its servants. The summons bears the date of bringing the suit, and the sheriff's return thereon was in words following: "Not being able to find the president of the within-named the Chicago, Burlington, & Quincy Railroad Company, I have served the within summons on the within-named the Chicago, Burlington, & Quincy Railroad Company by reading the same and delivering to E. F. Bradford, agent of the said Chicago,

Case Note.—Service of process on servant or agent of lessee of railroad corporation.—The sufficiency of the service of process on the servant or agent of the lessee of a railroad corporation in an action against the lessor depends on the question whether the one served can be regarded as a representative, or in the employ, of the lessor for the purpose of receiving such service.

The service of a summons on a station agent of a railroad company which had a forty-year lease of the road, in an action

Burlington, & Quincy Railroad Company, a true copy of the within, this 2d day of October, 1903." Appellant is incorporated under the laws of the state of Illinois as the Chicago, Burlington, & Quincy Railroad Company, and will be hereafter referred to as the railroad company. There is also a corporation incorporated under the laws of the state of Iowa and doing business in this state under the name of Chicago, Burlington, & Quincy Railway Company, which will be hereinafter referred to as the railway company. The defendant (appellant) filed its duly verified plea in abatement, averring that at the time of the serving of said summons upon the defendant the said Bradford was not the agent at Quincy or elsewhere, and prayed that the writ be quashed. Appellee replied, tendering issue upon the above plea, and upon a trial by a jury the issue was found for the plaintiff, and his damages were assessed at $6,000, and the court, after overruling a motion for a new trial, entered judgment upon the verdict. Appellant prosecuted an appeal to the appellate court for the third district, where the judgment below was affirmed, the appellate court requiring a remittitur of $2,000, and appellant prosecutes this appeal.

Under the plea in abatement three witnesses testified for appellant that they were acquainted with both the railroad and railway companies. E. F. Bradford, upon whom the summons was served, testified that he was the general agent in the traffic department for certain territory in Illinois of the railway company; that he had been the agent from about 1887 to December, 1901, of the railroad company, which up to the latter date had operated the railroad upon which the appellee's decedent was alleged to have been injured; that on December 21, 1901, the railroad changed hands, and that from that time to the time of said trial the railway company had operated said railroad; that said latter company, from the date last aforesaid, controlled all trains running on said road, employed, paid, and discharged all employees, and that all remittances of money, as the receipts for business of said railroad, were made to said railway company; and that on October 2, 1903, when the summons in this case was served on him, he was not the agent of the railroad company. The witness produced, and there was offered in evidence, without objection, a circular letter marked "No. 1," dated December 16, 1901, and received by him December 21, 1901, signed by the president of the railway company, notifying the witness, as an agent and employee of the railroad company, that the railway company, as lessee, had taken over and would operate the properties owned and otherwise controlled by the railroad company, and that upon receipt of that letter he proceeded at once to change the stationery, billheads, and everything of that kind, by using a stamp and stamping them to read "railway" where the word "railroad" appeared, so as to read "The Chicago, Burlington, & Quincy Railway Company," under instructions received so to do from said railway company until new supplies were furnished. The witness further testified that since December 21, 1901, the railroad company had no office in Quincy, nor had it any agent there, and that from the date of the receipt of the circular No. 1 he had acted as the agent of the railway company, and not the agent of the railroad company. Appellant also introduced Alvin C. Anders, the freight agent of the railway company at Quincy, who testified that before the change of the com-

against the lessor company, which had leased the road upon its completion, was held insufficient in Le Roy & C. Valley Air Line R. Co. v. Sidell, 62 Kan. 349, 63 Pac. 599, on the ground that the person served was not in the employ, or under the direction, of the lessor; and, inasmuch as it was stipulated that the lessor was not doing business within the state, the right to serve the summons on any station agent is not conferred by a statute granting the right to serve anyone in charge of a station in case a railroad company doing business within the state fails to designate someone on whom notices may be served.

And in Perry v. Brunswick & W. R. Co. 119 Ga. 819, 47 S. E. 172, the court held that the statute providing that in certain cases railroad companies which have leased their property or lines of railroad may be held liable for claims against the lessee does not contemplate that service upon the agent of the lessee will amount to service on the lessor.

But in Van Dresser v. Oregon R. & Nav. Co. 48 Fed. 202, which was criticized by the court in CHICAGO, B. & Q. R. Co. v. WEBER, it was held that a domestic railroad company which owns a railroad in the state, and, without being authorized by law, leases it to another company and receives revenue under the lease, will be bound, in an action for personal injuries, by the service of process on the lessee's servant, whose position in the operation of the road does not appear, since, having transferred its franchise without the consent of the state, whoever, with its knowledge, has the actual control or superintendence of the road, must be regarded as its authorized agent and representative.

panies he was the freight agent of the railroad company, but that in December, 1901, he received notice of the change of companies, and from that time on acted as the agent of the railway company, and that from that time on, and at the time of the injury complained of, and at the time of bringing the suit in question and service of the summons, the railroad was being operated by the railway company; that he stamped the waybills and other blanks and stationery in his office in December, 1901, so as to read "railway company" instead of "railroad company," and that the railroad company had no agent at Quincy after December, 1901; that he was paid by the railway company and remitted all the money to it. In fact, his testimony was substantially like that of the witness Bradford, and need not be further adverted to. Alfred S. Ellis, the ticket agent for the railway company at Quincy, testified that he had known the railroad for twenty years, during all of which time he had acted as ticket agent; that he acted for the railroad company up to December, 1901, and for the railway company from that time to the time of giving his testimony. He testified with reference to the notification of change and receiving a stamp to change the tickets by the use of the stamp so as to read "railway company," that from December, 1901, to the time of testifying he was paid by the railway company for his services and made all remittances of money to the railway company, and other details upon the same line, and as fully as did the witness Bradford. All three of the witnesses testified that the railroad company had no agent or office in Quincy at any time after December, 1901, and that the railroad company had an office in Chicago from December, 1901, to the time of testifying, where George B. Harris, the president of the railroad company, had his headquarters and could be found. Appellant also offered, and there was admitted in evidence over the objection of appellee, what purported to be a certified copy of a lease from the railroad company to the railway company of all the railroad company's lines in the state of Illinois and other states, which purported to run from November 20, 1901, for a period of ninety-nine years, which said supposed copy of the lease was duly certified by T. S. Howland, secretary of the Chicago, Burlington, & Quincy Railroad Company, and affixed thereto was the corporate seal of said company.

The only evidence offered by appellee as tending to dispute or contradict the evidence of these witnesses was a folder of the "Burlington route" bearing date October 4, 1903. It was such a folder as is usually found in stations and hotels, advertising the road, containing a map and list of the stations, officers, and time cards for the various divisions of the road, in this and other states. On the margin of the first page of this folder was stamped in very small letters, with red ink, "Chicago, Burlington, & Quincy Railroad Company, owner," and in the list of officers as representing the Burlington route was "W. A. Lalor, assistant general passenger agent C., B. & Q. R. R., Chicago, Ill." On page 11 there was a notification in regard to the redemption of tickets, in which it was said that they would be redeemed by presentation at the offices of the "C., B. & Q. R. R., Chicago, and B. & M. R. R., Omaha." On page 19 was a time card of the Galesburg & Quincy Route, which bore the heading "Chicago Burlington, & Quincy R. R." On page 15 appeared the time cards of the Aurora, Ottawa, & Streator division and of other divisions, and was originally headed "C., B. & Q. R. R." Where the letters "R. R." were originally printed were three or four stamps, in red letters, of the words "railway" and "railway company." Appellee proved by witness Bradford, that this folder was a regular monthly folder issued by the Chicago, Burlington, & Quincy Railway Company, and that the railroad company had nothing to do with it.

At the close of all the evidence counsel for appellant, limiting their appearance for that purpose, moved the court to direct the jury to find a verdict for it, which motion was denied. Among other instructions given at the request of appellee was the following: "(2) If the jury find, from the evidence herein, that the defendant, the Chicago, Burlington, & Quincy Railroad Company, was the owner of and operating a railroad known as the 'Chicago, Burlington, & Quincy Railroad" for many years immediately before December 21, 1901, and that at about the date last aforesaid the said railroad company, as lessor, leased its railroad and the operation thereof to the Chicago, Burlington, & Quincy Railway Company as lessee, and that continuously thereafter to the present time said lessee, by its servants and agents, had the exclusive management and control of said railroad and its operation, then the agents and servants of any such lessee would be the agents and servants of this defendant for the purpose of service of summons in this case."

Appellee assigns as cross-error the admission of the copy of the lease.

Mr. Chester M. Dawes, with Messrs. Joseph N. Carter and Matthew F. Carrott, for appellant:

Where the statute prescribes a mode of service of summons on the defendant in order to bring him into court, that mode must be followed to obtain jurisdiction of the person, where he does not voluntarily appear.

Grand Tower Min. Mfg. & Transp. Co. v. Schirmer, 64 Ill. 106; St. Louis & S. Coal & Min. Co. v. Sandoval Coal & Min. Co. 111 Ill. 32.

Where the statute designates particular persons, or classes of persons, on whom the process of summons may be served, the service must be had upon one of such specified persons.

Hinman v. Andrews Opera Co. 49 Ill. App. 135; Grand Tower Min. Mfg. & Transp. Co. v. Schirmer, *supra;* 22 Am. & Eng. Enc. Law, p. 116.

There is no ground of public policy requiring that the agents of one company shall be treated as the agents of another for the purpose of the service of summons upon such other company.

Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559; Perry v. Brunswick & W. R. Co. 119 Ga. 819, 47 S. E. 172; Kingsley v. Great Northern R. Co. 91 Wis. 380, 64 N. W. 1036; LeRoy & C. Valley Air Line R. Co. v. Sidell, 62 Kan. 349, 63 Pac. 599; 23 Am. & Eng. Enc. Law, 2d ed. p. 784; 2 Elliott, Railroads, 468; 22 Am. & Eng. Enc. Law, p. 116; Union P. R. Co. v. Miller, 87 Ill. 45.

It is not sufficient that the person served with summons had been the agent of the defendant corporation, but he must be such agent at the time of the service of the writ, in order to bind the corporation.

Equitable Produce & Stock Exch. v. Keyes, 67 Ill. App. 461; Combs v. Hamlin Wizard Oil Co. 58 Ill. App. 123; Winney v. Sandwich Mfg. Co. 86 Iowa, 608, 18 L.R.A. 524, 53 N. W. 421.

Nor is service on an agent of an agent sufficient.

Union P. R. Co. v. Miller, *supra.*

Messrs. Vandeventer & Woods, for appellee:

A contractor exercising the chartered power of a corporation, with its assent, must be regarded, in so far as the public and third persons are concerned, as the servant or agent of the corporation.

Lesher v. Wabash Nav. Co. 14 Ill. 86, 56 Am. Dec. 494; Hinde v. Wabash Nav. Co. 15 Ill. 76; Chicago, St. P. & F. du L. R. Co. v. McCarthy, 20 Ill. 388, 71 Am. Dec. 285; Chicago & R. I. R. Co. v. Whipple, 22 Ill. 108; Chicago Economic Fuel Gas Co. v. Myers, 168 Ill. 147, 48 N. E. 66; Metropolitan West Side Elev. R. Co. v. Dick, 87 Ill. App. 40; North Chicago Street R. Co. v. Dudgeon, 184 Ill. 480, 56 N. E. 796; Suburban R. Co. v. Balkwill, 94 Ill. App. 456, 195 Ill. 538, 63 N. E. 389; West Chicago Street R. Co. v. Anderson, 102 Ill. App. 312, 200 Ill. 333, 65 N. E. 717; Chicago & G. T. R. Co. v. Hart, 104 Ill. App. 59, 209 Ill. 414, 66 L.R.A. 75, 70 N. E. 654; Chicago Union Traction Co. v. Stanford, 104 Ill. App. 102.

There being no legal evidence showing the Chicago, Burlington, & Quincy Railway Company to be the lessee of appellant, its employees and servants, in operating the railroad, became and were the agents and servants of the appellant, Chicago, Burlington, & Quincy Railroad Company.

Hayes v. Ottawa, O. & F. River Valley R. Co. 61 Ill. 422; Ottawa, O. & F. River Valley R. Co. v. Black, 79 Ill. 262; Chicago & G. T. R. Co. v. Hart, 209 Ill. 420, 66 L.R.A. 75, 70 N. E. 654; 23 Am. & Eng. Enc. Law, 2d ed. p. 777; Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38.

Ricks, J., delivered the opinion of the court:

Many errors are assigned by appellant and argued by its counsel, but as we view the case it is unnecessary for a proper disposition of it to consider but two matters urged by the appellant. The controlling and important questions, as we think, arise from the refusal of the court to give the peremptory instruction directing a verdict for appellant, and the giving by the court of instruction No. 2 given at the request of appellee. Preliminary to the consideration of these questions we should, perhaps, consider the cross-error assigned by appellee upon the admission by the trial court of the certified copy of the lease from appellant to the railway company.

Appellee states that the admission of this evidence was error, and cites and relies upon Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38. We have examined that case, and find that it contains a construction of § 18 of the statute in regard to evidence and depositions. Hurd's Rev. Stat. 1903, p. 937. Section 14 of that chapter relates to the admission of papers and records, etc., of cities and villages. Section 16 is as to the form of the certificate. Section 17 relates to the manner of certifying the records of justices of the peace, and § 18, which was considered in the case cited, reads: "Any such papers, entries, records, and ordinances may be proved by copies examined and sworn to by credible witnesses." The language of § 16 is peculiar, and states that the certificate of the clerk of a court or village,

city or town, shall certify that he is the keeper thereof, and if there is no seal shall so state. All the sections of that act from 10 to 18, inclusive, except § 15, which will be hereafter noticed, were part of an act appearing in the Revision of 1845, and when the language of § 16 is considered, that "if there is no seal" the clerk "shall so state," the meaning and purpose of § 16 are made quite apparent. Section 15 was not passed until 1853, and was no part of the act at the time that §§ 16 and 18 were passed. Section 15 reads: "The papers, entries, and records of any corporation or incorporated association may be proved by a copy thereof, certified under the hand of the secretary, clerk, cashier, or other keeper of the same. If the corporation or incorporated association has a seal the same shall be affixed to such certificate." This section was doubtless placed by the revisers or editors of the statutes as § 15 of the act for the purpose of giving effect to § 18 in a case where the corporation had no seal. The language of § 15 is clear, unambiguous, and direct, and, if effect is to be given to it, the only inquiry that can arise under it is as to what is meant by the language "the papers, entries, and records" of such corporation or association.

No reason has been suggested why § 15 should not be given effect, other than that in the case cited by appellee it is held that a contract between a certain miners' union and a certain coal company was not properly admitted in evidence by merely proving a copy thereof by the testimony of a credible witness. In that case it appears that no proof was made that the corporation or association had no seal, nor was there any certificate to that effect, as required by § 16 of the act. We think the case relied upon has no application to the question before us, as in the case at bar the copy is certified by the proper officer, and in compliance with the statute the seal of the corporation is affixed to the certificate. This section of the statute was considered by this court in Mandel v. Swan Land & Cattle Co. 154 Ill. 177, 27 L.R.A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, and it was there held that by virtue of it the papers, etc., that were admissible under its provisions are original and not secondary evidence. It remains, then, to determine whether the lease is such a paper as is contemplated by the language of said § 15. Whether that section applies to all papers, such as contracts between a company and its employees or for materials, or other ordinary matters between it and third persons, need not be and is not now considered or decided.

The lease in question is a most important paper in the business of the appellant corporation. It evidences the leasing by it to the railway company of over 5,000 miles of railroad, traversing a number of states, with the stations, yards, side tracks, shops, equipment of engines, cars, machinery, tools, furniture, and franchises, except its franchise to be a corporation, for a period of practically a century. That the preservation of such an instrument is of first importance to appellant can be neither doubted nor questioned. The courts must also take knowledge of the fact that under the laws of this state appellant, as lessor, does not escape the risk of frequent litigation arising from the operation of the road by its lessee, and that it would be most hazardous if it were possible that the original instrument be produced at each trial and introduced in evidence, and held by the court or some competent officer until a record should be made, and perhaps by order of the court certified to courts of appeal. We cannot be unmindful of the fact that there may be a number of suits pending against appellant and for hearing at the same time in different courts, in which case it would be practically impossible, if not totally so, to have the same instrument in various courts at the same time and to be used as evidence. These considerations doubtless appealed to the legislature in enacting the law, and as no reason has been suggested, and none suggests itself to our minds, why the statute in question may not and should not be given full effect, we are disposed to give it effect, and to hold that the lease in question is such an instrument as is contemplated by the provision of the statute, and that the court did not err in the admission of the copy so certified as evidence.

Appellee urges that this evidence is incompetent, and that this court should so hold, and that if it does so hold there is no competent evidence in the record to support the plea in abatement, as it is said by appellee that the only legal evidence of the leasing of the railroad by appellant to the railway company is a written lease, and that no such lease was in evidence. If the question were as to the contents of the lease or its provisions, and as between the parties to it, the position taken by appellee would certainly be sound. But such is not the situation, as we view it. The terms and conditions of the lease were not material or controlling. The fact that the railroad was being operated, at the time of the injury complained of, by a railroad company other than the appellant, was the material question that arose under that plea, and it

would seem clear that anybody having knowledge and who was familiar with the railroad corporations, and who knew that up to a given time one of them operated the road and after that time the other operated it, could testify, and the evidence would be competent, and material. Three witnesses did testify, and they show by their testimony that they had absolute knowledge, as they were employees originally of the appellant company and from 1901 were employees of the railway company, and their business and duties were of such a character and their relation to the two companies such that they could not be mistaken upon the fact as to who was actually operating the railroad.

Appellee strenuously insists that the questions of fact as to what company was operating the railroad at the time of the injury is foreclosed by the finding of the jury and the judgment of the appellate court. Under the request to direct the jury to find a verdict for appellant a question of law, and not a question of fact, arose, and that question of law is preserved and open to our consideration. If there is evidence in the record which, taken as true, together with all the reasonable legal inferences that may arise therefrom, tends to support the position of appellee that the railroad was being operated by appellant, and not by the railway company, or if, under the law, although the railway company may have been operating the railroad, service upon the agent of the railway company was legal service as to the railroad company, then the trial court was warranted in refusing the instructions as asked; otherwise not. As is pointed out in the statement of the case, the only evidence tending to show that the railroad company was operating the railroad at the time of the injury was the folder offered by appellee; but in offering that evidence appellee inquired of the witness Bradford, and elicited from him the statement that that circular or folder was issued by the railway company, and not by the railroad company. Furthermore, it is not shown that the railroad company had at any time such a stamp as that which was impressed on the first page of the folder, or that it was placed there by any person in authority of the railroad company. In the absence of such proof, and with the proof called forth by appellee clearly showing that the folder was not a folder issued by appellant, but by the railway company, it, with any inference that could be drawn from it, amounted to a mere scintilla of evidence at the very most. It went to the jury and to the court absolutely discredited and absolutely shown not to be the document or act of appellant, but that of another company not a party to the suit. It did not amount to any legal evidence, or was not such evidence as comes within the requirement that it shall be such evidence as, with all the reasonable inferences that shall be drawn from it, fairly tends to support the contention of the party relying upon it, so that unless service upon the servants of the railway company can be held to be service upon appellant the instruction should have been given.

Since 1855 the statute of this state has permitted railroad companies organized under the laws of this state to lease their railroads to corporations organized in this and other states. Hurd's Rev. Stat. 1903, chap. 114, ¶ 44. But, following what seemed to this court to be a sound doctrine, we have uniformly held that a railway company cannot absolve itself from the performance of duties imposed upon it by its charter or any general law of the state, or relieve itself from liability for the wrongful acts or omission of duties of persons operating its road, by transferring its corporate powers to other parties or by leasing its road to them; and so we held in Balsley v. St. Louis, A. & T. H. R. Co. 119 Ill. 68, 59 Am. Rep. 784, 8 N. E. 859, that the lessor company was liable for the destruction of property by fire caused by neglect upon the part of the lessee company to keep its track and right of way clear and free from dead grass and dry weeds, etc., and in Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559, it was held that the lessor company was liable for the death of one caused by the negligence of the operating company. It is there said (page 659 of 132 Ill. and page 560 of 24 N. E.): "The law has become settled in this state by an unbroken line of decisions that the grant of a franchise giving the right to build, own, and operate a railway carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others; and where injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise is granted or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable." In the more recent case of Chicago & G. T. R. Co. v. Hart, 209 Ill. 414, 66 L.R.A. 76, 70 N. E. 654, we held that the lessor company was liable to the servants of the lessee company for injuries received by the breaking of a worn or defective axle or journal on a switch engine upon which such servant was employed. Among other things it is

there said (page 417 of 209 Ill., page 78 of 66 L.R.A., and page 655 of 70 N. E.): "While the duty which rests upon the lessor companies to operate their roads is an obligation which they owe to the public, the permission given by the legislature, as the representative of the public, to perform that duty through lessees, has no effect to absolve such companies from the duty of seeing that the lessee company provides and maintains safe engines and cars, and that the employees of the lessee companies to whom is intrusted the operation of their roads are competent, and that they perform the duties devolving upon them with ordinary care and skill; for upon the character and condition of safety of such engines and cars and on the competency and care of such employees depend the lives and property of the general public. As a matter of public policy such lessor companies are to be charged with the duty of seeing that the operation of the road is committed to competent and careful hands." The doctrine that a railroad company cannot escape liability for injuries resulting from negligence by leasing their roads or permitting other companies or persons to operate the same is neither new nor modern, but was early announced in Lesher v. Wabash Nav. Co. 14 Ill. 85, 56 Am. Dec. 494.

The cases above cited, and many more announcing the same principle, are cited by appellee; and his insistence is, as we understand it. that, inasmuch as the law is that the lessor company is liable for the negligence of the lessee company, therefore the lessee company is in law the agent and servant of the lessor company, and, being such agent or servant, service upon the lessee company is a compliance with the law in regard to the service of process in such cases; and if we understand counsel for appellee correctly, their contention goes further, and to the extent that the agents and servants of the lessee company are the agents and servants of the lessor company as to the public and third parties. As applied to the question of liability for negligence, and confined exclusively to that question, it is doubtless true that this court has gone so far as to say that the public and third persons may look to the corporation to which a franchise has been granted, and that for that purpose a company which such original company permits to use its tracks, and likewise the servants and employees of such lessee company, will be regarded as the servants and agents of the owner. The doctrine of agency and liability has not been carried beyond that class of actions arising from the negligence or wilful failure to perform a duty springing from the chartered powers and owing to the public. It has not gone to the extent of liabilities arising from contracts, or even the torts of the lessee company, if they are not made or committed in the discharge of and in connection with the public duty arising from an obligation springing from the chartered privileges or chartered powers of said company. Anderson v. West Chicago Street R. Co. 200 Ill. 329, 65 N. E. 717. The fact that the lessee company and its servants and agents may, as a matter of public policy, be held the servants and agents of the lessor company in actions for negligence arising in the exercise of the chartered powers of the lessor company, does not also require or authorize the holding that such servants and agents, for the purpose of liability, shall also be held as the servants and agents of the lessor company for other purposes. It would hardly be contended that, if the lessee company makes purchases of supplies, machinery, rolling stock, or the many other things necessary in the operation of a railroad, the lessor would be liable therefor upon any principle of agency or upon the principle of agency declared in the cases above cited and quoted from. Nor would the lessor company be liable in an action of tort, in replevin, or in trover for the unlawful taking or holding of property by the lessee company or its agents. The question of liability of the principal for acts that it cannot delegate to others is a question wholly distinct from the question of agency.

The statute regulating the practice and procedure in courts of record provides that "an incorporated company may be served with process by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought; if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent, or any agent of said company found in the county; and in case the proper officer shall make return upon such process that he cannot in his county find any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent, or any other agent of said company, then such company may be notified by publication and mail in like manner and with like effect as is provided in §§ twelve (12) and thirteen (13) of an act entitled 'An Act to Regulate the Practice in Courts of Chancery,' approved March 15, 1872." Laws 1871, 1872, p. 331. E. F. Bradford, upon whom service was attempted to be, or was, made as the supposed agent of appellant, testified, and was supported by two other

witnesses, the evidence of each of whom was uncontradicted, that at the time of said service he was not the agent or servant of appellant, and had not been since 1901,—almost two years prior to the time of service. He was the agent of the railway company. He was not acting for appellant, was not employed by it, was not paid by it, and received no directions from it. It had no control over him. He made no reports to it, and it could not discharge or relieve him from his position. He owed it no duty, and could not, except in a sense of liability for negligence in the discharge of its chartered powers, be regarded in any manner as the agent of appellant. As a servant or agent he would owe a duty to his principal, and if served with process in actions against his principal his duty naturally would be to forward the copy to his principal or advise his principal of the service thereof, and upon his failure to do so his principal would have the remedy to discharge him, while appellant would have no remedy. Bradford owed no such duty to appellant, but was interested in the welfare of the railway company, of which he was a servant, and if he consulted the interests of his principal he might well conclude that he subserved them by silence as to such service. The lessor and lessee are alike responsible for the actions of negligence of the servants of the lessee, and if the rule contended for is sound, an action may be brought against both and service had upon the agent of the lessee, who owes no duty to advise the lessor of the bringing of such suit or the service upon him of the process, and whose interest lies with the lessee, and the interests of the latter may be that judgment shall go against the lessor, so that a judgment by default may go against the lessor without any knowledge that it has been sued. Of course, this could make no difference if the person served was in fact the agent or any one of the persons named in the statute upon whom service might be made, as the courts do not inquire into the discharge of the duty of the agent to his principal, as that is a matter between them; and if the service is good, in the absence of an appearance the court will enter a default, and such default will stand whether the principal received notice of the service or not. This and many other situations clearly not contemplated by law could readily arise which should make the process of courts a mere pretense, and for all practical purposes the defendant had as well be served by notice of publication in a newspaper in some foreign country as to assume a service such as is here contended for. The language of the statute in this provision as to who may be served requires no nicety of construction. It is plain and simple and is to be given its ordinary meaning. The question has arisen in other courts, and so far as we know there is but a single case in a court of review in all the states that in any reasonable degree sustains appellee's position. That case is Van Dresser v. Oregon R. & Nav. Co. 48 Fed. 202. It bears little analogy to the case at bar, and if it were in point we would not be disposed to follow it, as it is contrary to the general rules of construction of statutes and the spirit of our law as we interpret it.

By § 1 of the practice act (Hurd's Rev. Stat. 1903, chap. 110, ¶ 2) railroad companies may be sued where the principal office is located or in any county through which the railroad runs, and by § 4 of the act (Id. ¶ 5), as we have already pointed out, service may be had in those counties where no agent or clerk or other person authorized by the statute to be served in such cases is kept, by publication in the same manner as in suits in chancery. The law, therefore, furnishes a remedy, and, though it may not be the most satisfactory or convenient, we are not authorized to enter the field of legislation and add to the statute still a further provision for the benefit of those in the appellee's situation. We think the service was not a valid or legal one, that the peremptory instruction directing a verdict for appellant should have been given, and that the court erred in giving the second instruction given at the request of appellee. The judgment is therefore reversed, and the cause is remanded to the Circuit Court of Adams County for further proceedings in conformity with this opinion.

Magruder, J., dissents.

MICHIGAN SUPREME COURT.

JOHN C. HICKS, Plff. in Err.,
v.
GEORGE A. STEEL.

(— Mich. —, 105 N. W. 767.)

Assignability of action for fraud.

1. A right to recover damages for fraudulent representations may be assigned under a statute permitting assumpsit

Case Note.—Liability of bank director for breach of duty as such when he acts for himself or for a third person in the transaction.—The liability of a bank director for breach of his duty as such depends on the answer to the question whether he acted in the capacity of a director, or individually or for a third person, in inducing the be

to be brought in such cases, and providing that the cause of action shall survive.

Bank—liability of director.

2. A bank director cannot be held liable for breach of his duty as such in inducing the bank to extend credit to an individual beyond the statutory limit, and in making false representations as to paper presented for discount, where he was not at the time acting as director, but as agent for the borrower.

(December 15, 1905.)

ERROR to the Circuit Court for Clinton County to review a judgment in favor of defendant in an action brought to hold him liable for losses alleged to have occurred through his wrongful acts as a bank director. Affirmed.

The facts are stated in the opinion.

Messrs. **William A. Norton** and **John C. Dooling**, for plaintiff in error:

An action for naked fraud is assignable. Howd v. Breckenridge, 97 Mich. 65, 56 N. W. 221.

A representation that a note is good, when, as a matter of fact, it is not, is not an expression of opinion, but is a statement of fact, and entitles the plaintiff to recover. Beebe v. Knapp, 28 Mich. 53; Evans v. Stuhrberg, 78 Mich. 145, 6 L.R.A. 501, 18 Am. St. Rep. 435, 43 N. W. 1046; Hicks v. Steel, 126 Mich. 408, 85 N. W. 1121; St. Johns Nat. Bank v. Steel, 135 Mich. 165, 97 N. W. 704; Crane v. Elder, 48 Kan. 259, 15 L.R.A. 795, 29 Pac. 151; Bish v. Beatty, 111 Ind. 403, 12 N. E. 523; Andrews v. Jackson, 168 Mass. 266, 37 L.R.A. 402, 60 Am. St. Rep. 390, 47 N. E. 412; Belcher v. Costello, 122 Mass. 189.

Where the circumstances show that the bank has relied upon the director to aid in conducting its business, and he has availed himself of the opportunity afforded by his official relations to the bank to obtain an undue advantage, he is liable.

Hicks v. Steel, *supra*.

A director's transactions with the bank are always subject to severe scrutiny, and he is under the obligation of acting in the utmost good faith.

3 Thomp. Corp. § 4063; Gallery v. National Exch. Bank, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193; First Nat. Bank v. Reed, 36 Mich. 263; Brown v. Farmers' & M. Nat. Bank, 88 Tex. 265, 33 L.R.A. 359, 31 S. W. 285.

Officers of a national bank, participating in the making of unlawful loans, are personally liable in case of loss to the bank arising therefrom.

Stewart v. National Union Bank, 2 Abb. (U. S.) 424, Fed. Cas. No. 13,435; Witters v. Sowles, 31 Fed. 1; Robinson v. Hall, 12 C. C. A. 674, 25 U. S. App. 48, 63 Fed. 222;

to accept uncollectable paper or make unauthorized loans. In HICKS v. STEEL, liability of the defendant was denied under pleadings framed on the theory that he acted as director in the transaction, where as the facts showed that he acted as agent for another.

The case of St. Johns Nat. Bank v. Steel, 135 Mich. 165, 97 N. W. 704, is much like HICKS v. STEEL, and apparently relates to a similar transaction with another bank of which the same defendant was director. In this case, however, it was held that, under a statute providing, in substance, that no action shall be brought charging any person by reason of the favorable representation or assurance made concerning the character or credit of any other person, unless such representation or assurance shall be in writing signed by the party to be charged or his lawfully authorized agent, a bank director was not liable to the bank for oral representations concerning the credit of the maker of certain notes which he knew to be worthless, and which he had discounted at the bank, acting, to the knowledge of the cashier, as agent for his father, to whose credit the proceeds of the notes were placed. It seems to be assumed in this case that the defendant under the circumstances was not liable irrespective of the statute, upon the ground of a breach of duty as director.

But in Hicks v. Steel, 126 Mich. 408, 85 N. W. 1121, in which a similar transaction was involved, the court held that one who acts as president and director of a bank is bound to refund to the bank the amount of the proceeds of a note, owned by him, which he sold to the bank, representing the maker and indorsers to be financially responsible, when he knew the contrary to be the case, and knowing that the cashier was in the habit of acting on his advice and accepting his aid as director in obtaining outside loans. This case is distinguishable from the others, in that the defendant's relation to the bank was such as to entitle it to a full disclosure of his information.

A director of a national bank, who, with the consent of his codirectors, obtains a loan from the bank in excess of one tenth of the capital stock, is not liable under a statute requiring that directors of a national bank, who make, or assent to the making of, a loan exceeding one tenth of the capital stock, shall become personally and individually liable for all loss sustained thereby, since, in procuring the loan to himself, he must be regarded as having acted as an individual, and not as a director, and therefore is liable to the bank only as a debtor. Witters v. Sowles, 31 Fed. 1.

The general subject of the liability of the directors of a corporation to the corporation by reason of negligence or acts in excess of their authority is treated in an exhaustive note in 55 L.R.A. 751.

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527, 33 L. ed. 1002, 10 Sup. Ct. Rep. 592; Thompson v. Greeley, 107 Mo. 577, 17 S. W. 962; Thompson v. Swain, 107 Mo. 594, 17 S. W. 967; Benton County Sav. Bank v. Boddicker, 105 Iowa, 548, 45 L.R.A. 321, 67 Am. St. Rep. 310, 75 N. W. 632.

Mr. H. E. Walbridge, for defendant in error:

A right to bring an action for naked tort is not assignable.

Final v. Backus, 18 Mich. 218; Dickinson v. Seaver, 44 Mich. 624, 7 N. W. 182; Lewis v. Rice, 61 Mich. 104, 27 N. W. 867; Smith v. Thompson, 94 Mich. 381, 54 N. W. 168; Farmers' F. Ins. Co. v. Johnston, 113 Mich. 430, 71 N. W. 1074; Ware v. Brown, 2 Bond, 267, Fed. Cas. No. 17,170; Dehn v. Heckman, 12 Ohio St. 181.

An action against a director for violation of § 5200 of the national banking act should be brought in equity, and not at law.

Welles v. Graves, 41 Fed. 459.

Blair, J., delivered the opinion of the court:

Plaintiff, as assignee of the Gratiot County State Bank, brought this action against the defendant in the circuit court for the county of Clinton to recover damages alleged to have been sustained by his assignor in consequence of certain fraudulent representations of defendant, and a violation of his duty as a director of its predecessor, the First National Bank of St. Louis, Michigan. The declaration alleges, in brief, that at the time of presenting certain notes payable to Robert M. Steel for discount and renewal for his benefit the defendant, being a director of the bank, fraudulently represented the notes and the makers and indorsers thereof to be good and collectable, and that, in violation of his duty as a director of the bank, he procured and permitted the bank to extend credit to said Robert M. Steel in excess of the limit fixed by U. S. Rev. Stat. § 5200 of the national banking law (U. S. Comp. Stat. 1901, p. 3494). The trial court directed a verdict for the defendant upon the grounds, in brief: "First, a right of action for damages for a naked fraud is not assignable; second, the plaintiff can only recover upon such issues as he alleges in his declaration; third, the plaintiff, as an officer of a bank, may deal with his bank in the same manner as any other patron, providing he does not in the transaction attempt to represent or act for the bank; fourth, no person can be held liable for representation as to the credit or financial standing of another person, unless such representations are in writing, signed by the person sought to be charged thereby." Plaintiff brings the record to this court for review upon writ of error.

First. We think the court was in error in holding that the cause of action in this case was not assignable. The First National Bank of St. Louis was organized in 1884 and continued its business down to July 6, 1897, when it was succeeded by the Gratiot County State Bank, in accordance with the provisions of § 6106, Comp. Laws 1897. Under such circumstances the state bank was substantially the same corporation as the national bank, invested with all its property and possessed of all its rights of action. First Commercial Bank v. Talbert, 103 Mich. 625, 50 Am. St. Rep. 385, 61 N. W. 888; City Nat. Bank v. Phelps, 97 N. Y. 44, 49 Am. Rep. 513. Act No. 195, p. 250, of the Session Laws of 1897 took effect August 29, 1897, and provides that an action of assumpsit may be brought for injuries produced by fraudulent representations or conduct in place of an action on the case for fraud or deceit, and that a promise shall be implied to pay all such damages as arise from such fraud or deceit. The 2d section of the act provides that the cause of action shall survive. The act, in terms, provides for cases where "an injury has been," as well as to cases where an injury "shall be produced," and, as we have heretofore held, related to causes of action in existence at the time it took effect. First Nat. Bank v. Steel, 136 Mich. 588, 99 N. W. 786. The state bank had, as successor of the national bank, a right to bring an action for fraud and deceit against defendant at the time the act took effect, and immediately thereafter it had the right, at its option, to bring an action of assumpsit. As the act provided for the survival of the cause of action, it could be assigned.

Second. The trial court construed the declaration as charging that the defendant presented to the national bank, of which he and his father, Robert M. Steel, were directors, five promissory notes, which were the property of his father, for discount, and that defendant, knowing that the notes were not collectable and the makers and indorsers thereof financially irresponsible, fraudulently represented that the notes were good and the makers and indorsers thereof financially responsible, relying upon which representations the bank discounted the notes for the benefit of Robest M. Steel and accepted renewals thereof. The court further held that there was no evidence of any fraudulent representations in writing, as required by the statute of frauds, and therefore plaintiff could not recover therefor, as held by this court in St. Johns Nat. Bank

v. Steel, 135 Mich. 165, 97 N. W. 704. Plaintiff's counsel concede that "the declaration as to all but the Mt. Pleasant Lumber & Manufacturing Company note proceeds upon the theory that the notes were the property of Robert M. Steel, and were not the property of George A. Steel;" but they insist that the declaration charges that the property in that note was in George A. Steel, and that as to such note oral representations were sufficient. We find no such distinction made in the declaration, and think the trial judge was correct in his construction of it. We are also of opinion that the trial judge correctly held that there was no evidence of any written representation upon which a verdict would be justified under the declaration. The essence of the allegations in the declaration was that the fraudulent misrepresentations were made with reference to the identical notes and the renewals thereof at the several times when they were discounted by the bank or renewed, and there was no written evidence of such misrepresentations signed by defendant given in evidence or offered in evidence.

Third. Testimony was introduced by plaintiff tending to show that defendant made false representations as to the notes to his fellow directors at meetings of the board held on October 23, 1895, and January 17, 1896, when it is claimed that he was acting as a member of the board. On the contrary, defendant contends that the undisputed testimony discloses that he was not at such times acting as a director with reference to the paper involved in this suit, but as the agent and representative of his father dealing with the bank, and this was the view taken by the trial judge. We have carefully considered the testimony contained in the record, as well as that excluded by the court upon this subject, and have come to the same conclusion as that reached by the circuit judge. Our conclusion that the defendant was not acting as a director in obtaining the discount and renewals of the various notes disposes of the contention that defendant was liable because he induced or permitted the bank to extend credit to Robert M. Steel in excess of the legal limit fixed by U. S. Rev. Stat. § 5200 of the national banking law (U. S. Comp. Stat. 1901, p. 3494). The declaration is framed upon the theory of the violation by defendant of his duty as a director. So far as this question is concerned, Mr. Chief Justice Fuller, in his opinion in Briggs v. Spaulding, 141 U. S. 132, 146, 35 L. ed. 662, 668, 11 Sup. Ct. Rep. 924, 929, quotes with approval § 556 of Morawetz on Corporations as follows: "The liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule, which renders every agent liable who violates his authority, to the damage of his principal. A statutory prohibition is material under these circumstances merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed."

The declaration alleging a violation of defendant's authority as such agent, to the damage of his principal, it was essential to a recovery that he should show such agency. This he failed to do. We do not intend to intimate that under a broader declaration a cause of action might not be established by the facts disclosed by this record. We have considered the assignments of error not herein discussed, and find no errors committed by the trial court.

The judgment is affirmed.

MISSOURI SUPREME COURT.

HARRY E. MILTON, Respt.,
v.
MISSOURI PACIFIC RAILWAY COMPANY, Appt.

(193 Mo. 46, 91 S. W. 949.)

False imprisonment—liability of employer.

The employment of a detective to ascertain and report the facts as to who was concerned in a robbery does not render the employer liable for an arrest made by him for the purpose of ascertaining whether or not the person arrested was concerned in the robbery.

(Valliant, J., dissents.)

(January 24, 1906.)

Case Note.—Liability of master for arrest or false imprisonment by servant employed as detective, policeman, or watchman.—The fact that a person is employed by a railroad company as a "detective" does not necessarily import authority to arrest criminals or persons charged or suspected of committing criminal acts. Where the business of the master requires the performance of such acts, and the employment of the detective is in connection therewith, or if there be expectation that he may be required to make arrests in the discharge of the duties intrusted to him, liability

APPEAL by defendant from a judgment of the Circuit Court for Clay County in favor of plaintiff in an action brought to recover damages for false imprisonment. Reversed.

The facts are stated in the opinion.

Mr. Elijah Robinson for appellant.

Messrs. Frank P. Walsh, William H. Wallace, and T. B. Wallace for respondent.

Marshall, J., delivered the opinion of the court:

This is an action for false imprisonment. The plaintiff recovered a judgment for $10,000 in the circuit court of Clay county, and the defendant appealed.

The petition alleges that on the 4th of October, 1898, the defendant, acting through its agents and servants, and through certain detectives and officers from Missouri and Kansas, did, without any warrant or other legal process, and without probable cause, falsely, wantonly, maliciously, illegally, and unlawfully imprison plaintiff in a certain jail in the western part of Kansas City, Missouri, did keep him there for about four days and nights, and denied him access to his relatives and friends and the benefit of counsel, for which the plaintiff claimed $15,000 compensatory damages and $15,000 punitive damages. The answer is a general denial.

The case made is this: On the 23d of September, 1898, one of the defendant's passenger trains was held up and robbed near Leeds, in the southern part of Kansas

may attach for a wrongful arrest; but it is essential that evidence of such conditions be given, sufficient to warrant the inference. Penny v. New York C. & H. R. R. Co. 34 App. Div. 10, 53 N. Y. Supp. 1043.

As in the case of MILTON v. MISSOURI P. R. Co., a detective is frequently employed simply to collect evidence. So, also, a private policeman or watchman might be employed simply to preserve order or protect property, without any authority, express or implied, to make arrests.

But where such an employee has express authority to arrest offenders, or such authority is clearly implied from the general scope of his duties, there is no question that the master is liable in case a wrongful arrest is made.

Thus, one who employs an agent to detect and arrest offenders is responsible for all acts of the agent, committed within the general scope of his employment, although he may have violated instructions and arrested an innocent person. Pennsylvania Co. v. Weddle, 100 Ind. 138; Harris v. Louisville, N. O. & T. R. Co. 35 Fed. 116.

And an unlawful arrest, made by an express company's agent employed to pursue and arrest a person who has stolen its property, renders the company liable. American Exp. Co. v. Patterson, 73 Ind. 430.

So, a railroad company is liable for an unlawful arrest, and imprisonment by one employed to detect, arrest, and prosecute persons unlawfully obstructing its tracks. Evansville & T. H. R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102.

And the owner of a summer resort, who employs a detective agency to take charge and control of the resort so far as the police regulations are concerned, is liable for a wrongful arrest made by a policeman appointed by such agency,—especially when the arrest is directed and approved by the defendant's manager. Clark v. Starin, 47 Hun, 345. In this case the defense that the arrest was not within the scope of the authority conferred by the defendant was set up, and the court said the question was not whether the particular act was authorized, but whether the servant was engaged in his master's business and acting within the general scope of his authority; that here the management of this summer resort was confided to the detective agency, and if, through lack of judgment and discretion, or even infirmity of temper, it went beyond the strict line of authority, the defendant must nevertheless be held liable.

False imprisonment of an innocent person on a charge of attempting to pass counterfeit money, which was procured by a railroad detective while acting within the scope of his authority, renders the railroad company liable, although he exceeded his authority and acted contrary to his instructions respecting the caution to be exercised. Eichengreen v. Louisville & N. R. Co. 96 Tenn. 229, 31 L.R.A. 702, 54 Am. St. Rep. 833, 34 S. W. 219. In this case the detective had been employed for the purpose of protecting the property of the company and of ferreting out and prosecuting persons guilty of crimes against the company. He had general instructions not to make arrests without first consulting the local attorneys of the road, although he was authorized to make an arrest when the proof against the party was clear, and there was no time to consult the local attorneys.

And a railroad company is liable for an unlawful arrest by an employee who had been set to watch people suspected of stealing coal, and instructed, if any of them were caught, to lock them up, although the arrest was made at a point several blocks distant from the premises of the railroad company, and his instructions limited his authority to the premises. Kastner v. Long Island R. Co. 76 App. Div. 323, 78 N. Y. Supp. 469.

Where a depot master, in discharge of his duty of maintaining order in the depot, makes an unlawful arrest, his master is liable therefor, and the fact that the depot master is also acting for another railroad company does not affect the question. Illinois C. R. Co. v. King, 69 Miss. 852, 13 So. 824.

A corporation is liable for a wrongful arrest and malicious prosecution by a detective policeman employed by it to pro-

City. A day or two afterwards H. G. Clark, the defendant's general superintendent, sent for Thomas Furlong, the president of the Furlong Secret Service Company, a corporation engaged in the detective business, and when Furlong arrived Clark said to him: "I suppose you have read and heard about this train robbery up near Kansas City?" He said: "Yes, sir." Clark then said: "I want you to go up there and find out who committed this robbery, and report." Furlong states the matter in this way: "Mr. Clark said a train had been held up at Leeds the night before, and that he wished that I would go up there and ascertain the facts pertaining to the robbery, if I could, as to who the parties were that held up the train." The foregoing is all the evidence in the case as to the employment of Furlong by the defendant, and that evidence was adduced by the plaintiff. Accordingly Furlong went to Kansas City, and had two of his employees, Dickson and Harbaugh, to go there also. Prior to Furlong's reaching Kansas City, John Hays, the chief of the police department at that city, with his detective force, had been investigating the matter, and had obtained information that convinced them that one Lowe was implicated therein, but they had been unable to locate him. After Harbaugh's arrival, he succeeded in finding him, and he was arrested by the police department of Kansas City, and Lowe confessed to having been interested in the hold-up, and stated the names of other persons who acted with him, and said that one of the parties told him that his friend Harry (no surname is disclosed, and Lowe disclaimed knowledge of the same) would get the buggy in which they would ride to the place where the hold-up was to occur. Furlong instructed Harbaugh to ascertain any facts and any information that he could that would lead to the discovery of the robbers, and to act in connection with Chief Hays, and to report to Chief Hays, and Chief Hays detailed Harbaugh to work with three of the Kansas City detectives, Sanderson, Bryant, and Keshlear, on the matter. Thereafter Harbaugh continued so to operate with the local detectives. There were other detectives representing the express company also working on the case. Furlong did not re-

tect its property. Edwards v. Midland R. Co. L. R. 6 Q. B. Div. 287.

So, if general authority of a detective employed by a railroad company included expressly or by general usage and consent the power to make an arrest in behalf of the company, then the fact that he made an arrest without a warrant is immaterial, and the company is liable therefor. Duggan v. Baltimore & O. R. Co. 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186.

A wrongful arrest by a janitor and watchman, of a person on the charge of stealing from the building, renders the master liable if the servant acted under his authority in making the arrest, but not if he acted solely under the direction of a police officer. Geary v. Stevenson, 169 Mass. 23, 47 N. E. 508.

And a railroad company is not liable for the false arrest, by a detective in its employ, of a passenger in its station, where the latter's appearance and behavior justified the belief that he had committed, or was about to commit, a felony. Newman v. New York, L. E. & W. R. Co. 54 Hun, 335, 7 N. Y. Supp. 560.

Where a person is in the employ of, and paid by, a private person or corporation, but has been appointed a special policeman by public authority, the question sometimes arises whether, in making a wrongful arrest, he acts as a servant of his employer or as a public officer; and there seems to be some difference of opinion as to this.

Thus, a policeman appointed on the application of a corporation which is required by law to pay his salary has been held to be an officer of the state, and the corporation is not responsible for his acts as such officer in making an arrest,—especially if it is not done on the premises of the corporation. Tolchester Beach Improv. Co. v. Steinmeier, 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188.

So, where a person whose entire salary is paid by a market company, which employs him to collect rents for the stalls, with general authority to maintain order, but without any express authority from the company to make arrests, and who has also been appointed a special policeman for the company, on its application, makes an unlawful arrest, it is held that he must be regarded as doing so in his character of public officer, for whose acts the market company is not liable. Wells v. Washington Market Co. 8 Mackey, 385.

But, under a statute empowering railroad station agents to arrest and deliver to the sheriff or other proper officer any person guilty of disorderly conduct about the station, such an agent is held not to be an officer of the state so as to relieve his employer from liability for false arrests made by him, although the agent supposed he was acting as a conservator of the peace in making the arrest. King v. Illinois C. R. Co. 69 Miss. 245, 10 So. 42.

And where a mayor, having no legal authority to do so, has appointed a special policeman for a railroad company, which pays his salary, the company is held liable for a wrongful arrest by him. Union Depot & R. Co. v. Smith, 16 Colo. 361, 27 Pac. 329; Norfolk & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935.

As to the liability of a master generally for false arrest, imprisonment, or malicious prosecution by servant, see note in 14 L.R.A. 791.

main long in Kansas City. From information obtained by Hays, he concluded that the plaintiff was the person referred to as Harry, and accordingly reported to Mastin, the prosecuting attorney of the county, and he advised him to send over to Kansas City, Kansas, where the plaintiff was working as a switchman in the yards of the Chicago & Great Western Railway Company, and ask him to come over to Kansas City, Missouri, and, if he refused, to ask for the assistance of the police department of Kansas City, Kansas, and have him (the plaintiff) locked up over there, and to send the persons who claimed to be able to identify "Harry" to see him. Accordingly Harbaugh, Bryant, Keshlear, and Sanderson went over to the said yards, and Sanderson, with the assistance of one Addison, who was connected with the police department of Kansas City, Kansas, arrested the plaintiff, and Sanderson took him to the Mulberry street police station in Kansas City. Harbaugh, Sanderson, and Addison testified that Harbaugh had nothing to do with the arrest or subsequent confinement, while, on the other hand, other witnesses, who were present, testified that Harbaugh participated in the arrest. After Sanderson had taken the plaintiff to Kansas City, Missouri, Harbaugh and Addison went to the house of the plaintiff's sister, Mrs. Hodgins, and without her consent, searched the room in the house where the plaintiff had been staying, and took a hat, a necktie, and a collar, being the property of the plaintiff, after she had refused to sell them to them for $5, and told her the plaintiff would not be home that night for they had him at the police station where they wanted him. Furlong testified that his company had no authority to make arrests and no police power, and that he gave Harbaugh no instructions as to participating in the arrest of any person in this particular case, but that Harbaugh had general instructions not to participate in arrests. While the plaintiff was in prison he was compelled to put on the hat, necktie, and collar, aforesaid, and to submit to the inspection of various persons to see whether he could be identified as the "Harry" who got the buggy for the robbers. During those inspections Harbaugh was present and participated therein. None of the persons who had called to identify him were able to say that he was the "Harry" referred to. So, after being held under arrest for four days and nights, the plaintiff was discharged and went back to work with the railroad aforesaid.

At the close of the whole case the defendant demurred to the evidence, the court overruled the demurrer, and the defendant excepted, and now assigns that ruling of the court as the chief error relied on.

The chief contention of the defendant is that the plaintiff failed to make out a prima facie case. The gist of the contention is that the employment of Furlong by the defendant's general superintendent conferred no authority upon Furlong or any of his agents to arrest the plaintiff or to participate in any such arrest, nor was such an arrest within the scope of the employment of Furlong. Reduced to its last analysis, this case must be solved upon the determination of the proposition whether authority conferred by a principal upon an agent to ascertain facts and to report to the principal makes the principal liable for the act of the agent in arresting a third person for the purpose of ascertaining whether he was concerned in the robbery under investigation. There is very little difference between counsel as to the general rules of law bearing upon the question under consideration.

The plaintiff cites a great number of cases, but relies principally upon Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405. In that case the defendant kept a gun store and had a clerk to assist him in selling firearms and ammunition. He had instructed the clerk never to load a gun. A customer went to the store to buy a gun and the clerk showed him a Henry rifle. The customer requested the clerk to load it so that he could see how it worked. The clerk at first refused, stating that it was against orders to load firearms in the store. The customer refused to buy unless he could see how it was loaded. Thereupon the clerk undertook to load the gun. It was discharged, and the plaintiff, who was sitting at a window on the opposite side of the street, was shot. This court, per Wagner, J., stated the general rule of law as follows: "The universally recognized rule is that a principal is civilly liable for the neglect, fraud, or other wrongful act of his agent in the course of his employment, though the principal did not authorize the specific act; but the liability is only for acts committed in the course of the agent's employment. A master is not responsible for any act or omission of his servants which is not connected with the business in which they serve him, though in general he is responsible for the manner in which they execute his orders, and for their negligence in selecting means by which the orders are to be carried out. In determining whether a particular act is done in the course of a servant's employment, it is proper, first, to inquire whether the servant was, at the time, engaged in serving his master. If the act was done while the servant was at liberty from his service, and pursuing his own ends exclusively, there can then be no question that

the master is not responsible, even though the injuries complained of could not have been committed without the facilities afforded by the servant's relations to his master. Shearm. & Redf. Neg. § 63, and notes. It may not perhaps be very easy to reconcile the numerous cases on this subject, but we think that the correct rule extracted and deduced from them will be found as above laid down." In the same case it was further said: "The true ground upon which a master avoids responsibility for most of the wilful acts of his servants when unauthorized by him is that they are not done in the course of the servant's employment. When they are so done, the master is liable for them."

In 1 Am. & Eng. Enc. Law, 2d ed. p. 1151, the rule is thus stated: "It is a general rule that the principal will be liable where the torts of an agent are done by his express authority, or are the natural consequence resulting from an order given, or where they are committed in the course of the agent's employment, although the principal did not authorize, or justify, or participate in, or even if he disapproved of, them. But the principal will not be liable for torts committed by the agent outside the scope of the authority delegated to him." The same author, at page 1156, says: "The earlier cases, both in this country and in England, support the doctrine that the principal cannot be held liable for the wanton or malicious acts of the agent. The later decisions, however, incline to the rule making the principal liable for acts of the agent done within the scope of his employment, though they be wanton or malicious, and relieving him from responsibility when the agent steps aside from the business of his principal and wantonly or maliciously commits an act to accomplish an independent purpose of his own."

Stringer v. Missouri P. R. Co. 96 Mo. 299, 9 S. W. 905, was an action for damages for personal injury. On the invitation of a brakeman, the plaintiff boarded one of defendant's engines in the city of St. Louis to ride to another point in the city. The engine jumped the track, and the plaintiff was injured. It was held that the defendant was not liable, and Snyder v. Hannibal & St. J. R. Co. 60 Mo. 419, was cited as authority for the proposition that "the mere fact that a tortious act is committed by a servant while he is actually engaged in the performance of the service he has been employed to render cannot make the master liable. Something more is required. It must not only be done while so employed, but it must pertain to the particular duties of that employment." And Sherman v. Hannibal & St. J. R. Co. 72 Mo. 63, 37 Am. Rep. 423, and Cousins v. Hannibal & St. J. R. Co. 66 Mo. 576, were said to hold the same doctrine.

Farber v. Missouri P. R. Co. 116 Mo. 81, 20 L.R.A. 350, 22 S. W. 631, was an action for damages for personal injuries. The plaintiff and his friend boarded one of defendant's freight trains in St. Louis to steal a ride to Kirkwood. Before reaching their destination a brakeman observed them and ejected them from the train, while it was in motion, in consequence of which the plaintiff was injured. This court, per Gantt, J., said: "It was said in Snyder v. Hannibal & St. J. R. Co. 60 Mo. 413, that 'it is firmly established [in this state] that the master is civilly liable for the tortious acts of his servant, whether of omission or commission, and whether negligent, fraudulent, or deceitful, when done in the course of his employment, even though the master did not authorize or know of such acts, or may have disapproved or forbidden them.' Garretzen v. Duenckel, *supra*. Indeed, the doctrine of the old cases, as announced in M'Manus v. Crickett, 1 East, 106, no longer obtains in the courts of this state. The liability of the master for the acts of the servant rests now upon the condition whether or not the act of the servant was in the course of his employment. Perkins v. Missouri, K. & T. R. Co. 55 Mo. 201; Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504."

Counsel have cited many cases illustrative of the liability of a principal for the tortious acts of an agent, and with few exceptions they all proceed, or attempt to proceed, on the rule hereinbefore referred to. There is not much difficulty in determining the law applicable to such cases, but the trouble always arises from the application of the law to the particular facts in judgment in each case. The crucial test in all cases is whether the act of the agent was within the scope of his employment. For instance, the employment of an agent to present a claim, and demand payment thereof from a debtor to his principal, does not include within its scope the right to arrest or assault the debtor if he refuses to pay. Such an employment contemplates only lawful and peaceable acts, and, when an agent so clothed with authority commits a trespass upon the debtor, he acts wholly outside of the scope of his employment. The employment of a mercantile agency by a creditor to ascertain and report the financial condition of a debtor does not contemplate, within its scope, the arrest of the debtor by the mercantile agency, even to force him to disclose his true financial condition. In short, the employment of one to ascertain a fact and to report the result thereof does not contem-

plate within its scope the right to arrest or commit any trespass upon any person whomsoever.

The case at bar is totally different from cases wherein the agent was charged with the duty of keeping and preserving the property of a principal, and, in the attempt so to do, caused the arrest of a third person who undertook to interfere or make way with the principal's property. In the case at bar a grievous wrong was clearly done to the plaintiff, but the defendant is not liable therefor, unless it could be held that the employment of the detective to ascertain the facts as to who was concerned in the hold-up and robbery of its train contemplated within its scope the right or duty of the detective to cause the arrest of anyone whom the detective might suspect had been concerned therein. The employment by the defendant of Furlong was to ascertain the facts as to the robbery and to report the result to the defendant's general superintendent. The fact that Furlong was engaged in the detective business does not alter the defendant's liability in the least. The defendant's liability would be the same if it had sent one of its own employees to make such investigation and report. The fact, if it be a fact, that detectives unlawfully arrest persons for the purpose of extorting confessions from them, or of subjecting them to scrutiny by other persons for the purpose of identification, cannot alter the rules of law applicable to the liability of a principal for the acts of his servant, unless the principal knew that the detective employed was in the habit of employing such methods; and there is no evidence that such was the case in this instance.

The full extent and scope of Furlong's employment by defendant was to ascertain and report the facts, not to arrest anyone or to commit any tortious acts whatever. The defendant would be liable for all of the acts done by Furlong or his agents within the scope and purpose of the employment, whether the same be tortious or otherwise; but the defendant is not liable for any act of Furlong or his agents that did not fall within the scope of such employment. For the purpose of this case it may be conceded that Harbaugh made the arrest complained of, although there is scarcely room for doubt that the arrest was made by the direction of the chief of police of Kansas City on the advice of the prosecuting attorney of Jackson county, and not at the instance of either the defendant or Harbaugh, although Harbaugh was present and may have aided or abetted therein, yet as Harbaugh had no authority from anyone so to do, and as the business of the defendant, which Furlong was employed to conduct, did not include within its scope the arrest of anyone, the defendant cannot be held liable for the act of Harbaugh in the premises.

This conclusion makes it unnecessary to consider the other points relied on by the defendant, and necessarily results in holding that the trial court erred in overruling the demurrer to the evidence.

As no good purpose can be subserved by a new trial herein, the judgment of the Circuit Court is reversed, without remanding the case.

Brace, Ch. J., and **Gantt**, **Burgess**, **Fox**, and **Lamm**, JJ., concur.

Valliant, J., dissenting:

The master's liability for the wrongful act of his servant depends not on the words in which the contract of employment is expressed, for, if that were the case, then care in phraseology would enable the master to avoid all liability. The liability of the master is not one that he contracts to assume, but it is one that is imposed by law on the relation of master and servant. And it is not necessary that the wrongful act of the servant be done with the knowledge or consent of the master; the master may in fact give the servant strict orders to be very careful to avoid hurting others, and yet be liable if the servant disregards the orders. The theory of the law is that the hand of the servant, moving in the performance of the act which he was employed to do, is the hand of the master, and, if in his effort to accomplish that act the servant negligently or wilfully injures another, it is in legal theory the hand of the master that does the wrong. The master has chosen his own servant, and is responsible to others for that servant's lack of capacity, or lack of care, or lack of regard for the rights of others when that servant is in the act of doing his master's work, and when the wrong that he does is his method of accomplishing the work he was set to do. Of course this rule must be accepted with reasonable limits. Extreme cases may be supposed, as were given for illustration in the oral argument, and extreme cases may have occurred, in which no reasonable master could have anticipated the act which the servant committed; but with that qualification the rule is a just one, and whether the act committed is one that is beyond reason to have anticipated is a question of fact in a given case.

To say that a master may employ an agent possessing the power and the means of inflicting wrong, which the evidence in this case tends to show the agent in this instance possessed, and yet hide his liability behind

the innocent form of expression he used when he employed the agent and sent him forth to do his work, would be to mark out an easy method for doing wrong without incurring liability. And the aptitude of the servant for committing torts is to be judged by his acts rather than by his words. What would it have profited the plaintiff in this case, while he was undergoing torture for four days, to be told that the detective agency had no lawful power to make arrests and that its emissaries had strict orders to refrain from doing so? Of course the detective agency had no lawful power to make arrests, but, as soon as its agent in this case landed in Kansas City, he put himself in close companionship with those who could make arrests and incited them to action. If making or promoting an arrest was not in its line of business, and not in contemplation when it was employed to do work of this kind, what was the necessity or pertinency of giving its men orders, on sending them out, not to arrest anyone? A merchant sending out his traveling salesmen gives them no such orders; why should a detective agency, which we are asked to believe is as innocent of committing wrong as anyone, give such orders to its men? I do not underrate the merit displayed by the railroad company in seeking to discover the criminals who held up its train for robbery and murder. It had a right to do so in its own self-interest; but doubtless a higher motive also prompted the act. But the merit in the effort to find and punish the criminal does not justify or mitigate the offense of seizing and torturing an innocent man. To say that the defendant is not liable for the act of its servant, under the circumstances which the plaintiff's evidence tends to show in this case, is, in my opinion, to lay down a doctrine that is full of danger to the citizen.

For these reasons I am compelled to dissent from the opinion of the majority of the court in this case.

RHODE ISLAND SUPREME COURT.

DANIEL F. GRADY
v.
HOME FIRE & MARINE INSURANCE COMPANY.

(— R. I. —, 63 Atl. 173.)

Insurance—arbitration—public policy.

1. A provision for arbitration in a standard insurance policy the form of which has been approved by the legislature cannot be declared void as against public policy.

Same—action on policy.

2. Arbitration as to the amount of the loss is a condition precedent to an action on an insurance policy, where the policy expressly provides that no action shall be sustainable until after full compliance with all conditions, one of which is that in case of dispute the amount of loss shall be fixed by arbitration.

Same—failure of arbitration.

3. Failure of arbitration through no fault of the insurance company does not abrogate a provision in the policy that no action shall be brought until the amount of the loss has been settled by arbitrators, and there is nothing to show that arbitration has become impossible.

(January 26, 1906.)

PETITION by defendant for new trial after verdict in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Granted.

The facts are stated in the opinion.

Messrs. **C. M. Van Slyck** and **Frederick A. Jones**, for defendant:

The agreement for arbitration is valid.

Hamilton v. Liverpool & L. & G. Ins. Co. 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. Rep. 945; Scott v. Avery, 5 H. L. Cas. 811; Wolff v. Liverpool & L. & G. Ins. Co. 50 N. J. L. 453, 14 Atl. 561; Seibel v. Lebanon Mut. Ins. Co. 16 Lanc. L. Rev. 356; Chippewa Lumber Co. v. Phenix Ins. Co. 80 Mich. 116, 44 N. W. 1055.

The provisions created a condition precedent to the plaintiff's right of action.

Davenport v. Long Island Ins. Co. 10 Daly, 535; Fisher v. Merchants' Ins. Co. 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282; Lamson Consol. Store Service Co. v. Prudential F. Ins. Co. 171 Mass. 433, 50 N. E. 943; Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855; Carroll v. Girard F. Ins. Co. 72 Cal. 297, 13 Pac. 863.

An attempt at arbitration having failed without fault on the part of the defendant, and the company still insisting that the ascertainment of the amount of loss shall be by arbitration, the plaintiff cannot refuse to agree to such arbitration and maintain his suit.

United States v. Robeson, 9 Pet. 319, 9 L. ed. 142; Hamilton v. Liverpool & L. & G. Ins. Co. 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. Rep. 945; Davenport v. Long Island Ins. Co. *supra;* Uhrig v. Williamsburgh City F. Ins. Co. 101 N. Y. 362, 4 N.

Case Note.—Insurance; effect of failure of arbitration.—The standard form of fire insurance policies in general use in this country contains the same provisions for arbitration of damage for loss by fire as are quoted in GRADY v. HOME F. & M. INS. CO.

E. 745; Fisher v. Merchants' Ins. Co. *supra;* Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Thorndike v. Wells Memorial Asso. 146 Mass. 619, 16 N. E. 747; Seibel v. Lebanon Mut. Ins. Co. *supra;* Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855; Christianson v. Norwick Union F. Ins. Soc. 84 Minn. 526, 87 Am. St. Rep. 379, 88 N. W. 16; Vernon Ins. & T. Co. v. Maitlen, 158 Ind. 393, 63 N. E. 755; Westenhaver Bros. v. German American Ins. Co. 113 Iowa, 726, 84 N. W. 717.

Messrs. **Bassett & Raymond** and **Russell W. Richmond,** for plaintiff:

The agreement to arbitrate is illegal and void.

Pepin v. Société St. Jean Baptist, 23 R. I. 84, 91 Am. St. Rep. 620, 49 Atl. 387; Stephenson v. Piscataqua F. & M. Ins. Co. 54 Me. 55; Chippewa Lumber Co. v. Phenix Ins. Co. 80 Mich. 116, 44 N. W. 1055; Liverpool, L. & G. Ins. Co. v. Creighton, 51 Ga. 95; Cobb v. New England Mut. M. Ins. Co. 6 Gray, 192; Johnson v. Humboldt Ins. Co. 91 Ill. 92, 33 Am. Rep. 17.

In order to make such an award a condition precedent to the right of bringing suit, it must be so expressed in the policy or necessarily implied from its terms.

Liverpool, L. & G. Ins. Co. v. Creighton, *supra;* Birmingham F. Ins. Co. v. Pulver, 126 Ill. 329, 9 Am. St. Rep. 598, 18 N. E. 804; Reed v. Washington F. & M. Ins. Co. 138 Mass. 572.

Such agreement to submit to arbitration is regarded as a collateral and independent

and in actions on such policies the same question frequently arises as to the effect of a failure of the arbitration once entered upon by the assured and the insurance company. Such failure, it is evident, may result from the fault of the parties themselves or of their arbitrators.

It is the duty of each party, in good faith, to bring about the appraisement of damage in the manner demanded by the insurance policy, and, if either acts in bad faith, and thereby defeats the real object of the arbitration, the other party is absolved from compliance with that condition. Hence, if the arbitration fails through the fault of the assured, the proposition is self-evident and assented to by all the courts, that he cannot bring an action on the policy until the arbitration clause therein is fully complied with. 4 Cooley, Briefs on Insurance, 3625; Elliott, Ins. § 324; Kerr, Ins. 642; Western Assur. Co. v. Hall, 120 Ala. 547, 74 Am. St. Rep. 48, 24 So. 936; Providence Washington Ins. Co. v. Wolf (Ind. App.) 72 N. E. 606; Caledonian Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13; Morley v. Liverpool & L. & G. Ins. Co. 85 Mich. 210, 48 N. W. 502; Silver v. Western Assur. Co. 164 N. Y. 381, 58 N. E. 284; Williams v. German Ins. Co. 90 App. Div. 413, 86 N. Y. Supp. 98; Davis v. Atlas Assur. Co. 16 Wash. 232, 47 Pac. 436, 885.

Equally well settled is the rule that the failure of arbitration from the fault of the insurer abrogates that provision of the policy making an award by arbitrators a condition precedent to the assured's right of action, and, if the latter can show that the disagreement of arbitrators has been accomplished by the insurer for the purpose of preventing an award, and that he himself is free from fault in the matter, he has discharged his whole duty in that regard, and may maintain an action on the policy without waiting for an award by arbitrators. It would be manifestly unjust, says the court, to tie up the assured forever and against his will by an ineffectual arbitration. 4 Cooley, Briefs on Insurance, 3669, 3670; Elliott, Ins. § 324; Kerr, Ins. 642; Harrison v. German-American F. Ins. Co. 67 Fed. 577; Hall v. Western Assur. Co. 133 Ala. 637, 32 So. 257; Ætna Ins. Co. v. Stevens, 48 Ill. 31; Niagara F. Ins. Co. v. Bishop, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102; Read v. State Ins. Co. 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665; Powers Dry Goods Co. v. Imperial F. Ins. Co. 48 Minn. 380, 51 N. W. 123; Uhrig v. Williamsburgh City F. Ins. Co. 101 N. Y. 362, 4 N. E. 745; Michel v. American Cent. Ins. Co. 17 App. Div. 87, 44 N. Y. Supp. 832; Davis v. Atlas Assur. Co. *supra.*

This much-desired unanimity of the courts ceases when we come to deal with the failure of the arbitration from causes other than the acts of the principal parties themselves. The most numerous class of cases where the arbitration has failed without the fault of either the assured or the insurance company are those where the arbitrators have irreconcilably disagreed on the choice of an umpire. Whether the failure of the arbitrators to agree arises from no improper conduct on their part, but is the result of an honest difference of opinion arrived at in good faith, or is traceable to the actual fault or misconduct of one or the other or both of them, there is the same lack of accord in the decisions. Of course these acts must be the acts of the arbitrators themselves, uninfluenced by those that selected them; for, if their conduct is induced by either insurer or insured, their acts become the acts of the parties themselves, and the burden of blame is shifted to the real person at fault, and the rules heretofore set forth would apply. Quite frequently, however, the arbitrators fail to agree where both the assured and the insurance company are free from any fault contributing to their disagreement, and perhaps the greater weight of authority, if not the reason thereof, sustains the position taken in GRADY v. HOME F. & M. INS. CO. These tribunals strictly enforce the general rule of contractual obligation as settled by United States v. Robeson, 9 Pet. 327, 9 L. ed. 145, and many other decisions, that the contract itself is a law between

agreement, the breach of which, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract.

Hamilton v. Home Ins. Co. 137 U. S. 370, 34 L. ed. 708, 11 Sup. Ct. Rep. 133; Seward v. Rochester, 109 N. Y. 164, 16 N. E. 348; Reed v. Washington F. & M. Ins. Co. *supra;* Mutual F. Ins. Co. v. Alvord, 9 C. C. A. 623, 21 U. S. App. 228, 61 Fed. 752.

The failure to arbitrate, or to reach an award after an effort has been made, is sufficient ground to warrant either party in applying to the court for relief.

Bristol v. Bristol & W. Waterworks, 19 R. I. 419, 32 L.R.A. 740, 34 Atl. 359; Cooke v. Miller, 25 R. I. 92, 54 Atl. 927.

Johnson, J., delivered the opinion of the court:

The action was upon a policy of fire insurance which contained the following provisions: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus

the parties thereto; and, where they expressly fix how the amount to be paid thereunder is to be ascertained, the party seeking to enforce the agreement must show that he has done everything within his power to effectuate it; and, in the language of Judge M'Lean, "he cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so."

The mere failure, then, of the arbitrators to agree, say these courts, does not of itself justify a suit by the assured for the amount of the loss; and, in the absence of bad faith or acts intended to defeat arbitration on the part of the insurance company, the assured must propose the selection of other arbitrators in order that an award may be agreed upon and a basis of action determined in accordance with the terms of the policy. It is assured's duty to select another arbitrator where the ones first selected have failed to agree through no fault of the insurer. On this theory, the condition in the policy providing for arbitration still stands as the binding agreement of the parties, and is not complied with or waived by the mere fact of the failure of arbitrators to agree. The insured is therefore required to do everything in his power to have the agreement given effect and the damages ascertained in the manner provided in the insurance policy, and, until this is done, he cannot, if the insurance company is in nowise responsible for the failure of the arbitration, resort to the courts. 4 Cooley, Briefs on Insurance, 3626; Elliott, Ins. § 324; Kerr, Ins. 644; May, Ins. § 496 B; Carroll v. Girard F. Ins. Co. 72 Cal. 297, 13 Pac. 863; Providence Washington Ins. Co. v. Wolf, *supra;* Westenhaver Bros. v. German American Ins. Co. 113 Iowa, 726, 84 N. W. 717; Fisher v. Merchants' Ins. Co. 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282; Christianson v. Norwich Union F. Ins. Co. 84 Minn. 526, 87 Am. St. Rep. 379, 88 N. W. 16; Davenport v. Long Island Ins. Co. 10 Daly, 535.

The same rule was applied where the views of both arbitrators as to an umpire's qualifications were obstinately and unreasonably adhered to, both acting honestly and in good faith. Vernon Ins. & T. Co. v. Maitlen, 158 Ind. 393, 63 N. E. 755.

In other jurisdictions it has been held that assured has done all his duty in submitting to arbitration and selecting an arbitrator, even though, after the failure of the arbitration was definitely known to him, he did not select another arbitrator or request the assured to do so. Thus, it was said in Western Assur. Co. v. Decker, 39 C. C. A. 383, 98 Fed. 381: "The terms of the policy are satisfied when the insured, acting in good faith, appoints an appraiser. If the appraisement falls through by disagreement of the appraisers without any fault of the insured, he has discharged his covenant and satisfied the requirements of the policy, and may then resort to the courts to have his damages assessed."

In a North Carolina case, where, after failure of the arbitrators to agree, a subsequent attempt to agree upon another board also failed, the court said: "The proper rule is . . . that where the arbitrators, or a majority of them, fail to agree upon an award, the plaintiff (unless he is shown to have acted in bad faith in selecting his arbitrator) is not compelled to submit to another arbitration and another delay, 'but may forthwith bring his action in the courts.'" Pretzfelder v. Merchants' Ins. Co. 116 N. C. 491, 21 S. E. 302, 123 N. C. 164, 44 L.R.A. 424, 31 S. E. 470.

The Illinois supreme court, in a case where the policy in suit was identical in its arbitration clause with the one in GRADY v. HOME F. & M. INS. Co., repudiated *in hæc verba*, as far as that insurance policy was concerned, the doctrine of Davenport v. Long Island Ins. Co. *supra*, that it is the duty of assured, upon the failure of the arbitrators to agree upon an umpire, to propose to the insurer the selection of new arbitrators; adding that "the contract here only requires insured to choose appraisers once, and not twice." Niagara F. Ins. Co. v. Bishop, *supra*.

The Maryland supreme court has gone

determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described. . . . In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss. . . . This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty

even further to aid insured, asserting that because assured, as has been held in some cases, is entitled to recover on the policy without an award of loss by arbitrators when the failure of arbitration is caused by the unreasonable conduct of the arbitrator selected by the insurance company, it does not follow that his right of action is barred, even when the arbitration is defeated by the acts of the arbitrator selected by him. In such case the assured may maintain his action on the policy if he can show that the failure was caused by no act of his. The court said: "The title of the insured to maintain his suit rests upon his policy, and not upon the conduct of the insurer in relation to the appraisement. He may, when the policy provides for an appraisement, be estopped from bringing his suit by his own conduct in reference to the appraisement, but if his conduct in that connection be free from fault, he is not estopped from suing by the failure of the appraisement from other causes." Connecticut F. Ins. Co. v. Cohen, 97 Md. 294, 99 Am. St. Rep. 445, 55 Atl. 676.

In Minnesota the rule as laid down in GRADY v. HOME F. & M. INS. Co. seems now accepted. The supreme court, in 1892, said: "If the contract is to receive a reasonable construction, it cannot be that the assured is bound to enter and re-enter into fruitless arbitrations indefinitely. If bound to enter into the second, he is into the third, and so on. Where is a line to be drawn? No line can logically be drawn anywhere if the assured is bound to enter the second arbitration. The reasonable rule is that by one submission in good faith the assured has done all his covenant requires, and may then resort to the courts." Powers Dry Goods Co. v. Imperial F. Ins. Co. 48 Minn. 384, 51 N. W. 123.

Many of the failures of arbitration found in the books are due to an irreconcilable difference of opinion between the arbitrators as to the qualifications of an umpire in the matter of residence, the arbitrator selected by the assured generally insisting upon the choice of a resident of the vicinity of the fire as likely to be better qualified for the estimation of values of property in that locality, while the arbitrator chosen by the company very often insists upon the appointment of someone living at a distance from the place of the fire as more likely to be disinterested. The courts have generally held that it is not unreasonable for the arbitrator chosen by the assured to insist upon the appointment of an umpire from persons residing at or near the place of the fire, and that where he suggests the names of worthy, competent, and unprejudiced persons of the vicinity of the fire, the locality from which a jury in case of suit would be drawn, and the arbitrator selected by the insurer capriciously and without any reason therefor, except that of their residence, declines to accept any of them, and on his part refuses to name any within the locality of the fire, and insists on the choice of someone resident at a distance, his conduct is unexcusable, unreasonable, and arbitrary, and amounts to a refusal to proceed with the arbitration, and assured need wait no longer to bring an action on the policy. Niagara F. Ins. Co. v. Bishop, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102; Brock v. Dwelling House Ins. Co. 102 Mich. 583, 26 L.R.A. 624, 47 Am. St. Rep. 562, 61 N. W. 67; Fowble v. Phœnix Ins. Co. 106 Mo. App. 527, 81 S. W. 485; McCullough v. Phœnix Ins. Co. 113 Mo. 606, 21 S. W. 207; Braddy v. New York Bowery F. Ins. Co. 115 N. C. 354, 20 S. E. 477; Hickerson v. German-American Ins. Co. 96 Tenn. 193, 32 L.R.A. 172, 33 S. W. 1041; Chapman v. Rockford Ins. Co. 89 Wis. 572, 28 L.R.A. 405, 62 N. W. 422.

Some cases apply a theory of agency in holding that where the failure of the arbitration is due to the misconduct of the arbitrator selected by the insurance company, and the company itself is free from fault during the course of the attempted arbitration, the provision of the insurance policy making an award a condition precedent to assured's right of action is abrogated. They say that while an arbitrator is not the agent of the party appointing him, and should not be regarded as such simply because of the fact of his appointment, yet

days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. . . . No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." The property covered by this policy having been destroyed by fire, the parties entered into an agreement of submission to arbitration, in accordance with the terms of the policy. The arbitrators selected appointed an umpire and proceeded with the appraisal. An award in writing, dated April 23, 1902, was signed by the two arbitrators and the umpire. Subsequently one of the arbitrators erased his name and appended the following memorandum: "Signature erased a/c disagreement 5-27-'02." The defendant offered to abide by the award, although admitting its insufficiency; and, its offer in that regard being rejected, demanded a new appraisal and named its arbitrator. The plaintiff refused to submit to a new appraisal, and subsequently this action was commenced.

The declaration contained no reference to the arbitration clause of the policy, nor to the attempted arbitration under it. The defendant filed the general issue only. The parties, however, stipulated that the defendant might, under the general issue, make any defense which it might make under any plea in bar, of which the defendant should give the plaintiff notice in writing, "and especially the defense that the parties failed to agree as to the amount of loss; and therefore a determination of the amount of loss by appraisers is a condition precedent to the plaintiff's right of action and that no such determination has been made." It was admitted by the parties that the award was not in accordance with the provisions of the agreement of submission to arbitration, and was invalid.

The case was tried with a jury in the common pleas division, and at the close of the testimony the defendant moved the court to direct a verdict upon the following grounds: (1) That, upon the evidence, an appraisal in accordance with the terms of the policy is a condition precedent to the right of the plaintiff to recover. (2) That, there having been an agreement for arbitration, and the arbitration having failed without the fault of either party, the plaintiff must comply with the defendant's request for a resubmission before he can maintain his action. This motion was denied, and the defendant thereupon excepted. The defendant then presented to the presiding justice requests to charge the jury as follows: "(1) By the terms of the policy the determination of the amount of the loss by arbitration is a condition precedent to the plaintiff's right to sue, and, in order to recover, it is incumbent upon the plaintiff either to aver and prove the determination of the amount of the loss in that manner, or to aver and prove facts which excuse him from procuring such determination by arbitration. (2) Where an attempt has been made by the insured and the company to have the amount of loss determined by arbitration in accordance with the terms of the policy, and the arbitration fails without misconduct on the part of the company, and the company seasonably notifies the assured that it requires arbitration in accordance with the terms of the policy and names an arbitrator, no action will lie against the company until such arbitration shall be had or shall have failed through the misconduct of the company. (3) The notice from the company to the assured that arbitration is required by it and the nomination by the company of an arbitrator as disclosed by the evidence was seasonable." The court granted the third of these requests but refused the first and second requests, and the defendant excepted. The jury returned a verdict for the plaintiff for $960.83, and the case is now before us on the defendant's petition for a new trial upon the grounds of the refusal of the presiding justice to direct a verdict for the defendant, and his refusal to direct and charge the jury in accordance with the first and second requests above quoted.

It is well settled, both in this country and in England, that a stipulation in a contract providing that all controversies and disputes which may subsequently arise between the

he may act in such a partial manner, or so manifestly in the interest of the party appointing him, that it may become a question of fact whether he conducts himself as an agent to such an extent that the party to whom he owes his appointment shall be held responsible for his acts. And if the arbitrator selected by the company does so conduct himself, the company will be held responsible for such conduct on his part as inures to its benefit. If he presents an agreement as to the damage or the appointment of an umpire by methods which show him to be the company's agent and acting in its interest, his acts will be regarded as those of his principal, thus visiting the consequences of the failure of arbitration on the one who caused the selection of such an arbitrator. Niagara F. Ins. Co. v. Bishop, and Fowble v. Phœnix Ins. Co. *supra*. See also Bishop v. Agricultural Ins. Co. 130 N. Y. 488, 29 N. E. 844.

parties shall be settled by arbitration is invalid because its effect would be to oust the courts of their jurisdiction. It is, however, equally well settled that, if the arbitration agreement relates only to some preliminary matter, such as the ascertainment and determination of the amount of damages to be recovered, and does not apply to the whole question of liability, such an agreement providing a reasonable and definite method for choosing arbitrators is valid and enforceable. Hamilton v. Liverpool & L. & G. Ins. Co. 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. Rep. 945; Scott v. Avery, 5 H. L. Cas. 811; Chippewa Lumber Co. v. Phenix Ins. Co. 80 Mich. 116, 44 N. W. 1055; Fisher v. Merchants' Ins. Co. 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282; Wolff v. Liverpool & L. & G. Ins. Co. 50 N. J. L. 453, 14 Atl. 561; Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855; Seibel v. Lebanon Mut. Ins. Co. 16 Lanc. L. Rev. 356; Westenhaver Bros. v. German American Ins. Co. 113 Iowa, 726, 84 N. W. 717; Viney v. Bignold, L. R. 20 Q. B. Div. 172; Delaware & H. Canal Co. v. Pennsylvania Coal Co. 50 N. Y. 250; Reed v. Washington F. & M. Ins. Co. 13 Mass. 572, 576; Hall v. Norwalk F. Ins. Co. 57 Conn. 105, 114, 17 Atl. 356. See also Brown v. Roger Williams Ins. Co. 5 R. I. 394, 401, 402. Furthermore, the policy in this case was in the standard form prescribed by chapter 183, p. 578, of the General Laws of 1896; and, even if the validity of such a stipulation were less strongly supported by the authorities, it could not well be argued that a contract made in the express terms required by the statute was void as against public policy. A provision in a contract that preliminary matters about which differences may arise between the parties shall be determined by arbitration may go to the extent of making such determination a condition precedent to a right of action upon the contract, or may be simply a collateral and independent agreement which will not be a bar to an action on the principal contract, but would be a basis for a separate action in case of breach.

In Fisher v. Merchants' Ins. Co. 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282, 283, the court says: "The general principle is, as decided in Roper v. London, 1 El. & El. 825, that such a condition in a contract to refer any question which may arise out of the contract will be, if so stated, a condition precedent to the right to sue on the contract; but unless the condition expressly stipulates that until arbitration had no action shall be brought, its performance is not precedent to the right to sue on the contract. . . . And it is settled beyond controversy that when the contract provides that no action upon it shall be maintained until after such an award, then the award is a condition precedent to the right of action." In Hamilton v. Liverpool & L. & G. Ins. Co. 136 U. S. 255, 34 L. ed. 423, 10 Sup. Ct. Rep. 949, Mr. Justice Gray, speaking to this very point, says: "Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. . . . The case comes within the general rule long ago laid down by this court: 'Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so.' United States v. Robeson, 9 Pet. 319, 327, 9 L. ed. 142, 145."

In the contract before us the parties have stipulated that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required;" and also that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." These provisions clearly constitute a condition precedent to the right of action. Hamilton v. Liverpool & L. & G. Ins. Co. and Fisher v. Merchants' Ins. Co. *supra;* Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Reed v. Washington F. & M. Ins. Co. *supra;* Hutchinson v. Liverpool & L. & G. Ins. Co. 153 Mass. 143, 10 L.R.A. 558, 26 N. E. 439; Levine v. Lancashire Ins. Co. and Westenhaver Bros. v. German American Ins. Co. *supra.* A valid agreement, therefore, having been made by the parties, that, in case of loss no action shall be sustainable until the amount of loss has been first ascertained in the manner provided in the policy, the question arises whether the attempted arbitration, which it is admitted failed without the fault of the defendant, was such a compliance with the contract as will permit the plaintiff to maintain this action, which is brought to recover, not the award contemplated by the contract, but such loss or damage as he has sustained irrespective of the award. We think that it

clearly is not. If the arbitration had failed through the fault of the defendant, the case would be different. There is, however, no allegation that the defendant was at fault in the matter, or that arbitration had become impossible. This very question was decided in Fisher v. Merchants' Ins. Co. 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282, in which the court said (page 491, Am. St. Rep. page 431, Atl. page 284): "A determination by arbitration of the amount of loss having been especially made by the parties a condition precedent to any right of action for recovery of damages for the loss, it was incumbent upon the plaintiff to prove performance or a valid excuse for nonperformance. An ineffectual attempt to perform is not a compliance with such a condition in a contract, when no reason is shown why there should not have been full performance. If the award of the arbitrators was invalid, as claimed by the plaintiff, for the reasons set out in the amended declaration, it was the duty of the plaintiff to seek a new determination of the amount of his loss in the manner provided by the contract. The action in such a case is upon the policy, but the damages recoverable are such as have been previously ascertained and determined by the arbitrators, unless the plaintiff shows some sufficient reason why such a determination could not have been obtained. Consequently there can be no action until performance of the condition or excuse shown for nonperformance; and it is not sufficient to show an award which the plaintiff repudiates, and is not willing to be bound by." The same question was decided in Levine v. Lancashire Ins. Co. *supra*, in which it was said (page 149 of 66 Minn., page 860 of 68 N. W.): "The law also, undoubtedly, is that, under such a provision, if an award be set aside for misconduct of the arbitrators not participated in or caused by the insurer, the agreement for an appraisement still remains in force, and a new appraisement, unless it had become impossible, would still be a condition precedent to a right of action on the policy, unless waived." In Westenhaver Bros. v. German American Ins. Co. 113 Iowa, 726, 84 N. W. 717, the court said (page 733, N. W. page 720): "Ascertainment of the amount of loss by appraisement was a condition precedent to a right of action; and, if the appraisers selected failed to agree on a third, this does not in itself justify a suit for the amount of the loss. In the absence of bad faith or acts intended to defeat arbitration on the part of the insurer, the plaintiff must propose the selection of other arbitrators, to the end that an award may be agreed upon and the basis for action determined." To the same effect are Carroll v. Girard F. Ins. Co. 72 Cal. 297, 13 Pac. 863; Hood v. Hartshorn, *supra;* Thorndike v. Wells Memorial Asso. 146 Mass. 619, 16 N. E. 747; and Davenport v. Long Island Ins. Co. 10 Daly, 535.

The cases relied on by the plaintiff do not support his contention. Those which are in point clearly recognize the distinction between a collateral and independent provision for arbitration and one which makes an award a condition precedent to the right of maintaining an action upon the contract. In Pepin v. Société St. Jean Baptiste, 23 R. I. 84, 91 Am. St. Rep. 620, 49 Atl. 387, the by-law under consideration required every contestation between the society and a member to be referred to a committee whose decision should be final. Such a contract is clearly invalid as ousting the courts of their jurisdiction, and was so held. In Stephenson v. Piscataqua F. & M. Ins. Co. 54 Me. 55, the court clearly recognized the distinction made by the authorities, saying (page 70): "While parties may impose as a condition precedent to application to the courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law." Chippewa Lumber Co. v. Phenix Ins. Co. is clearly in point, and supports our conclusion. We have cited it, *supra*. In passing upon an arbitration provision, substantially like the one in the case at bar, the court says (page 121 of 80 Mich., page 1056 of 44 N. W.): "Plaintiff and defendant deliberately agreed to this method of ascertaining the damages. . . . They deliberately provided a penalty for failure to comply with this obligation. If plaintiff refused compliance, then it could not bring suit. If defendant refused compliance, then suit could be brought against it immediately. We hold the agreement reasonable and legal. It is sustained by the clear weight of authority." In Liverpool, L. & G. Ins. Co. v. Creighton, 51 Ga. 95, the court, speaking of such a stipulation, says (page 110) it does not bar the insured of his right of action without such reference, "unless the stipulation amounts to a condition precedent to his right to resort to the courts, or makes such submission the only mode by which the amount of damage is to be ascertained, or by which the liability of the company can be fixed. Either of these two latter provisions would, at last, be equivalent to making the submission a condition to be performed before suit." In Reed v. Washington, F. & M. Ins. Co. *supra*, the court says of the provision in the policy before it (pages 576, 577, of 138 Mass.): "And it is simply an agreement to refer that matter to arbitration, without any agreement by

the plaintiff not to sue. There is nothing to bring it within any of the cases in which a provision to refer has been held to be a condition, such as Scott v. Avery . . . in England, and Hood v. Hartshorn, *ubi supra*, in this commonwealth." In Mutual F. Ins. Co. v. Alvord (9 C. C. A. 623, 21 U. S. App. 228, 61 Fed. 752) the court says (9 C. C. A. 626, 21 U. S. App. 228, 61 Fed. 755): "It is undoubtedly true that a policy of insurance may contain a valid provision which prohibits the insured from maintaining an action until the amount of loss shall have been first submitted to arbitration, and an award shall have been made. In such a case the determination of the amount by arbitration is recognized as a condition precedent to the right . . . to bring suit. . . . But, in order to make such award a condition precedent to the right of maintaining suit, it must be so expressed in the policy or necessarily implied from its terms. A mere provision in the policy that the amount to be paid, in case of disagreement, shall be submitted to arbitration, does not prevent the insured from maintaining an action, unless the policy further provides that no action shall be maintained until after award. . . . There is nothing in the terms of this policy which expressly or by implication forbids the insured from bringing suit until after the amount of loss has been submitted to arbitration and an award has been made, and therefore we must consider the provisions in the policy relating to this subject as constituting a collateral and independent agreement, and not one which was a condition precedent to the right of maintaining an action."

The plaintiff argues that, in accordance with the general rule, the agreement is revocable at any time before an award is made. That, however, does not help the plaintiff. A revocation of the authority of the arbitrators would only stop the proceedings under that arbitration. The provision of the policy requiring an award as a condition precedent to a right of action would still be in force. The revocation, therefore, would only make it necessary to begin the arbitration anew. An award by arbitration having been made by the policy a condition precedent to the right of action, it was incumbent on the plaintiff to allege and prove such award; or, if the award was invalid, then to allege and prove either that the amount of loss had been determined by other arbitrators selected according to the provisions of the policy, or that for some valid reason such determination had become unnecessary or impossible.

The request that a verdict be directed for the defendant should have been granted. And when the case was given to the jury the instructions requested should have been given.

Defendant's exceptions sustained. Petition for new trial granted. Case remitted to the Superior Court, with direction to enter judgment for the defendant.

Petition for modification of decree denied.

SOUTH DAKOTA SUPREME COURT.

JOSEPH REMILLIARD, Appt.,
v.
GEORGE AUTHIER, Respt.

(— S. D. —, 105 N. W. 626.)

Judgment—ejectment—conclusiveness.

A claim of one as heir at law to real estate is cut off by a judgment against him in an action to quiet title, in which the title is put in issue, and he might have presented such claim but did not.

(November 29, 1905.)

APPEAL by plaintiff from a judgment of the Circuit Court for Union County in defendant's favor in an action brought to quiet title to an interest in land. Affirmed.

The facts are stated in the opinion.

Messrs. **Winsor & McNaughton**, for appellant:

To constitute an estoppel by a former

Case Note.—Conclusiveness of judgment in actions of the nature of ejectment, as to claim of title, previously acquired, not in issue.—An understanding of the nature and evolution of the common-law action of ejectment, so essential to the proper comprehension of questions relating both to the original action and to modern substitutes therefor, is nowhere more necessary than to explain the varying views taken of the question above stated. Originally an action in the nature of trespass, brought by a lessee to recover damages for an ouster, it later became a means of recovering the possession also, the courts of law following the lead of equity in aiding to reinstate a successful plaintiff. It was thus at its inception purely a possessory action, the mode provided by the common law for trying the title being by writ of right. But, as the defendant usually set up an adverse claim of title, the plaintiff, whose prima facie case consisted in proving his lease and ouster, was also obliged to show his lessor's title, and by this means the question of title became involved, though only as incidental to the main question, the right of possession. It being at once perceived that this indirect mode of determining the title had several advantages over the direct mode, it became the practice for

judgment, the precise point which is to constitute the estoppel must be put in issue and decided.

Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec. 143; Abbe v. Goodwin, 7 Conn. 377; Howard v. Kimball, 65 Me. 308; Eastman v. Symonds, 108 Mass. 567; Watts v. Watts, 160 Mass. 464, 23 L. R. A. 187, 39 Am. St. Rep. 509, 36 N. E. 479; 1 Van Fleet, Former Adjudication, p. 512; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195.

Mr. J. A. Miller also for appellant.

Messrs. Ericson & Stickney, for respondent:

Any claim or demand is barred by the former recovery, which ought to have been included in the first suit.

2 Black, Judgm. 725; 11 Am. & Eng. Enc. Law, p. 390; Secor v. Sturgis, 16 N. Y. 554; Nathans v. Hope, 77 N. Y. 420.

Corson, P. J., delivered the opinion of the court:

This was an action to quiet title to a one-fifth interest in a quarter section of land situated in Union county. The case was tried to the court without a jury, and, findings and judgment being in favor of the defendant, the plaintiff has appealed.

The plaintiff seeks a reversal upon two grounds: (1) That the court erred in admitting in evidence the record of a certain deed purporting to be executed by the father and mother of the appellant to Peter Remilliard, on the ground that the

an adverse claimant to enter upon the land and execute a lease to a friend, who was given technical possession. The real occupant continuing during this time upon the premises, a technical ouster of the lessee took place at once, and the action was thereupon instituted in the name of the friend, but really on behalf of the claimant. At this stage in the development of the action, the person in actual possession was made defendant. To correct an abuse which crept in, though having the lessee dispossessed by a second friend, who was made defendant, whereby the proceeding was concealed from the actual occupant, a rule was adopted requiring the nominal defendant, or casual ejector, as he was called, to give notice of the action to such occupant. This opened a way by which the trouble of going through the formalities above described was avoided, the means employed being known as the "consent rule." The casual ejector being the defendant, the real party in interest was admitted to defend on condition that he admit the entry, lease, and ouster. And so it came about that what was originally the main issue was always admitted, and what was originally incidental became the real point litigated.

At common law, a judgment in ejectment was not regarded as conclusive; and to explain this three theories have been advanced. Perhaps the most commonly accepted one is that stated in Miles v. Caldwell, 2 Wall. 35, 17 L. ed. 755, quoted in REMILLIARD v. AUTHIER, *viz.*, the fictitious character of the action. Another, mentioned in the same case, is the peculiar sanctity of the title to land accorded by the common law, so that it might not be settled by one trial. This theory, however, is not consistent with the fact that an action by writ of right, for the express purpose of determining title, did settle it conclusively. The third theory, which seems preferable because explaining the inconclusiveness of the action before it acquired its fictitious character, is that advanced in Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187, that, the title being only collaterally or incidentally in issue, the judgment could not operate as a bar.

In the statutory actions which have generally superseded the common-law action of ejectment, the effect of the judgment is usually prescribed, but in the absence of a special provision, such as that of New York, that the judgment shall be conclusive only as to the title established, or one clearly indicating a legislative intent to have such judgment conclude all further controversy as to claims then existing, the solution of the question of the conclusiveness of the judgment on a party's title not in issue depends upon the same considerations, both where the conclusiveness of the judgment generally is the subject of statutory regulation, and where it is not prescribed.

It is apparent that, in order to preclude the assertion of a different title, the judgment must be given effect as a bar, since it cannot operate as an estoppel as to a point not in issue; and that, in order to operate as a bar, the subject-matter of the second action must be such as might have been litigated in the first. It therefore follows that the determination of the question under discussion depends upon the view to be taken of the basis of the action itself, upon whether the real issue is as to the ownership, or as to the comparative strength of the respective claims set up. The query is, Is the purpose of the form of action provided, the determination of the ownership, or to test the right to possession? And consequently decisions to the effect that a party to other actions relating the real property, such as partition suits, or actions to quiet title, must set up as many claims of title as he has, cannot be regarded as authoritative,—a distinction which the text writers appear to have overlooked. The varying views on the conclusiveness of judgments in ejectment generally may, then, be explained by the extent to which the various courts and legislatures have discarded the idea of ejectment as a possessory action.

With these preliminary observations, let us turn to the cases bearing upon the question in hand, which, it is submitted, will

deed purported to convey the homestead, and that the notary's certificate of acknowledgment of the mother was insufficient to entitle the deed to record, and hence the record of said deed was inadmissible as evidence; (2) that the court's conclusion that the judgment in the prior case was a bar to the present action was erroneous. The complaint of the plaintiff is in the usual form. The defendant, in his answer, denies the title of the plaintiff to the property, and as a third defense pleads a former adjudication of the circuit court of Union county as a bar to the action. Several other defenses are pleaded by the defendant, but in the view we take of the case it will only be necessary to consider and discuss the third defense above referred to. The court practically found all of the issues raised by the pleadings in favor of the defendant, and its findings upon the third defense above referred to is as follows: "That on April 18, 1892, the plaintiff herein commenced an action in this court against the defendant herein and against Julia Chaussee and Ezilda Remilliard as defendants to set aside and to have adjudged as void and of no effect the deed made and executed by the said Ezilda Remilliard to this defendant on November 18, 1891, and recorded in book 15 of Deeds, on page 441, referred to in finding No. 17, and claimed in said action that plaintiff was the owner of and entitled to the possession of the premises in the first finding herein described, and alleging that the de-

be found for the most part to substantiate the foregoing views.

Among those which support, or which tend to support, the conclusiveness of the judgment as to all existing claims of title whether litigated or not, is Sherman v. Dilley, 3 Nev. 21, cited in the case in hand. This was an action to obtain an injunction restraining the defendant from diverting a certain stream of water from premises claimed by the plaintiff. The report of the case does not show that a different claim of title was relied on than was involved in an action of ejectment to recover possession of the premises from which the water was diverted, the judgment in which was given in evidence as an estoppel. The instruction given by the court, however, that "the judgment read in evidence in this case by the plaintiff is a bar to any right which the defendant might or did have, or might have proved, at the time of the trial in which said judgment was rendered," is broad enough to raise the question. The approval of this instruction seems to be based on the idea that the ownership, rather than the right of possession, is the real issue in an ejectment action. The court says: "Under our practice, the real parties in interest are made plaintiffs and defendants; and, as is usual under the new forms the real ownership or title is put in issue, there is perhaps no reason why a judgment upon such pleadings could not operate by way of estoppel. If the plaintiff pleads ownership or title in fee in himself, and issue is taken upon that question and found against him, we can see no reason why the record should not operate as an estoppel to any title existing in the same party at the time of the first trial."

In Mann v. Rogers, 35 Cal. 316, it is said: "A judgment in ejectment is not conclusive, except as against defenses actually made or legal defenses which might have been made on the trial." This language, however, was used with reference to the right of the party to rely on subsequently acquired title, and should, perhaps, be regarded only as applicable to such a state of facts.

The decision in Elizabethport Cordage Co. v. Whitlock, 37 Fla. 190, 20 So. 255, that a prior judgment in ejectment must be held to be an adjudication in favor of the plaintiff therein against whatever title the defendant had or held, or could have set up or asserted, at the time of the trial, whether he brought such titles forward at the trial or not, is grounded upon a statute expressly declaring the plea of "not guilty," put in by the defendant, to have the effect of putting in issue the title of the land in controversy.

In Hentig v. Redden, 46 Kan. 231, 26 Am. St. Rep. 91, 26 Pac. 701, a judgment in ejectment was held to preclude an unsuccessful defendant from setting up another claim of title acquired during the pendency of the former action, in a subsequent action to quiet title to the *locus in quo*, on the ground that, under the provisions of the Civil Code, an action in the nature of ejectment settles the title between the parties in favor of the one recovering the judgment.

In Freeman v. McAninch, 87 Tex. 132, 47 Am. St. Rep. 79, 27 S. W. 97, a judgment in an action of trespass to try title was held to preclude the unsuccessful party from subsequently asserting a title acquired during the pendency of the former action, the issue presented by the pleadings and determined by the judgment in such action being one of title.

What is said in Caperton v. Schmidt, *supra*, in which the question involved is the effect of a judgment in ejectment on the right to bring an action based on a claim of title subsequently acquired, quoted in the case in hand, with regard to the conclusiveness of a judgment in ejectment, seems to be based on the view that the action puts the title in issue.

A different disposition of the question under discussion is found in Treaster v. Fleisher, 7 Watts & S. 138, in which it was said regarding an instruction that the action was barred by two previous verdicts and judgments provided the land in contest were the same, that the judge should have added, provided the title in contest also

fendant in this action had no estate, right, or interest in or to said land. That in said action the plaintiff filed notice of *lis pendens*, and that thereafter the defendant herein and the said Ezilda Remilliard appeared in said action and answered, denying that plaintiff had any right, title, or interest in or to said land or any portion thereof, and alleging that this defendant, by virtue of the conveyances hereinbefore referred to from Ezilda Remilliard to George Authier, was the owner of said premises, and praying that defendant's title thereto be declared good and valid. That thereafter said cause was tried, and on the 10th of August, 1892, a decree was made and entered by the court adjudging that Ezilda Remilliard, on November 18, 1891, at the time of her conveyance to the defendant, was the owner in fee of said premises, and that this defendant was the owner in fee of said premises and was entitled to the possession thereof; and plaintiff's action was thereby dismissed. (20) That said judgment was duly entered, and has never been appealed from, reversed, modified, or set aside."

It will be noticed that the court finds that the plaintiff in said action, who is also the plaintiff in this action, claimed therein that he was the owner of and entitled to the possession of the premises described in this action, and alleged that the defendant in this action had no estate, right, title, or interest in or to said land, and that the defendant herein and the said Ezilda Remilliard appeared in said action and answered, denying that plaintiff had any right, title, or interest in or to said land or any portion thereof, and alleging that the defendant, by virtue of the conveyance herein from Ezilda Remilliard to him, was the owner of the said premises, and praying defendant's title thereto be adjudged valid; and that a decree was thereafter entered by the court adjudging that the defendant was the owner in fee of the said premises, and that the defendant was entitled to the possession thereof, and that plaintiff's action be dismissed; and that said judgment of dismissal was duly entered, and has never been appealed from, modified, reversed, or set aside. It will thus be seen that the title of plaintiff to the premises was adjudged invalid and his action dismissed, and that the defendant was adjudged the owner in fee of the said premises, and was entitled to the possession thereof. The plaintiff in the present action now claims title to one fifth of the same property as heir at law of his father and mother, both of whom died prior to 1891, and does not now claim any title to the said property acquired subsequently to the commencement of the action in which the former judgment was rendered. We are of the opinion, therefore, that the plaintiff is estopped by the judgment in the former action from claiming any interest in the land in this action as heir at law of his father or mother. His

were the same. Gibson, Ch. J., says: "The statute does not expressly say that the verdicts and judgments must be on the same title; but it was so said in Mercer v. Watson, 1 Watts, 344, and the principle is, besides, so plain that an authority for it would not be given were it not at hand, for it certainly could not have been intended that a title should be barred by adjudication without having been adjudicated." The force of this case is somewhat weakened, however, by the fact that the title relied on could not have beeen set up in one of the previous actions, thus bringing it within a qualification presently to be noted.

In Mercer v. Watson, 1 Watts, 330, above referred to, the Pennsylvania statute declaring that "where two verdicts shall in any writ of ejectment between the same parties be given in succession for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought," was construed as not barring the party from bringing a new action of ejectment for the same land upon the same title until after two decisions should be had against him upon a full view and consideration of the whole of his case.

Where the statute provides that two verdicts and judgments in ejectment between the same parties and their privies shall be conclusive upon the rights of possession claimed by the other, two verdicts are incidentally an estoppel, not to absolute rights, but to further remedies enforcing possessory rights, and hence will not preclude the assertion of a claim to surplus moneys arising from a foreclosure sale. Woolston's Appeal, 51 Pa. 452. Such statute, it seems, would not preclude the assertion of another claim of title.

The case of Brooke v. Gregg, 89 Md. 234, 43 Atl. 38, in holding that a plea of *res judicata* in a second ejectment action, which fails to allege that said judgment was rendered on the same cause of action mentioned in the plaintiff's declaration, and fails to set forth the extent of the plaintiff's claim in the former case, is insufficient, may, perhaps, be regarded as bearing indirectly on the question in hand.

In Missouri a judgment in ejectment is not regarded as conclusive, even as to the claim of title directly involved. See Slevin v. Brown, 32 Mo. 176; Holmes v. Carondelet, 38 Mo. 551; Foster v. Evans, 51 Mo. 39; Kimmel v. Benna, 70 Mo. 52; Ekey v. Inge, 87 Mo. 493; Avery v. Fitzgerald, 94 Mo. 207, 7 S. W. 6; St. Louis v. Schulenburg & B. Lumber Co. 98 Mo. 613, 12 S. W. 248. The reason assigned for this is that the repeal of the statute providing that a judgment in such cases should be a bar is regarded as equivalent to a declaration

right as such heir at law was fully adjudicated in the former action, for the reason that a party seeking to recover the possession of real estate or quieting his title thereto, where his title is in issue in an action, is required to present to the court in such action all claims that he may have to the property from any source, if he have such title at the time of the commencement of the action, and all such claims presented by him, or which might have been presented and adjudicated in that action, are barred by the judgment entered therein.

Mr. Freeman, in his work on Judgments (§ 302), says: "Whenever, in an action for possession of realty, the question of title is put in issue by the pleadings, the judgment prima facie constitutes an estoppel to the assertion of any title which existed in the losing party at the time of the former suit." Mr. Black, in his work on Judgments (§ 655), says: "In other states the adoption of a code of practice has abolished all forms of action, and the modern innominate action for the recovery of realty resembles the old suit in ejectment only in respect to its object. The action being brought by and against the real claimants, and all other fictions being abolished, it correlates in all respects with the purely personal actions, and, as a necessary consequence, the judgment has the character of finality. It follows that in all these states the judgment is conclusive of the points and questions actually litigated and determined, —that is, the titles put in issue and tried, and the right of possession,—and will bar any subsequent action between the same parties or their privies for the same land. The decisions show that this is now the settled rule in the states of Vermont, New York, North Carolina, Georgia, Mississippi, Arkansas, Kentucky, Illinois, Iowa, California, Oregon, [and] Nevada, . . . and probably in some others not here enumerated. The modern rule is therefore correctly stated in the following language by the supreme court of Illinois: 'A judgment at law, whether in an ejectment suit or in some other form of action, is conclusive on the parties upon all questions, titles, and rights involved in the litigation and passed upon by the court, which the court had power and jurisdiction to hear and determine, and nothing more; and, whenever the same questions, or the same rights or titles, are again drawn in issue, whether in a court of equity or court of law, between the same parties or their privies, the previous adjudication must be regarded as conclusive upon them, and they will not be permitted to open up the controversy again.'" Hawley v. Simons, 102 Ill. 115.

This question was very fully considered by the supreme court of Nevada in Sherman v. Dilley, 3 Nev. 21, in which that court held: "When the pleadings in ejectment put the title or ownership in issue, prima facie, the verdict and judgment would constitute

that such judgment is not a bar to another action (Slevin v. Brown, *supra*), and it is now regarded as a rule of real property, not to be disturbed save by legislative enactment. Avery v. Fitzgerald, and St. Louis v. Schulenburg & B. Lumber Co. *supra*.

Even where a judgment in ejectment is regarded as conclusive as to all titles then possessed by a party, the rule is subject to the qualification that the titles must be such as might have been asserted.

Thus, an equitable title which could not have been set up in an action at law is not concluded by a judgment in ejectment. McCurry v. Robinson, 23 Ga. 321.

Another qualification of the rule occurs where, by reason of statutory provision, the structure of the pleadings, or the form of the judgment, the right of possession only is determined.

Thus, where a declaration does not set out the plaintiff's estate in the demanded premises a judgment upon submission in his favor will not determine any question of title. Barber v. James, 21 R. I. 279, 43 Atl. 101.

A judgment upon plaintiff's failure to prosecute, finding that defendants were "lawfully in possession," does not preclude the plaintiff from subsequently asserting ownership of the property. Sanford v. King (S. D.) 103 N. W. 28.

A judgment for a defendant who neither pleaded nor proved title in himself, but stood on his possession, is not conclusive as to title. King v. Townshend, 141 N. Y. 358, 36 N. E. 513.

A former judgment in ejectment in which the plaintiff declared merely that he was "well seised and possessed of the premises" will not estop the defendant, who allowed judgment to be taken by default, from subsequently setting up in another action a title in fee. Bradford v. Bradford, 5 Conn. 127.

Where a statute provides that a plaintiff in ejectment may recover upon prior possession alone, a judgment is not necessarily conclusive as to the title to the fee between the parties to the suit. Glover v. Stamps, 73 Ga. 209, 54 Am. Rep. 870.

And in Parks v. Moore, 13 Vt. 183, 37 Am. Dec. 589, it is held that, though by statute a judgment in ejectment is conclusive of title, the prima facie effect of such judgment may be qualified by showing by parol that the title was not in fact litigated, or by showing that the judgment was against the plaintiff, not on the title, but because he did not prove that the defendant was in possession.

an estoppel to the assertion of any title which existed in the party at the time of the former action." The court in its opinion says: "Under our practice the real parties in interest are made plaintiffs and defendants, and, as is usual under the new forms the real ownership or title is put in issue, there is, perhaps, no reason why a judgment upon such pleadings should not operate by way of estoppel. If the plaintiff pleads ownership or title in fee in himself, and issue is taken upon that question, and found against him, we can see no reason why the record should not operate as an estoppel to any title existing in the same party at the time of the first trial. . . . Therefore the same reason which made a judgment in a writ of entry or assize operate as a bar to a subsequent action of the same character between the same parties would undoubtedly make a judgment in our action of ejectment operate in the same way. Hence, we conclude that a judgment in ejectment, where issue is taken upon the title or ownership, will operate by way of estoppel in a subsequent action between the same parties, involving the same subject-matter; such estoppel being confined to the rights and relations of the parties as they existed at the time of rendition of the judgment, and not to affect subsequently acquired rights or titles. Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187." In Caperton v. Schmidt, the supreme court of that state held: "A judgment rendered in an action to recover the possession of real estate, under our system of pleading and practice, is, as to all matters put in issue and passed on in the action, conclusive between the parties and their privies, and a bar in another action between the parties or their privies, where the same matters are directly in issue." In that case, after a very exhaustive and able opinion by Mr. Justice Sawyer, he concludes: "If a party declares upon a seisin in fee, and thus puts his title in issue, and chooses to rely upon a prior possession merely, or does not choose to put in all his evidence of title, or is unable from any accident to get it in, he is in no worse position than many other parties, who for any reason fail in personal actions to get in sufficient, or all their evidence. Prudent counsel, where, from any unforeseen accident, they fail to make as strong a case as the facts and evidence attainable should enable them to do, and they are not satisfied of the sufficiency of their proofs, will submit to a nonsuit, or in a proper case, with the permission of the court, withdraw a juror and begin again. If they do not, they cannot complain that the judgment against them in the action should be followed by its legitimate consequences." That court in the subsequent case of Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475, affirms the former decision, and holds: "A judgment in an action to recover the possession of real property under the Code of Civil Procedure is conclusive between the parties and their privies as to all matters put in issue and passed on in the action, and is a bar to another action between them when the same matters are directly in issue. The bar of such a judgment is, however, limited to the rights of the parties as they existed at the time when it was rendered, and neither the parties nor their privies are precluded from showing in a subsequent action any new matters occurring after its rendition which give the defeated party a title or right of possession."

The question as to the conclusiveness of a judgment as an estoppel in a subsequent action was very fully considered by this court in the case of Howard v. Huron, 5 S. D. 539, 26 L. R. A. 493, 59 N. W. 833, and on a rehearing in 6 S. D. 180, 26 L. R. A. 498, 60 N. W. 803, and in the latter case this court held: "A judgment, if rendered upon the merits, is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which is offered to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." And in the opinion this court quoted with approval from the opinion of the Supreme Court of the United States in Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195, in which the distinction between the effect of judgment as a bar or estoppel on the same cause of action and as an estoppel or bar in another action is thus stated: "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . The language, therefore, which is so often used, that a judgment estops, not only as to every ground of recovery or defense actual-

ly presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever." As was stated by the supreme court of Nevada in the case above cited, and is often stated, at common law, a judgment in ejectment was not conclusive as an estoppel in a subsequent action, but the reason for that rule is thus stated by the Supreme Court of the United States in Miles v. Caldwell, 2 Wall. 35, 17 L. ed. 755: "One reason why the verdict cannot be made conclusive in those cases is obviously due to the fictitious character of the action. If a question is tried and determined between John Doe, plaintiff, and A. B., who comes in and is substituted defendant in place of Richard Roe, the casual ejector, it is plain that A. B. cannot plead the verdict and judgment in bar of another suit brought by John Den against Richard Fen, though the demise may be laid from the same lessor, for there is no privity between John Doe and John Den. Hence, technically, an estoppel could not be successfully pleaded so long as a new fictitious plaintiff could be used. It was this difficulty of enforcing at law the estoppel of former verdicts and judgments in ejectment that induced courts of equity (which, unrestrained by the technicalty, could look past the nominal parties to the real ones) to interfere, after a sufficient number of trials had taken place, to determine fairly the validity of the title; and by injunction, directed to the unsuccessful litigant, compel him to cease from harassing his opponent by useless litigation. . . . They, however, did concede to those solemn actions the writ of right and the writ of assize, the same force as estoppels, which they did to personal actions in other cases." And the court held in that case that under our modern system of pleading, in which fictions are to a great extent abolished, no reason exists why the judgment in a former action of ejectment might not be pleaded as an estoppel and bar to a subsequent action involving the title to the property.

While the Code of this state has not provided for the action of ejectment in terms, it has provided for an action to determine adverse titles and for the recovery of the possession of real property which in effect embraces the modern action of ejectment, and is substitute therefor. Sections 675 and 678 read as follows: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." Rev. Code Civ. Proc. § 675. "In an action brought by a person out of possession of real property, to determine an adverse claim or an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and, if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed." Rev. Code Civ. Proc. § 678. Under the provisions of the Code, where the title to the property is in issue, an adjudication in favor of either party as to such title will therefore necessarily constitute a bar to any action as to any title claimed by either party at the time of the commencement of such action. In the case at bar it was perfectly competent for this plaintiff in the former action to have given in evidence any title which he had or claimed to have at the time as heir, or otherwise, as against the defendant upon the question of ownership of the property or of any part thereof. The plaintiff alleged title in himself in the former action, and, that title being put in issue by the answer of the defendant, and the defendant and respondent herein pleaded that he was seised in fee of the said premises and entitled to the same, the title to the property was directly in issue. The court upon that issue found the title to be in the defendant, and thereupon entered the judgment dismissing the plaintiff's action and adjudging the defendant to be the owner of the property. From that judgment no appeal was taken, and it still remains in full force and effect. The conclusiveness of that judgment cannot be questioned in this action. If the appellant failed to assert his title as heir in that action, it is not material whether or not such failure was the result of inadvertence or otherwise. He cannot remedy his mistake in this action, and he is estopped by that judgment from now claiming any interest in the property held by him at the time of the commencement of the former action. Southard v. Smith, 8 S. D. 230, 66 N. W. 316.

It is contended by the appellant that by an examination of the complaint in the former action it would appear that the only issue raised was as to the validity of the deed executed by Ezilda Remilliard to the defendant, and also a deed executed by her to the plaintiff, and that it was not an action to quiet title to the land in controversy; but, as we have seen, the court finds that the plaintiff in that action alleged that he was the owner of the premises, and that the defendant denied such ownership and pleaded that he was seised in fee of the same, and that the judgment of the court

was based mainly upon that issue, holding that the defendant in that action was the owner and the plaintiff was not the owner of the property. It will thus be seen that the title of the respective parties was directly in issue, and that the judgment of the court adjudicated upon that issue in favor of the defendant. The fact therefore that other issues were involved in the trial is not material as to the judgment as an estoppel in the present action.

These views lead to the affirmance of the judgment of the court below, and we therefore express no opinion upon the other questions presented by the record and discussed by the counsel.

The judgment of the Circuit Court and order denying a new trial are affirmed.

WASHINGTON SUPREME COURT.

WILLIAM JENSEN, Respt.,
v.
COOKS' & WAITERS' UNION OF SEATTLE, Impleaded, etc., Appt.

(30 Wash. 531, 81 Pac. 1069.)

Strike—picketing—injunction.

Striking employees and the union to which they belong, and which is aiding them, may be enjoined from congregating about the entrance to the place of business of their former employer and endeavoring to persuade his customers to withhold their patronage from him.

(August 8, 1905.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in a suit to enjoin unlawful interference with plaintiff's business. Affirmed.

The facts are stated in the opinion.

Messrs. **Root, Palmer, & Brown**, for appellant:

An employee may enter, refuse to enter, or, having entered the employ of another at any time, quit such employ; and what may be done by one, if lawful, may be done by a number simultaneously.

Arthur v. Oakes, 25 L.R.A. 414, 11 C. C. A. 209, 4 Inters. Com. Rep. 744, 24 U. S. App. 239, 63 Fed. 319; Clemmitt v. Watson, 14 Ind. App. 38, 42 N. E. 367; Boyer v. Western U. Teleg. Co. 124 Fed. 246; Worthington v. Waring, 157 Mass. 421, 20 L.R.A. 342, 34 Am. St. Rep. 294, 32 N. E. 744; Hopkins v. Oxley Stave Co. 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Union P. R. Co. v. Ruef, 120 Fed. 102.

If the act is lawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act.

Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 339, 40 Am. St. Rep. 319, 55 N. W. 1119; Longshore Printing Co. v. Howell, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547; Sinsheimer v. United Garment Workers, 77 Hun, 215, 28 N. Y. Supp. 321; Master Builders' Asso. v.

Case Note.—Picketing.—The lawfulness or unlawfulness of "picketing" in the United States—as subsequently shown, it is otherwise in England in consequence of statutory provisions—must be determined in view of the fundamental principle upon which all the courts are agreed, that the boundary between lawful and unlawful conduct in the effort to induce persons, not under contract, to leave another's employment, or not to enter such employment, is the line between peaceable persuasion and intimidation. As a practical matter, however, it is not always easy to determine exactly when peaceable persuasion ceases and intimidation commences, or so to frame an injunction that it will, in its practical operation, prevent intimidation without infringing the right of peaceable pursuasion. Open threats, much less actual violence, are not an indispensable accompaniment or condition of intimidation. That which in appearance and outward form is but peaceable persuasion may, by virtue of the intent which lies behind it or the circumstances which surround it, carry a menace the practical effect of which is intimidation. Indeed, it is quite conceivable that, under the circumstances generally surrounding a strike or other labor difficulty, that which was in good faith intended as peaceable persuasion, and designed merely to influence the voluntary action of employees or persons seeking employment, may, by reason of the timidity or unprotected condition of persons upon whom it is exerted, operate practically as intimidation or coercion. Picketing a place of business where a strike is in progress, though in intent as well as in outward appearance maintained for the lawful purpose of persuading the classes of persons mentioned, has almost inevitably some tendency to intimidate individuals belonging to those classes. This tendency has induced a few courts, though they are in a decided minority, to condemn picketing *per se* and under all circumstances as unlawful, or at least to enjoin picketing without qualification or exception by reference to intimidation, though even in cases of this kind the showing upon which injunctions have been granted has included facts indicating that the picketing had been accompanied by threats or other conduct amounting to actual intimidation.

Thus in Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077, it appeared that a preliminary

Domascio, 16 Colo. App. 25, 63 Pac. 782; Brewster v. C. Miller's Sons Co. 101 Ky. 368, 38 L.R.A. 505, 41 S. W. 301; National Protective Asso. v. Cumming, *supra;* Allen v. Flood, 67 L. J. Q. B. N. S. 119; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; Clemmitt v. Watson, *supra;* Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598.

A body of organized labor has a right, by means of persuasion, appeal, and entreaty, so long as the means do not amount to intimidation, to endeavor to accomplish its purposes, and the mere picketing of some of its members in the neighborhood of a place of business of an individual is not unlawful.

Foster v. Retail Clerks' International Protective Asso. 39 Misc. 48, 78 N. Y. Supp. 860; Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Asso. 59 N. J. Eq. 49, 46 Atl. 208; Krebs v. Rosenstein, 31 Misc. 661, 66 N. Y. Supp. 42; Levy v. Rosenstein, 66 N. Y. Supp. 101; Union P. R. Co. v. Ruef, *supra;* Beaton v. Tarrant, 102 Ill. App. 124; Rogers v. Evarts, 17 N. Y. Supp. 264.

The mere fact that an individual may be put to pecuniary loss as a consequence of the concerted efforts of a number of individuals or organizations, even though that be their object, so long as the means used and the end sought to be attained are lawful, is not sufficient upon which to predicate a cause of action.

Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; Bowen v. Matheson, 14 Allen, 499; Payne v. Western & A. R. Co. 13 Lea, 507,

injunction had been granted which, without limitation to force or intimidation, restrained the defendants "from interfering with the plaintiff's business by patroling the sidewalk or street in front, or in the vicinity, of the premises occupied by him, for the purpose of preventing any person or persons who now are or may hereafter be in his employment, or desirous of entering the same, from entering it, or continuing in it." The provision of the final decree on this point was against interfering with the petitioner's business by obstructing or physically interfering with any persons in entering or leaving the plaintiff's premises. The majority held that the injunction should be in the form originally issued, and not in the form embodied in the final decree. It was also expressly held in this case that the injunction should not be so limited as to relate only to persons who are bound by existing contracts of employment, but should extend, also, to cover persons seeking to enter the employment, or persons already in the employment, but not under contract. Holmes, J., who entered the final decree, dissented from the modification of that decree, saying that the opinion of the majority turned in part upon the assumption that the patrol necessarily carries with it a threat of bodily harm, but that in his opinion such assumption was unwarranted. Field, Ch. J., was also of the opinion that the final decree should be affirmed without modification.

In Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 416, 74 Am. St. Rep. 421, 77 N. W. 13, the court said: "To picket complainants' premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. . . . It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce. As applied to cases of this character, the lexicographers thus define the word 'pickets:' 'A body of men belonging to a trades union, sent to watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress.' Century Dict.; Webster's Dict. The word originally had no such meaning. This definition is the result of what has been done under it and the common application that has been made of it. This is the definition the defendants put upon it in the present case." The court then added that possibly the decree rendered was specific enough to include picketing, but that it deemed it its duty to place the point beyond controversy, and directed the decree to be modified so as to enjoin, *inter alia*, 'picketing,'—meaning, evidently, that there should be no qualification or limitation of the effect of the injunction in that respect by reference to force or intimidation.

In Otis Steel Co. v. Local Union No. 218, 110 Fed. 698, the court, after stating that the one admitted thing in the case was the establishment and maintenance of a system of picketing, said: "Whether this picketing has been accompanied with violence or not we need not consider. It certainly was one of the means used by this defendant organization to enforce its mandate. While picketing may not be an occasion of war, it certainly is an evidence that war exists, and the term is appropriately borrowed from the nomenclature of actual warfare. This system constantly kept up, in its nature leads to disturbance, and has a tendency to intimidate. . . . It is certainly true that this system of picketing, although it may not have been accompanied by violence on the part of those who have served as pickets, has and will do injury." The court, after referring to the facts, as shown by the affidavits, that the complainant employed 500 or 600 men, 50 or 60 of whom were molders (the strike being confined to the department to which the molders belonged), and that all of the employees of the complainant other than molders had gone to and from their homes in the usual way, apparently uninfluenced by any fear of injury,—added: "I cannot imagine a company resorting to these extraordinary expenses and pains without there was some cause; nor can I imagine the individual

49 Am. Rep. 666; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) *supra;* Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Clemmitt v. Watson, *supra;* Delz v. Winfree, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; Graham v. St. Charles Street R. Co. 47 La. Ann. 214, 27 L.R.A. 416, 49 Am. St. Rep. 366, 16 So. 806; Longshore Printing Co. v. Howell, Boyer v. Western U. Teleg. Co., National Protective Asso. v. Cumming, Brewster v. C. Miller's Sons Co., and Master Builders' Asso. v. Domascio, *supra:* Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; Allen v. Flood and Mogul S. S. Co. v. McGregor, *supra;* Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; Cote v. Murphy, 159 Pa. 420, 23 L.R.A. 135, 39 Am. St. Rep. 686, 28 Atl. 190; Cohen v. United Garment Workers, 35 Misc. 748, 72 N. Y. Supp. 341; Robison v. Texas Pine Land Asso. (Tex. Civ. App.) 40 S. W. 843; Sinsheimer v. United Garment Workers, 77 Hun, 215, 28 N. Y. Supp. 321; Baker v. Sun L. Ins. Co. 23 Ky. L. Rep. 1178, 64 S. W. 967; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373; Balliet v. Cassidy, 104 Fed. 704.

Mr. Dallas V. Halverstadt, with Messrs. **Piles, Donworth, Howe, & Farrell,** for respondent:

Action taken without justifiable cause, for molders submitting to be thus confined unless intimidation of some sort had influenced them. This state of things is evidence of a higher character in deciding the issue as to whether or not picketing tends to intimidate those against whom it is directed than the statements in affidavits filed by the individual defendants, to the effect that no means of intimidation have been used." Again the court said: "Nor must intimidation be disguised in the assumed character of persuasion. Persuasion too emphatic or too long and persistently continued may itself become a nuisance, and its use a form of unlawful coercion." The court then allowed the injunction as substantially prayed for, which apparently included a prohibition of "picketing" *per se* without any limitation to force or violence. In reply to a question of counsel for defendant as to just what was meant by "picketing," the court said: "I think these defendants know what 'picketing' means, as they have inaugurated it. It is the establishment and maintenance of an organized espionage upon the works and upon those going to and from them."

In Knudsen v. Benn, 123 Fed. 636, the court, after stating that the defendants admitted that they had been placing pickets to observe who were employed and for the purpose of inducing such employees to leave the employment of the complainants, said: "Fellow workmen may agree together to leave at once the service of their employer; but, having done so and being no longer interested in that matter, then, notwithstanding certain *dicta* in cases that have been read from, it does not seem clear to me that they are acting lawfully when they are persuading the servants of their former employer to break their contracts and leave the service. It is a matter that does not concern them any longer. It is a matter that is apparently injurious to their former employer. It seems to me that such an interference in a matter with which they have no rightful concern, and which is injurious to another, is not lawful." The decision, however, did not rest upon this broad ground, as it appeared that there had been acts of violence and intimidation on the part of defendants; and the injunction order as granted merely restrained the establishment and maintenance of spies and pickets, for the purpose of inducing or compelling, by threats, intimidation, violence, or abusive language or persuasion, any employee of complainants to fail or refuse to perform his duties as such, or for the purpose of interviewing employees of complainants and inducing them not to remain in the complainants' employment.

Most of the cases that have passed upon the lawfulness or unlawfulness of "picketing," and whether the same should be enjoined, have expressly or in effect conceded that picketing is not *per se* unlawful, and that, if strictly and in good faith confined to the purpose of gaining information as to what persons remain in the employment, or what persons are seeking employment, or of peaceably pursuading such persons, if not under contract, to leave the employment, or not to enter the employment, it will not be enjoined. This concession is frequently made in express terms in the opinions, and is commonly reflected in the form of the injunction order or decree.

Thus, in Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Asso. 59 N. J. Eq. 49, 46 Atl. 208, the vice chancellor, though stating that the court, in Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077, seemed to hold that picketing was in itself an intimidation, said that looking at the form of the injunction in that case in connection with the views expressed in the opinion, and in the absence of any case in New Jersey, he could not say that a preliminary injunction can go upon the notion that picketing without some other act evidential of coercion is of itself evidence of intimidation; and added that the decision of the question must depend upon the circumstances surrounding each case, the size of the guard, the extent of their occupation, and what they say and do. He further said: "Taking every circumstance into account, if it appears that the purpose of the picketing is to interfere with those passing into or out of the works,

the purpose of inflicting malicious injury, is unlawful.

Casey v. Cincinnati Typographical Union No. 3, 12 L.R.A. 193, 45 Fed. 135; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 803; Oxley Stave Co. v. Coopers' International Union, 72 Fed. 695; Knudsen v. Benn, 123 Fed. 636; 1 Eddy, Combinations, p. 416; Walker v. Cronin, 107 Mass. 555; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Moran v. Dunphy, 177 Mass. 485, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Ertz v. Produce Exchange, 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 737; State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Martin v. McFall, 65 N. J. Eq. 91, 55 Atl. 465; Beattie v. Callanan, 82 App. Div. 7, 81 N. Y. Supp. 413; W. P. Davis Mach. Co. v. Robinson, 41 Misc. 329, 84 N. Y. Supp. 837; Erdman v. Mitchell, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; Flaccus v. Smith, 199 Pa. 128, 54 L.R.A. 640, 85 Am. St. Rep. 779, 48 Atl. 894; Delz v. Winfree, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111.

A conspiracy entered into for the purpose of maliciously injuring another's business, or his place of business, is unlawful.

Old Dominion S. S. Co. v. McKenna, 30 Fed. 48; Casey v. Cincinnati Typographical

or those wishing to pass into the works by other than persuasive means, it is illegal. If the design of the picketing is to see who can be the subject of persuasive inducements such picketing is legal." The form of the injunction allowed in this case does not appear.

In W. & A. Fletcher Co. v. International Asso. of Machinists (N. J. Eq.) 55 Atl. 1077, the court said: "Picketing may be lawful; picketing may be unlawful. Whether picketing is lawful or unlawful depends wholly upon the purpose with which it is carried on, or perhaps it would be more accurate to say the effect which is produced by it. If the purpose and effect are to intimidate, to interfere with the liberty of workmen in seeking employment, to interfere with what in another case I called the employer's right to have labor flow freely to him so that a reasonably courageous person would be restrained from offering his labor to such employer, then picketing is unlawful, and, where the other necessary conditions for the interference of a court of equity exist, will be prohibited by an injunction. If, however, the picketing is carried on for the mere purpose of obtaining information, or for the purpose of conveying information to persons seeking or willing to receive the same, or even in some cases for the purpose of bringing orderly and peaceable persuasions to bear upon the minds of men who desire to listen to the same, the object of such persuasions not including in any way the disruption of an existing contract for labor, then there may be no unlawful element in the picketing, and carrying it on may found no action even at law, and certainly may not call for any interference on the part of a court of equity." The court accordingly denied the contention of counsel that the preliminary injunction should extend to restraining picketing without reference to its object or effect.

In Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230, the vice-chancellor continued until final hearing a restraining order, which, *inter alia*, enjoined defendants "from loitering or picketing in the streets near the premises of complainant . . . with intent to procure the personal molestation and annoyance of persons employed, or willing to be employed, by complainant and with a view to cause persons so employed to quit their employment, or persons willing to be employed by complainant to refrain from such employment."

In Union P. R. Co. v. Ruef, 120 Fed. 124, Munger, J., said: "Picketing in and of itself, when properly conducted, is not unlawful; but when accompanied by violence, or any manner of coercion or intimidation, to prevent persons from engaging in the service of an employer, it is unlawful." The decree as entered in this case did not specifically or in terms restrain "picketing," but did, *inter alia*, restrain the defendants "from congregating at or near the premises of complainant for the purpose of intimidating its employees, or coercing said employees, or preventing them from rendering their service to said complainant."

In American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3, 90 Fed. 608, the facts established upon the application for an injunction showed something beyond mere picketing, namely, the massing of large bodies of men around the premises in which a strike was in progress. The injunction as granted restrained the defendants from collecting in and about the approaches to the complainant's mills "for the purpose of picketing or patroling or guarding the streets, avenues, gates, and approaches . . . for the purpose of intimidating, threatening, or coercing any of the employees of complainant, or any person seeking the employment of complainant."

In Christensen v. Kellogg Switchboard & Supply Co. 110 Ill. App. 61, the injunction, so far as concerned picketing, was in substantially the same terms as that in the last case At the conclusion of the opinion the court said: "It is urged that the injunction order should be so modified as not to restrain the maintenance of a picket or patrol, which it is said is not unlawful. It is, we think, true that picketing or patroling, when the terms are used to designate mere watching or being in the street, should not be enjoined. The terms them-

Union, No. 3, and Thomas v. Cincinnati, N. O. & T. P. R. Co. *supra;* Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310; Oxley Stave Co. v. Coopers' International Union, *supra;* Allis Chalmers Co. v. Reliable Lodge, 111 Fed. 264; United States ex rel. Guaranty Trust Co. v. Haggerty, 116 Fed. 510; Knudsen v. Benn, *supra;* 1 Eddy, Combinations, §§ 479, 480; State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; State v. Stockford, 77 Conn. 227, 58 Atl. 769; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; Lucke v. Clothing Cutters' & T. Assembly, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Walker v. Cronin, 107 Mass. 555; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Plant v. Woods, Moran v. Dunphy, Beck v. Railway Teamsters' Protective Union, Ertz v. Produce Exchange, and State v. Donaldson, *supra;* Van Horn v. Van Horn, 52 N. J. L. 284, 10 L.R.A. 184, 20 Atl. 485; Barr v. Essex Trades Council, and Martin v. McFall, *supra;* Rourke v. Elk Drug Co. 75 App. Div. 145, 77 N. Y. Supp. 373; Beattie v. Callanan, W. P. Davis Mach. Co. v. Robinson, Flaccus v. Smith, Erdman v. Mitchell, and Delz v. Winfree, *supra;* State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L.R.A.

selves are of military origin, and apply to acts customary in time of war. Nevertheless there may doubtless be picketing and patroling which are not unlawful. But the picketing described in the bill before us is not of that character. It is, as we have said, accompanied with the use of force and violence, and it is the kind of picketing and patroling described in the bill of complaint which is enjoined."

In Southern R. Co. v. Machinists' Local Union No. 14, 111 Fed. 54, the court said that if the picketing, the climbing of adjacent telephone poles, the climbing upon fences, the watching of shops, the assemblies in streets and at the entrances, and the constant and unceasing surveillance had been confined to obtaining information and to unobjectionable social intercourse for the purpose of begging and entreating not to work, there could be no injunction. The order granted in this case enjoined, *inter alia*, the "picketing or patrolling" the premises, "for the purpose of intimidating its employees or coercing them by threats, intimidation, violence, abusive or violent language, or preventing them, in the manner aforesaid, from rendering their service to said company."

In Winslow Bros. Co. v. Building Trades Council, 31 Chicago Legal News, 337, Holdom, J., said that picketing which is simply the keeping watch by workmen belonging to labor unions so that they may know what is going on, what is being done, for record, as a merchant would keep watch of the market quotations, is permissible; but that when a picket resorts to any unlawful method, like threats or violence, then from that time his whole act becomes unlawful, and the proper subject of injunction. The terms of the injunction granted in this case do not appear, but it is clear from the opinion that the restraint of picketing was to be limited by reference to intimidation.

In Underhill v. Murphy, 117 Ky. 640, 78 S. W. 482, a judgment sustaining a demurrer to a petition for an injunction to restrain members of a labor union was reversed and remanded with directions to grant a temporary injunction. The terms of the injunction sought or directed to be granted do not appear. The proof, however, showed not only picketing, but actual interference with employees of the complainant, and presumably the court intended that the injunction against "picketing" should be limited by reference to intimidation.

Loitering around, picketing, and patrolling premises where a strike is in progress are not unlawful unless accompanied by insulting or annoying conduct, or acts of a similar character. Levy v. Rosenstein, 100 N. Y. S. R. 101, denying motion to continue an injunction.

In Herzog v. Fitzgerald, 74 App. Div. 110, 77 N. Y. Supp. 366, the complaint upon which an application for an injunction was based, alleged, *inter alia*, that the strike had been accompanied, on the part of defendants as participants or sympathizers, with threats of violence, acts of violence, threats of coercion, acts of coercion and intimidation, "picketing" the plaintiff's premises, the use of violent and abusive language, and other familiar devices. The injunction granted did not specifically restrain picketing, but generally restrained the commission of acts of violence and threats or attempts to commit such acts.

In Kerbs v. Rosenstein, 56 App. Div. 619, 67 N. Y. Supp. 385, an injunction restraining, *inter alia*, "picketing," and "patrolling" premises was dissolved upon the ground that there was not a sufficient showing that the picketing or patrolling had been accompanied by threats or intimidation, although the picketing and patrolling themselves seem to have been conceded. McLaughlin, J., who dissented, apparently because he differed from the majority as to the showing of intimidation and violence, admitted that picketing *per se* may not be an illegal act, and stated that the preliminary injunction in restraining without qualification picketing and patrolling was too broad, and should have been modified so as to prevent picketing in such a manner as to express or imply a threat, intimidation, coercion, or force.

In Foster v. Retail Clerks' International

700, 85 N. W. 1046; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.

Per Curiam:

This is a suit brought by the respondent against the Cooks' & Waiters' Union of Seattle and certain individual defendants to enjoin them from unlawfully interfering with and injuring the respondent's business. A general demurrer was interposed to the complaint, which the trial court overruled, whereupon the defendants refused to plead further, and judgment was entered against them according to the prayer of the complaint. The ultimate question on this appeal therefore is, Does the complaint state facts sufficient to constitute a cause of action? The respondent, in his complaint, alleges that he is a resident and citizen of the city of Seattle, and was at that time, and for three years last past had been, the proprietor of and running that certain café in the city known as the "Bismarck;" that, prior to the interference therein of the defendants, the café had been doing a very large business, it affording a seating capacity for 550 people and was patronized daily by from 2,000 to 3,000 persons; that he had in his employ as floor manager for his café one Kuehl, who was a competent man for such position, and whose work therein was satisfactory to the respondent, and that said Kuehl was not a member of the appellant union; that shortly prior to November 13, 1904, certain employees of respondent, who were members of the ap-

Protective Asso. 39 Misc. 48, 78 N. Y. Supp. 860, the picketing sought to be enjoined was maintained for the purpose of enforcing a boycott that had been declared by a labor organization against a store the proprietor of which had refused to sign an agreement with a clerks' local union as to the hours of opening and closing. It appeared that the clerks employed by the plaintiff had no complaint to make, and did not leave his employment. The court, notwithstanding its opinion that the particular defendants in question, who had never been employees of the plaintiff and were not even members of the union, had no such interest in the matter which gave rise to the difficulty as to justify their conduct in picketing the plaintiff's place of business if such conduct needed justification, nevertheless held that such picketing, being peaceful and unaccompanied by threat or intimidation, was not unlawful, and could not be enjoined whatever may have been the motive of the picketers.

An employer against whom a strike has been declared can have no relief in equity against strikers who, in pursuance of an agreement between them, maintain pickets within the vicinity of plaintiff's establishment for the purpose of intercepting persons who may be going there to take the places of the strikers, and to persuade them to refrain from working for the plaintiff, if this is done in a proper way, and the influences which they seek to bring to bear are appeals merely to the judgment and understanding of the persons they are desirous of influencing. Standard Tube & Forkside Co. v. International Union, 7 Ohio N. P. 87. The court further said, if they were there in such numbers, or were using such means, as were reasonably calculated to frighten, or intimidate, or overawe men seeking employment, then they were there in the exercise of influences which they had no right to bring to bear; they could not use threats under the law; they could not assemble in such numbers as to overawe and terrify or bear down the judgment of the men going there to get work. They had, however, a perfect right to speak in a proper way to men who were seeking employment such as they had abandoned, to explain to them their view of the matter, to reason with them, and to make such appeals to the judgment and sense of propriety of brother workmen as were reasonable and proper. The moment, however, they should attempt to interfere with the free will of anybody, and to compel or coerce him into doing what he did not wish to do, they would exceed the bounds of reasonable interference.

Picketing premises where a strike is in progress, for the purpose of reporting to a labor union the number of men which the employer is able to secure, with a view to keep the union informed as to the probable success of the strike, is not unlawful, and will not be enjoined if unaccompanied by acts or conduct amounting to intimidation or coercion. Perkins v. Rogg, 11 Ohio Dec. Reprint, 585.

In Standard Tube & Forkside Co. v. International Union, *supra*, an injunction against picketing or patrolling was denied, because it did not appear that the picketing or patrolling had been accompanied by display of force or language amounting to intimidation.

In Everett-Waddey Co. v. Richmond Typographical Union (Va.) 53 S. E. 273, the court cited with approval the following statement in 1 Eddy, on Combinations, p. 437: "Pickets may be established about factories and places where nonunion men are employed, providing the number of pickets is not so great as to overawe or intimidate the nonunion workmen, or in any manner obstruct the street or sidewalk, and providing the so-called 'pickets' confine themselves to the use of persuasion or argument with the nonunion employees; but, if the watching or picketing is carried to an extent which causes intimidation, or amounts to coercion, compulsion, or molestation in any form of either the nonunion workmen or their employers, it is unlawful, and the combination making use of such unlawful means is a conspiracy."

A novel point was presented in Atkins v. W. A. Fletcher Co. 65 N. J. Eq. 658, 55 Atl. 1074. There the effort was not by an employer to restrain picketing, but by per-

pellant union, and the appellant union, acting by its members and by the defendants Smith, Reef, and Hasketh, demanded of respondent that he discharge from his employ said Kuehl, because said Kuehl was not a member of the appellant union; that the respondent refused to comply with this demand, whereupon said persons requested the respondent to inform them whether he would allow them to endeavor to induce said Kuehl to join the appellant union, to which request the respondent replied that he had nothing to do with the actions of said Kuehl in that regard; that on November 13, 1904, said appellant union, acting by said Smith, Reef and Hasketh, and other members of said union, demanded of Kuehl that he join the appellant union, to which demand the said Kuehl refused to comply, and that thereupon the said union ordered a strike among respondent's employees, and that said employees who were members of said union, namely, his cooks and waiters, walked out just at the dinner hour of said café, and that said strike had since been continued by the said union under the direction and with the co-operation of said Smith, Reef, and Hasketh; that since the inauguration of said strike the said Smith, Reef, and Hasketh and their associates, under the name of the appellant union, had maintained pickets in and about the entrance to said

sons, who, for the purposes of the case, were held to represent a labor union, to restrain the employers from interfering with the work of pickets employed by the labor union. The injunction was denied, not, however, upon the ground that the picketing itself was unlawful, but upon the ground that there was no such pecuniary or financial injury to the labor union from interference with pickets maintained by it as to entitle it to a remedy in equity. The court emphasized the point that the bill was not filed by the complainants as pickets or persons employed in a certain business whose opportunities for employment are cut off by the alleged unlawful conspiracy of the defendant, but that, under the allegations of the bill, the interference with the work of the pickets must be regarded in the case as an alleged grievance of the labor union. The decision upon the latter assumption is consistent with the decisions in New Jersey granting injunctions in favor of employers against picketing.

In the cases above cited, in which injunctions have been granted to restrain picketing, the relief has been granted, not upon the application of persons claimed to have been prevented from seeking employment or remaining in the employment on account of the picketing, but upon the application of the employer whose premises were picketed. Few of the cases discuss the ground upon which the right of the employer to invoke the power of equity rests. This point, however, was discussed by the vice chancellor in Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230. He referred the employer's right to apply for relief under such circumstances to his right to enjoy a certain free and natural condition of the labor market,—which in the phrase of Lord Ellenborough he describes as a "probable expectancy,"—an actual pecuniary loss to the complaining party by the interference with his enjoyment of his "probable expectancies" in respect of the labor market. He concedes that this right of the employer is not an absolute one, and that, to entitle the employer to an injunction, there must be such a degree of molestation as might constrain a person having reasonable fortitude and not being unreasonably sensitive to abandon his intention to employ or to be employed, in order to escape such molestation.

By the English conspiracy and protection of property act, 1875, § 7, subsec. 4, a penalty or other punishment is prescribed for one who watches or besets the house or other place where another resides or works, with a view to compel any other person to abstain from doing, or to do, any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority, or watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place. By a proviso to the section it is declared that "attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section." Under the influence of that statute, the court of appeal, in Lyons v. Wilkins, 65 L. J. Ch. N. S. 601, approved a preliminary injunction restraining defendants "from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them, or for any purpose except merely to obtain or communicate information." This position was adhered to upon a subsequent appeal, reported in 68 L. J. Ch. N. S. 146, from a perpetual injunction in that form, notwithstanding the intervening decision in Allen v. Flood, 67 L. J. Q. B. N. S. 119 [1898] A. C. 1. The case is, of course, clearly distinguishable, by virtue of the statutory provisions, from the cases above cited denying an injunction against picketing for the purpose of peaceable persuasion.

The question as to the lawfulness or unlawfulness of "picketing" frequently involves a consideration of the broader question as to the effect of a bad motive or malice to render unlawful what would otherwise not be. That question is treated in an exhaustive note in 62 L.R.A. 674.

café who interfered with the patrons of said café, and informed said patrons that the said café was a scab place, that it was an unfair place, and that it should not be patronized by the public; and that said pickets congregated around the entrance to said café especially at meal hours, and attempted to dissuade persons from entering the café; that they abused the respondent as maintaining an unfair and scab place of business; that they endeavored to persuade the public generally, and the patrons of said café especially, to boycott said café until the respondent should comply with the demand of the appellant union; that the action of the appellant union and its codefendants was joint and concerted, and was had pursuant to an agreement made between them prior to the inauguration of said strike with the malicious intention of injuring the respondent's business; that they had threatened to drive respondent out of business, and were endeavoring to carry out their threats by diverting the patronage which prior to said strike had been going to respondent's café; that respondent had, by care and attention, built up a large business, but that the appellant and its codefendants had, by their wrongful acts and conduct, diverted a large part of his business, reducing his daily receipts by large sums, averaging from $100 to $150 per day; that, if said picketing was allowed to continue, the respondent would be irreparably injured in the conduct of his business, and would be without remedy therefor, because said appellant union and its codefendants were wholly irresponsible, and insolvent, and unable to respond in damages. The prayer was for an injunction enjoining the defendants from the commission of these acts.

In discussing the questions suggested by the record the arguments of counsel have taken a wide range, and elaborate briefs have been filed, in which numerous authorities are collated. The vital question at issue, however, it seems to us, is a simple one, and easy of solution. Clearly, the acts of the appellants and defendants as set forth in the complaint are illegal, and may be restrained by an injunction. It is true that a man not under contract obligations to the contrary has the right to quit the service of another at any time he sees fit, and may lawfully state, either publicly or privately, the grievances felt by him which gave rise to his conduct. And that right which one man may exercise singly many may lawfully agree by voluntary association to exercise jointly. But one man singly, nor any number of men jointly, having no legitimate interests to protect, may not ruin the business of another by maliciously inducing his patrons and other persons not to deal with him. Men cannot lawfully jointly congregate about the entrance of one's place of business, and there, either by persuasion, coercion, or force, prevent his patrons and the public at large from entering his place of business or dealing with him. To destroy his business in this manner is just as reprehensible as it is to physically destroy his property. Either is violation of a natural right, the right to own, and peaceably enjoy, property. The acts of the defendants as set forth in the complaint amounted to an invasion of the respondent's lawful rights, and they were properly enjoined by the trial court.

The judgment appealed from is affirmed.

Root, J., having been of counsel, took no part.

TENNESSEE SUPREME COURT.

HARRIS N. BROWNE
v.
FORD N. TAYLOR.

(— Tenn. —, 88 S. W. 933.)

Deed—covenant—unexpired lease.

1. Knowledge by a purchaser of real estate of an unexpired lease of the property will not prevent his maintaining an action for breach of covenant because of such lease.

Covenant—breach—damages—counsel fees.

2. Counsel fees expended in a fruit-

Subject Note.—Effect of purchaser's knowledge of encumbrance in action for breach of covenant.

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I. Introduction.

The rule adopted in BROWNE v. TAYLOR,

less attempt to eject the tenant are not recoverable in an action for breach of covenant in a sale of real estate because of an unexpired lease of the property.

Same—measure of damages.

3. The measure of damages for breach of covenant in a deed of real estate, consisting of an outstanding lease which prevents the grantee from obtaining immediate possession of the property, will not include the special damages resulting from inability to make a contemplated subdivision of the property, although the grantor had knowledge of such intended use of the property, where the subdivision could not have been perfected before the time for the expiration of the lease had possession been secured, because the connecting streets had not been opened to the property.

Same—outstanding lease—rental value.

4. The rental value of the property during the time the purchaser is kept out of possession is the measure of damages for breach of covenant in a deed of real estate, consisting of an outstanding lease.

(May 22, 1905.)

CROSS-APPEALS from a judgment of the Circuit Court for Shelby County in a suit to recover damages for breach of covenant in a deed of real estate; the defendant appealing from so much as held him liable for the breach; and plaintiff appealing from so much as refused to award him the full damages claimed. Modified.

The facts are stated in the opinion.

Mr. R. G. Brown for plaintiff.

that a purchaser's knowledge of an encumbrance will not stand in the way of an action for breach of covenant, is the prevailing law of the land. In a few instances, where the encumbrance affects the physical condition of the property, and is open, visible, and notorious, a different conclusion has been reached by some of the courts; but the weight of authority, even on this branch of the subject, is easily the other way.

This note covers no cases except those dealing with the question of the effect of mere knowledge of the encumbrance. There is a line of closely allied authorities, in which vendors have sought to avoid the plain words of their covenant on the ground that the purchaser not only had notice of the encumbrance, but orally agreed to purchase subject to it. This involves a consideration of the conflicting doctrine that the real consideration of a deed may be shown by parol, and the doctrine that a deed may not be contradicted or varied by parol. These cases, of course, deal with something more than knowledge of the encumbrance, and are therefore excluded.

Neither does the note include cases in which encumbrances are excepted from deeds by implication, as where land is described as bounded by the center of a public road (Holmes v. Danforth, 83 Me. 139, 21 Atl. 845); or where a deed describes the property as land "over which the water of a mill passes" (Prescott v. Williams, 5 Met. 429, 39 Am. Dec. 688); or where the land conveyed is described as flats, the term alone implying that the public has the right to use the land for the purpose of navigation, the existence of the right in that case not being a breach of the covenant against encumbrances (Montgomery v. Reed, 69 Me. 510).

In a number of instances the question which forms the subject of the note is discussed, not in direct actions for breach of covenant, but in other actions, being for the most part those brought by the seller to recover the consideration, where breach of covenant is interposed as a defense. These cases are included, so far as deemed helpful.

II. The general rule.

The general rule is that a covenantor covenants against known as well as unknown defects. Both parties may be in possession of all of the facts. Either or both may believe an encumbrance is not an encumbrance. The purchaser, although not entirely easy about it, takes his chances on the covenant which the seller is willing to give. If the apparent encumbrance turns out to be real, the seller must answer. Nothing is easier, if the seller wishes to escape from such liability, than for him to except the encumbrance from his covenant. This he must do, or be bound by the words of his deed,—at least so far as the question of notice to the purchaser is concerned.

In Barlow v. Delaney, 40 Fed. 97, it was claimed that a covenantee could not recover of the covenantor for a breach of the covenant if at the time of its execution he knew of the defect covenanted against. Brewer, J., said that a statement of this proposition carried its own answer. The very purpose of the covenant was protection against defects; and to hold that one could be protected only against unknown defects would be to rob the covenant of more than one half its value, besides destroying the force of its language. If from the force of a covenant it were desired to eliminate known defects, or to limit the covenant in any way, it was easy to say so. General in its language, it reached to all defects within its terms, known or unknown. It was held immaterial in this case that a purchaser knew at the time of the warranty that the seller did not have title to all of the land the warranty called for. To the same effect are McCall v. Wilkes, 121 Ga. 722, 49 S. E. 722; Allen v. Taylor, 121 Ga. 841, 49 S. E. 799.

So, undoubtedly, a purchaser's knowledge of an encumbrance would not relieve the vendor from answering for breach of this general warranty.

In Medler v. Hiatt, 8 Ind. 171, the court,

Messrs. **Flippin & Neuhardt**, for defendant:

If the purchaser knows that the premises are in possession of a tenant, and no special contract is made, the occupant becomes the tenant of the purchaser, and there will be no breach of covenant against encumbrance.

Lindley v. Dakin, 13 Ind. 388; Page v. Lashley, 15 Ind. 152; Maupin, Marketable Title to Real Estate, p. 203; Weld v. Traip, 14 Gray, 330.

McAlister, J., delivered the opinion of the court:

The plaintiff below, Harris L. Browne, recovered judgment against the defendant, Ford N. Taylor, for the sum of $92.65, as damages for breach of covenant against encumbrances contained in a deed for the sale of land. Both sides appealed and have assigned errors.

The cause was heard by the circuit judge, without the aid of a jury, upon evidence which is practically undisputed. The record reveals that on the 29th of February, 1904, Ford N. Taylor and wife conveyed to Harris L. Browne, by deed duly executed and recorded, a tract of land in the suburbs of Memphis, for which Browne agreed to pay the sum of $5,600 whereof $1,400 was paid in cash, and notes executed for the balance of the purchase money, due in one, two, and three years, with interest from date. The deed contained the usual covenants and warranties that the premises were free from en-

in distinguishing Allen v. Lee, 1 Ind. 58, 48 Am. Dec. 352, a case dealing with the question of the effect of a contemporary agreement as to an encumbrance, said that none of the authorities sustained the position that mere notice of an existing encumbrance to the vendee at the time he received his deed excluded it from the operation of an express covenant against encumbrances.

In Yancey v. Tatlock, 93 Iowa, 386, 61 N. W. 997, it was held that a grantee might recover for a broken covenant against encumbrances, although he knew of the encumbrance before he took his deed.

In an action for breach of such a covenant the deed governs, and the grantor cannot defeat the covenant by parol evidence of the grantee's knowledge of it. Newburn v. Lucas, 126 Iowa, 85, 101 N. W. 730.

In Townsend v. Weld, 8 Mass. 146, it was held that, although a purchaser knew of an existing encumbrance, the grantor could covenant to save him harmless; and that, if the grantor did not mean to do so, he should have excepted it from his covenant, as parol evidence was inadmissible to vary the terms of a deed.

In Scott v. Twiss, 4 Neb. 133, it was said that the mere existence of an encumbrance was a breach of the covenant without regard to the knowledge of the grantee as to it.

In Demars v. Koehler, 62 N. J. L. 203, 72 Am. St. Rep. 642, 41 Atl. 720, Reversing 60 N. J. L. 314, 38 Atl. 808, it was said that a grantee is not compelled to require for his protection a special covenant against a known encumbrance, but may rely on the general and unrestricted covenant against all encumbrances.

When a covenant is made against all encumbrances without exception, knowledge of the existence of one encumbrance cannot take that encumbrance out of the general terms of the covenant unless such was the intent of the parties, and knowledge alone does not prove such intent, for a contrary intent is consistent with it. Ibid.

In Lloyd v. Quimby, 5 Ohio St. 262, in holding that mutual ignorance of the parties could not affect the operation of the covenant against encumbrances in a mortgage, the court said that the obligation of covenants of warranty could not depend upon the knowledge, or want of knowledge, of parties. If it could the covenants would be of little avail; for one of the leading inducements to the requirement of such covenants was that they might serve as a safeguard against possible ignorance of his own title on the part of the vendor.

In Parish v. White, 5 Tex. Civ. App. 71, 24 S. W. 572, it was held that the doctrine of notice arising from circumstances sufficient to provoke inquiry had no application where the seller who created the lien was sued for breach of the covenant against encumbrances.

In Worthington v. Curd, 22 Ark. 277, it was held that a purchaser's knowledge of encumbrances or defects of title was no objection to recovery upon the covenants of the deed in a court of law, but that it was a ground for equity to refuse relief out of the unpaid consideration because it supposed that with such knowledge the defendant chose to rely upon the covenants, and to their legal effect he would be remitted. To the same effect is Busby v. Treadwell, 24 Ark. 457.

In Pennsylvania, encumbrances are considered to be of two kinds: (1) Such as affect the title; and (2) those which affect only the physical condition of the property. A mortgage or other lien is an illustration of the former, and a public road of the latter. In Memmert v. McKeen, 112 Pa. 315, 4 Atl. 542, the court said that where encumbrances of the former class existed they were broken the instant made, and that it was of no importance that the grantee had notice of them when he took the title. They were usually of a temporary character and capable of removal, and the very object of the covenant was to protect the vendee against them; hence, knowledge, actual or constructive, of their existence, was no answer to an action for breach of the covenant. Where, however, there was a servitude imposed upon the land, which was visible to the eye and

cumbrances and that the grantors would forever defend the same against all lawful claims whatever.

It is disclosed by the record that the property was purchased by Browne for the purpose of making a subdivision, and it was agreed that, upon certain cash payments being made, any portion of the property desired would be released from the operation of the trust deed executed to secure the deferred payments.

It further appears that at the date of the deed there was an encumbrance on the land, consisting of an outstanding lease, with ten months to run before its expiration. It was contended on behalf of Taylor that Browne had actual knowledge of the encumbrance, and that the lessee thereby became his own tenant. It is shown that Taylor, the vendor, before executing the conveyance, stated to the agent who was negotiating the contract of sale that there was a gardener on the land who had a lease until such time as he could get his crop gathered for that year, probably some time in September or October, and that he desired this gardener to be protected. It is further shown that this agent, before the deed was executed or title examined, communicated to Browne the fact that there was a gardener on the place and Taylor wanted him protected, and that this gardener was at the time paying as rental the sum of $7.50 per month. Browne replied that he did not know about the $7.50 per month, but supposed the matter could be arranged in some way. Plaintiff below

which affected not the title, but the physical condition of the property, a different rule prevailed. This question is treated of, *infra*, IV.

An attempt to establish the same distinction in Indiana was made in De Long v. Spring Lake Beach Improv. Co. 72 N. J. L. 125, 59 Atl. 1034, but the question was held not presented by the pleadings, and it was not passed upon.

III. Encumbrances affecting the title to land.

a. Mortgages.

The courts are unanimous in holding that, where an encumbrance touches the title, a purchaser's knowledge of it is no answer to an action for breach of covenant. The question has arisen a number of times with reference to mortgages.

In Good v. End, 6 N. B. 603, an action by a purchaser for breach of covenant against encumbrances because of a mortgage on the property prior to the sale, a plea that the mortgage was recorded in the public records, and that the plaintiff received his deed subject to the mortgage, was held bad. Chipman, Ch. J., said it was very clear that the defendant could not qualify his covenant in the way attempted by the plea as plaintiff's knowledge of the mortgage was perfectly immaterial.

In Osburn v. Pritchard, 104 Ga. 145, 30 S. E. 656, it was held that an outstanding mortgage, although known to the purchaser at the time of the sale was covered by a general warranty of title against the claims of all persons whatsoever.

In Snyder v. Lane, 10 Ind. 424, mere notice to the purchaser of the existence of a mortgage on the land bought was held not to exclude it from the operation of the seller's covenant against encumbrances.

In Bundy v. Ridenour, 63 Ind. 406, a purchaser with knowledge of a mortgage on the premises at the time of the sale was allowed to recover nominal damages in an action for breach of the covenant against encumbrances, where he had not paid off the mortgage, and had not been evicted from the premises.

In an action for breach of covenant against encumbrances an allegation of the plaintiff's want of knowledge of the existence of a mortgage at the time he purchased, and its concealment from him, is wholly immaterial, and need not be proved. Yancey v. Tatlock, 93 Iowa, 386, 61 N. W. 997.

But in Foster v. Woods, 16 Mass. 116, a covenant against encumbrances excepted mortgages recorded by the grantor during his lifetime. In addition to certain mortgages recorded, there was a prior deed of the property to a son of the grantor and a bond of defeasance not at that time required to be recorded. The court said it was ambiguous whether the deed was not considered by the parties as one of the mortgages recorded, and that parol evidence of the purchaser's knowledge of the encumbrance was therefore admissible to explain the transaction, in an action for breach of the covenant by reason of the existence of the deed and defeasance.

In Smith v. Lloyd, 29 Mich. 382, in holding that, where a mortgage was excepted from a general covenant against encumbrances, the accrued interest on the mortgage was not included in the exception, the court saw nothing in the suggestion that the clause contained sufficient notice to the purchaser to have put him on his guard. The court said that it was as usual, and certainly as competent, to covenant against known as unknown encumbrances or defects of title; and that with this covenant the purchaser was not called upon for the exercise of any diligence.

A purchaser's knowledge of the existence of a mortgage on property conveyed, but not excepted from the covenant against encumbrances, is no defense to an action for a breach of the covenant against encumbrances. Corbett v. Wrenn, 25 Or. 305, 35 Pac. 658.

In Funk v. Voneida, 11 Serg. & R. 109, 14 Am. Dec. 617, it was held that constructive notice to the purchaser of an outstanding mortgage, resulting from its being re-

now seeks to recover damages for breach of the covenant against encumbrances, upon the facts stated in regard to the existence of an outstanding lease on the premises. It is denied on behalf of Taylor that Browne is entitled to any recovery, for the reason that he accepted a deed with full knowledge of this encumbrance, and that he must look to the tenant for his protection. Counsel for defendant cites in support of his contention Ballard's Law of Real Property, vol. 6, § 142, in which the rule is thus stated: Where grantee in a conveyance of lands in fee simple which contains a covenant against encumbrances, and before execution and delivery of the deed, has actual knowledge of the existence of a lease made between grantor in said conveyance and a tenant, the tenant being in actual possession of the premises, the grantee cannot maintain against his grantor an action for breach of covenant,—citing Demars v. Koehler, 60 N. J. L. 314, 38 Atl. 808. In the last case the court said: "There can exist no question in law but that an outstanding term, or an unexpired lease, on the premises conveyed, is an encumbrance, within the covenant against encumbrances contained in the deed of conveyance. Fritz v. Pusey, 31 Minn. 368, 18 N. W. 94; Jarvis v. Buttrick, 1 Met. 480; Batchelder v. Sturgis, 3 Cush. 201; Carter v. Denman, 23 N. J. L. 261, 272; Grice v. Scarborough, 2 Speers, L. 649, 42 Am. Dec. 391; Maupin, Marketable Title to Real Estate, § 125, p. 293."

While this rule is undoubtedly supported

corded, could not affect his right of action for breach of the general covenant against encumbrances. The court said: "The rule as to the vendee is *caveat emptor*. So, let the vendor take care of the covenants he enters into. There was no special stipulation on the subject, and the plaintiff might safely rely on the general one. Notice of the mortgage would make no difference, as was determined in Levit v. Witherington, 1 Lutw. 317."

In Watts v. Fletcher, 107 Ind. 391, 8 N. E. 111, a purchaser's notice of a mortgage was held not to affect his right to recover for breach of an express covenant against encumbrances.

In Clore v. Graham, 64 Mo. 249, it was held that neither actual nor constructive knowledge of the existence of a mortgage upon land conveyed would relieve the covenantor from his covenant against encumbrances.

In Fletcher v. Chamberlin, 61 N. H. 438, it was held that knowledge of a second mortgagee, of a prior mortgage, could not relieve the mortgagor of his covenant against encumbrances in the second mortgage, and that after strict foreclosure of the second mortgage the title in the mortgagee was perfected, and the mortgagor could not afterwards claim title under the first mortgage and hold it as against the covenantee.

In Jaques v. Esler, 4 N. J. Eq. 463, the court said it was well settled that the purchaser of real estate by deed of warranty had a right to relief in equity against the vendor who sought to enforce payment of a bond and mortgage, given for the purchase money, until the suit actually brought to recover the premises, by a person claiming them by paramount title, should have been determined; and that this rule applied whether the purchaser had notice of the outstanding claim or not. Indeed, in practice it not unfrequently happened that notice of such claim induced the purchaser to require the covenant against it.

In Stockton v. Cook, 3 Munf. 68, 5 Am. Dec. 504, a purchaser's knowledge of an outstanding mortgage on the property bought was held not to stand in the way of his relief against his bond for purchase money, where the seller warranted the property to be free from all encumbrances.

b. Leases.

The conclusion reached in BROWNE v. TAYLOR is supported by the authorities from other states. The case of Demars v. Koehler, 60 N. J. L. 314, 38 Atl. 808, cited in the opinion as being opposed to this view, has since been reversed.

It is now the law of New Jersey that an action for breach of covenant against encumbrances is maintainable when there is an outstanding term on the lands conveyed, although its existence was known to the grantee at the time of accepting the deed, Demars v. Koehler, 62 N. J. L. 203, 72 Am. St. Rep. 642, 41 Atl. 720, Reversing 60 N. J. L. 314, 38 Atl. 808. The court said that knowledge of the existence of an encumbrance not only did not destroy its inherent character as an encumbrance, but might and often did lead to the purchaser's requiring the grantor to protect him by covenants. This puts all of the authorities in harmony upon this branch of the subject.

A purchaser's knowledge of the existence of an unexpired lease and the right to a growing crop upon the land will not prevent him from holding the seller to his covenant against encumbrances. Clark v. Fisher, 54 Kan. 403, 38 Pac. 493.

In Batchelder v. Sturgis, 3 Cush. 201, in an action for breach of covenant against encumbrances, evidence was offered of the purchaser's knowledge of an outstanding lease, and an attempt was made to show an accord and satisfaction by an agreement, at the time of executing the deed, to reduce the amount of interest on the mortgage; but the court held that the lease should have been excepted from the covenant if the parties so intended, and that the evidence was therefore inadmissible.

Knowledge of a covenantee of an existing tenancy on land exchanged will not stand in the way of his action for a breach of the covenant against encumbrances. Edwards

by highly respectable authority, it is not, in our view, the sound rule, and is not sanctioned by the weight of authority. The true rule has thus been formulated in the Cyclopedia of Law and Procedure, vol. 11, p. 1066, as follows: "Knowledge on the part of the purchaser of the existence of an encumbrance on the land will not prevent him from recovering damages on account of it, where he protects himself by proper covenants in his deed,"—that is to say, we may add, a covenant against encumbrances. The author cites in support of the text cases from twenty-three states of the Union, including the case of Perkins v. Williams, 5 Coldw. 512. In the last case cited, decided by this court in 1868, it was held that covenant of seisin embraces a defect of title, constituting want of seisin to covenant, although such defect of title was known to covenantee at the time of the making of the covenant. "Knowledge by the covenantee of such defect will not bar his action at law for a breach of the covenant,"—citing American notes to Wallam v. Hearn, 2 Leading Equity Cases; also, Rawle, Covenants for Title, chap. 13. It is true that the matter involved in the last case was an alleged breach of covenant of seisin, and it was held that while equity would not lend its aid to rescind a covenant of seisin, although the covenantor be insolvent, where it appears that the covenantee knew of the defect of title at the time he took the conveyance, in such a case the party will be left to such remedy as he can obtain at law

v. Clark, 83 Mich. 246, 10 L. R. A. 659, 47 N. W. 112.

In Grice v. Scarborough, 2 Speers, L. 649, 42 Am. Dec. 391, it was held that evidence of a purchaser's knowledge of an outstanding lease was inadmissible in an action for breach of covenant, where the deed contained a covenant against all encumbrances, as the very object of the covenant might have been to compel the seller to extinguish the encumbrance.

So in Keith v. Day, 15 Vt. 660, an action for breach of covenant against encumbrances, the court said the fact that the purchaser knew of a claim against the land sold, consisting of an annual rent due to the University of Vermont, and insisted upon a general covenant of warranty against all claims, was the best of reasons why that claim should not be taken out of the operation of the covenant.

c. Miscellaneous encumbrances.

The rule applies to other encumbrances affecting the title. A purchaser's knowledge of a judgment lien against the land conveyed at the time of the sale will not prevent him from having his action for breach of the covenant against encumbrances. Whittern v. Krick, 31 Ind. App. 577, 68 N. E. 694.

In Long v. Moler, 5 Ohio St. 271, it was held that notice to the purchaser of a tax lien on the land purchased would not save the seller from his covenant against encumbrances. The court said that nothing was more common than for parties to make and accept covenants of this kind with a full knowledge of existing encumbrances, the covenantor relying upon his liability to discharge them, and the covenantee on a security which the covenant afforded; and the fact of a purchaser having notice of the encumbrance was the very reason of his taking a covenant within whose scope it was excluded.

In Shaffer v. Greer, 87 Pa. 370, an action for breach of implied covenant against encumbrances from the words "grant, bargain, and sell," in the deed, the defendant offered to show that the purchaser knew of a tax lien for improvements on the land conveyed; but the evidence was held irrelevant.

Notice to the covenantee of attachments on land exchanged will not stand in the way of an action for breach of a covenant against encumbrances. Gragg v. Wagner, 71 N. C. 316. The court said that, if there were known encumbrances, and it was the object of the vendor to except them from the operation of the covenant, it was always in his power to make it appear so on the face of the deed, and, if he failed to do so, it was his own folly, and he would not be allowed to repair the error at the expense of settled rules of construction which had become a part of the laws of property.

IV. Encumbrances affecting the physical condition of land.

a. Easements.

1. In general.

The only conflict in the authorities as to the effect of the purchaser's knowledge on his action for breach of covenant, as before stated, arises where the encumbrance affects the physical condition of the land. In the few jurisdictions in which this is made an exception to the general rule, the reason given is that, the encumbrance being open, visible, and notorious, the parties are supposed to have contracted with reference to it. One other reason is given in the case of public highways, which will appear in its proper place.

In Morgan v. Smith, 11 Ill. 194, it was held that a purchaser's knowledge of a previous grant of an easement to a third person did not affect the grantor's liability on his covenant against encumbrances.

A purchaser's knowledge of an easement over land at the time of the sale does not defeat his right to recover for breach of covenant against encumbrances. Teague v. Whaley, 20 Ind. App. 26, 50 N. E. 41.

In McGowen v. Myers, 60 Iowa, 256, 14 N. W. 788, a purchaser's knowledge of a

for breach of the contract. Rawle, in the second edition of his valuable work on Covenants for Title (p. 149), states the law to the same effect as follows: "In case there are known encumbrances of any kind [on property] subject to which the purchaser agrees to take, . . . these should, for the vendor's protection, be especially and expressly excepted from the covenant, as otherwise the fact of their being known to the purchaser will, according to the weight of authority, be no bar to his recovery upon it. . . . So, in a case in Connecticut, it was said: 'How can the plaintiff's knowledge destroy the effect of the defendants' covenant? Suppose the defendants had sold a farm, which they and the purchaser knew they did not own, could that knowledge destroy or affect the covenant of seisin? If not, by what rule can such knowledge impair a covenant of warranty against encumbrances? Such evidence might probably be excluded on two grounds: One, because of its immateriality, and the other, under the rule that parol evidence is not admissible to control or contradict the effect of written instruments." Rawle, Covenants for Title, p. 151. Again, on page 152, Mr. Rawle says: "It has, moreover, been said that the fact of the purchaser having notice of an encumbrance is the very reason for his taking the covenant within whose scope it is included, and that the vendor may be expected to discharge it out of the purchase money. For all these reasons, therefore, whenever the contract is

common easement in a stairway, which was a burden upon the land conveyed, was held to be no defense to an action for breach of the covenant against encumbrances; and the court said that any other holding would invade the rule against the use of parol evidence to ingraft exceptions and reservations on the deed.

A purchaser's knowledge of a right of an adjoining owner to the maintenance of a stairway, hallway, etc., affecting the land conveyed, will not spoil his action for breach of covenant against encumbrances. Myers v. Munson, 65 Iowa, 423, 21 N. W. 759.

In Ladd v. Noyes, 137 Mass. 151, evidence that the immediate covenantees knew of the existence of a drain on the land conveyed with covenant against encumbrances was held inadmissible in an action by a subsequent grantee against the original grantor.

In Medler v. Hiatt, 8 Ind. 171, a purchaser's knowledge of an outstanding right of way granted to a third person to flow the land was held not to exclude it from the operation of an express covenant against encumbrances. Something additional showing an intent to exclude it was held necessary.

In Huyck v. Andrews, 113 N. Y. 81, 3 L. R. A. 789, 10 Am. St. Rep. 432, 20 N. E. 581, the right to maintain a milldam on land conveyed with covenant against encumbrances was held to support an action for breach of the covenant, though the easement was open, visible, and notorious, and known to the grantee all the time. The court said, that the covenant against encumbrances is broken by an outstanding easement of any kind is perfectly well established by the authorities in New York, and there is no hint in any of them that the knowledge by the grantee of the existence of an easement at the time of the conveyance makes any difference. But the rule in New York as to public highways is different. See *infra*, IV. a, 2.

In Burr v. Lamaster, 30 Neb. 688, 9 L. R. A. 637, 27 Am. St. Rep. 428, 46 N. W. 1015, it was held that a covenant against encumbrances covered an obligation to pay part of the costs of a party wall, under an agreement between the grantor and an adjoining owner, whether the agreement was known or unknown to the covenantee.

In Mohr v. Parmelee, 11 Jones & S. 320, it was held that notice of a party wall entirely upon land conveyed was quite immaterial to the purchaser's right of action for breach of covenant against encumbrances, or on a question of damages.

In Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633, a purchaser's knowledge that the land conveyed was burdened with the maintenance of a fence was held not to stand in the way of his action for breach of covenant against encumbrances, as, said the court, knowledge of its existence might have been the very reason for taking the covenant.

But in Janes v. Jenkins, 34 Md. 1, 6 Am. Rep. 300, a lot was sold burdened with an easement of light which had been granted to the owner of an adjoining building. The purchaser failed in an action for a breach of the usual covenant against encumbrances. The court said that the parties, in the absence of anything to the contrary, were presumed to have contracted with reference to the then state and condition of the property, and that, if an easement to which it was subject were open and visible and of a continuous character, the purchaser was supposed to have been willing to take the property as it was at the time, subject to such burden. That being so, the covenants in the deed must likewise be construed with reference to the condition of the property at the time of the conveyance. The grantor, by his covenant, had warranted the premises as they were, and by no means had intended to warrant against an existing easement, which was open and visible to the purchaser, and over which the former had no power or control whatever. To construe the covenant to embrace such subject would most likely defeat the understanding and intention of the parties, certainly that of the grantor.

And in Memmert v. McKeen, 112 Pa. 315, 4 Atl. 542, the right to maintain an action

that the purchaser takes the land *cum onere*, the encumbrance should be expressly excepted in the deed from the operation of the covenant, in which case, of course, the covenantor will not be liable."

The general rule is that the right of action on covenant against encumbrances arises upon evidence of an encumbrance, irrespective of any knowledge on the part of grantee, or of any eviction of him, or of any actual injury it has occasioned him. 2 Greenl. Ev. § 242; 2 Washb. Real Prop. § 717. So that it is clear upon authorities plaintiff below was entitled to maintain his action at law for breach of covenant against encumbrances, notwithstanding his actual knowledge of the unexpired lease upon the premises.

The remaining question that arises is in respect of the proper rule for admeasurement of damages. The trial judge adopted as a measure of the damages the rental value of said property for the unexpired term at $8 per month. He also allowed counsel fees, amounting to $10, incurred by Browne in a misdirected action before a justice of the peace to evict the lessee from the premises. It was admitted on all hands that the lessee was rightfully in possession of the premises, and, of course, the purchaser, Browne, had no right to evict him until the expiration of his term. It may be remarked there was no authority for the allowance of counsel fees in such a case; but, on the contrary, in Williams v. Burg, 9 Lea, 455, it was expressly decided by this

for breach of covenant against encumbrances because stone steps belonging to an adjoining house occupied part of the sidewalk in front of the house sold, was denied where the purchaser had knowledge of the servitude at the time of the sale. The court said it was a physical condition of the property, notorious in its character, and affecting its value, and that, under all the authorities, it must presume the price to have been fixed with reference to it. If a recovery could be had in damages under the covenant against encumbrances, the plaintiff would be twice paid.

2. Public and private rights of way.

The application of the rule where public and private rights of way are imposed upon the land conveyed has given the courts the most trouble. Those which except highways from the covenant against encumbrances do so for the reason specified in the last-mentioned subdivision of the note, and in some instances because the highway is supposed to enhance the value of the property. The courts, however, which make no exception to the general rule, except in cases where such encumbrances are excepted by implication (referred to *supra*, I.), are the more consistent.

In Copeland v. McAdory, 100 Ala. 553, 13 So. 545, it was held that a purchaser's knowledge that part of the premises conveyed formed a portion of a public street did not stand in the way of his recovery for breach of covenant against encumbrances, as it was held that such a covenant was taken for protection against known and unknown encumbrances or defects of title.

In Hubbard v. Norton, 10 Conn. 423, evidence of knowledge of the covenantee of the existence of certain public roads across the land conveyed to him was held inadmissible in an action for a breach of the covenant against encumbrances. The court said that, if it were claimed that warranties in personal contracts did not extend to visible and known defects, it was believed that it had never been held to affect contracts of the kind in suit under hand and seal.

In Butt v. Riffe, 78 Ky. 352, a purchaser's knowledge of a private pass way over the land was held not to stand in the way of his action for damages for breach of warranty of title.

In Harlow v. Thomas, 15 Pick. 66, it was held that a purchaser's knowledge of a right to take water from a spring, and a passageway over the land to the spring, would not stand in the way of his recovery for a breach of the covenant against encumbrances, the ground being that parol evidence could not be allowed to contradict the deed. "Uncertain would be the titles of real estate," said the court, "and useless the registration of deeds, if their contents and effects were to be determined by the testimony of witnesses. They would mislead rather than guide us in a safe course."

In Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426, it was held that a purchaser's knowledge of the existence of a public highway over land purchased would not affect his right of action for a breach of covenant against encumbrances. The court said it was not a relief or discharge of the covenant to say that both parties knew that it was not true, or would not be performed when made.

In De Long v. Spring Lake Beach Improv. Co. 72 N. J. L. 125, 59 Atl. 1034, a declaration on the covenant of warranty free from encumbrances alleged that the land conveyed had been dedicated as a public park and means of access to a lake, and a plea that the dedication was known to the vendee at the date of the deed was held bad.

In Butler v. Gale, 27 Vt. 739, a covenant against encumbrances was held broken by the existence of a public right of way across the land conveyed. The court said it could make no difference whether the right was notorious or not.

In New York the highway cases form the one exception to the rule that the existence of an easement constitutes a breach of the covenant against encumbrances. Huyck v.

court that counsel fees are not taxed as costs, nor regulated as to amount by law in this state, and that sums paid therefor by the covenantee for defense in ejectment by adverse claimant are not recoverable from covenantor. This principle is conclusive of any allowance for counsel fees in this case.

Recurring to the question made touching the measure of damages, it is insisted on behalf of counsel for Browne that, when he purchased this land, he disclosed to his grantor that his purpose in buying the land was to make division, and the proof of the record establishes this contention. It further appears that, by reason of the existence of this outstanding lease, the purchaser was prevented from acquiring immediate possession of the premises; but it does not appear that this fact prevented a subdivision of the premises. On the contrary, it distinctly appears that the streets upon which this subdivision was to front, although dedicated to the public, had not been formally opened, and could not have been opened up to and including the time of the expiration of this lease. The contention on behalf of Browne is that, having thus been deprived of immediate possession of his premises, he should be entitled to recover at least the interest he was paying on the deferred payments, and should not be confined to the rental value of the premises. Plaintiff invokes the familiar rule that, when a contract is made under special circumstances and those circumstances are

Andrews, 113 N. Y. 81, 3 L. R. A. 789, 10 Am. St. Rep. 432, 20 N. E. 581.

This exception is due to a ruling in the early case of Whitbeck v. Cook, 15 Johns. 483, 8 Am. Dec. 272, an action for breach of covenant of seisin by the existence of a public highway running through the land conveyed. In this case the court said: "It must strike the mind with surprise that a person who purchases a farm through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn round on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say that such an attempt is unjust and inequitable, and contrary to the universal understanding of both vendors and purchasers. If it could succeed, a flood gate of litigation would be opened, and for many years to come this kind of action would abound. These are serious considerations; and this court ought, if it can consistently with law, to check the attempt in the bud."

In Huyck v. Andrews, *supra*, it was said that, while the deed under consideration in the last-mentioned case contained no covenant against encumbrances, the reason for the decision was reasonably applicable to such a covenant, and that since that decision it had always been understood in New York that such a covenant was not broken by the existence of a highway. This is only another way of saying that the purchaser's right of action for breach of covenant is taken away by his knowledge of the encumbrance.

In Butler v. Gale, *supra*, the argument in Whitbeck v. Cook, *supra*, was said to be more plausible than sound. The highway might, indeed, be a benefit to the land, and so might, in some sections of the country, the right (and the exercise of it) to cut wood and timber growing upon the land. But it could scarcely be claimed that such a right was no encumbrance. If the highway were no encumbrance, neither would it be if the whole land were covered by a highway or public common.

But in Harrison v. Des Moines & Ft. D. R. Co. 91 Iowa, 114, 58 N. W. 1081, it was held that a public highway is not a breach of the ordinary covenant against encumbrances, on the ground that such a highway is usually appreciative of land values.

In Hymes v. Estey, 116 N. Y. 501, 15 Am. St. Rep. 421, 22 N. E. 1087, the court, in holding that a public highway across the land conveyed was not a breach of a covenant of warranty, said that the exemption of the easement of the public in a highway from the operation of the covenant of warranty evidently rested upon the presumption arising from the opportunity furnished to the purchaser by its apparent existence or use to take notice of it, and when that was the situation the purchaser was charged with knowledge of it, and was presumed to have purchased with reference to it.

But in Rea v. Minkler, 5 Lans. 196, it was held that the purchaser's knowledge of a previous conveyance of a strip of land, from which there was no access to the highway, except over the land afterwards sold, was no defense to an action for a breach of warranty. The court said that the rule should not be enlarged so as to embrace private rights of way.

In Patterson v. Arthurs, 9 Watts, 152, a public highway was held not to be an encumbrance within the meaning of the covenant against encumbrances in a deed. The court said that, although a public highway no doubt was, in many instances, an injury instead of a benefit to the holder or owner of the land upon which it was located, and therefore tended to lessen its value in the estimation of a purchaser, yet it was fair to presume that every purchaser, before he closed his contract for his purchase of land, had seen it and made himself acquainted with its locality and the state and condition of it; and that, consequently, if there were a public road or highway open and in use upon it, he must be taken to have seen it, and to have fixed in his own mind the

communicated by one party to another, the damages resulting from breach of contract, which they would reasonably contemplate, constitute the true measure for the assessment of damages,—citing 13 Cyc. of Law and Procedure, p. 34. We are unable to concur in this contention, for the obvious reason that it does not appear from this record that the breach of covenant against encumbrances was the essential cause of preventing the opening of this land for subdivision; but, on the contrary, it appears that, if the plaintiff, Browne, had obtained immediate possession of the premises, subdivision could not have been made on account of unopened streets until after the expiration of the term of this lease. Hence it does not appear that special damages, claimed by Browne to have been within the contemplation of the parties, in fact resulted as a proximate consequence of the breach of covenant. Hence the facts herein stated do not present a case for the application of the rule invoked, but for the ordinary rule which obtains in such cases, namely, the rental value of the property during the period purchaser was kept out of possession. As stated in the Cyclopedia of Law and Procedure, in speaking of a covenant against encumbrances, that being a covenant of indemnity, the general rule for the measure of damages in actions for its breach, by reason of an encumbrance

price that he was willing to give for the land with reference to the road, either making the price less or more, as he conceived the road to be injurious or advantageous to the occupation and enjoyment of the land.

And it was held in another case that a purchaser having constructive notice from the public records of the location of a public street to be opened across the land bought could not have an action for breach of covenant against encumbrances, implied from the words "grant, bargain, and sell," contained in his deed. Ake v. Mason, 101 Pa. 17.

But a private right of way over the land conveyed was held, in Wilson v. Cochran, 46 Pa. 229, to be a breach of covenant against encumbrances, where the purchaser had no actual notice of it, but only constructive notice through the public registry.

In Barre v. Fleming, 29 W. Va. 314, 1 S. E. 731, a purchaser was held not entitled to abatement of a portion of the purchase money where the land was conveyed to low-water mark, the state having an easement in that portion of the land between low and high water mark. This was held not to constitute a breach of the covenant of warranty in the deed. The court said that the fact that a part of the lot was subject to a public easement, which was notorious and of which they had full knowledge, did not, any more than would the easement of a public road over a portion of the lot, constitute a breach of the covenant of warranty in the deed.

In Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85, the court said that the doctrine in the highway cases above mentioned did not rest upon the fact that the right was in favor of the public, but that the easement was obvious and notorious in its character, and that therefore the purchaser must be presumed to have seen it and to have fixed his price for it with reference to its actual condition at the time.

In Burbach v. Schweinler, 56 Wis. 386, 14 N. W. 449, a parcel of land was conveyed by reference to a recorded plat which showed a street or alley through the land. The purchaser thus having constructive notice of an easement, it was held not to be a breach of the covenant of the deed.

In Scribner v. Holmes, 16 Ind. 142, a legal public highway in actual use was held not to be embraced in a general covenant against encumbrances.

But in Sherwood v. Johnson, 28 Ind. App. 277, 62 N. E. 645, it was held that, in an action for breach of a covenant against encumbrances, it is immaterial whether the purchaser knew of the existence of an easement in the shape of a cart way across the land at the time of the sale, if it is not excepted from the covenant.

Section 10, chap. 30, Ill. Rev. Stat., which went into effect in 1874, provides that "no covenant of warranty shall be considered as broken by the existence of a highway upon the land conveyed, unless otherwise particularly specified in the deed." The term "highway," as used in this section, had application to public highways only. Before its adoption knowledge of the existence of a public or private way on the part of the grantee was no defense in a suit on the covenants of the deed. Schmisseur v. Penn, 47 Ill. App. 278.

But the purchaser's knowledge of the existence of a private way over land conveyed does not stand in the way of an action for breach of a covenant against encumbrances. Ibid.

3. Railroad rights of way.

A purchaser's knowledge of the right of way of a railroad across the land bought does not afford the seller an avenue of escape from his covenant against encumbrances. This is the rule in all the cases.

In Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290, it was held that one selling land encumbered by a right of way of a railroad across it, and covenanting against encumbrances, must be held to perform his covenant by its removal, or respond in damages, although both parties knew of the existence of the railroad at the time of the sale. The court said it was not a release or discharge of the covenant to say that both parties knew it was not true, or that it would not be performed when it was made. A person might warrant an article to be

existing upon the property at the time of sale, is the loss actually sustained by the covenantee, with interest. Damages, costs, and expenses, when given as a penalty for breach of covenant, mean the necessary, natural, and proximate damages resulting from such known performances, and not some remote accidental or special injury to the party to whom the right of action accrues. The author further says that, in an action for breach of covenant against encumbrances, if the encumbrance has inflicted no actual injury to plaintiff, and he has paid nothing towards removing or extinguishing it, he can only recover nominal damages. Where encumbrance is removed by the grantor without expense or trouble to grantee, the latter can recover only nominal damages,—citing volume 11, pp. 1164, 1165; Egan v. Yeaman (1897; Tenn. Ch. App.) 46 S. W. 1012.

We are constrained to hold, upon the facts disclosed in this record, that the plaintiff has sustained actual damages in being deprived of immediate possession of the premises; but, in view of all the facts, it is adjudged that he is only entitled to recover rental value of the property during the currency of the lease as compensation for the breach of covenant against encumbrances. As modified herein, the judgment is affirmed.

sound when both buyer and seller knew it was unsound. So the seller might warrant the quantity or quality of an article he sold when both parties knew that it was not of the quality or did not contain the quantity warranted. In fact, the reason the purchaser insisted upon the covenant for title, or a warranty of quality or quantity, was because he either knew or feared that the title was not good, or that the article lacked in quantity or quality. If he were perfectly assured on these questions he would seldom be tenacious in obtaining a covenant of warranty.

In Wadhams v. Swan, 109 Ill. 46, it was said that a covenant against encumbrances was broken by the delivery of the deed of land upon which a railroad had a right of way and that the purchaser acquired an immediate right of action. The fact that he knew at the time of the delivery of the deed of the defect in the title did not stand in the way of his action.

In Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731, a purchaser's knowledge of a right of way of a street railroad over the premises conveyed was held not to prevent him from holding the seller to his covenant against encumbrances.

In Quick v. Taylor, 113 Ind. 540, 16 N. E. 588, an action on a purchase-price note, a breach of covenant of warranty by the existence of a right of way of a railroad over the land conveyed was set up as a counterclaim, and was held maintainable, although the purchaser knew of the encumbrance at the time of the sale. The court said that the rule as accepted and declared by that and some other courts was, that the existence of an easement or right of way of a railroad, which excluded the owner from the beneficial use and enjoyment of the land affected thereby, constituted such an encumbrance as would support an action, even though the grantee knew of its existence at the time he received the conveyance.

In Barlow v. McKinley, 24 Iowa, 69, it was held that a purchaser having knowledge of the right of way of a railroad across the land conveyed, at the time he accepted the deed, can, nevertheless, recover upon a covenant against encumbrances.

In Gerald v. Elley, 45 Iowa, 322, it was held that, upon an exchange of land, a covenantee's right of action for breach of covenant against encumbrances was not affected by his knowledge of the existence of a right of way of a railroad across the land received.

A purchaser's knowledge of a right of way of a railroad across the premises conveyed will not defeat his right of action for breach of the covenant against encumbrances. Flynn v. White Breast Coal & Min. Co. 72 Iowa, 738, 32 N. W. 471; Williamson v. Hall, 62 Mo. 405; Whiteside v. Magruder, 75 Mo. App. 365.

b. Restrictions.

The purchaser's knowledge of restrictions in other deeds will not affect the action for breach of covenant. Constructive notice of a restriction as to the distance at which buildings might be erected from streets will not affect a buyer's right of action for breach of the covenant against encumbrances. Roberts v. Levy, 3 Abb. Pr. N. S. 311. But the court said the evidence was admissible in mitigation of damages.

In Foster v. Foster, 62 N. H. 532, however, it was held that a purchaser's knowledge of restrictions in the use of the lot conveyed would not reduce his right to recover for breach of covenant of warranty to nominal damages.

And in Doctor v. Darling, 68 Hun, 70, 22 N. Y. Supp. 594, it was held that oral evidence to show that the grantee knew of a certain restriction in a former deed as to the kind of building which might be erected on the land conveyed was inadmissible in an action for breach of covenant against encumbrances.

In Cathcart v. Bowman, 5 Pa. 317, a purchaser's knowledge of a previous conveyance of timber on the land, with privilege of cutting it for a term, was held not to affect his right of action for a breach of the covenants of the deed, including the covenant against encumbrances.

c. Timber rights and other burdens.

The general rule applies to timber rights

communicated by one party to another, the damages resulting from breach of contract, which they would reasonably contemplate, constitute the true measure for the assessment of damages,—citing 13 Cyc. of Law and Procedure, p. 34. We are unable to concur in this contention, for the obvious reason that it does not appear from this record that the breach of covenant against encumbrances was the essential cause of preventing the opening of this land for subdivision; but, on the contrary, it appears that, if the plaintiff, Browne, had obtained immediate possession of the premises, subdivision could not have been made on account of unopened streets until after the expiration of the term of this lease. Hence it does not appear that special damages, claimed by Browne to have been within the contemplation of the parties, in fact resulted as a proximate consequence of the breach of covenant. Hence the facts herein stated do not present a case for the application of the rule invoked, but for the ordinary rule which obtains in such cases, namely, the rental value of the property during the period purchaser was kept out of possession. As stated in the Cyclopedia of Law and Procedure, in speaking of a covenant against encumbrances, that being a covenant of indemnity, the general rule for the measure of damages in actions for its breach, by reason of an encumbrance

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A purchaser's knowledge of the right of way of a railroad across the land bought does not afford the seller an avenue of escape from his covenant against encumbrances. This is the rule in all the cases.

In Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290, it was held that one selling land encumbered by a right of way of a railroad across it, and covenanting against encumbrances, must be held to perform his covenant by its removal, or respond in damages, although both parties knew of the existence of the railroad at the time of the sale. The court said it was not a release or discharge of the covenant to say that both parties knew it was not true, or that it would not be performed when it was made. A person might warrant an article to be

existing upon the property at the time of sale, is the loss actually sustained by the covenantee, with interest. Damages, costs, and expenses, when given as a penalty for breach of covenant, mean the necessary, natural, and proximate damages resulting from such known performances, and not some remote accidental or special injury to the party to whom the right of action accrues. The author further says that, in an action for breach of covenant against encumbrances, if the encumbrance has inflicted no actual injury to plaintiff, and he has paid nothing towards removing or extinguishing it, he can only recover nominal damages. Where encumbrance is removed by the grantor without expense or trouble to grantee, the latter can recover only nominal damages,—citing volume 11, pp. 1164, 1165; Egan v. Yeaman (1897; Tenn. Ch. App.) 46 S. W. 1012.

We are constrained to hold, upon the facts disclosed in this record, that the plaintiff has sustained actual damages in being deprived of immediate possession of the premises; but, in view of all the facts, it is adjudged that he is only entitled to recover rental value of the property during the currency of the lease as compensation for the breach of covenant against encumbrances. As modified herein, the judgment is affirmed.

sound when both buyer and seller knew it was unsound. So the seller might warrant the quantity or quality of an article he sold when both parties knew that it was not of the quality or did not contain the quantity warranted. In fact, the reason the purchaser insisted upon the covenant for title, or a warranty of quality or quantity, was because he either knew or feared that the title was not good, or that the article lacked in quantity or quality. If he were perfectly assured on these questions he would seldom be tenacious in obtaining a covenant of warranty.

In Wadhams v. Swan, 109 Ill. 46, it was said that a covenant against encumbrances was broken by the delivery of the deed of land upon which a railroad had a right of way and that the purchaser acquired an immediate right of action. The fact that he knew at the time of the delivery of the deed of the defect in the title did not stand in the way of his action.

In Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731, a purchaser's knowledge of a right of way of a street railroad over the premises conveyed was held not to prevent him from holding the seller to his covenant against encumbrances.

In Quick v. Taylor, 113 Ind. 540, 16 N. E. 588, an action on a purchase-price note, a breach of covenant of warranty by the existence of a right of way of a railroad over the land conveyed was set up as a counterclaim, and was held maintainable, although the purchaser knew of the encumbrance at the time of the sale. The court said that the rule as accepted and declared by that and some other courts was, that the existence of an easement or right of way of a railroad, which excluded the owner from the beneficial use and enjoyment of the land affected thereby, constituted such an encumbrance as would support an action, even though the grantee knew of its existence at the time he received the conveyance.

In Barlow v. McKinley, 24 Iowa, 69, it was held that a purchaser having knowledge of the right of way of a railroad across the land conveyed, at the time he accepted the deed, can, nevertheless, recover upon a covenant against encumbrances.

In Gerald v. Elley, 45 Iowa, 322, it was held that, upon an exchange of land, a covenantee's right of action for breach of covenant against encumbrances was not affected by his knowledge of the existence of a right of way of a railroad across the land received.

A purchaser's knowledge of a right of way of a railroad across the premises conveyed will not defeat his right of action for breach of the covenant against encumbrances. Flynn v. White Breast Coal & Min. Co. 72 Iowa, 738, 32 N. W. 471; Williamson v. Hall, 62 Mo. 405; Whiteside v. Magruder, 75 Mo. App. 365.

b. Restrictions.

The purchaser's knowledge of restrictions in other deeds will not affect the action for breach of covenant. Constructive notice of a restriction as to the distance at which buildings might be erected from streets will not affect a buyer's right of action for breach of the covenant against encumbrances. Roberts v. Levy, 3 Abb. Pr. N. S. 311. But the court said the evidence was admissible in mitigation of damages.

In Foster v. Foster, 62 N. H. 532, however, it was held that a purchaser's knowledge of restrictions in the use of the lot conveyed would not reduce his right to recover for breach of covenant of warranty to nominal damages.

And in Doctor v. Darling, 68 Hun, 70, 22 N. Y. Supp. 594, it was held that oral evidence to show that the grantee knew of a certain restriction in a former deed as to the kind of building which might be erected on the land conveyed was inadmissible in an action for breach of covenant against encumbrances.

In Cathcart v. Bowman, 5 Pa. 317, a purchaser's knowledge of a previous conveyance of timber on the land, with privilege of cutting it for a term, was held not to affect his right of action for a breach of the covenants of the deed, including the covenant against encumbrances.

c. Timber rights and other burdens.

The general rule applies to timber rights

on the lands conveyed, ice-cutting privileges, and the right to remove buildings. But one case appears to be in conflict with this view.

In Spurr v. Andrew, 6 Allen, 420, the fact that a grantee knew of the right of a former owner of the land conveyed to cut timber from it was held not to bar him from recovery in an action for breach of covenant against encumbrances.

But in Safford v. Annis, 7 Me. 166, the owner of land sold growing timber upon it, covenanting that the purchaser should have seven years in which to remove it. He then sold the land to a third person without reserving the timber. In an action by the purchaser of the timber for a breach of covenant, the court said that, if the purchaser of the land had notice of the rights of the purchaser of the timber, it would have been as effectual as an exception in the deed. "And," continued the court, "as the plaintiff contends that the covenant was broken by the conveyance made by the defendant, he should prove, also, that the purchaser had no notice, in order to render the conveyance a breach of the covenant."

In Weiss v. Binnian, 178 Ill. 241, 52 N. E. 969, Affirming 78 Ill. App. 292, it was held that a seller was not released from his covenant to convey land free from encumbrances by the purchaser's knowledge of a previous conveyance of an ice-cutting privilege upon the land sold.

In Van Wagner v. Van Nostrand, 19 Iowa, 422, it was held that a purchaser's knowledge of a tenant's right under a contract with the covenantor to remove a stable from the land conveyed would not affect the operation of the covenant. "For," said the court, "in an action of covenant the deed governs; and in such an action by the grantee against grantor the latter cannot, in order to defeat the operation of the covenant, establish by parol the grantee's knowledge of an encumbrance or defect in the title, or by parol ingraft upon the deed exceptions and reservations not therein mentioned."

V. Illustrative cases.

The following illustrative cases have been taken to show how the rule has been applied in case of other covenants than those against encumbrances. No distinction seems to be made.

In Abernathy v. Boazman, 24 Ala. 189, 60 Am. Dec. 459, a purchaser's knowledge of an adverse claim of title at the time of the sale was held not to relieve the seller from liability to make good on his covenants as to title, as the latter assumed the burden of extinguishing all paramount titles so as to make that which he attempted to convey available.

In Smith v. Eason, 46 Ga. 316, a bond for title covered a small piece of land which had been sold by the obligor. The court said the fact that the obligee knew the land had been sold was not a reply to the express words of the bond, unless it appeared there was a mistake in the description, as men often made warranties knowing of the defects in the title, the very object of the warranty being to meet known defects.

In Foute v. Elder, 109 Ga. 713, 35 S. E. 118, the court said that whenever one contracts to sell land embraced within certain boundaries, and it afterwards turns out that he cannot make title to all of the land embraced within such boundaries, he is liable to the vendee for the deficiency, whether the vendee knew or ought to have known that the vendor had, before making the bond, disposed of a portion of the tract; as the vendee has a right to rely upon the warranty or the contract obligation of the vendor, and to demand compliance with the contract as expressed in the deed or bond for titles.

McCall v. Wilkes, 121 Ga. 722, 49 S. E. 722, was an action on a note in which the defendants sought to set off the value of certain timber on the land, the title to which was warranted in the conveyance to them, alleging that the warranty as to this timber had failed. It was held not to be a good rejoinder that the grantees had knowledge of the outstanding paramount title to the timber before the execution of the deed, under Civil Code, § 3615, *supra*, II.

In Wadhams v. Innes, 4 Ill. App. 642, an action for breach of covenant of seisin, the court said the fact that either or both parties know at the time the covenant is made that the grantor has no title in a part, or in any of the land, does not affect the right to recover damages for its breach.

In Bever v. North, 107 Ind. 544, 8 N. E. 576, in an action for breach of covenant of title, it was held that the seller could not prove that the buyer knew of a wife's third interest in the property, and agreed to assume and pay for the encumbrance.

A purchaser's knowledge of defect of title at the time of the sale will not relieve the seller from making good on his warranty of title. Batterton v. Smith, 3 Kan. App. 419, 43 Pac. 275.

In Sparrow v. Smith, 63 Mich. 209, 29 N. W. 691, an action to enjoin suit for breach of covenant of seisin, the court said the fact that the defendant, at the time of his purchase, knew of the insufficiency or invalidity of complainant's title, was not an available defense to the action on the covenants, either at law or in equity. In that action the deed governed, and the grantor, in order to defeat the operation of the covenant, could not, in the absence of fraud, establish by parol the grantee's knowledge of an encumbrance upon the land conveyed, or a defect in or utter want of title, or by parol proof ingraft upon the deed exceptions and reservations not therein mentioned.

But in Sanders v. Rowe, 20 Ky. L. Rep. 1082, 48 S. W. 1083, an action on a promissory note given in part payment of the purchase price of certain land, the defendant counterclaimed for damages for breach of

covenant of warranty on the ground that the seller had previously sold mineral rights in the land. The court said that there was no breach of the covenant of warranty, as it appeared that the purchaser had full knowledge of the sale of the mineral rights at the time he took his deed.

And in Smith v. Hughes, 50 Wis. 620, 7 N. W. 653, a purchaser was held presumed to have purchased with full knowledge of railways or highways across the land, so that they constituted no breach of the covenants of title of the deed; following the rule in the public highway cases. The breach of the covenant was set up in this case as a counterclaim against the seller.

In Eller v. Moore, 48 App. Div. 403, 63 N. Y. Supp. 88, the court held that the purchaser's knowledge of the existence of a private right of way across land conveyed would not deprive him of a right of action for a breach of covenant of quiet enjoyment.

In Martin v. Martin, 12 N. C. (1 Dev. L.) 413, notice of an adverse claim was held not to defeat an action for breach of covenant of quiet enjoyment. The purchaser was also held entitled to substantial damages for breach of the covenant.

But in Neeson v. Bray, 46 N. Y. S. R. 914, 19 N. Y. Supp. 841, a breach of covenant of quiet and peaceable possession was alleged because of the fact that an act of the legislature had restricted the use of the lands; it was held that the action was not maintainable because of the fact that the statute was public, the purchaser had knowledge of it, and must be considered to have contracted with reference to it.

H. C. S.

WEST VIRGINIA SUPREME COURT OF APPEALS.

WHEELING & ELM GROVE RAILROAD COMPANY, Appt.,
v.
TOWN OF TRIADELPHIA et al.

(— W. Va. —, 52 S. E. 499.)

Ordinance—right in street.

1. An ordinance, passed by the council of a town, granting to a street railway company the right to lay its track and operate its railway in the streets of the town, and accepted by the railway company, constitutes a contract between the town and such company, vesting title to such right or easement in it, unless the ordinance contains conditions precedent, compliance with which is requisite to the vesting of title.

Same—forfeiture.

2. Such right may be forfeited and lost by failure to comply with subsequent conditions, and, if the ordinance expressly provides for forfeiture as the penalty of noncompliance with conditions specified in it, substantial performance of the contract as a whole constitutes no answer to a proceeding to forfeit for failure to comply with such conditions, however slight their relative importance may be. The question of materiality is, in such case, withdrawn from the courts by the stipulations of the contract.

Same.

3. A street-railway license or privilege in a street may be forfeited for failure to lay planks of prescribed dimensions along the rails of its track in front of improved property, if the ordinance expressly gives the right to forfeit it for such cause.

Relief from forfeiture.

4. Equity will relieve from forfeitures for nonperformance of covenants other than those for the payment of money, arising out of accident, mistake, or surprise, and in the absence of wilful and deliberate refusal to perform, when no pecuniary injury has resulted to the covenantee and the wrong done is easily remediable; but such power of relief is discretionary, and will not be exercised unless the delinquent covenantor is able and willing to immediately perform the covenant.

Same.

5. Equity will not permit the enforcement of a forfeiture in an inequitable and oppressive manner, nor a perversion thereof to purposes other than those for which the power of forfeiture has been reserved.

Same—oppressive forfeiture.

6. In the exercise of such power, under an ordinance of a municipal corporation prescribing notice and specification of cause as a necessary preliminary step, the officers of such corporation must deal fairly, openly, and frankly with the party whose rights they attempt to take away, and abstain from such conduct as will work a surprise

Headnotes by POFFENBARGER, J.

Case Note.—Municipal declaration of forfeiture of street franchise or privilege for breach of conditions as a judicial determination.—It does not expressly appear from the opinion in the foregoing case that the repeal of the ordinance granting the franchise or privilege to the railway company was based upon a finding of the existence of a cause of forfeiture within the reservation of the original ordinance. It does, however, appear that the repeal was, as required by the terms of that ordinance, preceded by a notice; and the remark in the opinion that, "it is suggested that inquiry and determination as to the cause or ground of forfeiture is judicial," would seem to indicate that there was such an inquiry and determination. If so, the position taken by the court, that the repeal and revocation of the privilege or franchise was a mere exercise of the police power and was not of a judicial character, appears to be opposed by the case of North Jersey Street R. Co. v. South Orange Twp. 58 N.

upon him. Their conduct is governed by substantially the same rules and principles as apply to proceedings by private persons under similar circumstances. In order to be inequitable and oppressive, their conduct need not be actually fraudulent. If in equity and conscience it is oppressive or lacking in fairness, equity will relieve, however honest and sincere the parties attempting to forfeit may have been.

Same—discretion of court.

7. The discretion of the court in such case is a sound legal discretion, subject to review, and the appellate court will reverse the action of the trial court when, in its opinion, relief has been improperly denied.

Municipal declaration of forfeiture—effect.

8. A declaration of forfeiture of a street railway privilege in a street by the council of a town, effected by repeal of the ordinance by which the privilege was granted, pursuant to a reservation of power so to do, for cause and after notice, has not the force and effect of a judicial determination of the existence of cause for forfeiture, and does not preclude a resort to the courts by the railway company for vindication of its rights. After such repeal, pursuant to notice, the railway company may, by injunction, prevent the town authorities from removing or disturbing its track, if no cause of forfeiture existed, or the circumstances shown are such as to call for the exercise of equity jurisdiction to relieve from forfeiture. In so far as the decision in Davis v. Davis, 40 W. Va. 464, 21 S. E. 906, imports the contrary of the foregoing proposition, it is re-examined and disapproved.

Same—police power.

9. The action of municipal authorities in granting and revoking privileges and licenses in highways is the exercise of delegated police power, and is not judicial in character.

Certiorari—when proper.

10. Only judicial action is reviewable by the writ of certiorari under §§ 2 and 3 of

J. Eq. 83, 43 Atl. 53, holding that a proposed ordinance reciting various matters in which a street railway had failed to fulfil and perform certain conditions contained in the original ordinance granting the privilege of laying and maintaining its railway in the street, and declaring in consequence that the rights and privileges granted by such ordinance were determined and at an end, and that the line of the road be sold at auction to the highest bidder,—was of a judicial character, and therefore not within the rule which prevents a court of equity from enjoining the adoption of a municipal ordinance of a legislative or executive character. The adoption of the proposed ordinance in question was accordingly enjoined. The court said in support of its decision: "It [proposed ordinance] does not assume or pretend to prescribe a rule of civil conduct, or to revoke or repeal a previous grant, but it is wholly and entirely judicial in its character. It ascertains and finds certain facts which are recited. It then proceeds to declare that, as the result and by the force of those facts, the rights and franchises vested in the complainant corporation by the previous ordinances are at an end." The case of Cape May & S. L. R. Co. v. Cape May, 35 N. J. Eq. 419, was distinguished upon the ground that the proposed ordinance in that case the adoption of which the court refused to enjoin merely purported to revoke and repeal a previous grant of a franchise. The fact that the ordinance involved in WHEELING & E. G. R. Co. v. TRIADELPHIA in form repealed the former ordinance granting the franchise or privilege, instead of merely declaring, as in North Jersey Street R. Co.'s Case, that the rights granted by the previous ordinance were determined and at an end, is hardly sufficient to distinguish the two cases, assuming that the repeal was based upon a finding of facts constituting a cause of forfeiture.

In Jersey City, H. & P. Street R. Co. v. Passaic, 68 N. J. L. 110, 52 Atl. 242, the New Jersey supreme court upon certiorari to review a municipal ordinance attempting to revoke street railway franchises for failure to comply with certain conditions, held the same void because the record did not show that any notice was given, or opportunity to be heard afforded, to the companies interested. It seems to have been assumed that certiorari to review the revoking ordinance was the proper remedy; and this case therefore seems to be opposed to the position taken in WHEELING & E. G. R. Co. v. TRIADELPHIA.

It will be observed that the argument in support of the decision in the WHEELING CASE proceeds upon the theory that the power to repeal a franchise or privilege in the use of the street, like the power to grant the privilege or franchise in the first instance, pertains essentially to the police power, and that its character in that respect is not changed by the fact that it is exercised under a form of procedure having some of the usual characteristics of a judicial proceeding. It is difficult to perceive how cases like Asheville Street R. Co. v. Asheville, 109 N. C. 688, 14 S. E. 316, and Easton S. E. & W. E. Pass. R. Cc. v. Easton, 133 Pa. 505, 19 Am. St. Rep. 658, 19 Atl. 486,—which the court apparently relies on,—lend any support to its fundamental proposition that the repeal or revocation of the franchise or privilege is a police, and not a judicial, function. In neither of those cases was there an express grant or reservation to the municipality of the power to declare a forfeiture or revoke the franchise or privilege for breach of conditions; and the point made by the decisions is that, in the absence of such grant or reservation of power, the municipality had no right to take the law in its own hands and determine that the franchise or privilege had been forfeited, but that it should have proceeded to have a forfeiture declared by a court, and until it had pro-

chapter 110 of the Code of 1899. The scope of the writ is not altered by the statute in respect to the nature of the proceedings for the review of which it may be had. In this respect it remains as it was by the common law.

Cumberland road—county and municipal jurisdiction.

11. Consent of the board of commissioners of Ohio county to the operation of a street railway on and over the Cumberland road in said county of Ohio does not confer authority upon the railway company holding such permit to construct and operate its railway on and over such portion of said road as lies within the limits of the town of Triadelphia, in said county, without the consent of the authorities of said town.

(December 12, 1905.)

APPEAL by plaintiff from a decree of the Circuit Court for Ohio County in defendants' favor in a suit to enjoin interference with plaintiff's rails. Reversed.

The facts are stated in the opinion.

Mr. **Henry M. Russell**, for appellant:

The franchise became, not a mere license, but a contract right.

Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 739, 50 L.R.A. 142, 35 S. E. 994.

The forfeiture of such a franchise should not be put into effect until a proper judicial determination.

Hornbrook v. Elm Grove, 40 W. Va. 543, 28 L.R.A. 416, 21 S. E. 851.

Nor unless some substantial reason exists for enforcing it.

People v. Broadway R. Co. 126 N. Y. 29, 26 N. E. 961; Booth, Street Railways, § 45.

Messrs. **Howard & Handlan** also for appellant.

Messrs. **Alfred Caldwell** and **Nelson C. Hubbard** for appellees.

cured such a declaration, it would, irrespective of the actual existence or nonexistence of a cause of forfeiture, be enjoined from tearing up the track or otherwise interfering with the rights of the company under the franchise or privilege. The inference from these cases, therefore, seems to be that the revocation of such a franchise or privilege for breach of conditions does not pertain to the police power, but is a judicial function. It is true that these cases held, as does the WHEELING CASE, that the action of the municipality with respect to the revocation of the franchise or privilege was not binding or conclusive so as to deprive a court of equity of jurisdiction; but in the WHEELING CASE the decision is upon the ground that the action of the municipality in this respect, though within the authority expressly reserved to it, was not of a judicial character, whereas in the other cases the decisions were upon the ground that the power to revoke being of a judicial character, and not having been expressly conferred upon or reserved to the municipality, the attempted exercise of such power by the municipality not only did not oust the jurisdiction of the court, but was of no legal effect whatever. Perhaps it does not necessarily follow from these cases that the power to revoke the privilege or franchise, or to declare a forfeiture thereof for breach of conditions, is a judicial function, even when exercised by the municipality under an express grant or reservation of such power; but it is difficult to understand how they can properly be regarded as authority for the proposition that a municipality, in exercising such granted or reserved power, performs a police function, and not a judicial function.

Upon the authority of those cases, it is stated in Booth, Street Railways, § 49, that the municipal authorities cannot legally substitute their arbitrary judgment for a judicial declaration of forfeiture, and that, if they threaten to destroy or remove the railway, or to interfere with the relaying of tracks previously torn up by them, without first obtaining a judicial determination of their rights in the proper forum, they may be enjoined. To the same effect is Akron, B. & C. R. Co. v. Bedford, 6 Ohio N. P. 276.

In Stewart v. Ashtabula, 98 Fed. 516, Taft, J., held that the owner of a street railway could not maintain an action for damages against a municipality for the removal of its tracks, where the ordinance granting the franchise reserved the right to make such removal in case of the failure of the company to comply with certain conditions, and it had been adjudged, in an action in the state court, though after the removal, that the company had not complied with such conditions. He said, however: "It may be (I do not find it necessary to decide) that, even in the face of these strong provisions of the ordinance for the benefit of the village, the defendant [the village] should have applied to a court to adjudge the existence of a ground of forfeiture." The decision on the above point was approved by the circuit court of appeals in Stewart v. Ashtabula, 47 C. C. A. 21, 107 Fed. 857, though the case was reversed on another ground.

Where, however, a street railway company fails to comply with conditions subsequent the city may, if that power is reserved by the ordinance, terminate the contract by repealing the ordinance and by notifying the company to remove its tracks, and for that purpose no previous judicial determination is required. Belleville v. Citizens' Horse R. Co. 152 Ill. 171, 26 L.R.A. 681, 38 N. E. 584. The court, in the last case, did not pass upon the question whether the action of the municipality in repealing the ordinance for breach of condition was judicial in its nature so as to be binding upon the parties in a suit or proceeding in a court of law or equity.

Poffenbarger, J., delivered the opinion of the court:

The council of the town of Triadelphia, in Ohio county, having repealed the ordinance under which the Wheeling & Elm Grove Railroad Company had been operating its street railway in said town, and caused a part of its track to be taken up, said railroad company obtained a temporary injunction, inhibiting the town, its officers, and agents from interfering with its road. Thereupon the town answered the bill, alleging forfeiture of the privileges granted by the ordinance, because of failure and refusal to observe and perform conditions, and praying, by way of affirmative relief, that the railroad company be enjoined and restrained from further operating its road in said town and compelled to remove from the streets thereof its poles, wires, rails, ties, etc., and restore the street and a certain bridge, mentioned in the bill, to the condition in which they were before the construction of the road, unless the consent of the town to the further occupation and use of the street for the purpose aforesaid should be obtained. On the hearing, the injunction was dissolved, and the cross-relief asked for by the town granted. From this decree said company has appealed.

The ordinance was passed on the 31st day of March, 1896, granting to the Wheeling Suburban Railway Company, its successors and assigns, the privileges now in question, and that company subsequently assigned the same to said Wheeling & Elm Grove Railway Company. Under it, the road was constructed within the time required. The forfeiture is not for nonuser of the franchise or privilege, but for failure to comply with certain conditions imposed by § 4 of the ordinance in the following clauses thereof: "Said railway company shall so construct its tracks upon the roads or streets hereinbefore mentioned that at any place any of its tracks may cross any road or street within said town, the said railway company shall at every such place lay its track or tracks on a level with the surface or plane of said road or street at the place of such crossing, and shall pave with white-oak planks not less than 2 inches thick between all its rails crossing such road or street, and shall at all times hereafter keep and maintain the said paving or planking in good order and repair to the satisfaction of the council of said town. Said company shall also lay and maintain a white-oak plank 2 inches thick and 8 inches wide on each side of each rail along its track in front of all improved property." To enforce compliance with these conditions and others inserted in the ordinance, § 15 of that instrument provided as follows: "Should the Wheeling Suburban Railway Company fail to fulfil and perform the conditions of this ordinance, or comply with the requirements thereof upon them, or do those things they are by this ordinance prohibited from doing, the said town may give said Wheeling Suburban Railway Company notice of its intention to repeal this ordinance and revoke and annul all the rights, powers, and privileges by this ordinance given by said town to said Wheeling Suburban Railway Company; and stating in such notice in what respect said Wheeling Suburban Railway Company have failed to fulfil and perform the conditions of this ordinance or to comply with the requirements thereof upon them, or wherein they have done any of those things they are by this ordinance prohibited from doing. At any time after three months from the service of such notice upon the president or secretary of said Wheeling Suburban Railway Company the council of said town may repeal this ordinance and revoke and annul the rights, powers, and privileges by this ordinance given by said town to said Wheeling Suburban Railway Company; provided, however, that, if the said Wheeling Suburban Railway Company before such repeal and revocation and annulling shall fulfil and perform the condition or conditions of this ordinance said notice alleges they have failed to fulfil and perform, and shall comply with the requirement or requirements of this ordinance said notice alleges they have failed to comply with, and shall cease at once on receipt of said notice to do any of those things that they are prohibited from doing by this ordinance which said notice states they have been doing, said council shall not have the power to repeal and revoke and annul the rights, powers, and privileges thereby given by said town to said Wheeling Suburban Railway Company." Notice dated August 28, 1901, specifying, as breaches of conditions, elevation of the tracks above the level of the streets at the crossings of Monroe street and Clay street, failure in part to pave the crossing at Clay street, and failure to lay planks along the rails in front of lots 24 to 33, inclusive, except a short strip at the corner of lot 30, was served upon the railway company. Just a few days before the expiration of three months from the date of service of said notice, said company caused its track to be lowered at the crossings and some plank to be put down at the places specified in the notice; but the plank pavement at the street crossing did not extend entirely across the street, and the planks laid along the tracks in front of improved property were not of the width required by the ordinance. Many of them were only 5 inches wide, and, in one place, for a distance of about 90 feet, none at all was put down, and

the crossing at Monroe street was left too high by about 5 inches. On the 7th day of December, 1901, more than three months after the date of the service of the notice, the council of the town repealed the ordinance, reciting in the repealing ordinance the giving of the notice and noncompliance with its requirements. The failure to comply strictly with the requirements of the ordinance is not denied by the railway company, but it claims to have substantially complied with them, and also that, prior to the repealing of the ordinance, its agents applied to officials of the town to know whether there was any objection to the manner in which the work had been done, and expressed a willingness to remedy any defects in it which might be suggested, and no objection was made. But this seems to have occurred after the repeal of the ordinance. The railway company's own witness says it was afterward.

In addition to its defense of substantial compliance, the railway company relies upon certain ordinances adopted by the commissioners of Ohio county, granting to it the privilege of operating its railway on and over certain portions of what is known as the Cumberland road, including that portion thereof which runs through the town of Triadelphia, and on which said railway is located through said town. This road was originally constructed and owned by the government of the United States. In 1835 the government ceded to the several states through which said road was located the care and control of the portions thereof lying respectively within said states, reserving to itself certain rights in them. By this compact it relieved itself of the burden of maintaining said road and cast it upon the states; but it retained the right to use the same free of charge for any governmental purpose. Searight v. Stokes, 3 How. 151, 11 L. ed. 537; Neil v. Ohio, 3 How. 720, 11 L. ed. 800; Achison v. Huddleson, 12 How. 293, 13 L. ed. 993. Upon the formation of the state or West Virginia, that portion of said road lying within this state passed under its control, and, by statute, the management thereof was intrusted to the board of public works of the state. By an act of the legislature, passed on the 13th day of February, 1890, the care and control of so much of said road as lies within the county of Ohio, together with all the rights, powers, and duties in relation thereto, belonging to the board of public works of this state under existing laws, including power to collect tolls on said road, was committed to the board of commissioners of said county, as soon as said board should pass an ordinance agreeing to accept the trust. Soon afterwards, such ordinance was passed. It is contended now that the town of Triadelphia has no control of that part of said road which lies within its limits, and that the railway company is entitled to the use and occupation thereof, for the purposes of its road, under the ordinances passed by said board of commissioners. On the other hand, it is urged that the act of the legislature of Virginia, passed on the 4th day of February, 1840, incorporating the town of Triadelphia, lying on both sides of said road, and conferring upon it, among other things, the power "to regulate and graduate the streets and alleys, and to pave the same if deemed necessary," vested in said town all the right and title to, and power over, so much of said road as lies within its territory that the state of Virginia then had. Counsel for the appellees rely also upon § 5 of article 11 of the Constitution of this state, which provides that "no law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town, or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad." The status of so much of the national road as lies within the territory of the town of Triadelphia depends upon the statutory provisions. Chapter 56 of the Code, concerning the board of public works and tolls on the Cumberland road and other turnpikes, provides for the maintenance of said road and turnpikes, by means of the exaction of tolls; and this, as to said Cumberland road, was done by the board of public works of the state, until its care and control were transferred to Ohio county by the act hereinbefore mentioned. Section 21 of chapter 39 of the Code provides that the interest which belonged to the state on the 1st day of July, 1868, in any road or bridge or public landing lying wholly or in part within the limits of any county is transferred to and shall continue vested in such county, so far as such road, bridge, or public landing is within the said county. But the Cumberland road is expressly excepted from the operation of said section. Section 31 of chapter 43 of the Code of 1899 says: "The roads, bridges, and public landings transferred by the state to the several counties in which they are situated shall hereafter be regarded as county roads, bridges, and landings." Section 28 of chapter 47, relating to cities, towns, or villages, says: "The council of such city, town, or village shall have power therein to lay off, vacate, close, open, alter, curb, pave, and keep in good repair, roads, streets, alleys, sidewalks, cross walks, drains and gutters, for the use of the public, or any of the citizens thereof, and to improve

and light the same, and have them kept free from obstructions on or over them." Section 33 of chapter 43 of the Code of 1899 provides that no road or landing shall be established by the county court of a county upon or through any lot in any incorporated village, town, or city without the consent of the council thereof.

Aside from the question of title to the fee in public roads lying within incorporated cities and towns, courts everywhere incline to the view that such corporations have certain rights and powers respecting such public roads. When there are no express statutory provisions limiting the powers of the county authorities over such portions of the public roads, and the General Statute or the charters of cities and towns confer power to lay out, open, and regulate streets, alleys, and walks, portions of the road lying within the city or town are generally held to be under the control of the authorities thereof so far as to enable them to keep the same free from obstruction and in good condition and order by improving them. State, Parker, Prosecutor, v. New Brunswick, 30 N. J. L. 395; Quinn v. Paterson, 27 N. J. L. 35; State v. Passaic Turnp. Co. 27 N. J. L. 217; State, Townsend, Prosecutor v. Jersey City, 26 N. J. L. 444. These are cases of turnpikes and plank roads owned by private corporations. Dillon on Municipal Corporations, vol. 2, 4th ed. § 676, says: "Throughout the United States, township, county, or other local authorities have the general control and supervision over the ordinary public highways, while in incorporated towns and cities this power, as respects streets, is usually conferred upon the corporate authorities. When the jurisdiction and power in the one is excluded by the charters of the other has given rise to nice and difficult questions of construction, depending upon the supposed intention of the legislature, to be gathered from the whole course of legislation on the subject in the particular state, and with reference to the particular municipality." At § 677 the same work says: "So, by statute in Texas, the counties had general authority to keep in repair the public highways therein, and an incorporated town, by its charter, had the right to improve its streets and alleys; and the question arose whether the county or town authorities had power to keep in repair streets or highways within the corporate limits of the town. The court, to prevent conflict of jurisdiction, held that the town had exclusive control of the streets and highways therein. So it is held in Indiana, that the General Statutes of the state in relation to 'public highways' do not apply to the streets and alleys of an incorporated town or city." In Norwich v. Story, 25 Conn. 44, such provisions in the charter of a city, read in connection with the general laws conferring powers upon the county authorities, were held to give concurrent jurisdiction over the highway within the city to city and county authorities.

The status of the Cumberland road seems to be somewhat different from that of the ordinary county road. The legislature has dealt with it in a manner different from that in which it has dealt with other roads. Whether the law contemplated its maintenance throughout from tolls, until its transfer to the authorities of Ohio county, is not clearly indicated. It would seem, however, that, in order to effectuate the purpose of its maintenance, the legislature must have necessarily retained the power of maintenance through the corporations situated on it. No express authority is conferred upon them to close or alter it, nor is any duty laid upon them to maintain it according to any particular standard. Hence, if the state did not retain the power to keep it up, the portions lying within the town might have become, or might yet become, so dilapidated and out of repair as to render the whole road practically useless. Before the cession of the road to the state, the government expended upon it large amounts of money, and stipulated for the use of the road for governmental purposes, without liability for future expenses or cost of keeping it in repair. By allowing the road or any part of it to fall into decay, the state might become guilty of recreancy to the trust confided in it by the national government. On the other hand, as the towns have the power to make, construct, and keep in repair their roads and streets, it seems reasonable to say they might improve, repair, and maintain such portions of said road as lie within their territories. This is not at all inconsistent with the rights of the state or county. Though not having full and complete control so as to enable them to impair the efficiency of the road as a state road, they might well have the right and power, consistently with the interests of the state, to aid in keeping it in repair and to add to the work done by the state such additional work and expense as their authorities might deem expedient in order to put such portions of it in a higher and better state of repair and condition than other portions thereof. As to additional burdens upon the road, a reasonable view would be that the state, without the consent of the authorities of the town, would have no right or power to place upon that portion of it lying within the town anything in the nature of an obstruction or additional burden. The town, when incorporated, accepted the road as a part of its

territory without any such burden, and the Constitution withholds from the legislature power to grant the right to construct a street railroad within any city or incorporated village, without the consent of its authorities. And the state may have the power to say, on the other hand, that the town shall not impair the efficiency and usefullness of its road by authorizing the construction of a street railway upon it. The statutes and constitutional provisions must be harmonized, if possible, so that all may have effect. By giving this community of interest in so much of the road as lies within the town, repugnancy is avoided, and the rights of both the state and the town protected. Part of the Cumberland road was taken into the town by express legislative authority. The town accepted it as a part of its territory in its then condition. No change occurred in it prior to the adoption of the present Constitution, and that instrument denies to the legislature the power to authorize the invasion of any town by a street railroad without its consent. As the legislature has no power to do this in any case, it could not authorize the board of commissioners of Ohio county to grant such a privilege within the town. In view of this situation, the respective rights of the town, and of the state or Ohio county, the Wheeling Suburban Railway Company took the precaution to obtain grants of privileges in that part of the road lying within the town of Triadelphia from both the board of commissioners and the council of said town. Whether, as to that portion of the road, it was necessary to have authority from said board of commissioners, it is not necessary to decide, but we are clearly of the opinion that it was necessary to have authority to use it from the council of the town of Triadelphia. The grant from the town of permission to use said Cumberland road and continuance thereof being conditions precedent to its rights to use it, two questions arise: First. Assuming that there has been no forfeiture of the franchise granted, has the railway company sought the proper remedy for the vindication of its rights? The council of the town, by repealing the ordinance, has declared a forfeiture. What is the effect of that action? What is the character of the function performed in declaring the forfeiture? Is it legislative, executive, or judicial? Second. Does the admitted failure of the railway company to comply with the conditions mentioned operate a forfeiture, independently of the force and effect of the repeal of the ordinance?

No objection to the jurisdiction in equity or the remedy invoked has been raised by counsel. Both sides ask an adjudication upon the merits. But it has been suggested here, in consultation, that the action of the council in repealing the ordinance is judicial and is binding upon the parties until reversed by some appellate procedure, in consequence of which resort cannot be had to a court of equity as to any matter involved in, or governed by, this action of the council. If this be true, the remedy is certiorari, under the statute. Code 1899, chap. 110, § 2. But is it true? This depends upon the nature of the proceeding, as well as the nature and scope of the remedy by certiorari. That writ is an extraordinary common-law remedy, except in so far as it has been altered by statute. Originally, it could be invoked only to review judicial proceedings, and to correct errors of law apparent on admitted and established facts. 4 Enc. Pl. & Pr. p. 11. "The office of a writ of certiorari is to bring to a superior court for review the record and proceedings of an inferior court, an officer, or a tribunal exercising judicial functions, to the end that the validity of the proceedings may be determined, excesses of jurisdiction restrained, and errors, if any, corrected. It is not essential, however, that the proceedings should be strictly and technically judicial in the sense in which that word is used when applied to courts of justice, but it is sufficient if they are quasi judicial. It is enough if they act judicially in making their decision, whatever may be their public character." 6 Cyc. Law & Proc. p. 750; Poe v. Marion Mach. Works, 24 W. Va. 517. Our statute (Code 1899, chap. 110, §§ 2, 3) concerning the remedy by certiorari is broad in its language, and, upon a hasty reading thereof, would seem to import that the writ is applicable to all proceedings before county courts, municipal councils, justices, and other tribunals; but a careful examination of it leads to the conclusion that it does not broaden the scope of the writ as to the class of cases to which it applies. It says the writ shall lie in every case, matter, or proceeding before a county court, council, a city, town, or village, justice, or other inferior tribunal, in which there has been a judgment or final order, or a judgment or order abridging the freedom of a person. What is the meaning of the words "every case, matter, or proceeding?" Are they to be taken literally? Why did the legislature use these terms? A very good reason is that proceedings reviewable by writ of certiorari are such in their very nature as can be described only by the use of general terms. They are proceedings not according to the course of the common law, but anomalous proceedings, various in number and unusual in kind. Common-law proceedings are embraced under the designations of the forms of action.

such as assumpsit, debt, covenant, trespass, trespass on the case, ejectment, and others. For all these, the writ of error is the process for review. In chancery causes the remedy is by appeal. But proceedings which do not fall within these classes of cases are indefinable by nature and must be referred to in general terms. This difficulty was experienced by the legislature, and the section under consideration bears evidence of it on its face, in the description of the classes of cases to which certiorari was applicable before the passage of that statute. It says: "In every case, matter, or proceeding in which certiorari might be issued as the law heretofore has been." Those were cases to which common-law certiorari was applicable, and they are described in the exact language of the new statute. Prior to the passage of chapter 153, §§ 2, 3, pp. 487, 488, Acts 1882, the present statute, we had no similar one on the subject, and the writ had only its common-law force. This statute had other purposes than an increase in the classes to which the writ might apply. Prior to its enactment this mode of review was exercised before final judgment. This the statute cut off by saying the judgment or order must be final, unless it is one abridging the freedom of a person. It limited the right to review in civil cases before justices to those in which the amount in controversy, exclusive of interest and costs, exceed $15. Prior to the passage of any statute on the subject, the reviewing court could only consider questions of law, such as want of jurisdiction in the inferior court and deviations from the law in pronouncing judgment upon admitted or established facts disclosed by the record. It would not determine questions of fact, nor consider the evidence. This statute provides that, upon the hearing, the circuit court, in addition to determining such questions as might have been determined as the law was before its passage, shall review the judgment, order, or proceeding of the inferior court or tribunal upon the merits, determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require. No decision of this court has ever construed the statute as giving the right to review by certiorari as to cases, matters, or proceedings nonjudicial in their nature. It goes to a county court in cases of election contests. Cunningham v. Squires, 2 W. Va. 422, 98 Am. Dec. 770; Burke v. Monroe County, 4 W. Va. 371; Dryden v. Swinburn, 15 W. Va. 234; State ex rel. Thompson v. McAllister, 38 W. Va. 485, 24 L.R.A. 343, 18 S. E. 770. But these are all adversary proceedings involving the exercise of judicial functions. They involve the rights of parties in respect to matters distinct from the exercise of legislative or police power. In Brazie v. Fayette County, 25 W. Va. 213, the duties of election convassing boards are declared to be quasi judicial. Tested by that decision, the use of certiorari to review such proceedings is within the limits of judicial powers. In Board of Education v. Hopkins, 19 W. Va. 84, this writ was given to review the action of a county court upon a sheriff's settlement respecting an allowance of commissions to him. It was a matter of controversy between the sheriff and a board of education of the county, and the county court had jurisdiction to the extent of power to adjudge a settlement prima facie correct, but not conclusive. This also, as to the sheriff, was a matter of private right, the determination whereof required the exercise of judicial power. The judgment of the county court, for the time being, gave or withheld commissions claimed by him. It also made evidence for or against him, to be used in any other proceeding for the final and ultimate determination of his rights. The line of discrimination between judicial and nonjudicial functions is sometimes difficult to trace; but it is not difficult to see that the matters above mentioned stand upon a very different footing from many others, in which a municipal board or other tribunal, in the exercise of its legislative or police power, deals with the rights of the citizen who has no official connection with that body, such as a claim to office or a right to commissions. There is no suggestion by the court in any of these cases that the action reviewed is not judicial, or that the writ lies to review nonjudicial actions. Davis v. Davis, 40 W. Va. 464, 21 S. E. 906, presents a different and anomalous illustration of the writ, holding it to be appropriate to review the action of a town council in declaring a certain thing a nuisance and abating it as such; but the court was careful there to say the act was judicial. Whether this was a correct determination does not affect the question now under consideration. Consistently with the view here advanced, the court treated the act as a judicial one and proceeded accordingly.

Whether the council of a municipal corporation acts judicially in ascertaining whether there is cause of forfeiture of a right in a street granted by it to a railway company is a more difficult question. As above stated, the distinction between legislative or ministerial functions and judicial functions is difficult to point out. What is a judicial function does not depend solely upon the mental operation by which it is performed or the importance of the act. In solving this question, due regard

must be had to the organic law of the state and the division of powers of government. In the discharge of executive and legislative duties, the exercise of discretion and judgment of the highest order is necessary, and matters of the greatest weight and importance are dealt with. It is not enough to make a function judicial that it requires discretion, deliberation, thought, and judgment. It must be the exercise of discretion and judgment within that subdivision of the sovereign power which belongs to the judiciary, or, at least, which does not belong to the legislative or executive department. If the matter, in respect to which it is exercised, belongs to either of the two last-named departments of government, it is not judicial. As to what is judicial and what is not seems to be better indicated by the nature of a thing, than its definition. It is necessary to the proper and effective exercise of the police power of a state or community that it be free from restraint by the judiciary. It is at variance with the very nature of such power that the officers and tribunals intrusted with its exercise must stop at every step and take those proceedings which are requisite to the due exercise of judicial power. The health of the people, the good order of the community, and the due exercise of the power demand that the officers and tribunals intrusted with its exercise be free from such restraint. It may remove, destroy, and abate, without waiting for any judicial determination, and leave the party to his right of appeal to the courts, by an action for damages, for a determination of the question as to whether the thing abated was a nuisance, or protected by a contract, unless the abatement will result in irreparable injury and thereby give equity jurisdiction by injunction. In the case of a contested election, or the settlement of the accounts of an officer and allowance of his commission, no such public necessity exists. Pending these controversies, the public service goes on unaffected by them and unimpeded. Not so in the case of obstructions to streets and highways and the existence of offensive, unwholesome, and dangerous things constituting nuisances. The public service cannot wait upon tedious, long-drawn-out judicial investigations.

It would be difficult to enumerate all of the subjects belonging to the police power of a state or municipality, but that it does include the abatement of nuisances, the opening, construction, and repair of roads and bridges, and the lighting of streets is beyond question. 22 Am. & Eng. Enc. Law, pp. 927, 929, 930. That the establishment, control, and regulation of roads, bridges, and streets belong to the police power of the state is nowhere asserted more emphatically and plainly than by this court. In County Court v. Boreman, 34 W. Va. 87, 11 S. E. 747, it decided that private citizens, having no special property or interest to be affected, could not by certiorari review the trial or action of the county court in proceeding to alter the location of and rebuild a county bridge. Up until that time, these citizens had not made themselves parties to the proceeding. Afterwards, they did attempt to make themselves parties, and to appeal from the action of the county court, and this court prohibited the circuit court from entertaining the appeal by its writ of prohibition, for want of jurisdiction. County Court v. Armstrong, 34 W. Va. 326, 12 S. E. 488. Judge Brannon, in delivering the opinion, said: "We think it essential to the public interests, as involved in the execution by county courts of the important functions assigned them by law touching roads and bridges, that we should decide, as we now do, that citizens and taxpayers, merely because they are such, who have no special property or interest affected thereby, cannot become parties to proceedings by county courts for the establishment, location, or alteration or construction of county roads and bridges, and cannot appeal from the action of the county court therein. Under any other rule, it would be impossible to say when litigation would occur, when it would end, what would be the public cost, or what would be the delay and obstruction in these matters so essential to the public welfare." The supreme court of Virginia announced the same doctrine in Culpeper County v. Gorrell, 20 Gratt. 484. Of course, the citizen may object to the taking of his property for public uses without compensation, and interfere. But how does he interfere? Not by making himself a party to the unauthorized proceeding. He is not bound to subject himself and his rights to the assumed jurisdiction of a county court or a municipal council and review its action by certiorari in order to obtain relief. He appeals to a judicial tribunal having the power to settle and determine questions affecting his rights. He is entitled to have such important matters determined in the first instance, as well as finally, by a court, by a judge, or judge and jury, upon regular proceedings, according to the course of the common law, and not in an irregular, haphazard proceeding by mere agents of the state, unlearned in the law, and charged with more ministerial or legislative powers. Although the citizen may have a special interest in the sense of being damaged by the exercise of the sovereign power to establish roads, if his property is not actually taken, but only injured, he still has no power to interfere, and must resort to his action at law for damages. Spencer v. Pt. Pleasant

& O. River R. Co. 23 W. Va. 406; Arbenz v. Wheeling & H. R. Co. 33 W. Va. 1, 5 L.R.A. 371, 10 S. E. 14; Watson v. Fairmont & Suburban R. Co. 49 W. Va. 528, 39 S. E. 193. A work of internal improvement authorized by law, whether carried on by a private or a municipal corporation, is an exercise of police power delegated by the legislature, and is not subject to judicial control and is not itself judicial action. Corporations exercising such power are, so long as they confine themselves within the authority conferred, beyond any restraint at the hands of the judiciary. If, in the exercise of such power, they transcend the authority conferred upon them by the legislature, they are, in some form of action, amenable to the power of the courts, at the instance of any individual injured thereby, and their decision or mere declaration that they have power, when they have not, affords them no protection.

The granting of a license, privilege, or franchise to a street railway in the streets of a city, town, or village is so manifestly an act affecting the street itself, the care and custody of which is, by law, intrusted to the council, by way of exercising part of the police power of the state, as to preclude the idea that such grant can be anything other than an exercise of such power. This is not disputed. Nor can it be denied that the repeal of the ordinance granting such privilege, or a declaration of forfeiture in any other form, is a function of the same kind. But it is suggested that inquiry and determination as to the cause or ground of forfeiture is judicial. If so, it is only incidentally performed in the exercise of police power. It is not the thing done, the function performed, but a mere incident thereof. It is not the whole, including the exercise of police power as one of its parts, but is itself a mere part, governed, overshadowed, controlled, and limited by something larger,—a matter or function in government which, for reasons of public policy, is not required to wait on the slow process of judicial determination of private rights which are incidentally and occasionally affected, but not extinguished, by it, and, if injured, may be vindicated by proper remedies in the courts, in which the necessary judicial power for that purpose is lodged. It is an inclusive, subsidiary, or incidental power, which in the nature of things can be no broader than the thing to which it is incidental. Like the stream which can rise no higher than its source, or the blood which cannot circulate beyond the body to which it belongs, this function, be it quasi judicial or not, cannot operate or be effective beyond the limits of the act or proceeding in which it is performed. It does not determine the character of the proceeding in which it is performed, or alter or enlarge its nature. That is determined by the division of governmental powers, effected by the organic law of the state. The very nature of the police power and the necessity for its free and prompt exercise forbid any such restriction upon it as judicial supervision and control. To make it effective, those charged with its enforcement must be as free from restraint, as long as they confine themselves within their authority, as individuals are. Must there be citation and hearing before the city authorities may tear down a building as a means of stopping a disastrous conflagration? If a man erect a house or barn in the center of the principal street of a populous city, is he entitled to demand notice and a full judicial hearing before it can be removed? If, instead of so proceeding, the authorities abate it immediately, are they trespassers simply for lack of such judicial proceeding, to be punished with costs and nominal damages in a case in which they have violated no right, and done no wrong, other than that of failing to obtain an adjudication of the right to do what they have done? Are municipal corporations to be mulcted in costs attendant upon judgments for nominal damages for mere technical invasions of the rights of the citizen, as well as delayed in the exercise of the important powers conferred upon them for the promotion of the health and comfort of the people, the maintenance of order, and the prosperity and general welfare of the community? If we say the function is judicial in the full sense of the term, all these questions must be answered affirmatively, and such results attained as would paralyze the police power of the state. It is not a question of due protection of the rights of the citizen. It is not enough to say he may, by his writ of certiorari, accompanied by bond, supersede the action taken against him, pending the determination of the rightfulness of his claim. That covers but one side of the question. What about the public? Is it duly protected and vindicated, or is it hampered, clogged, and paralyzed? If we say the function is judicial, we allow the citizen, in obtaining vindication of his rights, to stop the machinery of government. If we say it is not judicial, he still has his remedy in the courts for any injury done him, as in the case of injury done him by a private individual, and the machinery of government goes on performing its functions, while he prosecutes his rights in the courts. He is no more entitled to stop, impede, or delay the operations of government, except to prevent irreparable injury, than to stop an individual. Are not the interests of the general public as great and as justly entitled to protection and freedom as those of his fel-

low man? The only exception to this is the case of irreparable injury, which may be prevented by injunction, as in cases of irreparable injury at the hands of individuals. If we say it is not judicial, there is no adjudication against the citizen. He still has his remedy. There is therefore no want of process. The legislature of the state, in declaring a forfeiture, performs exactly the same function that the council performed in this case. It necessarily ascertains the existence of cause of forfeiture. An individual, in declaring the forfeiture of a contract right, does the same thing. But no court has ever regarded such declaration in either case as an adjudication. Nor do they so regard such declarations made by municipal councils.

This court, in Belington & N. R. Co. v. Alston, 54 W. Va. 597, 46 S. E. 612, said: "If the council improperly annulled its orders or ordinances assenting to the plaintiff's occupancy of its streets, the plaintiff could treat such annulment as void, or it could have the same reviewed and reversed by proper judicial method of review." In Asheville Street R. Co. v. Asheville, 109 N. C. 688, 14 S. E. 316, the court held as follows: "Where a city, by authority of its charter, granted a street railway company the right to construct a branch road over a certain street, it cannot, by a subsequent ordinance, arbitrarily annul its license; and when, under such latter ordinance, it attempts by force to prevent the completion of the road then in process of construction, injunction will issue restraining the city from such interference." In Easton, S. E. & W. E. Pass. R. Co. v. Easton, 133 Pa. 505, 19 Am. St. Rep. 658, 19 Atl. 486, this declaration of principles was announced: "A railway track, laid upon a city street in good faith, under a corporate charter granted for the purpose, but not endangering the health or safety of the inhabitants, cannot be classed among the nuisances which the city authorities may abate summarily without resort to the processes of the law, even though, by reason of the manner of its construction, it may obstruct the street to such a degree as to amount to a nuisance. When the authorities of a city have declared such a track to be in violation of a municipal ordinance and a public nuisance, and have summarily undertaken to remove it by force, and the railway company prays for an injunction against such removal, the city not applying, by cross-bill or otherwise, for a legal adjustment of the differences between the company and itself, the injunction will be granted without regard to the merits of the controversy." In Bond v. Newark, 19 N. J. Eq. 376, 384, the court said, speaking of municipal corporations: "All legislative acts or exercise of discretionary powers, within their authority, are beyond the control of the courts, however unwise or impolitic, or even when done from corrupt motives, or unworthy purposes. . . . But when the corporations have fulfilled their legislative functions, and have exercised their legislative discretion, and are about to fulfil a contract by paying for its performance with the money of the lot owners, they are not acting in a legislative capacity, but as agents." In Cape May & S. L. R. Co. v. Cape May, 35 N. J. Eq. 419, Van Fleet, V. C., after quoting part of the above language, said, when the corporations "are about carrying their legislation into execution, then, if the effect of their act is to violate vested rights or inflict irreparable wrong, the courts may properly intervene." That case decides that injunction does not lie to prevent the repeal of an ordinance, but does lie to prevent the tearing up of a railroad pursuant to such repeal, and thereby, in effect, denies judicial effect to the action of the council. In Paterson & P. Horse R. Co. v. Paterson, 24 N. J. Eq. 158, 168, the court said: "The ordinance complained of is manifestly intended as means to an unlawful end, as a basis of operations for removing the track in Colt street. There is no good reason shown for the course of procedure on which the city have entered in this matter. They cannot be permitted, under such circumstances, to pursue it."

In Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496, Chief Justice Waite, in speaking of the reserved power to amend or repeal the charter of the Union Pacific Railroad Company, said: "All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made." In People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692, Ruger, Ch. J., said: "It is also to be observed that in none of the provisions for repeal in this state is there anything contained which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. . . . The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred." The same judge, in speak-

ing of the grant by the city of New York to the Broadway Surface Railway Company of the right to use the streets, said: "Grants similar in all material respects to the one in question have heretofore been before the courts of this state for construction, and it has been quite uniformly held that they vest the grantee with an interest in the street in perpetuity [to the extent necessary] for the purposes of a street railroad." "Both on reason and authority, a charter, lawfully granted and duly accepted and acted upon, has all the elements of a contract, and is binding upon all the parties to it, and enforceable, if not always in the same manner, yet to the same extent, as an ordinary agreement between natural persons." Booth, Street Railways, § 8. In Union Street R. Co. v. Saginaw Circuit Judge, 113 Mich. 694, 71 N. W. 1073, the court held it competent for a city council to declare a forfeiture upon a conceded and undisputed breach of a condition. Plainly this means that the forfeiture is effective only in such case, just as such a declaration by an individual is effective when he has the right to make it, and therefore has none of the efficacy of a judicial determination.

The decision of Davis v. Davis, 40 W. Va. 464, 21 S. E. 906, may seem to be inconsistent with this position, but it does not clearly propound a different doctrine. Whether it was intended there to give to the resolution of a municipal council the dignity and force and effect of a judicial decision, binding upon the citizen and denying to him any remedy except by way of appeal from it, is not at all clear. In the paragraph of the opinion which seems to countenance this view, it is admitted that the proceeding for abatement of a nuisance is an exercise of delegated police power, and no authority is cited for the position that a judicial function is involved. The question of its conclusiveness is propounded and not answered, except by the holding that there is a right of review by certiorari, and possibly of action for damages. If, after such abatement, a right of action exists, it is plain there has been no adjudication of the fact of nuisance. There cannot be two adjudications of the same right. One precludes the possibility of another, if pleaded. The trouble with the decision in Davis v. Davis is its failure to distinguish between the function of abating a nuisance and that of determining what is a nuisance. Abatement is the exercise of police power. That power the legislature has conferred upon the councils of cities, towns, and villages, but does not confer upon them the general judicial power necessary to determine what is a nuisance. They may determine it in a qualified manner, just as an individual, in the exercise of his common-law right of abatement, may determine for himself what is a nuisance. His determination of that question is binding upon nobody. In like manner, the determination of the same question by a municipal council is a determination for the sole purpose of coming to a decision as to whether it will exercise its power of abatement. After having done that, as in the case of an individual, it acts at its peril. If, assuming that to be a nuisance when is not, it destroys it, the preliminary declaration affords it no protection and is not binding upon the citizen. When a court of competent jurisdiction determines that a thing is a nuisance, its decision, until reversed, is final and conclusive. Whether the thing be in fact a nuisance or not, it becomes in law a nuisance by force of the decision. The courts everywhere say no such power is vested in a municipal corporation or in the legislature of the state itself.

In Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203, the court said: "The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the land of the individual, is a common-law right, and is derived in every instance of its exercise from the same source,—that of necessity. It is akin to the right of destroying property for the public safety in case of the prevalence of a devastating fire or other controlling exigency. But the necessity must be present to justify the exercise of the right, and, whether present or not, must be submitted to a jury under the guidance of a court. The finding of a sanitary committee, or of a municipal council, or of any other body of a similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of a matter of this kind."

Dillon on Municipal Corporations, vol. 1, 4th ed. at § 374, says: "This authority and its summary exercise may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such." In Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984, Mr. Justice Miller said: "But the mere declaration by the city council . . . that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine

not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the state within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city, at the uncontrolled will of the temporary local authorities."

All this argues lack of judicial power in such tribunals. It is because of want of such power and authority that their resolutions, declarations, or determinations, respecting personal and property rights are ignored by the courts. Being nonjudicial, the authority must be ministerial, legislative, or executive. It may be that the court, in Davis v. Davis, entertained the view that, in the exercise of police power, there is a right of review by certiorari, although the proceeding is not an adjudication, precluding a resort to the courts for damages. Whether, so viewed, the decision is sound, there is no occasion to say; and, but for the close analogy between that case and this, it would be unnecessary to reexamine it. It is not a case exactly in point, but many of the general principles involved in it are, to say the least, very similar to those governing this case. Being firmly of the opinion that the council of a municipal corporation is not clothed with the requisite judicial power to finally determine questions of property rights, in such cases as this, we cannot recognize it as authority binding upon us in this class of cases, and we leave its exact status and effect in nuisance cases to be determined whenever the necessity therefor shall arise. Nor are we to be understood as saying or intimating that the legislature cannot confer, or has not conferred, limited judicial power upon municipal corporations for the punishment of offenses and violation of ordinances.

Having reached the conclusion that jurisdiction in equity is not precluded by the action of the council, the next question is whether there has been such nonperformance of covenants as give power to forfeit by proper proceedings. Authorities already cited, to which many more might be added, show that, by acceptance, the ordinance became a contract. Can it have effect otherwise than according to its terms? To say that it can would be to deny to parties the power to determine their respective rights by contract, or, to say, after a contract has been made, its terms may be disregarded. Courts cannot do that, the power to do which is denied to the legislature by both the state and Federal Constitutions, namely, deny, relieve from, or refuse to enforce, the obligations of contracts. Noncompliance with the terms and conditions of the ordinance is frankly admitted, and the prayer for relief stands upon the allegation of substantial compliance. This argument is addressed to the court, concerning, not implied conditions, which the law reads into a contract in order to work out equity and justice between the parties as to matters not provided for by express stipulation, or express conditions, violation of which is not, by express stipulation, made cause of forfeiture, but conditions and covenants plainly written in the contract and the penalty for violation of which is expressly made a cause of forfeiture. Courts of equity have large powers for the vindication of equitable rights, and, under peculiar circumstances, for the amelioration of the rigidity of the law; but they cannot, any more than courts of law, ignore or violate contract rights fairly and properly acquired. There is here no suggestion of fraud or mistake in the procurement of the contract. It was deliberately and fairly entered into. Substantial compliance with the terms of an express contract never excuses the party in fault or supports a prayer for equitable relief against its obligation. The party not in default may hold the other to the performance of so much as he is able to do. He has a right of election to take that, rescind the contract, or, standing upon it, sue for damages for the breach. But no instance is recalled in which one party to a contract has been permitted to compel the other to accept less than full performance.

The authorities relied upon to sustain the position that substantial compliance with conditions, the violation of which is expressly made ground of forfeiture, do not support that view. They are all cases in which the ordinances did not say failure to comply with certain specific conditions, the conditions there in question, should result in forfeiture of the privilege granted. There was no such stipulation in the act construed by the court of appeals of New York in People v. Broadway R. Co. 126 N. Y. 29, 26 N. E. 961. The propositions asserted in Booth on Street Railways, § 45, are inapplicable for the same reason. At § 46 of the same work it is said: "But if the statute provides that upon such failure the franchise shall 'be terminated,' or shall 'cease,' the default will put an end to the franchise without judicial proceedings, and the legislature may confer the franchise upon any other company or person." And this is fully sustained by the following decisions cited in support of it: Re Brooklyn, W. & N. R. Co. 72 N. Y. 245, 75 N. Y. 335; Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524; Oakland R. Co.

v. Oakland, B. & F. V. R. Co. 45 Cal. 365, 13 Am. Rep. 181. Continuing, the author says, in the same section: "The same rule applies to a grant made by ordinance. Accordingly, if the company fails to build within the time fixed by the local authorities, the privilege no longer exists. Such consent is a mere license, and, until the grantee avails itself of the privilege, no obligation or relation arises which requires a judicial declaration of forfeiture. After the time expires, a renewal of the privilege is necessary to entitle the company to occupy the streets and build its road." This is sustained by Ft. Worth Street R. Co. v. Rosedale Street R. Co. 68 Tex. 169, 4 S. W. 534, and Street R. Co. v. West Side Street R. Co. 48 Mich. 433, 12 N. W. 643. For similar applications of the same principle, see Ward v. Sea Ins. Co. 7 Paige, 294; Re Jackson Marine Ins. Co. 4 Sandf. Ch. 559. "Slight deviations from the provisions of a charter would not necessarily be either an abuse or a misuser of it, and would therefore be no ground for its annulment, although it would be competent for the Crown, by apt words, to make the continuance of the charter conditional upon the strict and liberal performance of them." Eastern Archipelago Co. v. Queen, 2 El. & Bl. 856, 870. As to railway franchises and privileges, see also Oakland R. Co. v. Oakland, B. & F. V. R. Co. 45 Cal. 373, 13 Am. Rep. 181; Myrick v. Brawley, 33 Minn. 377, 23 N. W. 549. In the absence of the stipulation for forfeiture as to the conditions not complied with here, it could be held, consistently with all authority, that there has been a substantial compliance with the contract as a whole, and, therefore, no cause of forfeiture. But it is competent for the parties to make any condition a material and essential part of the contract. As these parties have done so, how can the court deny to one of them the benefit of the contract, or relieve the other from its obligation? A distinction between conditions precedent and conditions subsequent is made by the courts. The condition in this case belongs to the latter class, but the distinction does not seem to relieve the company. In the former class, no declaration or adjudication of forfeiture is necessary, but in the latter it is, since noncompliance may be waived. Hovelman v. Kansas City Horse R. Co. 79 Mo. 632; Chicago v. Chicago & W. I. R. Co. 105 Ill. 73, 78.

Having thus determined that there was, on the face of the contract, cause for forfeiture, it remains to be determined whether such steps were taken by the council as to work, in law, a forfeiture; and, if so, whether the circumstances under which it has been done, and the conduct of the municipal authorities in accomplishing it, have been such as to call upon a court of equity to ignore it or to relieve against it. In dealing with this situation the court must keep its eye upon both sides of this contract and both parties to it. It is not a one-sided affair. It places duties upon both. Under the strict letter of the contract mere failure to comply with conditions works no forfeiture. However great the cause of forfeiture, it does not occur until it has been legally and properly declared by the corporation. The mode of effecting it is prescribed by the ordinance. It requires three months' notice of intent to declare it, accompanied by specification of the cause. The ordinance was passed in 1896. Within a short time after that, the road was built and was then operated until August, 1901, without any steps having been taken by the town, in the manner prescribed by the ordinance, to require compliance with these conditions. For four or five years the town acquiesced in absolute noncompliance on the part of the railway company. There is no proof or evidence showing that any notice was ever served upon the company specifying these instances of noncompliance. There is some evidence tending to show that officers of the town had been directed to serve notice on the company, and that one member of the council did verbally make a demand upon, or request of, the president; but it does not appear that any such notice as is prescribed by the ordinance was ever given. But if such notice had been given, and not followed by any further action, it would simply tend to prove acquiescence and waiver. In August, 1901, after four or five years of acquiescence, the council took steps to forfeit by service of notice. Then before the expiration of the time allowed there was a partial compliance with the requirements of the notice,—a substantial compliance with its requirements. In view of the long acquiescence of the authorities of the town, the railway company may well have supposed, and no doubt did suppose, that no action to forfeit the franchise would be taken under these circumstances. If the testimony of the manager is entitled to credit, and there seems to be no reason for believing otherwise, the failure to comply fully was due, in part, to disappointment in obtaining the lumber from the place, and within the time, contemplated by the company. He says the order was given to mills in the country, but, as time went on and it did not arrive, they were compelled hastily to obtain it from somebody in the city. They gave the order for first-class lumber, and under that order lumber was furnished and put down by the company's employees. It did not prove to be of the requisite dimensions, and some portions of it were unsound,

and it had the appearance of being old; but it had never been used. This repealing ordinance was passed immediately after the timber was put down and possibly before it was all down, and without any intimation of dissatisfaction with the work. Immediately afterwards, the manager of the railway company applied to members of the council for information as to their objection to the work and offered to remedy the defects, but was informed that the ordinance had been repealed and all rights of the company forfeited.

While the town has the right to require full and complete performance of all covenants on the part of the railway company, and is not bound to accept a mere substantial performance, its authorities, in proceeding to take away the rights of the company, pursuant to the terms of the ordinance, must deal frankly and fairly with it. They must act in good faith and not endeavor to pervert this forfeiture clause to a purpose for which it was never intended. Neither party ever supposed it would be used for any purpose except to compel performance of the covenant entered into by the railway company. The public interests required the construction and operation of the railway. That was the inducement or consideration moving the town to the passage of the ordinance. It was also of interest to the public that the streets be kept in good condition. Hence, the provisions in reference to them, and the right of forfeiture to enforce performance thereof. That clause was never inserted for the purpose of ousting the railway company from the occupancy of the streets merely to get rid of it or to compel it to seek a new franchise with conditions more favorable to the town, nor at all, unless it refused to perform its covenants. Nothing in the answer of the defendant suggests a desire to get rid of the railway. On the contrary, it evinces a desire to keep it, but to impose conditions more favorable to the town than those contained in the present ordinance. On the whole, the evidence evinces a purpose, not merely to enforce compliance with the conditions of the ordinance under which the railway company had been operated, but to force that company to apply for a new franchise with new conditions, a purpose wholly foreign to the forfeiture clause. This motive apparent on the face of the answer and in the evidence, taken in connection with the circumstances and conduct hereinbefore adverted to, tends to prove that the declaration or forfeiture was not made in the utmost good faith, that the failure on the part of the railway company to comply with conditions was not wilful, in the sense of obstinacy, but, at the worst, negligent, and that the previous acquiescence and delay on the part of the town, followed by the sudden and speedy repeal of the ordinance, operated as a surprise upon it. By this, actual fraud is not imputed to the authorities of the town. Nor is it intended to impute any dishonest motive or purpose to them. It is an error of judgment, a misconception of legal rights and duties, working inequitable results. The answer shows a frank avowal of sincere belief on their part in their right to use this power of forfeiture to coerce a more liberal proposition from the railroad company, and shows an utter lack of appreciation of the force and effect in equity of their long acquiescence in nonperformance and the suddenness of the blow they have attempted to deliver by repealing the ordinance. Not being chancellors, conversant with the principles of equity, they could, as many others have done, easily fall into errors of grave character without being guilty of the least dishonesty or fraud in the ordinary sense of the terms, and it is perfectly apparent that they have done so. Such circumstances warrant intervention by a court of equity to relieve from forfeiture, when no pecuniary or substantial injury has resulted and full performance of the covenant can, and will, be effected. Willingness and desire to comply strictly with all its covenants is plainly expressed by the railway company in its bill, and was verbally communicated to the town authorities immediately after the forfeiture was declared, when the ink on the repealing ordinance was hardly dry. As to the ability of the company to make full compliance, there is no question. Under these circumstances, is it equitable and just to the company, or promotive of the public interests, to destroy this railway? It represents an investment of thousands of dollars and affords means of convenient and rapid travel and transportation for the people of the town and the general public. Why so great a punishment for such slight cause? It is unprecedented so far as the authorities examined disclose. If the injury could not be remedied, or the railway company stood defiant, refusing to perform, the case would wear a different aspect; but it does not. It is willing to perform to the letter,—to pay to the last farthing.

In Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151, this court applied the principle of relief against forfeiture, and declared as follows in respect to forfeiture of an oil lease: "In case of such a lease, if the lessor, by his conduct, clearly indicates that payment will not be demanded when due, and thus lulls the lessee into a feeling of security, and throws him off his guard, and, because of this, he does not make payments when due,

the landlord cannot suddenly, without demand or notice, declare a forfeiture, and there is no forfeiture which equity would recognize; and, if there is in such case technically a forfeiture at law, equity would relieve against it." It may be objected that, because the covenant violated here is not a pecuniary one, jurisdiction in equity to relieve it does not exist. It is said that in the English courts equity will only relieve in such cases. But this is not strictly accurate. Where the covenant is pecuniary, and there is default and consequent forfeiture, equity will relieve independently of the circumstances of fraud, accident, mistake, and surprise. But, where fraud, mistake, accident, or surprise enters into the matter, or the forfeiture has resulted from only negligent conduct on the part of the covenantee, equity will interfere, although the covenant be for the performance of some collateral matter, and not for the payment of money. Story, Eq. Jur. § 1323. In § 1324 of said work it is said that in America the narrow doctrine of the English courts and the restricted application of jurisdiction to relieve from forfeitures would be received with hesitation, and, substantially, that the jurisdiction is broader in this country. In cases of forfeiture for nonperformance of pecuniary covenants, relief in equity goes as a matter of course, where compensation may be made, but in other cases, unless the delinquency is wilful, the court has discretionary power to relieve. "A court of equity has power to relieve a party against forfeiture or penalty incurred by the breach of a condition subsequent, when no wilful neglect on his part is shown, upon the principle that a party having a legal right shall not be permitted to avail himself of it for the purpose of injustice and oppression." Noyes v. Anderson, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316. The forfeiture in this case was for failure to pay an assessment for a sewer. "When a mortgagor, without his fault or neglect, is prevented by accident from paying an instalment on the day named in a decree of foreclosure, on a bill brought to redeem, equity will grant relief; and he will be reinstated, but on terms that he satisfy the equitable rights of the other party." Kopper v. Dyer, 59 Vt. 477, 59 Am. Rep. 742, 9 Atl. 4. "Equity will relieve against a forfeiture incurred by the breach of a covenant to insure in a lease of real estate, caused by accident or mistake, if no actual damage has been sustained by the lessor." Mactier v. Osborn, 146 Mass. 399, 4 Am. St. Rep. 323, 15 N. E. 641. "A court of equity may grant relief from the forfeiture of an estate conditioned for the maintenance and support of the grantee, where the forfeiture was accidental and unintentional, and not attended with irreparable injury. But it rests in the sound discretion of the court when relief shall be granted in this class of cases." Henry v. Tupper, 29 Vt. 358. This is a leading case, and the opinion was written by Chief Justice Redfield, who, in the course of his opinion, said: "That relief might be granted in equity, even where the condition was for the performance of collateral acts seems to be admitted in most of the cases upon this subject. Webber v. Smith, 2 Vern. 103; Hack v. Leonard, 9 Mod. 91; Cox v. Higford, 2 Vern. 664; Sanders v. Pope, 12 Ves. Jr. 282. These are cases of nonrepair of premises leased; and the chancellor, Lord Erskine, says in the last case: 'I cannot agree it is necessary the nonperformance of the covenant should have arisen from mere accident or ignorance.' The cases are abundant where relief has been granted against forfeiture of title by nonperformance of other collateral acts, as for not renewing a lease (Rawstorne v. Bently, 4 Bro. Ch. 415), or for cutting down timber when covenanted against, on pain of forfeiture (Northcote v. Duke, 1 Ambl. 511; Thomas v. Porter, 1 Ch. Cas. 95). But it has been held relief will not be granted where the forfeiture arises from an act incapable of compensation, although of no essential damage to the other party, as the breach of a condition not to assign. Wafer v. Mocato, 9 Mod. 112. The same rule obtains where the forfeiture arises from an omission to insure. Rolfe v. Harris, 2 Price, 206 note. . . . It seems, however, to be pretty well established in England that relief for nonrepair of premises will not be granted as matter of course, and especially when there was a wilful default (Bracebridge v. Buckley, 2 Price, 200; Hill v. Barclay, 16 Ves. Jr. 403 and 18 Ves. Jr. 56); but where the failure is from 'accident, fraud, surprise, or ignorance not wilful,' relief will be granted (2 Lead. Cas. in Eq. 464, 465; Eaton v. Lyon, 3 Ves. Jr. 693),—the result of all which seems to be that there is no well-settled rule upon the subject, or none which is not liable to considerable variation, and to be affected by the circumstances of the particular case. . . . But we must all feel that cases of the character before the court should be received with something more of distrust, and relief afforded with more reserve and circumspection, than in ordinary cases of collateral duties. And although we are not prepared to say that it must appear that, in all cases, the failure arises from surprise, or accident, or mistake, we certainly should not grant relief when the omission was wilful and wanton, or attended with suffering or serious inconvenience to the grantee, or there was any

good ground to apprehend a recurrence of the failure to perform, as was held in Dunklee v. Adams, 20 Vt. 421, 50 Am. Dec. 44."

It may be objected here that this position is in violation of the rule that equity will not relieve against a statutory forfeiture. Pom. Eq. Jur. 458; Germantown Pass. R. Co. v. Fitler, 60 Pa. 124, 100 Am. Dec. 546. But this ordinance partakes of the nature of a contract. It is generally held, in such cases, that the relation of the parties is contractual. The power of municipal corporations to contract cannot be denied. This ordinance is not a statute. By its very terms it establishes a relation of contract. It does not provide for forfeiture without action on the part of the council. Unlike a statute granting a privilege or franchise and declaring forfeiture as the penalty of noncompliance with conditions, it provides for notice and active steps on the part of the council to bring about forfeiture. It was agreed that, in order to effect a forfeiture, the town authorities should adopt just such methods as one individual resorts to to bring about the forfeiture of the rights of another individual under a contract existing between them. Municipal authorities are agents as well as legislators, and are, in great measure, subject to the legal principles governing transactions between private persons. Many cases hold that municipal corporations are precluded by their conduct from enforcing forfeitures. "A court of equity will not enforce a forfeiture of the rights and privileges of the grantees in a contract for their failure to complete their performance of it in time, where the party seeking the forfeiture was guilty of the first breach of the agreement." Pike's Peak Power Co. v. Colorado Springs, 44 C. C. A. 333, 105 Fed. 1. In that case, the party seeking a forfeiture was a municipal corporation. "Where a street railway corporation has expended large sums of money and exercised due diligence in building and operating its road, so as to comply with an ordinance of permission, but unforeseen circumstances have caused a delay, which has occasioned no pecuniary injury to the township or its inhabitants, equity will interfere to restrain the adoption of an ordinance by the township declaring a forfeiture of the franchise of the corporation because it did not comply with the statute of permission, which provided that cars should be running at a certain headway, on a continuous line of double track, within a specified time." North Jersey Street R. Co. v. South Orange Twp. 58 N. J. Eq. 83, 43 Atl. 53. In Chicago v. Chicago & W. I. R. Co. 105 Ill. 73, the court enjoined the city from interfering with the laying of the track of a railway company after the expiration of the time limited by the ordinance, because the company had been prevented by injunctions, and by the police officers of the city, acting under the direction of the mayor, from prosecuting its work, in consequence of which the limit expired before it was completed. In this respect municipal corporations seem to stand upon the same footing as individuals. They are subject to the law of estoppel by acts *in pais*. But of late years, much more than formerly, the doctrine of estoppel, most wholesome and just in its operation when properly applied, has been extended to these municipal corporations, so as to bind and conclude them by their own acts and acquiescence, and the acts and acquiescence of their officers, wherever an estoppel would exist in the case of natural persons. Kneeland v. Gilman, 24 Wis. 39. See also Martel v. East St. Louis, 94 Ill. 67; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25; Wilson v. Wheeling, 19 W. Va. 323, syl., point 12, 42 Am. Rep. 780. This is subject to the limitation that the subject-matter must not be *ultra vires*,—must be within their authority. Here the town had undoubted right and power to waive nonperformance of covenants, or extend time.

As above indicated, however, there must be full performance of the covenant as a condition of relief. The relief is against the forfeiture, on the ground of inequitable conduct, working surprise, not against the contract or from its obligation. We do not take away either the right to have the delinquency made good or the power to forfeit for future delinquencies. The covenants for the nonperformance of which forfeiture has been declared must be performed, and that fully and promptly. In the event of refusal to perform, another question would arise, namely, whether the bill should be dismissed or retained and affirmative relief granted the defendant by way of enforcement of the forfeiture. As we cannot say such contingency will not arise, though there is hardly any probability of it, we must now give direction as to the course to be pursued in that event, else the principles of the cause will not be fully settled, and another appeal might result, involving a question already presented on this appeal. Cross-relief has been given by the decree. Never to declare or enforce a forfeiture, or devest an estate or title for violation of a condition subsequent, is an invariable rule of equity, if there is a legal remedy. Under such circumstances, a court of equity utterly declines to touch the case, and leaves the party to his legal remedies. In the language of a former able judge of this court, now deceased, equity abhors a forfeiture. Our leading case on the subject is Craig v. Hukill, 37 W. Va. 520, 16 S. E. 363. See

also Livingston v. Tompkins, 4 Johns. Ch. 415, 8 Am. Dec. 598; Horsburg v. Baker, 1 Pet. 232, 7 L. ed. 125; Marshall v. Vicksburg, 15 Wall. 146, 21 L. ed. 121. This is different from an appeal to equity for aid in the abatement of a nuisance. In such case there is no forfeiture, and no vested title or right as against the public. The thing proceeded against is wrongful. Here, a title vested by contract, and the effort is to take it away by forfeiture. To do this the town must resort to its legal remedies, if any are available. Besides the right of abatement without judicial proceedings, if it can be done peaceably, there are remedies in the law courts. There is much authority for the position that a municipal corporation has its possessory action for a street against a railway having no right to occupy it. Dill. Mun. Corp. §§ 662, 723. What others it may have it is unnecessary to inquire. To prevent equity jurisdiction for this purpose, it suffices that there is one.

Agreeably to the principles and conclusions above stated, the decree appealed from will be wholly reversed, with costs, and the cause remanded to the Circuit Court of Ohio County, with directions to perpetuate the injunction, if the covenants in question shall be fully and properly performed by the appellant within a reasonable time to be allowed for the purpose, if they have not already been so performed, but without prejudice to the right and power of the town of Triadelphia to forfeit the privileges of the appellant under the said ordinance for any further failures to comply with the conditions thereof, and to dismiss the bill if the appellant shall refuse to perform said covenants within the time to be allowed therefor, as aforesaid.

Brannon, P., dissenting:

If equity has jurisdiction, I find no fault with the actual decision of this case. If the decision of the town council is a nullity, injunction lies; but, if it has a legal force, I am not clear that injunction lies. The grant of the franchise vested the council with jurisdiction or power to examine the facts and determine whether the town ordinance had been complied with, or whether the franchise had been forfeited. Is not the repeal, declaring forfeiture, a judicial act? The council was a public body exercising legal function in this matter, and it has been difficult for me to see that its judgment repealing the charter is mere wind, without legal force. If erroneous on the facts, still it has force until reversed. To reverse the writ of certiorari is the process, not injunction, because certiorari is, and injunction is not, a process to correct error. By the Code of 1899, chap. 110, § 2, certiorari applies not only as it was by common law, but it is enlarged so as to apply to "every case, matter, or proceeding before a county court, council of a city, town, or village, justice, or other inferior tribunal." I do not therefore consent to the overruling of the case of Davis v. Davis, 40 W. Va. 464, 21 S. E. 906, syl., point 7. The common-law principles stated in Cunningham v. Squires, 2 W. Va. 422, 98 Am. Dec. 770, and Poe v. Marion Mach. Works, 24 W. Va. 517, would likely justify certiorari in this case, but, if not, that statute would seem to do so. In this case there was a notice that the ordinance had not been complied with by the company, warning it that, if it did not comply within a given time, its franchise would be repealed; but there was no notice giving time and place of the hearing of the question whether such warning had been heeded and the conditions of the grant complied with. Now, it may be that, as the repeal was *ex parte*, without hearing the company, the order of repeal is not one between parties, and that for that reason an injunction lies, as the injury is irreparable. If the company had been summoned, or had been heard, I think certiorari, not injunction, would lie. I think that the statute enlarges the scope of the writ, since that is imported by its words, and this court has several times so looked at the statute. Fouse v. Vandervort, 30 W. Va. 330, 4 S. E. 298; Chenowith v. Randolph County, 26 W. Va. 233; Morgan v. Ohio River R. Co. 39 W. Va. 17, 19 S. E. 588. In the Chenowith Case Judge Snyder said that the statute gives review by certiorari, "and makes no exception as to whether the matters to be reviewed are judicial or merely ministerial." Judge Dent has said as to this statute: "The legislature has seen fit to recognize town councils as inferior judicial tribunals in the determination of questions involving the rights of individuals and property, and has made their decisions subject to review by the higher judicial tribunals of the state. . . . It has thereby rendered unnecessary the appeal to equity in such cases, unless irreparable injury is threatened, or it is necessary to preserve the property *in statu quo* until the right thereto can be properly determined." Clifton v. Weston, 54 W. Va. 255, 46 S. E. 360. If a town council's order is good in any case until reversed, I do not see how injunction lies. In this case right to property of great value was involved, making the case one adversary in character. My idea is that the statute aimed to give certiorari in every case where rights of parties are involved, in the instances indicated by the statute, where no appeal or writ of error lies to the proceedings before the tribunals

referred to in the statute. In cases where writ of error or appeal lies, they are the remedies. The legislature knew that in cases before inferior tribunals rights of property of great importance are sometimes involved, and I think it designed to make certiorari, in such cases, commensurate for relief with appeal and writ of error.

Petition for rehearing denied January 9, 1906.

ILLINOIS SUPREME COURT.

CHARLES F. STEVENS, Appt.,
v.
COUNTY OF HENRY et al.

(218 Ill. 468, 75 N. E. 1024.)

Injunction of county contract—suit by taxpayer.

1. A citizen and taxpayer of a county may maintain a bill to enjoin the execution of a void contract by the county to employ a person to search for property omitted from the tax lists for a percentage of the amount recovered.

County—employment of tax ferret.

2. A county, in the absence of express legislative grant, has no power to enter into a contract for the employment of a tax ferret, even though the duty of discovering untaxed property has not been placed upon the public officials.

Same—contract—authority.

3. Statutory power to a county board of commissioners to make all contracts and do all other acts in relation to the property and concerns of the county necessary to its corporate powers does not include power to employ a tax ferret, where the statutes give such board no authority over the acts of the officials charged with the assessment and collection of taxes.

(December 20, 1905.)

APPEAL by plaintiff from a judgment of the Appellate Court, Second District, reversing a decree of the Circuit Court for Henry County enjoining a county contract for the employment of a tax ferret. Reversed.

Statement by Ricks, J.:

Henry county is under township organization. It has a population of less than 125,000. On January 6, 1904, said Henry county, by its board of supervisors, by resolution duly entered of record, contracted with George H. Manlove "to make diligent and careful search in this and other counties and states for such omitted and unassessed taxable property the taxes upon which are lawfully in this county, and upon the discovery thereof to report same to the proper officials, who shall proceed, as directed by the statute of the state of Illinois, to place same on tax rolls, and to collect taxes therefrom, and also to make diligent and careful search for money due from other sources." Said Manlove was to receive as compensation for such services "a sum equal to 20 per cent of all money collected as a result of such services, but in no event to exceed the county's share of the amount so collected," and "to have one year, or such time as may be necessary, to complete such services," and was to furnish bond to keep safe and harmless the county from all costs, expenses, and damages which may arise by reason of his doing anything under such agreement. By the order of employment it is also provided: "The county clerk is ordered to issue a warrant to the said George H. Manlove for any sums of money due him, on proper verified accounts to be filed with him." Appellant, a citizen, resident, and taxpayer of said county, in March, 1904, exhibited his bill in the circuit court of said county for an injunction to re-

Case Note.—Authority of county to employ "tax ferret."—In addition to the cases cited by the court in STEVENS v. HENRY COUNTY upon the authority of a county to employ an agent or attorney to discover and bring to light unassessed taxable property, there appear to be but three other reported cases, all of which, as in the cases cited from Indiana, were decided with reference to peculiar statutory provisions.

The first of these in point of time was Burnett v. Markley, 23 Or. 436, 31 Pac. 1050, in which the court said: "It seems to us that, as the county court is expressly charged with 'the general care and management of the county property, funds, and business' (Code, § 896), it may take such measures to secure a full, complete, and accurate list of all the assessable property in the county for the use of the assessor as in its judgment may seem advisable or necessary." The contract of employment was accordingly held to be valid.

In Disbrow v. Cass County, 119 Iowa, 538, 93 N. W. 585, such a contract was upheld, where the statute gave the board of supervisors of the county power "to represent the respective counties, and to have the care and management of the property and business thereof in all cases where no other provision shall be made;" there being no other provision for the purpose of uncovering and searching out property which had been negligently or fraudulently withheld from taxation.

In Shinn v. Cunningham, 120 Iowa, 383, 94 N. W. 941, the court had under consideration the same kind of a contract, and its ruling in the preceding case was reaffirmed.

strain said county, the county clerk, the county treasurer, and said Manlove, the appellees herein, from executing said contract. On notice to appellees, a temporary or interlocutory injunction was issued March 7, 1904. The bill alleged the making of the contract, and that appellee Manlove had executed the indemnity bond to the county in compliance with the order of employment, and that said Manlove and the county were about to enter upon the execution of the contract; that said contract is unlawful, null, void, *ultra vires*, contrary to law and public policy, and if permitted to be executed the moneys of the county would be unlawfully wasted and misappropriated, to the injury of the taxpayers. In his bill appellant stated that he is not advised whether there is any omitted or unassessed taxable property in the county upon which taxes are due, but, if there is any such property, it is the duty of the township officers and supervisor of assessments and board of review to place the same upon the tax books of the county, and, in event of the unlawful failure or refusal, there is a remedy to compel them so to do. In August, 1904, appellees filed their joint and several answer, in which they admitted the making of the contract between said Henry county and said Manlove, and admitted that said Manlove had filed his bond conditioned in pursuance of said contract, and that appellees were ready and intended to carry out and execute said contract. Appellees, further answering, say that John S. Smith, the supervisor of assessments, intended and expected to appoint said Manlove deputy supervisor of assessments for said county for the ensuing year after date of such contract, and that said Manlove was to receive and accept such appointment, to make careful and diligent search for property omitted from assessment of taxes due said county and its subordinate municipalities, and to make report of the same to proper officials of the county for assessment and taxation; and that the board of supervisors for the county expected to approve and consent to such appointment and that when they made the contract mentioned in the bill they intended to advise such appointment of Manlove by the supervisor of assessments, and said board expected to ratify the appointment, and fix his compensation as the same was fixed by said contract. They further state in their answer that they are informed and believe it to be true that a large amount of personal property, representing hundreds of thousands of dollars of various kinds of securities that should be listed in said county, is unlawfully and corruptly secreted and held from the assessment roll; that many of said securities are of record in other counties of this state and in other states, and that, unless someone is employed to make diligent search for such property, the taxes thereon will be wholly lost. Appellant excepted to so much of the answer as set up the intention of the supervisor of assessments to appoint Manlove, his deputy, and of the county board to approve the appointment and fix the salary the same as it was fixed in the contract, and the court sustained the exception. The case was heard at the September term, 1904, on the bill and answer, and a decree was entered perpetually enjoining the execution of the contract. An appeal was prosecuted to the appellate court for the second district, where the decree of the circuit court was reversed, and the cause remanded, with directions to the circuit court to dissolve the injunction and dismiss the bill. From the judgment of the appellate court, this appeal is prosecuted.

Messrs. **N. F. Anderson** and **Henry Waterman**, for appellant:

No power has been granted to counties, either expressly or by implication, authorizing them to provide means for the listing of property for taxation, nor is the contracting for such means essential to the performance of any power vested in, or of any duty enjoined upon, the board.

Gannaway v. McFall, 109 Ill. App. 23; Grannis v. Blue Earth County, 81 Minn. 55, 83 N. W. 495; Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; House v. Los Angeles County, 104 Cal. 73, 37 Pac. 796; Platte County v. Gerrard, 12 Neb. 244, 11 N. W. 298.

A taxpaying private citizen may enjoin a municipal corporation from issuing evidence of an illegal debt.

Wright v. Bishop, 88 Ill. 302; Chestnutwood v. Hood, 68 Ill. 132; Springfield v. Edwards, 84 Ill. 626; 2 Dill. Mun. Corp. 4th ed. 916; Grannis v. Blue Earth County, *supra*.

Such private individual may, by injunction, restrain the "execution of the illegal contract."

Chicago v. Nichols, 177 Ill. 97, 52 N. E. 359; Gannaway v. McFall, *supra;* Adams v. Brenan, 177 Ill. 194, 42 L.R.A. 718, 69 Am. St. Rep. 222, 52 N. E. 314; Holden v. Alton, 179 Ill. 318, 53 N. E. 556.

Messrs. **Charles E. Sturtz** and **Searle & Marshall** for appellees.

Ricks, J., delivered the opinion of the court:

The appellees, to sustain the judgment

of the appellate court, question the right of appellant, as a private citizen and taxpayer, to prosecute the bill in question, and, among other things, urge that, because appellant stated in his bill that he was not advised whether there was property that had been omitted from taxation, therefore he did not show that he would be injured. We have no doubt of the right of a private citizen and taxpayer to enjoin the enforcement or execution of a void contract, made by a county or any municipality in which he resides and pays taxes, that would affect the rights generally of the taxpayers. Under the contract in question, there remained nothing to be done except that appellee Manlove should enter upon the performance of it, and when he performed in whole or in part and rendered an account to the county clerk, the latter is directed by the contract and order of employment to issue to Manlove an order for the payment of the money. The contract did not contemplate any further action by the county board. In its order of employment, the county, by its board of supervisors, recited that a public necessity existed for the employment of experienced and competent persons to make diligent search for omitted, unassessed, taxable property. We do not feel it necessary to enter into a further discussion of this phase of the case, as, if we shall conclude that this contract was void, then we are not uncertain as to appellant's right to maintain his bill, or the sufficiency of the allegations thereof.

We quite agree with appellees that the correct rule as to the powers of a county is announced in Wheeler v. Wayne County, 132 Ill. 599, 24 N. E. 625, where it is thus stated (page 604 of 132 Ill., page 626 of 24 N. E.): "Counties can only exercise such powers, first, as are granted by express words; second, those necessarily or fairly implied in, or incident to, the powers expressed; and, third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. . . . Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby." The powers and duties of counties and county boards are declared and found in §§ 22–26 chap. 34, Hurd's Rev. Stat. 1903. There a county is declared to be a body corporate, and that the powers of the county as a body corporate shall be exercised by the board of supervisors. By paragraph 3 of § 24 it is provided that counties shall have power "to make all contracts and do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate powers." By paragraph 2 of § 25 it is provided that county boards shall have power "to manage the county funds and county business, except as otherwise specifically provided," and by paragraph 3, "to examine and settle all accounts against the county, and all accounts concerning the receipts and expenditures of the county." These powers are pointed out and relied upon by appellees as authority for a county entering into the contract here complained of. It has not been pointed out, nor do we think it can be, that the assessment of property for taxation, either omitted or otherwise, is the business or concern of a county, as such. In counties under township organization, the primary assessment is made by the local assessors elected by the people of the township. Their work is supervised by the county treasurer, who by law is made supervisor of assessments. When the books are returned by the local assessors, they pass into the hands of the board of review, which in counties of the kind and class of Henry consists of the chairman of the board of supervisors and two citizens of the county, to be appointed by the county judge. The duties of the board of review are prescribed by statute, and the first duty enjoined upon the board is to "assess all property subject to assessment which shall not have been assessed by the assessors." Hurd's Rev. Stat. 1903, chap. 120, ¶ 329. That provision has been examined and passed upon by this court, and we have held that since the act of 1898 the power to list and assess omitted property is confined by law exclusively to the board of review. People ex rel. Patton v. Sellars, 179 Ill. 170, 53 N. E. 545. When the board of review has finished its work, the books are returned to the county clerk, who extends the taxes, and the only authority vested in the county board is to levy taxes for county purposes, based on the assessment already made, and supervise the levies made by certain inferior bodies, and order the same extended on the tax books against the assessment. It has not even been suggested that the selection of the chairman of the county board and his designation as a member of the board of review by the legislature did in the most remote degree give the board of supervisors authority over the matter of assessments; and his selection was no recognition of the authority of the board of supervisors over such matters. The broad contention is that the matter of taxation is a county concern, and in that connection, it is pointed out that § 33 of chapter 34 pro-

vides that "it shall be the duty of the county boards of each of the counties of this state to take and order suitable and proper measures for the prosecuting and defending of all suits to be brought by or against their respective counties, and all suits which it may become necessary to prosecute or defend to enforce the collection of all taxes charged on the state assessment." The last provision of that section would seem to refute, rather than support, the contention of appellees. If it can have any significance, it is a clear recognition, if not declaration, on the part of the legislature that the county is not concerned in the matter of taxes until they are charged on the state assessment. It will readily be conceded that there is a wide distinction between taxes charged on an assessment, and the making of an assessment itself; and, while it is true that unpaid taxes are an asset of the county, the taxes that are to arise upon an assessment not made cannot be said to be an asset of any sort, and, unless it can be said that the matter of assessment is a concern of the county, it is manifest that the contract under consideration cannot be sustained.

It is conceded by the appellees that the question now under consideration has not before been passed upon by this court, and Gillett v. Logan County, 67 Ill. 256; Franklin County v. Layman, 145 Ill. 138, 33 N. E. 1094; Ottawa Gaslight & Coke Co. v. People, 138 Ill. 336, 27 N. E. 924, and Barnard v. Sangamon County, 190 Ill. 116, 60 N. E. 109,—are cited and relied upon by appellees as being analogous to the case before us. We are unable to say that any of them have any application. The power to sue and be sued is conferred upon counties, and Gillett v. Logan County, *supra*, simply holds that a county may employ counsel to procure evidence in defense of a contemplated suit against the county in relation to its bonds. Franklin County v. Layman, *supra*, sustains the employment of counsel in a case involving the validity of the bonds of the county. The action against the Ottawa Gaslight company was to collect a delinquent tax that had been charged on an assessment, and Barnard v. Sangamon County, *supra*, simply involves the authority of the board to furnish books and blanks to the county clerk's office under paragraph 3, § 26, chap. 34, Hurd's Rev. Stat. 1903, above referred to. In fact, each of these cses has its foundation in the powers expressly granted by the statute.

Appellees cite four cases from Indiana which do, in a general way, sustain their contention. The cases so relied upon are Fleener v. Litsey, 30 Ind. App. 399, 66 N. E. 82; Garrigus v. Howard County, 157 Ind. 103, 60 N. E. 948; Richmond v. Dickinson, 155 Ind. 345, 58 N. E. 260, and Wayne County v. Dickinson, 153 Ind. 682, 53 N. E. 929. These cases arise upon a peculiar statute of that state which reads: "The board of commissioners shall, unless in cases of indispensable public necessity to be found and entered of record as part of its orders, make no allowance not specifically required by law to any county auditor, clerk, assessor, sheriff, or treasurer, either directly or indirectly, or to any clerk, deputy, bailiff, or any employee of such officer; nor shall they, except in cases above provided, employ any person to perform any duty required by law of any officer or for any duty to be paid by commission or percentage. . . . If it be found necessary, and so entered of record, to employ any person to render any service, as contemplated in this section, as a public necessity, the contract for such employment shall be spread of record in said court, and for such service rendered the claimant shall file his account in said court ten days before the beginning of the term, and any taxpayer shall have the right to contest the claim." Under this statute, the commissioners of Park county employed Fleener and another, and made a contract somewhat similar to the one before us. When the bill was presented for the services, Litsey, as a taxpayer, objected. The court held that the duty to search for omitted property was not cast upon any officer, and that under the provisions of the above statute the county commissioners were authorized to employ a person by making the declaration of record that an indispensable public necessity required it. The Fleener Case, the Garrigus Case and Wayne County v. Dickinson are each predicated upon that statute. Richmond v. Dickinson holds that, under the law relating to the powers of cities and villages, the city of Richmond had power to make a similar contract for a similar purpose. This last case illustrates what seems to us a very serious objection to admitting the contention of appellees in the present case. There is just as much authority under our law for every city, school district, township, and other minor municipality in a county to employ a "tax ferret," as those persons who engage in that business are termed, as there is for a county to do so; and Indiana has practically gone to that extent. It is sufficient to say that we have read the Indiana cases, and do not agree with the reasoning further than as it is applied to the powers under their statute, and that the case is wholly inapplicable to the case before us. In this state, by our statute, the

board of review is expressly and by mandatory language required to assess property that has not been assessed by the local assessors. We have held in People ex rel. Patton v. Sellars, *supra*, the language there used refers to and means omitted property, and that the duty to assess such property is cast upon the board of review, and that local or township assessors no longer have that authority. Appellee Smith was the county treasurer, and, as such, was the supervisor of assessments of the county; but his supervision was wholly confined to the township assessors. He had no supervision over the board of review, and so much of the answer as stated that it was his intention to appoint appellee Manlove his deputy, and the intention of the county board to confirm the appointment, and fix the salary as agreed upon in the contract here in controversy, was properly stricken, because as supervisor of assessments Smith had nothing to do with the question of omitted property, nor could anyone acting as his deputy be given greater power or authority than had the chief officer, the supervisor.

We do not yield our consent to the proposition or contention that no officer or body of officers is charged with the duty of hunting and assessing omitted property, but take the view that that duty is cast upon the board of review; and, if its members refuse to perform it, they could be compelled to do so by action at law, and would be guilty of misfeasance in office if they had knowledge and failed to do so. The statute having designated the proper officers for the discharge of this duty, and having charged them therewith, and provided for the compensation they shall receive, we do not think the county, in the absence of any specific grant, had power to enter into the contract with Manlove. If it should be conceded that the statute does not require the board of review to hunt for and endeavor to discover secreted omitted property for taxation, we would still adhere to our position that the county, in the absence of a grant of power to do so, would have no authority to make the contract in question. Such situation might well be deplored, and the necessity be apparent for a law charging some person or persons specifically with the duty, or authorizing the county board or some competent authority to employ persons capable of such work; but, if such should be the case, it would be a suitable matter to call to the attention of the legislative department, and cannot be reached by the unauthorized action of county boards or other local governmental bodies, who have no such powers granted them. This question has been before the courts of Minnesota (Grannis v. Blue Earth County, 81 Minn. 55, 83 N. W. 495), North Dakota (Storey v. Murphy, 9 N. D. 115, 81 N. W. 23), California (House v. Los Angeles County, 104 Cal. 73, 37 Pac. 796), and Nebraska (Platte County v. Gerrard, 12 Neb. 244, 11 N. W. 298); and in each instance the court has held against the power of a county board or county commissioners to make such a contract. We regard the case of Grannis v. Blue Earth County, *supra*, as being on all-fours with the case at bar, for the reason that the language of the statute of Minnesota giving power to the board of commissioners seems to be identical with the language of our statute granting powers to the board of supervisors, *viz.*, "to make all contracts and do all other acts in relation to the property and concerns of the county necessary to its corporate powers." That section was invoked there as here, and held to have no application. In that case, after announcing the principle that counties can only exercise such powers as are expressly granted them by the legislature, or fairly implied as necessary to the exercise of the powers expressly granted, the court proceeds (page 58, 81 Minn., and page 496, 83 N. W.): "The power of taxation belongs exclusively to the state. And with respect to the levy, assessment, and collection of taxes, counties, as such, or their agents, the board of commissioners, have no authority whatever. The legislature has provided officers whose duty it is to levy all taxes, officers to cause all property to be properly assessed and placed upon the tax rolls, and officers for the collection of such taxes. The county commissioners, as agents and officers of the county, have no authority or control over any of those officials with respect to the performance of their duties. They act independently of such commissioners, and are responsible to the state for the faithful discharge of their duties. It is true that a county is interested and concerned in the matter of the collection of taxes. Its revenues are chiefly derived therefrom, and it is important to it, and to the state as well, that all property properly taxable pay its just share and proportion of the public burdens. But the county is not charged with the duty of seeing to it that all such property is assessed and placed upon the tax rolls. Other officials, acting independently of the county, are charged with the performance of such duties, and They alone are responsible therefor. The matter of unearthing and discovering property which has escaped taxation is not only not necessary to the exercise of the corporate powers of a county, but is beyond its express or implied authority. The doctrine

of *ultra vires* is held and applied more strictly to the acts of municipal bodies than to a private corporation."

We think the decree of the Circuit Court was right, and that the Appellate Court erred in reversing it. The judgment of the Appellate Court is reversed, and the decree of the Circuit Court is affirmed.

Petition for rehearing denied.

PENNSYLVANIA SUPREME COURT.

SARAH HANNA, Appt.,
v.
PHILADELPHIA & READING RAILWAY COMPANY.

(213 Pa. 157, 62 Atl. 643.)

Negligent death—presumption.

1. One killed at a railroad crossing, and seen to have used due care in looking for trains as he approached the crossing until he passed beyond the sight of witnesses, is presumed to have done his duty, and not to have been guilty of contributory negligence at the point of crossing.

Crossing accident—presumption of care.

2. A railroad company is, in the absence of evidence, presumed to have done its duty in approaching a street crossing: and no recovery can be had for the death of a person killed at the crossing, until this presumption has been overcome.

(January 2, 1906.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 5, for Philadelphia County granting a nonsuit in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Mr. **Frank M. Cody**, for appellant:

The presumption of law is that decedent stopped, looked, and listened.

Lehigh Valley R. Co. v. Hall, 61 Pa. 361; Pennsylvania R. Co. v. Weber, 76 Pa. 157,

Case Note.—The rule that one killed at a railroad crossing will, in the absence of evidence as to his conduct, or of circumstances from which a contrary inference is to be drawn, be presumed to have performed his duty, including the specific duty to look and listen for approaching trains, and therefore to have been free from contributory negligence, has been frequently declared and applied by the courts. See Northern P. Co. v. Freeman, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763; Texas & P. R. Co. v. Gentry, 163 U. S. 353, 356, 41 L. ed. 186, 189, 16 Sup. Ct. Rep. 1104; Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137; Choctaw, O. & G. R. Co. v. Baskins (Ark.) 93 S. W. 757; Wabash R. Co. v. De Tar, *post*, 352; Reed v. Queen Anne's R. Co. 4 Penn. (Del.) 413, 57 Atl. 529; Golinvaux v. Burlington, C. R. & N. R. Co. 125 Iowa, 652, 101 N. W. 465; Cowen v. Merriman, 17 App. D. C. 186; Chicago, R. I. & P. R. Co. v. Hinds, 56 Kan. 758, 44 Pac. 993; Kansas City-Leavenworth R. Co. v. Gallagher, 68 Kan. 424, 64 L.R.A. 344, 75 Pac. 469; Weller v. Chicago, M. & St. P. R. Co. 120 Mo. 653, 23 S. W. 1061, 25 S. W. 532, 164 Mo. 180, 198, 86 Am. St. Rep. 592, 64 S. W. 141; Fugler v. Bothe, 43 Mo. App. 44; McBride v. Northern P. R. Co. 19 Or. 64, 23 Pac. 814; Mynning v. Detroit, L. & N. R. Co. 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147. And cases cited in the opinion in HANNA v. PHILADELPHIA & R. R. Co.

In some of the foregoing cases instructions informing the jury that the plaintiff was entitled to such presumption were expressly approved, and it is probably implied in all of them that, in submitting the question of contributing negligence to the jury, the plaintiff should be given the benefit of that presumption. It will be observed that the cases next cited, however, while holding that the question of contributory negligence on the part of the deceased may properly be submitted to the jury, even though there is no express evidence as to his conduct, do not, expressly at least, hold that the plaintiff is aided by an affirmative presumption that the deceased exercised due care.

The absence of any fault on the part of deceased may be inferred from the circumstances in connection with the ordinary habits, conduct, and motives of men. Thomas v. Delaware, L. & W. R. Co. 19 Blatchf. 533, 8 Fed. 729.

In Gay v. Winter, 34 Cal. 153, the court, while conceding that the burden is upon the plaintiff, in an action to recover for the death of a person, to show that the deceased was not guilty of contributory negligence, yet said that it did not follow that he must prove affirmatively in all cases that the deceased exercised ordinary care: but, in the absence of any direct proof, the jury are at liberty to infer ordinary care and diligence on the part of the deceased from all the circumstances of the case,—his character and habits and the natural instinct of self-preservation.

The court, in Waldron v. Boston & M. R. Co. 71 N. H. 362, 52 Atl. 443, thus discusses the question: Plaintiff in an action to recover for the death of a person killed at a railroad crossing is bound to prove by competent evidence that the deceased was not himself guilty of negligence proximately contributing to his injury. The fact alone that the injury occurred is not sufficient evidence of his care or freedom from negligence. When there is no direct evidence bearing upon the question of the care exercised by the deceased, and all that is known in reference to it is the fact that he was killed while at-

18 Am. Rep. 407; Schum v. Pennsylvania R. Co. 107 Pa. 8, 52 Am. Rep. 468; Weiss v. Pennsylvania R. Co. 79 Pa. 387; Pennsylvania R. Co. v. Weiss, 87 Pa. 447; Reading & C. R. Co. v. Ritchie, 102 Pa. 425; Longenecker v. Pennsylvania R. Co. 105 Pa. 328; Haverstick v. Pennsylvania R. Co. 171 Pa. 101, 32 Atl. 1128; Roberts v. Delaware & H. Canal Co. 177 Pa. 183, 35 Atl. 723; Cromley v. Pennsylvania R. Co. 208 Pa. 445, 57 Atl. 832; McGill v. Pittsburgn & W. R. Co. 152 Pa. 331, 25 Atl. 540.

Mr. Gavin W. Hart, for appellee:

If one approaches a railroad in a vehicle, and cannot, from his seat in it, have a view of the tracks, he must get down from it and walk to where he can.

Kinter v. Pennsylvania R. Co. 204 Pa. 499, 93 Am. St. Rep. 795, 54 Atl. 276.

Decedent in this case stopped at a point where looking could not be of any avail.

Central R. Co. v. Feller, 84 Pa. 226; Kinter v. Pennsylvania R. Co. 204 Pa. 497, 93 Am. St. Rep. 795, 54 Atl. 276.

Elkin, J., delivered the opinion of the court:

This is an action of trespass to recover damages for the death of the plaintiff's husband, who was struck and killed by a train of the defendant company at a grade crossing. At the place of the accident the railroad tracks run approximately north and south, a short distance west of, and parallel with, the Schuylkill river. Between the river and railroad is a public road, also running north and south, on which the deceased was driving. An ice house 739 feet, and a battery wall 363 feet, both south of the crossing, are located between the public road and railroad. From the battery wall there is a down grade until the road reaches the bridge which crosses a small stream 109 feet south of the crossing. The road at the bridge is 12 feet below the level of the railroad tracks. There are five tracks at the crossing. The deceased was driving a team north on this road. At the ice house he stopped his team and looked for trains. He again stopped at the battery wall, got off his

tempting to cross a railroad track in front of an approaching train, the natural or instinctive disposition of men in general to avoid fatal injuries under such circumstances has been held to be evidence tending to show that the deceased did not carelessly and without due regard for his own safety expose himself to the inevitable fatality resulting from a collision with a swiftly moving locomotive. When, however, it is known what the deceased did or omitted to do for his protection, evidence derived from the instinct, which most men possess, of securing their own safety in crossing a railroad track, could not be used to prove that he used the same degree or kind of care. Its only office would be to furnish a test by which to determine the reasonableness of his own acts,—not to contradict them or to minimize their importance.

In Tolman v. Syracuse, B. & N. Y. R. Co. 98 N. Y. 202, 50 Am. Rep. 649, the court said: The burden of establishing affirmatively freedom from contributory negligence on the part of the deceased may be successfully borne though there were no eyewitnesses of the accident, and even though its precise cause and manner of occurrence are unknown. If in such case the surrounding facts and circumstances reasonably indicate, or tend to establish, that the accident might have occurred without negligence of the deceased, that inference becomes possible, in addition to that which involves a careless or wilful disregard of personal safety; and so a question of fact may arise, to be solved by a jury, and require a choice between possible, but divergent, inferences. If, upon the other hand, those facts and circumstances, coupled with the occurrence of the accident, do not indicate, or tend to establish, the existence of some cause or occasion of the latter which is consistent with the exercise of proper prudence and care, then the inference of negligence is the only one left to be drawn, and the burden resting upon the plaintiff is not successfully borne, and a nonsuit for that reason becomes inevitable.

In a case where death ensues as a result of a collision at a railroad crossing, and where there is no eyewitness of the occurrence, there is a relaxation of the rule requiring strict proof that the decedent was vigilant and observant as he advanced toward the track. The regulation exists in its integrity, but the proof presented may be inferential,—may be dependent upon circumstances and still be adequate to satisfy the court of the absence of contributory negligence. Pruey v. New York C. & H. R. R. Co. 41 App. Div. 158, 58 N. Y. Supp. 797, Affirmed in 166 N. Y. 616, 59 N. E. 1129.

The fact that a man killed on a railroad crossing was careful and sober, and had previously exercised due care in passing over the same crossing, tends to repel any inference of negligence arising from the mere fact that he went upon the track when a train was approaching. Missouri P. R. Co. v. Moffatt. 60 Kan. 113, 72 Am. St. Rep. 343, 55 Pac. 837.

The presumption that the deceased exercised due care does not apply, or is repelled, where his conduct at the time of the accident is shown by the evidence in the case.

The presumption that a person killed at a railroad crossing exercised due care does not apply where his conduct from the time he reached the danger zone until he was struck is covered by direct evidence. Golinvaux v. Burlington, C. R. & N. R. Co. 125 Iowa, 652, 101 N. W. 465.

The presumption that a traveler at a railroad crossing exercised due care is inapplicable when the circumstances of the

wagon, walked around his horses, then stood on the wheel of his wagon, and once more looked for trains. He then proceeded on his way until he reached the bridge, where he stopped and looked another time. He was not seen by anyone, so far as the testimony discloses, from the time he stopped at the bridge until he was struck and killed by a train running north on the third track. In the court below a nonsuit was granted; the learned trial judge holding that, "if the deceased had looked at a proper place before driving upon the tracks, he would have seen the train approaching. As his view of the tracks was obstructed by the coal cars, it was his duty to alight from the wagon and lead his horses to a point where he could see. If he had done this, he would have seen the train. He must, therefore, either have seen the train and driven directly in front of it, or he must have tried to cross the tracks without looking. In either case he was negligent."

The question therefore arises whether, under the testimony offered by the plaintiff, it was the duty of the court to hold, as a matter of law, that the deceased was guilty of such contributory negligence as to preclude a recovery in this action. The evidence does not disclose what the deceased did immediately before starting over the crossing. It does show that he had stopped and looked at the ice house, again at the battery wall, and still again at the bridge. These facts conclusively show that he had exercised the

accident are detailed by eyewitnesses. Reed v. Queen Anne's R. Co. 4 Penn. (Del.) 413, 57 Atl. 529.

In Reading & C. R. Co. v. Ritchie, 102 Pa. 433, it was held that the presumption that the deceased exercised due care was overcome by the testimony of the only witness who saw him approach the track, that he first saw deceased on a public road at a distance of about 100 yards from the railroad, moving directly towards the track, and proceeding without stopping until the moment of the accident, when he could no longer see him on account of the cars being higher than the wagon.

In Mynning v. Detroit, L. & N. R. Co. 67 Mich. 677, 35 N. W. 811, the court said that the case at bar was not one where there was no living witness of the accident, and consequently there was no room for the presumption arising from the natural instinct of self-preservation, that deceased was exercising due care to preserve his life or person from injury.

So, the presumption of the exercise of due care on decedent's part is repelled if the circumstances are such that he must have seen the train if he had looked, or have heard it if he had listened, in time to have prevented the accident. Wabash R. Co. v. De Tar, *post*, 352; Imes v. Chicago, B. & Q. R. Co. 105 Ill. App. 37; Crawford v. Chicago G. W. R. Co. 109 Iowa, 433, 80 N. W. 519; Malott v. Hawkins, 159 Ind. 127, 63 N. E. 308; Southern R. Co. v. Davis, 34 Ind. App. 377, 72 N. E. 1053; Wilcox v. Rome, W. & O. R. Co. 39 N. Y. 358, 100 Am. Dec. 440; Mitchell v. New York C. & H. R. R. Co. 64 N. Y. 655; Haetsch v. Chicago & N. W. R. Co. 87 Wis. 304, 58 N. W. 393. And see Carlson v. Chicago & N. W. R. Co. *post*, 349, and cases there cited.

Some cases have not only denied that there is a presumption in favor of the exercise of due care on the part of the deceased where his conduct does not appear from the evidence, but have refused even to submit the question of contributory negligence to the jury in such a case.

Thus, in an action to recover for the death of a person killed at a railroad crossing the plaintiff, in order to recover, must make it appear, either by direct evidence or else by inferences fairly deducible from the facts proved, that the deceased was free from contributory negligence on his part; and when the circumstances point as much to the negligence of the deceased as to its absence, or point in neither direction, a nonsuit must be granted. The presumption that a person exposed to danger will exercise care and prudence in regard to his own safety does not permit the inference to be drawn that he exercised due care. McAuliffe v. New York C. & H. R. R. Co. 85 App. Div. 187, 83 N. Y. Supp. 200.

In Rodrian v. New York, N. H. & H. R. Co. 125 N. Y. 526, 26 N. E. 741, the court said: "Whether the duty [to look in both directions for a train] imposed upon the traveler has been discharged, may be, and often is, a question involved in doubt. The evidence may justify opposing inferences. In such case the question is for the jury. There is another rule, equally well established in this state, that the plaintiff in an accident case assumes the burden of showing that the injury occurred without fault on the part of the person injured, or of giving evidence from which the jury may infer that he was without fault, and that his act did not contribute to the casualty. . . . In case of a death accident at a railroad crossing, it must often happen that the circumstances immediately preceding it, and the acts and conduct of the deceased, are left in great obscurity. But the rules of law governing the right of recovery are the same as in other cases, although slighter evidence of compliance with the duty cast upon a plaintiff might be deemed sufficient than where the injured person was alive and competent to testify." In this case it was held error to submit the case to the jury because the plaintiff failed to give any evidence tending to show, or from which the jury might find, that the decedent was free from contributory negligence, or exercised due care.

The burden is upon the plaintiff, in an action to recover for the death of a person

greatest care possible under the circumstances until he reached the bridge. What he did after leaving the bridge is only a matter of conjecture or inference. Under these circumstances, he is entitled by the settled rule of law to the presumption that he did his duty, and this presumption can only be overcome by testimony showing that he failed to observe the precautions required by law. Pennsylvania R. Co. v. Weber, 76 Pa. 157, 18 Am. Rep. 407; Weiss v. Pennsylvania R. Co. 79 Pa. 387; Longenecker v. Pennsylvania R. Co. 105 Pa. 328; Schum v. Pennsylvania R. Co. 107 Pa. 8, 52 Am. Rep. 468; Cromley v. Pennsylvania R. Co. 208 Pa. 445, 57 Atl. 832.

The learned counsel for appellee admits the force and effect of this rule as applied to the present case, but contends that the presumption of the deceased having done his duty is rebutted by the testimony offered by the plaintiff. The answer to this position is that there is no evidence in the case showing what the deceased did immediately before going on the crossing. The learned counsel argues that, under the circumstances, it was the duty of the deceased to lead his horses to a place where he could see the approaching train, and, if he had been leading his horses, he could and would have been seen by Mrs. Nippes. This does not necessarily follow. In the first place, it is doubtful whether, under the facts proved and circumstances established, the court was justified in holding, as a matter of law, that it was the duty of the deceased

killed at a railroad crossing, to show affirmatively, either by direct evidence or the drift of the surrounding circumstances, that the deceased was himself without fault, and approached the crossing with prudence and care and with senses alert to the possibility of approaching danger. Tolman v. Syracuse, B. & N. Y. R. Co. 98 N. Y. 202, 50 Am. Rep. 649.

But in Smedis v. Brooklyn & R. B. R. Co. 88 N. Y. 19, the court, in reply to the argument that, as no witness testified that the intestate looked to see or listened to hear if the defendant's train was approaching, it must be assumed that he did not, and that such omission was negligence on his part, said that it knew of no such rule: that, while it is true that a traveler, on approaching a railroad crossing, is bound to look for an approaching train before he undertakes to cross, it is only where it appears from the evidence that he might have seen if he looked, or might have heard if he listened, that a jury is authorized to find that he did not look and did not listen.

In Chicago, B. & Q. R. Co. v. Appell, 103 Ill. App. 185, the court approved of an instruction that the burden was upon the plaintiff to prove by the greater weight of evidence, not only the negligence of defendant, but also that the deceased was free from negligence which contributed to the collision.

In an action for the death of a person killed at a railroad crossing it must appear, either directly or circumstantially, that he was free from contributory fault; and there is no presumption to that effect in the absence of evidence as to the circumstances. Indiana, B. & W. R. Co. v. Greene, 106 Ind. 279, 55 Am. Rep. 736, 6 N. E. 603. In this case the court said that the fact that a person traveling on a highway comes in collision with a train on a railroad crossing is of itself sufficient to suggest the presumption of contributory negligence.

But an instruction that the law presumes that the injuries to plaintiff's decedent, if he died from injuries received by a collision with defendant's engine at a highway and railroad crossing, were brought about by his own negligence, was held erroneous, in view of the Indiana statute placing the burden of proving contributory negligence upon the defendant. Nichols v. Baltimore & O. S. W. R. Co. 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

When a person is killed at a railroad crossing, and no neglect of duty on the part of the defendant is shown, such as naturally might have misled him, a jury is not warranted in presuming that he took the necessary precautions. The nature of the accident in some cases makes it improbable, according to common experience, that negligence on the plaintiff's side was a contributing power; but it does not do so in the case at bar. Livermore v. Fitchburg R. Co. 163 Mass. 132, 39 N. E. 789. The report of the case does not show the facts and circumstances attending the accident.

In State v. Maine C. R. Co. 76 Me. 357, 49 Am. Rep. 622, it was said that it was settled in that state that the burden is upon the plaintiff to show due care upon the part of the person killed or injured, at the time of the accident. It was further held in this case that the fact that one in full possession of his faculties undertook to cross a railroad track at the very moment a train of cars was passing, or when a train was so near that he was not only liable to be, but was in fact, struck by it, was prima facie evidence of negligence.

In an action for negligently causing the death of a person at a railroad crossing the plaintiff has the burden of proving affirmatively due care on the part of the deceased, and there is no presumption that he was free from contributory negligence, though sometimes the circumstances may of themselves show that he was. Day v. Boston & M. R. Co. 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771. In this case it was held that the burden resting upon the plaintiff was not discharged where the evidence showed only that the deceased, who approached the railroad crossing with a team, stopped momentarily a few rods from

"to alight from the wagon and lead his horses to a place where he could see." The testimony did not clearly show that the view of the deceased was so obstructed as to require him to alight; nor does it show just what position of danger the deceased was in as the train approached, and whether he exercised such care as was required of him under the circumstances. But, even if it be conceded that it was his duty to alight and lead his horses, in the absence of evidence showing that he did not do so, the presumption is that he did perform whatever duty the law required of him. The testimony of Mrs. Nippes is not sufficient to overcome this presumption. In answer to questions by counsel and court, she testified: "I didn't see the man." At another time this witness said she did not see the man either before or after the accident. It requires a degree of ingenuity, not convincing to the court, to support the contention that the negative testimony of this witness is to be construed into affirmative testimony showing that the deceased had failed in the performance of a legal duty. The witness does not say whether deceased was leading his horses, or walking beside, or sitting upon, his wagon. She does not know where he was, nor has any other witness testified to the whereabouts of the deceased at the time of the accident. Certainly such negative, uncertain, and unconvincing testimony as this cannot be held to overcome the legal presumption in his favor. On the other hand, the presumption that the deceased did his duty before going on the tracks is strengthened by his course of action on his way to the crossing. He stopped three times to look for approaching trains, and may or may not have stopped a fourth time. These facts, added to the legal presumption that he exercised due care, make a particularly strong case in favor of the plaintiff.

It is earnestly contended that this case is ruled by Kinter v. Pennsylvania R. Co. 204 Pa. 497, 93 Am. St. Rep. 795, 54 Atl. 276. We think not. In that case it was held to be the duty of Kinter to stop, look, and listen at a place where he could see the approaching train. The evidence showed that he did not stop at such a point; and, it being conceded that he could not see where he did stop, it was for the court to say that he had not observed the rule requiring him to look. In the present case there is no evidence to show that the deceased did not stop at a place where he could see the approaching train, or that there was a better place of view where he should have stopped, or that he failed in the performance of any duty required of him by law. On these vital questions the evidence discloses nothing. The legal presumption, in the absence of evidence, is, that he did stop at a place where he could see, that it was the proper place to stop, and that he performed his duty. It is clear, therefore, that the rule in that case is not applicable to the one at bar.

The question of defendant's negligence has not been raised here, nor was it considered by the court below. When, however, the case is again tried, it should not be overlooked that the first and primary question to be determined is the negligence of the defendant. The contributory negligence of the deceased is predicated upon and presupposes the negligence of the defendant. If the testimony does not show negligence by the defendant, there can be no recovery,

the crossing and then immediately drove upon the crossing, there being no evidence that he, at that or any other time, listened or looked either way for approaching trains.

It is apparent from the foregoing review of the authorities that there is considerable difference of opinion upon the abstract question whether a presumption is to be indulged in favor of the exercise of due care by deceased where his conduct is not shown by the evidence, and the circumstances do not repel such presumption. The difference of opinion is doubtless of practical importance for the purposes of a case in which it appears merely that a person was killed at a crossing, and none of the attendant circumstances are shown. Cases of this kind, however, are very rarely, if ever, presented to the courts. The case of McAuliffe v. New York C. & H. R. R. Co. 85 App. Div. 187, 83 N. Y. Supp. 200, perhaps approximates as closely that position as any of the reported cases; and it will be observed that in that case the denial of the presumption of the exercise of due care by the deceased operated to defeat recovery. In most cases, however, additional circumstances bearing on the question of contributory negligence will appear, even though there is no direct testimony of eyewitnesses; and, since the circumstances may be such as to require the submission of the question to the jury, even by a court which formally denies the existence of a presumption in favor of due care, or, upon the other hand, may be such as to overcome the presumption and require the withdrawal of the case from the jury, even by a court which in general admits the presumption, the difference of opinion is as a rule more theoretical than practical.

The opinion of the circuit court of appeals in Wabash R. Co. v. De Tar, *post*, 352, contains a valuable discussion of the function and practical effect of this presumption, and especially of its relation to the burden of proof with respect to contributory negligence.

no matter how free from negligence the facts show the deceased to be. The defendant is entitled to the benefit of the presumption that through its agents and employees it did its duty in approaching the crossing. There must be affirmative evidence to rebut this presumption, else there can be no recovery. If the case stands on presumptions alone, no evidence having been offered either as to the defendant's negligence or the contributory negligence of the deceased, the presumptions would be equal, and the action to recover damages could not prevail. The burden of showing negligence by the defendant rests on the plaintiff, and must affirmatively appear from the evidence. It is true there is some evidence, negative in character, of the failure to blow the whistle and ring the bell as the train approached the crossing. Whether this evidence is sufficient to rebut the presumption that these duties were performed is a question not raised by this appeal, and it is therefore unnecessary to review this branch of the case.

Judgment reversed and a *procedendo* awarded.

MINNESOTA SUPREME COURT.

ANDREW CARLSON, Admr., etc., of Eric Pehrson, Deceased, Appt.,
v.
CHICAGO & NORTHWESTERN RAILWAY COMPANY.

(— Minn. —, 106 N. W. 555.)

Railroad—crossing accident—presumption.

1. In an action to recover damages for the death of a person, caused by a collision with a train of defendant at the intersection of a street and the railroad track, where the uncontradicted evidence conclusively shows that when decedent was 50 feet distant from the railroad track a train could have been seen at a distance of 2,500 feet from such crossing, and where the testimony shows that the deceased looked and listened for the train at that point, the law conclusively presumes either that he did not look and listen, or that if he did look and listen, or both, he afterwards heedlessly disregarded the knowledge thus obtained, and negligently went into an obvious danger.

Same—negligence of company—excuse for plaintiff's negligence.

2. Negligence of the defendant's employees in failing to whistle or ring a bell at a crossing is no excuse for negligence on the part of the person about to cross in failing to use his senses.

Same—extra train.

3. That the train which collided was an extra did not relieve either party to the collision from the duty of the exercise of care.

Same—presumption—evidence of acts.

4. The presumption that one who was killed while crossing a railway track looked and listened before attempting to cross it is destroyed where the plaintiff introduces direct and affirmative evidence as to exactly what occurred, and where it also appears from the undisputed evidence that, if the deceased had looked and listened before going upon the crossing, he must have seen and heard the train approaching.

(December 22, 1905.)

APPEAL by plaintiff from an order of the District Court for Nicollet County denying a motion for new trial after verdict in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. **Davis & Olsen** and **A. A. Stone**, for appellant:

Deceased might rely on the presumption that the defendant would perform its duty as to speed and signals.

Newstrom v. St. Paul & D. R. Co. 61 Minn. 78, 63 N. W. 253; Klotz v. Winona & St. P. R. Co. 68 Minn. 341, 71 N. W. 257; Staal v. Grand Rapids & I. R. Co. 57 Mich. 239, 23 N. W. 795; Hendrickson v. Great Northern R. Co. 49 Minn. 245, 16 L. R. A. 261, 32 Am. St. Rep. 540, 51 N. W. 1044.

Failure to look at the instant of attempting to cross a railroad track is not conclusive evidence of negligence.

Shaber v. St. Paul, M. & M. R. Co. 28 Minn. 103, 9 N. W. 575; Hendrickson v. Great Northern R. Co. *supra;* Thompson v. New York C. & H. R. R. Co. 110 N. Y. 636, 17 N. E. 690; Howard v. St. Paul, M. & M. R. Co. 32 Minn. 214, 20 N. W. 93; Stackus v. New York C. & H. R. R. Co. 79 N. Y. 464; Hicks v. New York, N. H. & H. R. Co. 164 Mass. 424, 49 Am. St. Rep. 471, 41 N. E. 721; Moore v. Chicago, St. P. & K. C. R. Co. 102 Iowa, 595, 71 N. W. 569.

If the belief that the crossing of the track might be safely made was entertained by the deceased, and such belief was a reasonable one, and it was erroneous only because of the negligence of defendant in moving its cars without notice, warning, or signal, then the injured party was not negligent.

Langhoff v. Milwaukee & P. du Ch. R. Co. 19 Wis. 490; Shaber v. St. Paul, M. & M. R. Co. *supra;* Detroit & M. R. Co. v. Van

Headnotes by JAGGARD, J.

Note.—See note to preceding case on question as to presumption of care on the part of one killed at a railroad crossing.

Steinburg, 17 Mich. 109; Newstrom v. St. Paul & D. R. Co. 61 Minn. 81, 63 N. W. 253; Hart v. Erie R. Co. 3 Alb. L. J. 312.

Messrs. **Brown, Abbott, & Somsen,** for respondent:

When the uncontradicted evidence conclusively shows that the train must have been plainly visible from the point or points which Pehrson occupied when it became and while it was his duty to look and listen, it must be conclusively presumed, either that he disregarded the rule of prudence, or that if he did look or listen, or both, he heedlessly disregarded the knowledge thus obtained, and negligently went into an obvious danger.

Miller v. Truesdale, 56 Minn. 274, 57 N. W. 661; Brown v. Milwaukee & St. P. R. Co. 22 Minn. 167; Weyl v. Chicago, M. & St. P. R. Co. 40 Minn. 350, 42 N. W. 24; Howe v. Minneapolis, St. P. & S. Ste. M. R. Co. 62 Minn. 78, 30 L.R.A. 684, 54 Am. St. Rep. 616, 64 N. W. 102; Nelson v. St. Paul & D. R. Co. 76 Minn. 193, 78 N. W. 1041, 79 N. W. 530; Schmidt v. Great Northern R. Co. 83 Minn. 105, 85 N. W. 935; Kemp v. Northern P. R. Co. 89 Minn. 139, 94 N. W. 439; Chicago & N. W. R. Co. v. Andrews, 64 C. C. A. 399, 130 Fed. 65; Northern P. R. Co. v. Freeman, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763.

The failure of deceased to look and listen was negligence without reference to the company's failure to do its duty, if it did so.

Beach, Contrib. Neg. p. 185; Schneider v. Northern P. R. Co. 81 Minn. 383, 84 N. W. 124; Sandberg v. St. Paul & D. R. Co. 80 Minn. 442, 83 N. W. 411.

Jaggard, J., delivered the opinion of the court:

This was an action brought to recover damages from the defendant for causing the death of Eric Pehrson by negligence. According to the appellant the facts are as follows: On August 17, 1903, plaintiff's intestate was proceeding along a public street in the city of St. Peter, called Hartew street. He was driving in a jump-seat top buggy hitched to a single horse. The horse was very gentle. The top on the buggy was up. The curtains of the top were down, but the one on the right-hand side, where deceased was sitting, was fastened only at the top. The front or jump seat on the buggy was down, and the other seat in place over the same. He was accompanied by his daughter, thirteen years of age. On the right-hand side of the street was a corn field, which obstructed entirely the view of the defendant's railroad track and right of way until the deceased arrived at a point 50 feet east of the center of the railroad track of defendant. As the deceased approached the defendant's railroad track he was driving very slowly, and when he reached a point at the corner of the right-of-way fence, 50 feet east of the center of defendant's railway track, he pulled up his horse and looked and listened for trains. In order to do so, the deceased had to stand up in the buggy and put his head outside of the buggy top. He then proceeded very slowly forward and onto the railway track of defendant, when he was struck by one of defendant's locomotives and a train of cars and instantly killed. The train was running very fast, more than 50 miles an hour, and in violation of an ordinance of said city, which ordinance is admitted to have been in force by the pleadings. The train which caused the death of plaintiff's intestate was an "extra," and arrived at the said crossing about thirty minutes after the regular passenger had gone down in the morning. There was no other regular train on this railroad, either way, for about three hours later than the time this "extra" arrived. There was a whistling post about 1,300 feet north of the Hartew street crossing, and near the city limits on the north. This "extra" train, which caused the death of plaintiff's intestate, approached this crossing, passing said whistling post, without giving any signals by bell or whistle. At any point between the center of the railroad track and the east line of the right of way, 50 feet east, a train could have been seen for a distance of 2,500 feet to the north of said crossing, where a sharp curve prevented seeing it any further. The railroad track ran almost north and south at the place where it intersected Hartew street, which runs east and west. The day was still, clear, and warm. The court granted the motion of the defendant to direct a verdict on the ground that the plaintiff's decedent was guilty of contributory negligence, and subsequently denied the plaintiff's motion for a new trial.

The essential question in this case concerns the contributory negligence of plaintiff's intestate. The defendant insists that it has demonstrated to a mathematical certainty that, if the deceased had been traveling at from 1½ miles to 3 miles per hour, and if the train had been going upwards of 100 miles per hour, and *a fortiori* if the train had been going at less speed, the engine would necessarily have been in plain sight of the plaintiff's decedent, if he had looked at the point his daughter says he did look. The photographs taken and introduced in evidence tend to sustain this contention. Counsel for plaintiff presented no clear refutation of the correctness of this calculation. Without, how-

ever, accepting it as unqualifiedly true, we are of the opinion that upon the record it conclusively appears that if the deceased had looked at this point he must have seen the moving train. The principles of law applicable to this state of facts are definite and well settled. When the uncontradicted evidence conclusively shows that the colliding train must have been plainly visible from the point at which the testimony shows that the injured or killed person looked and listened for the train, the law conclusively presumes either that he did not look and listen, or that if he did look or listen, or both, he afterwards heedlessly disregarded the knowledge thus obtained and negligently went into an obvious danger. In neither view is the company operating the train responsible under ordinary circumstances for the damages consequent upon the collision, of which the person injured or killed was the proximate cause. Brown v. Milwaukee & St. P. R. Co. 22 Minn. 165, 167; Miller v. Truesdale, 56 Minn. 274, 57 N. W. 661; Weyl v. Chicago, M. & St. P. R. Co. 40 Minn. 350, 42 N. W. 24; Howe v. Minneapolis, St. P. & S. Ste. M. R. Co. 62 Minn. 78, 30 L.R.A. 684, 54 Am. St. Rep. 616, 64 N. W. 102; Nelson v. St. Paul & D. R. Co. 76 Minn. 193, 78 N. W. 1041, 79 N. W. 530; Schmidt v. Great Northern R. Co. 83 Minn. 105, 85 N. W. 935; Kemp v. Northern P. R. Co. 89 Minn. 139, 142, 94 N. W. 439; Chicago & N. W. R. Co. v. Andrews, 64 C. C. A. 399, 130 Fed. 65; Northern P. R. Co. v. Freeman, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763; Wardner v. Great Northern R. Co. (Minn.) 104 N. W. 1084. If that point be so far distant from the track as to enable the person injured or killed to know of the approaching train in due season to avoid the collision with it, he is guilty of contributory negligence as a matter of law, and there is nothing for a jury to pass upon. Blount v. Grand Trunk R. Co. 9 C. C. A. 526, 22 U. S. App. 129, 61 Fed. 375; Straugh v. Detroit, L. & N. R. Co. 65 Mich. 706, 36 N. W. 161; Huggart v. Missouri P. R. Co. 134 Mo. 673, 36 S. W. 220; Stopp v. Fitchburg R. Co. 80 Hun, 178, 29 N. Y. Supp. 1008; Morris v. Lake Shore & M. S. R. Co. 148 N. Y. 182, 42 N. E. 579; Marland v. Pittsburgh & L. E. R. Co. 123 Pa. 487, 10 Am. St. Rep. 541, 16 Atl. 624; Butler v. Gettysburg & H. R. Co. 126 Pa. 160, 19 Atl. 37.

The present case is obviously distinguishable from Hendrickson v. Great Northern R. Co. The environment and the cause of the accident in that case was essentially different. When Hendrickson emerged from a ravine at a point 50 feet from the railroad, the engine came in view in a cut about 150 feet away and at once gave short and shrill danger whistles, whereby the horses became frightened and unmanageable, reared, and plunged forward towards the rails, notwithstanding the driver's efforts to control them, whereby the collision occurred. Collins, J., in Hendrickson v. Great Northern R. Co. 49 Minn. 251, 16 L.R.A. 261, 32 Am. St. Rep. 540, 51 N. W. 1044, 52 Minn. 340, 54 N. W. 189.

"Another principle is as well established, —that a person crossing as the plaintiff was cannot rely upon the signals to remind him of danger. He is bound to be awake and alive for his own protection." Lewis, J., in Sandberg v. St. Paul & D. R. Co. 80 Minn. 442, 83 N. W. 411. Accordingly, the failure of plaintiff's intestate to look and listen would be negligence or not according to the circumstances, but without being controlled by the defendant's failure to do its duty. Beach, Contrib. Neg. § 185; Schneider v. Northern P. R. Co. 81 Minn. 383, 84 N. W. 124. Negligence of the defendant's employees in failing to whistle or ring a bell at a crossing is no excuse for negligence on the part of the person about to cross in failing to use the senses to discover danger. Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 702, 24 L. ed. 542, 543; Northern P. R. Co. v. Freeman, *supra*. And see cases collected in Judson v. Great Northern R. Co. 63 Minn. 248, 254, 65 N. W. 447.

The duty of exercising caution in attempting to cross a railway track, a place of known danger, is not relaxed by the opportunity or occasion for theorizing or difference of opinion as to whether a train is or is not likely to pass. Observation, not logic, is the proper precaution. Dodge, J., in Guhl v. Whitcomb, 109 Wis. 69, 83 Am. St. Rep. 889, 85 N. W. 142. That the train which did the damage in this case was an "extra" did not relieve either party from the respective duty of the exercise of care. Swiftly moving and irregular trains are to be expected, and it is the duty of persons about to go upon crossings to look and listen for such trains, as well as those on time or which run slowly. Collins, J., in Judson v. Great Northern R. Co. *supra*. It is true that, in the absence of evidence to the contrary, there is sometimes a presumption that one who was killed while crossing a railroad track stopped, looked, and listened before attempting to cross the track. Texas & P. R. Co. v. Gentry, 163 U. S. 353, 366, 41 L. ed. 186, 192, 16 Sup. Ct. Rep. 1104; Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 474, 48 L. ed. 262, 267, 24 Sup. Ct. Rep. 137. But in this case the plaintiff introduced evidence of the daughter of deceased, who was driving with him, as to what happened. Moreover, when it appears from the undisputed evidence that, if

deceased had looked and listened before driving upon the crossing, he must have seen and heard the train approaching, as was the case here, the presumption is destroyed. Rollins v. Chicago, M. & St. P. R. Co. 139 Fed. 639.

Accordingly, upon appellant's own view of the facts in this case, that deceased looked up the track at a point 50 feet from it, it is not necessary to determine how far there is to be applied to it the ordinary rule that one who attempts to cross a railroad is bound to use his senses continually while approaching and while crossing the place of known danger (Rogstad v. St. Paul, M. & M. R. Co. 31 Minn. 208, 17 N. W. 287; Sandberg v. St. Paul & D. R. Co. 80 Minn. 442, 83 N. W. 411; Wright v. Cincinnati, N. O. & T. P. R. Co. 94 Ky. 114, 21 S. W. 581; Renwick v. New York C. R. Co. 36 N. Y. 132; Whitman v. Pennsylvania R. Co. 156 Pa. 175, 27 Atl. 290; Thompson v. New York C. & H. R. R. Co. 110 N. Y. 636, 17 N. E. 690; Moore v. Chicago, St. P. & K. C. R. Co. 102 Iowa, 595, 71 N. W. 569), in view of the fact that he was riding in a covered carriage, making it inconvenient for him to look up and down the road. See Stackus v. New York C. & H. R. R. Co. 79 N. Y. 464; Hicks v. New York, N. H. & H. R. Co. 164 Mass. 424, 49 Am. St. Rep. 471, 41 N. E. 721.

The conclusion thus reached renders it unnecessary to consider the other questions raised; for example, with respect to defendant's negligence in running faster than the ordinance permitted and to the reasonableness of that ordinance.

Order affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

WABASH RAILROAD COMPANY, Plff. in Err.,
v.
ROSA M. DE TAR, Admrx., etc., of William De Tar, Deceased.

(— C. C. A. —, 141 Fed. 932.)

Negligent injury—presumption of care.

1. Because the natural instinct of self-preservation generally prompts men to acts of care and caution when approaching or in the presence of danger, there is, in the absence of credible evidence of the actual fact in any instance, a presumption of the exercise of due care and caution; but, like other presumptions of fact arising from the ordinary or usual conduct of men, rather than from what is invariable or universal, this presumption is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it, which may be shown by the testimony of eyewitnesses to his movements, or by evidence of the physical surroundings and other conditions at the time.

Same—weight as evidence.

2. The presumption of the exercise of due care and caution on the part of one approaching a place of danger is essentially inferior in probative force and weight to credible evidence, either direct or circumstantial, explanatory of the actual occurrence, and, in those courts where the presumption underlies the rule that the burden of proving contributory negligence rests upon the defendant and must be maintained by a fair preponderance of the evidence, its force and influence are so largely embodied in the enforcement of that rule that it has little independent application, save as it rests upon a general, but not invariable, rule of human experience which may and should be considered in determining the credibility of evidence and the weight to be given to it when these matters are not otherwise entirely clear.

(November 15, 1905.)

ERROR to the Circuit Court of the United States for the Southern District of Iowa to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of her intestate. Reversed.

The facts are stated in the opinion.

Argued before Van Devanter and Hook, Circuit Judges, and Amidon, District Judge.

Messrs. Carr, Hewitt, Parker, & Wright, for plaintiff in error:

A failure to look and listen before crossing a railway track is negligence *per se*.

Chicago, R. I. & P. R. Co. v. Houston, 96 U. S. 697, 24 L. ed. 542; Schofield v. Chicago, M. & St. P. R. Co. 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; Northern P. R. Co. v. Freeman, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763; Blount v. Grand Trunk R. Co. 9 C. C. A. 526, 22 U. S. App. 129, 61 Fed. 375; Shatto v. Erie R. Co. 121 Fed. 678; Pyle v. Clark, 25 C. C. A. 190, 49 U. S. App. 260, 79 Fed. 744; Chicago, St. P. M. & O. R. Co. v. Rossow, 54 C. C. A. 313, 117 Fed. 491; Banning v. Chicago, R. I. & P. R. Co. 89 Iowa, 74, 56 N. W. 277; Murphy v. Chicago, R. I. & P. R. Co. 45 Iowa, 661; Schaefert v. Chicago, M. & St. P. R. Co. 62 Iowa, 624, 17 N. W. 893; Pence v. Chicago, R. I. & P. R. Co. 63 Iowa, 746, 19 N. W. 785; Griffin v. Chicago, R. I. & P. R. Co. 68 Iowa, 638, 27 N. W. 792;

Headnotes by VAN DEVANTER, Circuit Judge.

Note.—See case note to Hanna v. Philadelphia & R. R. Co. *ante*, 344.

Bloomfield v. Burlington & W. R. Co. 74 Iowa, 607, 38 N. W. 431; Platt v. Chicago, St. P. M. & O. R Co. 84 Iowa, 694, 51 N. W. 254; Lee v. Chicago, R. I. & P. R. Co. 80 Iowa, 172, 45 N. W. 739; Nixon v. Chicago, R. I. & P. R. Co. 84 Iowa, 331, 51 N. W. 157; Tierney v. Chicago & N. W. R. Co. 84 Iowa, 641, 51 N. W. 175; Sala v. Chicago, R. I. & P. R. Co. 85 Iowa, 678, 52 N. W. 664; Reeves v. Dubuque & S. C. R. Co. 92 Iowa, 32, 60 N. W. 243; Buelow v. Chicago, St. P. & K. C. R. Co. 92 Iowa, 240, 60 N. W. 617; Hinken v. Iowa C. R. Co. 97 Iowa, 603, 66 N. W. 882; Moore v. Keokuk & W. R. Co. 89 Iowa, 223, 56 N. W. 430.

Evidence which would be sufficient to meet defendant's burden of proof must of necessity overcome the presumption of care.

When it appears that, if proper precautions had been taken, they could not have failed to prove effectual, the court has no right to assume that such precautions were taken.

Northern P. R. Co. v. Freeman, 174 U. S. 383, 43 L. ed. 1016, 19 Sup. Ct. Rep. 763; Continental Improv. Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; Texas & P. R. Co. v. Gentry, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137.

Mr. J. C. Mabry, for defendant in error:

Deceased had the right to assume that the train would be run at a lawful rate of speed.

Moore v. Chicago, St. P. & K. C. R. Co. 102 Iowa, 595, 71 N. W. 569; Harper v. Barnard, 99 Iowa, 159, 68 N. W. 599; Mynning v. Detroit, L. & N. R. Co. 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147, 67 Mich. 677, 35 N. W. 811; Omaha, N. & B. H. R. Co. v. O'Donnell, 22 Neb. 475, 35 N. W. 235; 2 Thomp. Neg. § 1584; 3 Elliott, Railroads, § 1158; Continental Improv. Co. v. Stead, 95 U. S. 164, 24 L. ed. 405; Cummings v. Chicago, R. I. & P. R. Co. 114 Iowa, 85, 86 N. W. 40.

The question whether the plaintiff was guilty of contributory negligence was for the jury.

Schulte v. Chicago, M. & St. P. R. Co. 114 Iowa, 89, 86 N. W. 63; Case v. Chicago, M. & St. P. R. Co. 100 Iowa, 487, 69 N. W. 538; Funston v. Chicago, R. I. & P. R. Co. 61 Iowa, 452, 16 N. W. 518; Reed v. Chicago, St. P. M. & O. R. Co. 74 Iowa, 188, 37 N. W. 149; Spencer v. Illinois C. R. Co. 29 Iowa, 55; Whitsett v. Chicago, R. I. & P. R. Co. 67 Iowa, 150, 25 N. W. 104; Mackerall v. Omaha & St. L. R. Co. 111 Iowa, 547, 82 N. W. 975; Harper v. Barnard, 99 Iowa, 159, 68 N. W. 599; Grand Trunk R. Co. v. Ives, 144 U. S. 433, 36 L. ed. 494, 12 Sup. Ct. Rep. 679; Sullivan v. New York, N. H. & H. R. Co. 154 Mass. 524, 28 N. E. 911; Texas & P. R. Co. v. Cody, 166 U. S. 611, 41 L. ed. 1134, 17 Sup. Ct. Rep. 703; Baltimore & O. R. Co. v. Griffith, 159 U. S. 603, 40 L. ed. 274, 16 Sup. Ct. Rep. 105; Cincinnati, N. O. & T. P. R. Co. v. Farra, 13 C. C. A. 602, 31 U. S. App. 306, 66 Fed. 496; McGhee v. White, 13 C. C. A. 608, 31 U. S. App. 366, 66 Fed. 502; St. Louis & S. F. R. Co. v. Barker, 23 C. C. A. 475, 40 U. S. App. 739, 77 Fed. 810; Northern P. R. Co. v. Spike, 57 C. C. A. 384, 121 Fed. 45.

The presumption of care takes the place of other kinds of evidence to establish the fact or condition embraced in the presumption.

Graves v. Colwell, 90 Ill. 615; Lawson, Presumptive Ev. 661; 1 Greenl. Ev. § 34; Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137; 38 Am. Law Rev. p. 139; Hopkinson v. Knapp & S. Co. 92 Iowa, 328, 60 N. W. 653; Way v. Illinois C. R. Co. 40 Iowa, 341; Greenleaf v. Illinois C. R. Co. 29 Iowa, 48, 4 Am. Rep. 181; Dalton v. Chicago, R. I. & P. R. Co. 104 Iowa, 28, 73 N. W. 349; Burns v. Chicago, M. & St. P. R. Co. 69 Iowa, 456, 58 Am. Rep. 227, 30 N. W. 25; Baker v. Chicago, R. I. & P. R. Co. 95 Iowa, 171, 63 N. W. 667; Spaulding v. Chicago, R. I. & P. R. Co. 98 Iowa, 216, 67 N. W. 227; Allen v. Willard, 57 Pa. 374; Northern P. R. Co. v. State, 29 Md. 420, 96 Am. Dec. 545; Illinois C. R. Co. v. Nowicki, 46 Ill. App. 566.

Messrs. Ward & Mershon also for defendant in error.

Van Devanter, Circuit Judge, delivered the opinion of the court:

This was an action to recover damages for the death of William De Tar, who was instantly killed by a train which came in collision with his wagon as he was driving over the crossing of the Wabash Railroad and Chestnut street in the outer part of Albia, Iowa. The petition charged the railroad company with negligence in that the speed of the train was excessive, no signal of its approach was given, and no precaution to discover the presence of travelers at the crossing was taken by the enginemen. The answer traversed this charge, and also alleged that the deceased was guilty of negligence contributing to the injury in that he drove upon the crossing without exercising reasonable care for his own safety. The trial in the circuit court resulted in a verdict and judgment for the plaintiff. It appeared, from the evidence, that the collision occurred about 9 o'clock in the morning of a day in January; that the deceased was a mail carrier in the rural delivery service, was quite familiar with the crossing, having passed over it with

his wagon and team almost daily for many months; and that the wagon was partially inclosed, and the team was gentle. In respect of the charge that no signals of the approach of the train were given, the evidence was conflicting. There was no direct evidence, in the sense of testimony from eyewitnesses, as to what, if any, precautions for his own safety were taken by the deceased as he approached the crossing; but there was at least substantial evidence tending to show that the physical surroundings and other conditions at the time were such that, had he made reasonable use of his senses of sight and hearing, he would have discovered the approaching train before he drove upon the crossing and in ample time to have avoided the collision. In its charge to the jury, the court, after stating that, on the issue of contributory negligence, the railroad company had the burden of proof and must maintain it by a fair preponderance of the evidence, gave the following instruction: "It is a law of nature that you and I recognize that every man wants to live. It is so with men, unless their minds are disordered in some way or other. That is a natural instinct implanted within us,—the desire to live. That is entitled to weight as evidence, as an affirmative fact, and can only be offset by affirmative evidence on the other side. How much evidence does it take to ride down the presumption that every man is presumed not to do a negligent act? That is to say, whether one witness or several, or whether it may be ridden down by circumstances and situation and attendant facts; but this presumption that every man has a desire to live is entitled to weight as evidence. It is as though Mr. De Tar could in some way speak to us."

And in that connection the following requests to charge, tendered by the defendant, were refused: "If you find from the evidence introduced that said Wm. De Tar did see or hear the train, or by exercising reasonable care he could have seen it, in time to avoid the accident, then the presumption that he exercised care in order to preserve his life is overcome by the evidence, and plaintiff cannot recover.

"If you first find that defendant was negligent, then the presumption that said Wm. De Tar exercised reasonable care in order to preserve his life would be sufficient to warrant a recovery, if there was no opposing evidence upon that question; but in this case affirmative evidence has been introduced tending to show negligence upon the part of said De Tar, and, if you find there is sufficient evidence to establish his negligence by a fair preponderance of the evidence, there can be no recovery by the plaintiff in this case."

Complaint is made of these rulings, and we think it is well grounded. Because the natural instinct of self-preservation generally prompts men to acts of care and caution when approaching or in the presence of danger, there is, in the absence of credible evidence of the actual fact in any instance, a presumption of the exercise of due care and caution. Washington & G. R. Co. v. Gladmon, 15 Wall. 401, 407, 21 L. ed. 114, 115; Continental Improv. Co. v. Stead, 95 U. S. 161, 165, 24 L. ed. 403, 405; Baltimore & O. R. Co. v. Griffith, 159 U. S. 603, 610, 40 L. ed. 274, 277, 16 Sup. Ct. Rep. 105; Texas & P. R. Co. v. Gentry, 163 U. S. 353, 366, 41 L. ed. 186, 192, 16 Sup. Ct. Rep. 1104; Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 474, 48 L. ed. 262, 267, 24 Sup. Ct. Rep. 137; The City of Naples, 16 C. C. A. 421, 424, 32 U. S. App. 613, 69 Fed. 794; Northern P. R. Co. v. Spike, 57 C. C. A. 384, 121 Fed. 44.

But it is a presumption of fact, not of law, and, like other presumptions arising from the ordinary or usual conduct of men, rather than from what is invariable or universal, it is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it. Fresh v. Gilson, 16 Pet. 327, 331, 10 L. ed. 982, 983; Home Ins. Co. v. Weide, 11 Wall. 438, 441, 20 L. ed. 197, 198; French v. Edwards, 13 Wall. 506, 514, 20 L. ed. 702, 704; Lincoln v. French, 105 U. S. 614, 617, 26 L. ed. 1189, 1190; Schutz v. Jordan, 141 U. S. 213, 220, 35 L. ed. 705, 710, 11 Sup. Ct. Rep. 906.

Thus, in Continental Improv. Co. v. Stead, *supra*, it was said of persons approaching and passing over railroad crossings: "They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them,—such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault."

And in Baltimore & P. R. Co. v. Landrigan, *supra*, where approval was given to an instruction to the effect that, in the absence of evidence on the subject, there would be a presumption of the exercise of due care by one attempting to pass over a

railroad crossing, but that the presumption might be rebutted by evidence of the surrounding circumstances, it was said: "There are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to. But, notwithstanding the incentive to the contrary, men are sometimes inattentive, careless, or reckless of danger. These the law does not excuse nor does it distinguish between the degrees of negligence."

So, also, in the cases The City of Naples and Northern P. R. Co. v. Spike, *supra*, it was held by this court that the presumption arising from the natural instinct of self-preservation stands in the place of positive proof "in the absence of countervailing evidence." As the presumption reflects only the ordinary or usual conduct of men, and is at utter variance with what they sometimes do, it is not entitled to probative force or weight as affirmative or positive evidence, but only to the force or effect of a rebuttable inference of fact which must necessarily yield to credible evidence of the actual occurrence. Nor it is essential that such evidence shall come from eyewitnesses to the movements of the person injured, because the presumption must equally yield to evidence which shows that the physical surroundings were such that the injury would not have occurred had he been in the exercise of reasonable care. Tomlinson v. Chicago, M. & St. P. R. Co. 67 C. C. A. 218, 134 Fed. 233; St. Louis & S. F. R. Co. v. Chapman, 140 Fed. 129; Rollins v. Chicago, M. & St. P. R. Co. 139 Fed. 639; Northern P. R. Co. v. Freeman, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763. The last case was a railroad crossing case, the facts of which were these: The highway approached the crossing by a gradual decline, the length of which was 130 to 150 feet. Along the greater portion of this distance the view of an approaching train was cut off by the banks of the excavation on either side of the highway; but at a distance of about 40 feet before reaching the track the road emerged from the cut, and the view of the track for about 300 feet was unobstructed. The deceased was familiar with the crossing, and was driving a gentle team. The train which collided with his wagon was going at a speed of about 20 miles an hour. Three witnesses who, at the time, occupied positions ranging from 130 to 250 feet from the crossing, gave testimony tending to show that the deceased made no effort to discover whether or not a train was approaching. The court said: "When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken."

And also: "If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look, or, if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence. . . . Upon the whole, we are of opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor."

It is thus plainly and authoritatively settled not only that the presumption of the exercise of reasonable care is a rebuttable inference of fact, but also that it does not have any probative force or weight in a case where the surrounding circumstances are shown to have been such that, had the injured person taken reasonable precautions for his safety, the injury would not have occurred.

What is here said of this presumption is also sustained by many decisions in the state courts. Thus, in Crawford v. Chicago G. W. R. Co. 109 Iowa, 433, 435, 80 N. W. 519, it was said by the supreme court of Iowa: "The plaintiff also contends that, as Claflin lost his life in the collision, the presumption that he exercised due care must prevail. That such a presumption is proper, and must be given weight, may be conceded, but it cannot prevail against evidence which shows that he could not have exercised due care. . . . A person possessing the ordinary powers of seeing and hearing cannot, without negligence on his part, knowingly approach a railway crossing, and fail to discover an approaching train, which he can readily see or hear a sufficient length of time to enable him, with reasonable effort, to avoid danger."

And it was said by that court in Ames v. Waterloo & C. F. Rapid Transit Co. 120 Iowa, 642, 646, 95 N. W. 161, 162: "Had there been no evidence whatever as to the circumstances surrounding the deceased at the time his injury was received, or as to how the accident occurred, the presumption would be entertained that, prompted by the

instinct of self-preservation, the deceased was taking reasonable precautions for his own safety. But several witnesses saw deceased just as he stepped forward from behind the moving wagon and was struck by the car, and the fact that there was such evidence as to what occurred prevents the presumption which would otherwise be drawn from the instinct of self-preservation from being entertained."

And again: "It has never been held that the presumption from the instinct of self-preservation constitutes affirmative proof of any specific act, or the exercise of any specific care."

In Sullivan v. New York, L. E. & W. R. Co. 175 Pa. 361, 34 Atl. 798, it was said of this presumption by the supreme court of Pennsylvania: "The plaintiff's case rested upon the bare presumption that her husband had stopped, looked, and listened before attempting to cross the tracks. His duty in this regard was fixed by an unbending rule of law. The presumption that he did it is based upon the fact that the natural instincts of men lead them to avoid injury. It prevails in the absence of direct testimony upon the subject, but it may be rebutted by the proof of facts and circumstances as well as by direct evidence. It is demonstrated by the testimony that, if he obeyed the legal injunction, he saw and heard the approaching train; and the only deduction possible is that he did not look and listen, or that, seeing and hearing, he went on, regardless of the danger. The case comes directly within the rule stated in Myers v. Baltimore & O. R. Co. 150 Pa. 386, 24 Atl. 747: 'That one who is struck by a moving train, which was plainly visible from the point he occupied when it became his duty to stop, look, and listen, must be conclusively presumed to have disregarded that rule of law and common prudence, and to have gone negligently into an obvious danger.'"

Philadelphia, W. & B. R. Co. v. Stebbing, 62 Md. 504, 518, was an action somewhat like the present, in which the issues related to the care exercised by the defendant's enginemen and to that exercised by the plaintiff. In the course of the opinion, which was delivered by Chief Justice Alvey, a jurist of very high repute, it was observed: "It is certainly true, the motive to self-preservation is a principle of our common nature, and it is but rational to presume, in the absence of evidence to the contrary, that parties act under its promptings in view of impending danger. But, in such cases as the present, there is a counter-presumption, when the proof does not show to the contrary, and that is, that every person charged with a duty involving the safety of himself or others will perform that duty; so that in fact it is not often the case that these mere presumptions afford much assistance in arriving at correct or just conclusions. They ought not to be indulged to the exclusion of direct evidence to the contrary; and it is only where there is no reliable proof to the contrary, or there is rational doubt upon the evidence as to the acts or conduct of the parties, that such presumptions can properly be invoked. The jury ought not to be instructed in such terms as would justify them in acting upon the mere presumption of the absence of fault in either party, in disregard of the proof in the case, where there are facts and circumstances to be considered by them."

Chase v. Maine C. R. Co. 77 Me. 62, 66, 52 Am. Rep. 744, is also an instructive case, in which the question is discussed as follows: "Exception is taken to the judge charging the jury to take into consideration, upon the question of the intestate's care upon the occasion of the injury, the knowledge of the jury 'of the habits of thought and mind, and the natural instincts of men,' to preserve themselves from injury. Following, as no doubt it did, an impressive argument of counsel that a man would not be so unwise as to rush into danger when it was avoidable, we are inclined to think the idea intended was presented to the jury too prominently. Such a consideration is by no means evidence; for, if it were so, a jury might accept it as conclusive evidence. It is no more than an accompaniment or an appurtenance of evidence. It may have some influence upon the interpretation of facts affirmatively presented. It pertains, as said by defendant's counsel, to those natural laws in connection with which all evidence may be weighed. It belongs to the class of slight presumptions, described by Mr. Best, which, 'taken singly, do not either constitute proof or shift the burden of proof.' 1 Best, Ev. § 319. It may give character or force to facts already proved. But it does not of itself add or create proof. It is rather an argument or mode of reasoning upon evidence. Practically speaking, it is no more than that a person's motive may be taken into consideration in relation to any act done by such person. It would be reasonable to say that a man would be naturally stimulated to avoid rather than to rush into dangerous situations. He would be impelled by strong motives to do so. But this would apply to the engineer or fireman or brakeman on a train as well as to the traveler, although perhaps not generally in the same degree. But the weakness of the plaintiff's position lies in the fact that this motive for personal safety does not operate upon the

minds of men until they can clearly see that they are endangered by their carelessness. It does not keep them from careless acts. The danger is often not seen until too late to be extricated from it. The careless act usually precedes the moment when the natural instincts of self-preservation are aroused. And a man is quite prone to take risks. And a man is careless to take a risk in crossing a railroad in advance of a coming train. We all know that he often does it."

The decision of this court in Chicago, St. P. M. & O. R. Co. v. Bryant, 13 C. C. A. 249, 256, 27 U. S. App. 681, 65 Fed. 969, although not relating to this particular presumption, is in principle applicable to the present discussion. There the plaintiff's intestate was killed in a collision while being transported from one point to another over the defendant's road in a train, consisting of an engine and passenger coach, which was in charge of the defendant's yard master. When the case was first before this court it was held that, in the absence of evidence explanatory of the occurrence, the presumption was that one riding in a coach of a common carrier palpably designed for the transportation of passengers was lawfully there by the invitation or permission of the employees in charge of the vehicle, and that they had authority to bind the carrier by such invitation or permission. Bryant v. Chicago, St. P. M. & O. R. Co. 4 C. C. A. 146, 12 U. S. App. 115, 53 Fed. 997. But when the case came before the court again, it appeared, from the evidence produced at a second trial, that the yard master and some of his coemployees were operating the train solely for purposes of their own, without the knowledge of the defendant, and without color of authority from it, and it was then said: "Finally, it is said that, inasmuch as the presumption that the deceased was a passenger of the company arose from the facts that the yard master was in possession of the train, operating it on the track of the company, and the deceased was riding therein, there was some evidence for the jury in support of the claim of the defendant in error, and the case was properly submitted to them by the court. . . . A presumption of fact, like that which the counsel for the defendant in error here invokes, is a mere inference from certain evidence, and as the evidence changes, the presumption necessarily varies. A trial court is not bound to disregard a conclusive presumption which arises from all the evidence at the close of a case because at some time in the course of a trial counter-presumptions arose. Possession of real estate raises a presumption of title; but, when a legal title is proved in another, a conclusive presumption arises from all the evidence that the latter is the owner, and the court must so direct. Possession of a horse raises the presumption of ownership, but the uncontradicted evidence of competent witnesses that the horse is the property of another and that the possessor secretly took him from his owner without right raises so conclusive a presumption of ownership in the latter that the court might be bound to disregard the first presumption from possession, and the possession itself might raise a presumption of larceny."

The force and application of other presumptions are illustrated in Lisbon v. Lyman, 49 N. H. 553, 562; Agnew v. United States, 165 U. S. 36, 51, 41 L. ed. 624, 629, 17 Sup. Ct. Rep. 235; Dunlop v. United States, 165 U. S. 486, 502, 41 L. ed. 799, 804, 17 Sup. Ct. Rep. 375.

It is true that in the opinion of this court in Northern P. R. Co. v. Spike, *supra*, there are expressions indicating that the presumption of the exercise of due care and caution "has its application in all cases" and is entitled to weight as affirmative evidence, but as these expressions appear to have gone beyond what was necessary to a decision of that case and to ascribe to the presumption greater force and influence than in principle should be accorded to it, they cannot be permitted to control the decision of other cases. As was said by Chief Justice Marshall in Cohen v. Virginia, 6 Wheat. 264, 398, 5 L. ed. 257, 290: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Without further reference to judicial decisions, it may be safely said: Both reason and authority enforce and sustain the conclusion that the presumption of the exercise of due care is essentially inferior in probative force and weight to credible evidence, either direct or circumstantial, explanatory of the actual occurrence; that it arises and has application in the absence of such evidence, but not in opposition to it; and that, in those courts where it underlies the rule that the burden of proving contributory negligence rests upon the defend-

ant, and must be maintained by a fair preponderance of the evidence, its force and influence are so largely embodied in the enforcement of that rule that it has little independent application, save as it rests upon a general, but not invariable, rule of human experience which may and should be considered in determining the credibility of evidence and the weight to be given to it when these matters are not otherwise entirely clear.

In its charge to the jury, as before shown, the court, in addition to telling them that the burden of establishing contributory negligence on the part of the deceased was on the defendant and must be maintained by a fair preponderance of the evidence, attributed to the presumption of the exercise of due care the probative force and weight of affirmative evidence, notwithstanding there was substantial evidence tending to explain the actual occurrence, and also went to the extreme of indicating that the presumption was to be regarded as if it were testimony coming from the deceased. This was error, and plainly tended to mislead the jury. Los Angeles Traction Co. v. Conneally, 136 Fed. 104, 108; Thayer's Preliminary Treatise on Evidence, 337–339. There was also error in the general terms in which it was left to the jury to say whether the presumption could be overcome by evidence of the physical surroundings and other conditions at the time. That it could be so overcome was matter of law, to be stated by the court, and not matter of fact, to be determined by the jury.

The law requires that one about to go over so dangerous a place as a railroad crossing shall make vigilant use of his faculties of sight and hearing to discover whether or not a train is approaching, and that he shall do this at such short distance from the crossing as will be effectual for his protection. Chicago G. W. R. Co. v. Smith, 141 Fed. 930. It was therefore the duty of the court, when so requested, to have plainly instructed the jury that if the evidence showed that the deceased, by the exercise of reasonable care, would have seen or heard the train in time to have avoided the collision, the presumption was overcome, and the plaintiff could not recover.

While it was urged in argument that the evidence so conclusively established the defense of contributory negligence that the court should have directed the jury to return a ve dict for the defendant, the present state of the record is such that that question has not been considered.

The judgment is reversed, with a direction to grant a new trial.

COLORADO SUPREME COURT.

R. P. McCONATHY et al., Appts.,
v.
JAMES W. DECK.

(— Colo. —, 83 Pac. 135.)

Assault—exemplary damages.

1. A showing of illness resulting from unnecessarily rough treatment under a warrant of arrest, of a frail, sick man, and his confinement in a cold jail, will sustain a recovery of exemplary damages, although the extent of the actual damage in money is not shown.

Concealed weapon—forfeiture.

2. Conviction of the offense of carrying concealed weapons is not necessary to work a forfeiture of them under a statute prescribing a punishment for such offense, and providing that all concealed weapons taken from persons violating this statute shall be forfeited to the county.

(November 6, 1905.)

Case Note.—The case of McCONATHY v. DECK, which seems to be the only one which deals with the question of the necessity of a conviction for the offense of carrying concealed weapons as a condition precedent to a forfeiture of them under a statute prescribing the punishment for such offense, and providing that all concealed weapons taken from persons violating it shall be forfeited, derives some support from cases which hold a conviction not a necessary condition precedent to the enforcement of a statute providing that, if any person shall violate it, he shall, upon conviction thereof, forfeit property or pay a fine. Agnew v. McElhare, 18 Pa. 484; Garman v. Gamble, 10 Watts, 382; Meaher v. Chattanooga, 1 Head, 75. See also People v. Waterbury, 44 Hun, 493, in which it is held that where a law provides for the prosecution and punishment of the offender by indictment, and declares that, in addition to the fines and penalties prescribed, he shall forfeit and pay a fixed penalty of a certain sum, the punishments are entirely separate and distinct, and an action for the penalty prescribed is not dependent upon the fact that the defendant shall have been indicted, convicted, and punished for the misdemeanor.

The McCONATHY CASE, in holding that the fact of the violation of the statute may be shown in defense of the officer enforcing the forfeiture, contributes to the number of decisions on the disputed question of the right of the government to confiscate property unlawfully used, without a judicial determination of the facts on which the right of confiscation depends. A discussion of this question with reference to the confiscation, without trial, of property found in use in violation of the game laws, may be found in Daniels v. Homer, 3 L.R.A.(N.S.) 997, and the case note appended thereto.

Reference is also made to the cases of

APPEAL by defendants from a judgment of the District Court for Hinsdale County in favor of plaintiff in an action brought to recover damages for assault and conversion of personal property. Affirmed in part.

The facts are stated in the opinion.

Mr. Charles F. Repath for appellants.

Mr. H. C. Clay for appellee.

Gunter, J., delivered the opinion of the court:

This was an action by appellee, Deck, to recover of appellants, McConathy and Smeltzer, damages for an alleged assault upon appellee; also to recover certain personal property, taken from the person of appellee, or its value. The complaint contained two causes of action. The first stated the facts constituting the alleged assault, the second the facts showing the plaintiff (appellee) entitled to recover a certain pistol and a certain knife, or their respective value. After issue joined the case was tried to the court sitting without a jury.

1. As to the first cause of action, that to recover damages for an assault, the court found that appellants, as sheriff and deputy, acting under a warrant, arrested appellee; that in so doing they maliciously and unnecessarily subjected him to indignities, to violence, and to mental and physical suffering; that in disobedience of the mandate of the warrant they threw him into the common jail; and that for such trespass appellee (Deck) was entitled to recover exemplary damages in the sum of $500. Judgment went accordingly. The amount of the actual damages sustained by appellee was not found. The court did find, however, facts showing that appellee sustained actual damage, and the undisputed facts show that he received such damage; for example, the evidence shows that, in consequence of the rough treatment to which the court found appellee was unnecessarily subjected by appellants, he was rendered so ill as to be confined to his bed for several days, suffering in consequence mental and physical pain and loss of time. It is said the failure to find the amount of such actual damage is fatal to the judgment. This contention is an attempt to apply the rule announced by some of the authorities that exemplary damages can be awarded only when actual damages have been sustained; that is, "exemplary damages can never constitute the basis of a cause of action." It is unnecessary for us, in this case, to express an opinion as to whether such rule is the law in this jurisdiction, because the facts of the case do not bring it within such view of the law. As stated, the finding and the undisputed facts show that the arrest here was attended by unnecessarily rough treatment of a frail, sick man, his confinement in a cold jail, and consequent illness, and loss of time. The finding was to the effect that appellants were trespassers *ab initio* in making the arrest and casting appellee into prison, and that appellee had sustained real injury therefrom.

Cotter v. Doty, 5 Ohio, 393, Gallager v. Wooster, 4 Ky. L. Rep. 256, and Varden v. Mount, 78 Ky. 86, 39 Am. Rep. 208, which oppose the holding above stated. In these cases the defendant officers sought to justify under ordinances declaring forfeitures for their violation. And it is held that the principle that no man ought to be deprived of his prope ty by forfeiture without having legal investigation is not satisfied by the proceeding against the officer, since the question therein involved is not whether the ordinance is violated, but whether the proceedings of the officer are without constitutional sanction.

And in Darst v. People, 51 Ill. 286, 2 Am. Rep. 301, a prosecution for a riot in the seizure of liquor under an ordinance declaring a nuisance all intoxicating liquors kept within the limits of the town for the purpose of being sold or given away as a beverage to be drunk within the limits of the town, and which directed police officers of the town to abate the nuisance by removing the liquor beyond the town limits, the court said: "Even under this ordinance, the beer and spirits were not a nuisance liable to summary destruction, unless they were kept for sale or gift, to be drunk within the town; and whether they were kept for that purpose was a question which the owner had the right to submit to a court of justice before his property could be taken away. The board of trustees of Eureka had no more power to authorize their police officers to perform acts of this character than they had to authorize them at discretion to assess a fine of $50 upon any man whom they might believe to keep spirits for sale, and seize his property or person for its payment, without inquiry before a court, or an opportunity of being heard in his own defense. Such proceedings are a violation of the elementary principles of our Constitution and laws, and it is unnecessary to enlarge upon this topic. A man's property cannot be seized except for a violation of law, and whether he has been guilty of such violation cannot be left to police officers or constables to determine."

In connection with the case in hand, it may be of interest to note that a statute providing for the forfeiture of a weapon unlawfully carried has been held, in Jennings v. State, 5 Tex. App. 298, and Leatherwood v. State, 6 Tex. App. 244, to contravene a constitutional provision that every citizen shall have the right to keep and bear arms in the lawful defense of himself and the state.

The authorities are that if actual damage is shown, even though its amount is not shown or found, and the other elements entitling the plaintiff to exemplary damages are present, exemplary damages may be awarded. In other words, after actual damage is shown it is unnecessary to show its money extent to sustain a judgment for exemplary damages. We think the reasoning in Williams v. Williams, 20 Colo. 51, 67, 37 Pac. 614, is authority for this conclusion. That action was by the wife to recover damages for alienation of the husband's affections. The action arose after the enactment of our exemplary damage act. I Mills' Anno. Stat. § 1512. The court was of the opinion that the injury complained of was within the statute, because it was an actionable wrong. although unattended by bodily injury or pecuniary losses. *Inter alia*, the court said: "Such injury is a wrong done to the wife, as an individual, —as a person. The statute does not specify that the wrong shall be a physical or bodily injury. On the contrary, it allows exemplary damages when 'the injury complained of shall be attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings.' These words clearly import wrongs and injuries other than mere bodily wounds or pecuniary losses. They include, as well, injuries affecting the mind and sensibilities of the individual, which are often more grievous and painful than mere material injuries." In Favorite v. Cottrill, 62 Mo. App. 119, 123, plaintiff sued for the destruction of his business as a billposter. The jury returned a verdict of $1 as compensatory damages, and $5,000 as exemplary damages. A remittitur was made in the trial court, and judgment entered for $2,499. The evidence showed substantial damages, but, on account of a defect in the pleadings, the court excluded it from the consideration of the jury, and charged that the recovery of compensatory damages could not exceed a nominal sum, and that exemplary damages might be awarded. Exemplary damages were awarded. The point was made on appeal that the instruction as to exemplary damages was error because it permitted nominal damages to constitute the basis of exemplary damages. The court, after adverting to the conflict of authority upon this question, held that the judgment should stand, and, *inter alia*, said: "Here the injury inflicted was not theoretical or fanciful, but quite substantial, and the plaintiff was only precluded from recovering substantial damages because of the state of the pleadings. We will therefore overrule the assignment." In Robinson v. Goings, 63 Miss. 500, 504, Goings sued to recover damages for taking forcible possession of his wagon, team, and three bales of cotton. The evidence showed that plaintiff started his wagon loaded with three bales of cotton for delivery to a third party. When the wagon reached the store of defendants, it was stopped, and the cotton forcibly thrown off and rolled into their shed. The driver returned to the home of plaintiff with his wagon and team. Later the cotton was delivered by the defendants to the third party, upon the order of plaintiff. The evidence did not show actual damages to plaintiff in any particular sum. Plaintiff was awarded punitive damages in the sum of $125. It was contended that the facts did not justify an award of punitive damages because there was only a nominal injury to plaintiff. The court held that, although the extent of the injury was uncertain, it was a real injury, and was a basis for punitive damages. In the course of the opinion it said: "One in the orderly and lawful prosecution of his business cannot be said to be only nominally injured by the unwarranted and illegal seizure and detention of his property by another, so as to interrupt the course of business of the owner."

In the case before us the finding of the court and the undisputed evidence show that appellee sustained actual damages, although the money extent thereof was not found. The finding further was that such damage was inflicted under circumstances justifying the award of exemplary damages, and exemplary damages were awarded. We think the judgment on the first ground of action, awarding $500 as exemplary damages, should stand.

2. The second cause of action was to recover of appellants the value of a pistol and knife taken from the person of appellee at the time of the arrest mentioned in the first cause of action. The pistol was found to be of the value of $16, and the knife of the value of $1, and the judgment went for $17 on the second cause of action in favor of appellee and against appellants. The evidence, without conflict, showed that the pistol, at the time of the seizure, was being carried by appellee in violation of the statute against carrying concealed weapons. Mills's Anno. Stat. Rev. Supp. § 1364. There was no criminal charge preferred against appellee for carrying concealed weapons, and it is not claimed that the pistol was being held to be used as evidence upon the trial of such charge.

Appellants contend that as to this cause of action the judgment was wrong, because, under the undisputed facts, the pistol was taken from the person of appellee while carrying it in violation of the statute against carrying concealed weapons, and

that the mere occurrence of such facts devested appellee of his title, and worked a forfeiture of his interest in the pistol in favor of the county. Appellee contends that a judicial proceeding establishing a violation of the statute, as the conviction of appellee of the crime of carrying concealed weapons, was necessary to work the forfeiture; that, as there had not been such conviction, the ownership of the pistol was still in appellee. Decisive of the contention of the respective parties is, Was a conviction in a criminal proceeding for carrying concealed weapons necessary to work the forfeiture, or can the fact of a violation of the statute be availed of, if established by other evidence than a judgment of conviction?

The statute prescribes: "If any person . . . shall, within any city . . . carry concealed upon his . . . person any pistol . . . such person . . . shall, upon conviction thereof . . . be punished by imprisonment in the county jail, . . . or by a fine . . . or by both such fine and imprisonment. . . . All concealed weapons taken from parties violation [violating] this section shall be forfeited to the county and confiscated and sold at auction for the benefit of the school fund of the county in which the offense is committed." This section in effect says that any pistol taken from any party carrying it concealed upon his person within any city shall be forfeited to the county and confiscated, and sold at auction for the benefit of the school fund of the county in which the offense is committed. This statute, by its terms, makes the occurrence of the facts constituting its violation work a forfeiture. It does not make the forfeiture dependent upon a conviction. To construe the statute as requiring a conviction as a condition precedent to a forfeiture thereunder would be to supply a provision it has not.

The question before us is not a new one. In 13 Am. & Eng. Enc. Law, 2d ed. p. 58, it is said: "While a forfeiture at common law does not operate to devest the title of the owner until, by a proper judgment in a suit instituted for that purpose, the rights of the state have been established, it is otherwise where a statute in terms denounces a forfeiture of property as the penalty for a violation of law, without alternative of value or other qualifications or provisions, or language showing a different intent; for in such case the forfeiture takes place absolutely and instantaneously on the commission of the offense, or at such other time and upon such other conditions as the statute may name."

Wilkins v. Despard, 5 T. R. 113, was trespass, by an owner against the governor of a foreign country belonging to Great Britain, for seizing and selling his sloop. The defense was that the owner's title was devested by a forfeiture to the defendant and the Crown through a violation, by the owner, of the navigation act. Under the provisions of that act, if the facts existed set up in the answer, the sloop and its cargo became forfeited to the Crown and the defendant. It was contended by the owner that the existence of the facts constituting a violation of the navigation act, "without any sentence of condemnation of the said cargo and the said sloop . . . being given or rendered by any court having competent jurisdiction in that behalf," would not work a forfeiture. The court held that the violation of the act worked the forfeiture, and that the violation could be shown as any other fact, and that a previous judicial determination of a violation of the statute was not necessary to its operating to effect a forfeiture.

Fontaine v. Phœnix Ins. Co. 11 Johns. 293, was an action on a policy of insurance covering the schooner Phœnix. The vessel was practically lost. A question was whether the plaintiff at the time of the loss had an insurable interest in the vessel. The defense was that the title to the schooner had been forfeited to the United States prior to her loss for a violation of the exclusion act, and that her title was in the United States under such forfeiture at the time of the loss. The 6th section of that act (act March 1, 1809, chap 24, 2 Stat. at L. 529) provides that any vessel receiving cargo in violation of that act shall be forfeited to the United States. It was contended that a proceeding in condemnation, or some other judicial proceeding, was necessary to determine that there had been a violation of that act, and that the facts, without a judicial determination of their existence and that they amounted to a violation of the act would not work a forfeiture. The court held that the mere existence of the facts operated as a forfeiture, and that a previous judicial determination that such facts constituted a violation of the statute was not a condition precedent to their operating to devest the title of the former owner. The court approves Wilkins v. Despard, *supra*, and in speaking of the ruling there says: "It is decided that, if a ship be seized as forfeited under the navigation act, the owner cannot maintain trespass against the party seizing, although the latter does not proceed to condemnation; for by the forfeiture the property is devested out of the owner."

Kennedy v. Strong, 14 Johns. 128, was an action of trover for certain merchan-

dise. The defendant, a shipowner, who had converted the merchandise, set up that the same had been shipped in violation of the exclusion act, and that therefore the title to it had been forfeited to the United States. The plaintiff contended that the shipment of the goods in violation of the act did not, without a judgment establishing such violation, devest his title. The court held that a judgment by condemnation, or otherwise, establishing such violation, was not necessary to the facts constituting the violation operating as a forfeiture. In the course of its opinion the courts said: "That point has been settled in this court and in the Supreme Court of the United States. The forfeiture takes place on the commission of the act prohibited, and by the forfeiture the property is immediately devested out of the owner before any seizure or suit."

In Bennett v. American Art Union, 5 Sandf. 614, 631, plaintiff, in effect a subscriber of the art union, a corporation, sought an injunction to restrain the distribution by lot of certain works of art which that corporation had purchased. One ground for the court's denying the writ of injunction was that the plaintiff had no interest in the property because the title of the company to the property had become forfeited to the state through a violation of the statute. The court, among other things, said: "It was so vested by force of the forfeiture which the statute declares of 'all property that shall be offered for sale or distribution contrary to its provisions,'—a forfeiture which, by the express words of the law, may attach as well before as after the determination of the chance upon which the distribution depends. . . . It has, indeed, been insisted by the counsel for the plaintiff that the forfeiture which the statute creates, whatever may be its effect by relation, does not attach, so as devest the title of the owner, until, by a proper judgment in a suit instituted for that purpose, the rights of the state have been established: but although, it is undoubtedly true that a forfeiture at common law does not operate to change the property until some legal step has been taken by the government for the assertion of its rights, there is a material distinction between a common-law and a statutory forfeiture, to which the learned counsel failed to advert. 'When a forfeiture is given by statute, . . . the rules of the common law are dispensed with, and the thing forfeited may either vest immediately or upon the performance of some future act, according to the will of the legislature. This depends entirely upon the construction of the statute.' . . . There are many decisions in England and in the United States which establish that where, by the words of a statute, a forfeiture is attached to the commission of an offense, its immediate operation is to devest wholly the title of the owner, so as to deprive him of the right of maintaining any action or defense, to which, as owner, he would otherwise be entitled."

Oakland R. Co. v. Oakland B. & F. V. R. Co. 45 Cal. 365, 13 Am. Rep. 181, and Borland v. Lewis, 43 Cal. 569, also support the conclusion we have reached. In the course of its opinion in the former case the court used the following language: "Now while a forfeiture at common law does not operate to devest the title of the owner until, by a proper judgment in a suit instituted for that purpose, the rights of the state have been established, it is otherwise when the forfeiture is declared by a statute. In the latter case the title to the thing forfeited immediately vests in the state upon the commission of the offense or the happening of the event for which the forfeiture is declared, or at such other time and upon such other condition as the statute may name. . . . In some of the cases the question has been directly presented whether, after the forfeiture has taken place, but in the absence of any judgment declaring the forfeiture, the former owner could maintain any action in reference to the forfeited property, and it was held that he could not." In the latter case the provisions of the statute, declaring a forfeiture upon the existence of certain facts, was availed of by defendant in an ejectment case. See also United States v. 1,960 Bags of Coffee, 8 Cranch, 398, 3 L. ed. 602.

The statute under consideration divides into two parts,—the one providing that upon conviction the defendant shall be fined or imprisoned or both; the other, complete in itself, saying that a violation of the statute shall work a forfeiture. We repeat it is not provided that this violation, to be effective, shall be established in any particular manner. The provision simply is that, if the violation exists, it will work a forfeiture. It has been shown in this case that there was a violation of the statute. Its effect, then, according to the terms of the statute, was to devest the title of the pistol from the former owner, and invest it in the county. We think the judgment for the return of the pistol, or its value, should have been for appellants, the defendants. As to the knife, the evidence has not shown that it was within the statute.

The judgment below will be affirmed as

to the first cause of action, and reversed as to the second.

Judgment affirmed in part, and reversed in part.

The Chief Justice and Maxwell, J., concur.

MINNESOTA SUPREME COURT.

H. PARKS, Appt.,
v.
DAVID FOGLEMAN, Respt.

(— Minn. —, 105 N. W. 560.)

Agent—mistaken payment—right to recover.

If an agent by mistake pays to a third party money in his possession belonging to his principal, he may maintain in his own name an action for money had and received to recover it back.

(January 19, 1906.)

Headnote by START, Ch. J.

APPEAL by plaintiff from an order of the District Court for Stevens County granting a new trial after verdict in his favor in an action brought to recover money alleged to have been paid by mistake. Reversed.

The facts are stated in the opinion.

Messrs. **R. A. Stone** and **C. B. Randall**, for appellant:

Where a man pays money by his agent, which ought not to have been paid, either the agent or principal may bring an action to recover it back.

Stevenson v. Mortimer, 2 Cowp. 805; Oom v. Bruce, 12 East, 225; Holt v. Ely, 1 El. & Bl. 795, 18 Eng. L. & Eq. 422; Kent v. Bornstein, 12 Allen, 342; Huffcut, Cases in Agency, p. 215; Reinhard, Agency, §§ 372, pp. 377 et seq. Mechem, Agency, § 761; Story, Agency, 9th ed. § 398.

Messrs. **Smith & Beise** for respondent.

START, Ch. J., delivered the opinion of the court:

Action to recover money paid to defendant for plaintiff's use. The complaint al-

Case Note.—The decision in the above case, that an agent who, by mistake, pays to a third person money in his possession belonging to the principal, may maintain an action in his own name for money had and received to recover it back, is sustained by the text writers on the subject of agency. See 2 Clark & S. Agency, § 621; Mechem, Agency, § 761; Story, Agency, 9th ed. § 398; Tiffany, Agency, § 102; Huffcut, Cases in Agency, § 210. The following cases are cited by these authors in support of this position:

Stevenson v. Mortimer, 2 Cowp. 806, in which Lord Mansfield said: "Where a man pays money by his agent which ought not to have been paid, either the agent or principal may bring an action to recover it back. The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent." It was specifically held in this case that the owners of a vessel could recover in assumpsit for money had and received the excess of fees exacted by a customhouse officer from the master of a vessel, though the statute imposed the duty to pay the fees on the master personally. It was noted in this case that, notwithstanding the personal liability of the master for the fees, he was entitled to charge the necessary fees to the account of the owners, and that the master, as a witness in the case, testified that the money was paid by the order of the plaintiffs.

Holt v. Ely, 1 El. & Bl. 795, holding that one in whose hands a fund had been placed by another for the purpose of satisfying certain acceptances of the latter was entitled to maintain an action for money had and received against a third person who falsely represented that he held one of such acceptances, and thereby induced the plaintiff to pay him the amount of the same out of the fund. Lord Campbell, Ch. J., said that if only one party was entitled to sue it was the plaintiff, inasmuch as his principal had given him no authority to pay the amount of the bill of exchange actually satisfied, and he was therefore guilty of negligence in making such payment, and could not debit his principal with it. All of the judges expressed the opinion that either the principal or agent could maintain an action. Erle, J., said that even if the plaintiff had had the authority of his principal to pay the acceptance, either might have sued in respect of the defendant's fraud.

Oom v. Bruce, 12 East, 225, holding that a resident agent having taken out a policy of insurance for a Russian subject abroad at and from a port in Russia to London, which was void in its inception because made after the commencement of hostilities by Russia against Great Britain, was entitled to maintain an action for a return of the premium. The only question that seems to have been made in this case was whether there was any right to recover at all, and not whether such right was in the principal or in the agent. The case, therefore, lends but little additional support to the position taken by the text writers.

Kent v. Bornstein, 12 Allen, 342, holding that one employed simply to sell goods and pay over the money received to his employer, who undertook to exchange such money with a third person and received in exchange a counterfeit bill, could maintain an action in his own name to recover back the money so paid out by him, it not appearing that the transaction had been ratified by the principal. The decision is upon

leged that the plaintiff, on July 14, 1904, paid to the defendant $100, to the use and account of plaintiff; that he duly demanded of the defendant its repayment, which was refused. The answer was a general denial. The evidence on the part of the plaintiff was sufficient to establish these facts: On July 14, 1904, the plaintiff was the agent of the Monarch Elevator Company, in charge of their grain elevator at Cyrus, this state; that he had in his possession and control money belonging to the elevator company, and was authorized to purchase wheat and pay for it out of such money; that he purchased a quantity of wheat of the defendant, and by mistake overpaid him in the sum of $100; and, further, that on the same day he discovered the mistake and demanded from the defendant the return of the $100, which was refused. The evidence on the part of the defendant tended to show that he was not overpaid in any amount for his wheat. The jury returned a verdict for the plaintiff for the $100 and interest. Thereupon the defendant made a motion to set aside the verdict and for a new trial, which the court granted, and the plaintiff appealed from the order.

There is nothing in the record to indicate that the motion was granted upon the ground that the verdict was not justified by the evidence; hence it must be assumed that a new trial was granted on the ground of alleged errors of law occurring at the trial. The alleged errors relied upon by the defendant are to the effect that the trial court erred in denying his motion to dismiss the action, and, further, in not instructing the jury to return a verdict for the defendant for the reason that the evidence on the part of the plaintiff did not tend to prove the cause of action alleged in the complaint, but, on the contrary, the evidence proved a cause of action in favor of a third party, the elevator company; or, in other words, that there was a fatal variance between the allegations of the complaint and the proof. The case of Dennis v. Spencer, 45 Minn. 250, 47 N. W. 795, is cited in support of this contention. In that case the complaint alleged as the subject-matter of the action a contract made between plaintiff and defendant. There was no evidence to prove such contract, but the evidence did tend to prove a contract between the defendant and a third party which had been assigned to the plaintiff. It was held that this was not a variance, but a failure of proof. The case, then, is not here in point, if the evidence in this case tended to prove the alleged cause of action in favor of the plaintiff. The question here to be decided is whether an agent.

the ground that, under the circumstances, the plaintiff was liable to his principal for the money, and that the right to recover from the third person was the only mode in which he could indemnify himself against the principal's claim.

Clark & Skyles on Agency, § 621, also cite in support of the doctrine the case of Colonial Bank v. Exchange Bank, L. R. 11 App. Cas. 84, holding that a bank which undertook to remit moneys to a certain other bank had a sufficient interest to maintain an action to recover the money, which was, by mistake of their agent, remitted to defendant, who undertook to apply it to a debt of the person for whom the money was remitted. The bank's right of action was grounded upon its right to indemnify itself against liability on account of the mistake of its agent.

The case of Fear v. Jones, 6 Iowa, 169, is somewhat analogous. It was there held that an agent who, by mistake, delivered to a purchaser a superior article for the price of an inferior article, and who procured a promise from the purchaser to "make it right," had such an interest as entitled him to maintain an action against the purchaser to recover the difference.

In Hungerford v. Scott, 37 Wis. 341, the right of an agent of a steamship company, who, through mistake, sold tickets for less than the schedule price, to maintain an action against the purchasers for the difference, was denied, although it appeared that he had made the difference good to his principal. The decision, however, was not upon the ground that the right of action was not in the agent, but upon the ground that there was no right of action at all, there being no implied obligation on the part of the purchasers to make good the mistake.

The foregoing seem to be all of the cases which directly support the position taken by these authors, and by the court in PARKS v. FOGLEMAN.

In Steiner Bros. v. Clisby, 103 Ala. 181, 15 So. 612, the right of an agent to maintain an action for money had and received to recover back the purchase price of securities which he had been induced to purchase for his principal by the false and fraudulent representation of the defendant was denied, notwithstanding that it appeared that because of the principal's dissatisfaction with the securities and his insistence that the plaintiff had transcended his authority as agent, the latter refunded the money paid for the securities and took an assignment of the same, but not of the cause of action against the defendant. The decision is upon the ground that the facts did not show that the plaintiff had transcended his authority in purchasing the investments, or that he was guilty of any lack of skill and diligence in making the purchase, and therefore there was nothing to show that he was legally liable to refund the money to the principal, and that his voluntary refunding of the same would not support his action against the defendant.

having in his possession and control the money of his principal, may maintain an action in his own name to recover it, if a stranger, having no interest therein, obtains it from the agent by mistake or fraud or trespass. It is clear that, if the defendant in this case had taken the money from the possession of plaintiff under circumstances constituting an actual conversion, the plaintiff could have recovered in his own right and name from the defendant the money he took from the plaintiff's possession. Laing v. Nelson, 41 Minn. 521, 43 N. W. 476; Brown v. Shaw, 51 Minn, 206, 53 N. W. 633. In principle there can be no difference between such a case and this one, for here the money was in the possession of the plaintiff, and he was accountable for it to his principal; for he was not authorized to pay it to anyone without receiving an equivalent in wheat therefor, but the defendant, having no right to the money, obtained it by mistake from plaintiff's possession, and refused to return it on demand; or, in other words, he converted it to his own use. The plaintiff's cause of action in his own right was then complete, for he had a special property in the money by reason of his possession and the fact that he was liable primarily for it to the general owner thereof, who was not bound to pursue the defendant. Therefore the plaintiff had no other way of indemnifying himself against loss by reason of the mistake, except to get the money back into his possession; and, the defendant having refused, on demand, to return it to the plaintiff's possession, the plaintiff could recover the money in an action for conversion, or waive the tort and recover it in an action for money had and received to the use of the plaintiff.

Counsel for the defendant urges that, even if it be conceded that an agent may maintain an action to recover the money of his principal which he has paid to a third party by mistake, the plaintiff should have pleaded his agency in the complaint. This was not necessary, for the plaintiff does not seek to recover the money, either in the name or right of his principal, but, as already stated, in his own right. The case of Kent v. Bornstein, 12 Allen, 342, is directly in point. In that case the plaintiff had in his possession money of his principal, and, at the request of a third party, he gave him smaller bills in his possession, which were a part of the money of his principal, in exchange for a $50 bill which proved to be counterfeit. The agent, in his own name, brought an action against the third party to recover back the sum of $50 so paid. The defendant contended that the agent had no such interest in the subject of the suit as to entitle him to maintain the action. The court held otherwise, and said: "It is clear that the plaintiff exceeded his authority in exchanging the smaller bills in his possession for one of the denomination of $50, and he is liable to his employer for the loss occasioned by his unauthorized act. . . . It cannot, therefore, be said that the plaintiff has no beneficial interest in the cause of action on which this suit is brought. On the contrary, it plainly appears that his right to recover in this action is the only mode in which he can indemnify himself against the rightful claim of his employer for the loss caused by his abuse of the authority intrusted to him." We hold, upon principle and authority, that, if an agent by mistake pays to a third party money in his possession belonging to his principal, he may maintain an action in his own name to recover it back. 1 Am. & Eng. Enc. Law, 2d ed. p. 1166; Story, Agency, § 398; Mechem, Agency, § 761. It follows that the evidence on behalf of the plaintiff tended directly to establish the cause of action alleged in the complaint, that there was neither a variance nor failure of proof, and that the trial court erred in setting the verdict aside and in granting a new trial.

Therefore it is ordered that the order appealed from be reversed, and the case remanded to the District Court, with direction to cause judgment to be entered upon the verdict.

IOWA SUPREME COURT.

ANNA SHEEHY, Appt.,
v.
GEORGE E. SCOTT
and
EMMA DE CAMP, Intervener, Appt.

(— Iowa, —, 104 N. W. 1139.)

Homestead—family.

1. A mother and an adult son, who is incapable of caring for himself and receives support from her, merely doing chores about the house, constitute a family capable of claiming a homestead.

Subject Note.—What constitutes a "family" under the homestead and exemption laws.

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II. Different aggregations of people.
a. Husband and wife, 367.
b. Father and child, 369.
c. Wife with dependents, 369.
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f. Grandparent and child 383.
g. Single persons, 383.
h. Other combinations, 388.
i. Temporary separation, 388.

Sale — equitable conversion — attachment against heir.

2. A contract reading, "I have sold" my property for a certain price to a certain person, who has paid a sum to be forfeited provided the remainder of the purchase price is not paid before a certain future date, and providing that, upon such payment, a warranty deed will be made, does not amount to a sale, so as to constitute an equitable conversion and prevent the attachment of the land for a debt of an heir of the grantor after his decease.

Deed—signatures by one grantor—attachment.

3. The signing of a deed by an heir will not prevent the attachment of his interest in the estate if the deed has not been signed by the remaining heirs whose signatures are to be secured before delivery of the deed.

Land contract—attachment against grantor.

4. An equitable conversion effected by an election to exercise an option to buy real estate will not relate back to the date of the contract, so as to dissolve an attachment levied on the land as that of the grantor prior to the election, and while the grantor retains the ownership.

(October 18, 1905.)

APPEALS by plaintiff and intervener from a judgment of the District Court for Muscatine County in an action brought to enforce payment of a promissory note; plaintiff appealing from so much of the judgment as held certain attached property ex-

III. Rights acquired by survivorship.
a. By a widower, 390.
b. By a widow.
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V. Summary, 398.

I. "Family" defined.

In Roco v. Green, 50 Tex. 488, the court says: "We deduce from the authorities the following general rules to determine when the relation of a family, as contemplated by law, exists: (1) It is one of social status, not of mere contract; (2) legal or moral obligation on the head to support the other members; (3) corresponding state of dependence on the part of the other members for this support."

The family, within the meaning of the homestead law, consists of those members of the household who are dependent upon the householder for support, or to whom the householder owes some duty. Brokaw v. Ogle, 170 Ill. 115, 48 N. E. 394.

To constitute such (single men) a family, there must be a condition of dependence, and no mere aggregation of individuals will create this relation. Nor can the circumstance that a family exists elsewhere have any material influence on the case. Abercrombie v. Alderson, 9 Ala. 981.

To constitute a family, within the meaning of the act, the relation of parent and child, or that of husband and wife, must exist; there must be a condition of dependence on the one or the other of these relations; but it is not necessary that all the dependents should live under the same roof, or that the family should live together; it is the relation and the dependence on that relation, not the aggregation of the individuals, that constitutes a family. Sallee v. Waters, 17 Ala. 482.

In Fant v. Gist, 36 S. C. 576, 15 S. E. 721, the court says: "The authorities in this state, as well as elsewhere, show very clearly that it is not necessary that the relation of husband and wife, or parent and child, should exist in order to constitute a family. Nor is it necessary that there should be any blood relationship between one claiming to be the head of a family and the members thereof. Nor is it necessary that there should be any legal obligation on the part of one claiming to be the head of a family to support the members thereof; but a moral duty, arising from ties of consanguinity or affinity, or perhaps other similar relations, will be sufficient. But those who are said to constitute the family must be persons who are in some measure dependent upon the head of the family for a support, and who have a right, either in law or morals, to expect the same; and who, therefore, have an interest in the head of the family holding a portion at least of his property, and would be prejudiced by its seizure and sale under execution."

The word "family," as used in the exemption laws, we think embraces a collective body of persons, generally relatives and servants,—a household, living together in one house or curtilage,—and does not embrace separate individuals who have no common home. Zimmerman v. Franke, 34 Kan. 650, 9 Pac. 747.

The Texas court, defining "family" as used in the Constitution, said: "It was most certainly used in its generic sense, embracing a household, composed of parents and children, or other relatives, or domestics and servants; in short, every collective body of persons living together within the same curtilage, subsisting in common, directing their attention to a common object, the promotion of their mutual interests and social happiness." Wilson v. Cochran, 31 Tex. 677, 98 Am. Dec. 553.

The statement in the above quotation was criticized in Howard v. Marshall, 48 Tex. 471, the court saying: But in that case the man was a single man without any children

empt as homestead; and intervener appealing from so much as subjected property which she claimed under a land contract. Affirmed.

Statement by Ladd, J.:

Mary A. Scott, a widow, died intestate May 13, 1903, seised of the following real estate: Lot 9 in block 71, in the city of Muscatine; also lot 8 and the east half of lot 9 in block 106, and lot 8 in block 107. Ten children survived her, one of whom, George E. Scott, was indebted to the plaintiff on a promissory note of $1,500, dated February 14, 1898, with interest at 6 per cent per annum, on which this action was begun June 2, 1903, aided by writ of attachment, which was levied on Scott's interest in the above real estate June 20, 1903. He answered by admitting the indebtedness and alleging that lot 9 in block 71 was the homestead of deceased, and for that reason exempt from the levy. John F. De Camp intervened, and in his petition alleged the purchase of the east half of lot 9 and lot 8 from Mary A. Scott January 3, 1903; that George E. Scott had conveyed his interest therein to him, and he had taken possession, all prior to the levy, which he prayed to have vacated. The reply put in issue the allegations of the answer and petition of intervention. On hearing judgment was entered against George E. Scott as prayed. Lot 9 in block 71 was adjudged to be exempt as the homestead of deceased. Emma De Camp was substituted as intervener, and

or servants, and "the definition of a family was not necessary to the disposition of the cause, and should not be regarded as supported by an authoritative decision;" and holding that under Paschal's Dig. (Tex.) 5467, an unmarried man having servants and employees did not constitute a family entitled to a homestead.

The word "family" denotes a collective and communal body, and not a single individual. No one can be his own family. Ellinger v. Thomas, 64 Kan. 180, 67 Pac. 529.

A family is the collective body of persons who live in one house, under one head or manager. The relations between them must be of a permanent and domestic character; not that of those abiding temporarily together as strangers. Duncan v. Frank, 8 Mo. App. 286.

What is a family? It is, in the popular sense, defined by lexicographers to be a collection of persons living together; hence, one person cannot constitute a family. Nor can a person and his or her children, permanently separated, constitute a family. A residence together is essential to constitute a family. Rock v. Haas, 110 Ill. 528.

The Constitution has not given any definition of the term "family," nor indicated any of its necessary ingredients. The term must, therefore, be taken in its ordinary sense. In this sense it is not essential that it should include children. Bradley v. Rodelsperger, 3 S. C. N. S. 226.

It is true that the word "family," in its ordinary signification, refers to two or more persons, and, as used in § 1474, Code Civ. Proc., will include those living under the same roof as kindred or dependents, and under one head, thus constituting a family, as that term is generally understood; but this word, as used in the statute concerning probate homesteads, is not to be so restricted in its meaning as to exclude the only survivor of the family of which the deceased was a member. Re Lamb, 95 Cal. 397, 30 Pac. 568.

The word "family," as now used, implies that the persons constituting the group which is so designated are related to each other in some degree, more or less direct, by blood or affinity. Murdock v. Dalby, 13 Mo. App. 41.

The word "family," in its broadest sense, will include all the dwellers in a house under the common control of one person, and it is in this respect synonymous with household; but it has a narrower signification, and a more limited one, and is used to represent the progeny of common ancestors. Re Lambson, 2 Hughes, 233, Fed. Cas. No. 8,029.

II. Different aggregations of people.

a. Husband and wife.

The rule sustained by the weight of authority is that the debtor, in order to have a family, must have someone dependent upon him whom he is morally or legally bound to support. There is no question but that the relation of husband and wife constitutes a family, and that the husband is the head, under the homestead and exemption acts. The dependency of the wife is so apparent that this usual qualification is not referred to in the opinions. Some stress is laid upon dependency in referring to children, but the removal of the children, or their becoming of age, does not seem to affect the family. The family of husband and wife applies also to negroes who have complied with the statute, and relates back to their cohabitation. It has also been applied where a white man married an Indian.

In the following cases a husband having a wife is held to be the head of the family:

The marriage of a debtor, he thereby becoming the head of a family, was held to entitle him to a homestead, and the homestead act existing at the time of the debt was held to be valid, and not to impair the creditor's contract. Dye v. Cooke, 88 Tenn. 275, 17 Am. St. Rep. 882, 12 S. W. 631.

And the marriage by the debtor on the day of the execution sale was held to constitute him a householder having a family, under the Mississippi exemption statute, providing exemption from seizure or sale under execution to a householder having a family. Trotter v. Dobbs, 38 Miss. 198.

her petition dismissed, and the property other than the homestead ordered to be sold and the proceeds applied on the judgment. The plaintiff and intervener both appeal; that of the former being first perfected.

Messrs. Jayne & Hoffman, for plaintiff, appellant:

There was no valid homestead.

Fullerton v. Sherrill, 114 Iowa, 511, 87 N. W. 419; Emerson v. Leonard, 96 Iowa, 311, 59 Am. St. Rep. 372, 65 N. W. 153; Waples, Homesteads & Exemptions, 1st ed. 58; 15 Am. & Eng. Enc. Law, 2d ed. pp. 537, 2, 538, 3; Betts v. Mills, 8 Okla. 351, 58 Pac. 958; Whalen v. Cadman, 11 Iowa, 227; Thompson, Homesteads & Exemptions, 1st ed. § 45; Bank of Versailles v. Guthrey, 127 Mo. 189, 48 Am. St. Rep. 621, 29 S. W. 1005; Holnback v. Wilson, 159 Ill. 148, 42 N. E. 171; Fox v. Waterloo Nat. Bank, 126 Iowa, 481, 102 N. W. 424.

The agreement was an executory contract merely, to sell and convey at a future date, with a provision for forfeiture if the conditions of the agreement were not complied with.

Broadwell v. Raines, 34 La. Ann. 677; Stewart v. Fowler, 37 Kan. 677, 15 Pac. 918; Walker v. Douglas, 70 Ill. 445; Jackson ex dem. Shipley v. Moncrief, 5 Wend. 26; Jackson ex dem. Ludlow v. Myers, 3 Johns. 388; 3 Am. Dec. 504; Jackson ex dem. Green v. Clark, 3 Johns. 424; Ives v. Ives, 13 Johns. 235; Stewart v. Lang, 37 Pa. 201, 78

And the remarriage by a widower before a levy was held to entitle him to an exemption as the head of the family. Chafee v. Rainey, 21 S. C. 11.

In Kennerly v. Swartz, 83 Va. 704, 3 S. E. 348, where a lien had become fastened to land, and the debtor thereafter married, it was held that he was not entitled to a homestead. But this case was overruled in Oppenheim v. Myers, 99 Va. 582, 39 S. E. 218.

But in Pender v. Lancaster, 14 S. C. 25, 37 Am. Rep. 720, it was held that, after the lien of a levy had attached, the marriage of the debtor did not entitle him to an exemption as the head of a family.

In Williams v. Young, 17 Cal. 403, it was held that a husband or wife could set up the fact of homestead as a defense to ejectment based upon a sheriff's deed made on execution sale against her husband, where there was no abandonment of the homestead.

And having a wife was held to be having a family, under Ill. act 1851, Scates's Comp. Stat. 576, §1, providing that there shall be exempt from forced sale, under process, the ground and buildings occupied as a residence, owned by the debtor, being a householder and having a family, to the value of ——, etc. Kitchell v. Burgwin, 21 Ill. 40.

And enforced absence from home by reason of commitment to an asylum was held not to cause the loss, by the husband of the homestead, nor of any of his rights. Holburn v. Pfanmiller, 114 Ky. 831, 71 S. W. 940.

In the following cases the husband was held to be the head of a family. The fact that he had children, which is referred to in some of the cases, does not seem to be material.

So, it was held that a second wife became a member of the family, in an action by children claiming that their father was wasting the homestead. Barfield v. Barfield, 72 Ga. 668. The court said: "It is true that this court held that, when the children were all of age and gone, and the mother died, the family was at an end, and the homestead ceased and reverted to the father, free of the homestead uses; and when, in such a case, the father married again, if he wished a homestead estate, he must apply for it *de novo;* but it has not held, and will not hold, that when children are yet in the family circle, and the head marries again, the second wife does not become a member of the circle, and a beneficiary of the homestead as one of the family."

And this was held where his prior children attained majority and withdrew from the family. Nelson v. Commercial Bank, 80 Ga. 328, 9 S. E. 1075. The court said: "As the earth is for the use of the family of man, with its membership by marriage and by birth constantly changing, so is the homestead for the use of the family to whose head it is set apart, no matter what changes may occur in the membership thereof, provided there be at all times one or more persons of the class recognized by law as proper beneficiaries."

And the same was held where a widower remarried, and the children by the former marriage became of age. The homestead not having expired before the second marriage, the wife became a beneficiary by virtue of her marriage, and the family continued. Dismuke v. Eady, 80 Ga. 289, 5 S. E. 494.

So, where a widower's children became of age, it was held that he could claim a homestead by showing that his family consisted of his wife by second marriage and other dependents. Hebert v. Mayer, 47 La. Ann. 563, 17 So. 131. The court said: "Under the plain letter of the law, to obtain exemption the debtor must have a family, or person or persons dependent upon him for support. The dependency must be necessary."

And marriage to an Indian was held to constitute a family, although the debtor still exercised the privileges of a citizen of the state of Tennessee. Morgan v. Fowler, 2 Yerg. 450.

So, under a similar statute in Kentucky (Myers's Supp. p. 734, act Feb. 14, 1866), it was held that, where the intention was declared before the county clerk, a man was a housekeeper with a family from the time

Am. Dec. 414; Daubert v. Pennsylvania R. Co. 155 Pa. 178, 26 Atl. 108; Nunngesser v. Hart, 122 Iowa, 647, 98 N. W. 505.

The deed was not delivered, nor accepted, until after each one and all of the heirs had signed and acknowledged it in turn.

1 Warvelle, Vend. & P. 1st ed. 499, 508, § 8; Day v. Griffith, 15 Iowa, 104; Smith v. Smith, 68 Iowa, 608, 27 N. W. 780; O'Connor v. O'Connor, 100 Iowa, 479, 69 N. W. 676; Parlin, O. & M. Co. v. Daniels, 111 Iowa, 642, 82 N. W. 1015; Overman v. Kerr, 17 Iowa, 485; Hutton v. Smith, 88 Iowa, 241. 55 N. W. 326.

Messrs. **Richman & Richman**, for intervener, appellant:

The land was sold by the contract of January 3d, 1903.

Miller v. Corey, 15 Iowa, 167; Sackett v. Osborn, 26 Iowa, 146; Meyer v. Dubuque County, 49 Iowa, 193.

As between the parties, the execution of the deed, even subsequent to the attachment, related back to the date of the contract. The attaching creditor can be in no better condition.

Sackett v. Osborn, *supra;* Sigworth v. Meriam, 66 Iowa, 477, 24 N. W. 4.

The signing and forwarding of the deed, as shown, was a delivery.

9 Am. & Eng. Enc. Law, 2d ed. p. 153; Owen v. Perry, 25 Iowa, 412, 96 Am. Dec. 49; Mercer v. Mercer, 29 Iowa, 557; Newton v. Bealer, 41 Iowa, 334; Logsdon v. Newton, 54 Iowa, 448, 6 N. W. 715; Farmers' & T. Bank v. Haney, 87 Iowa, 101, 54 N. W. 61;

when he and his wife first assumed the relation of husband and wife. Dowd v. Hurley. 78 Ky. 260.

And, under S. C. act 1865 (13 Stat. at L. 269), providing that negroes living together as man and wife are legally married, and their children are legitimate, it was held that a negro father having such a child living with him was the head of a family, although his wife did not live with him. Myers v. Ham, 20 S. C. 522.

b. Father and child.

A husband acquired a homestead, and described his family as consisting of himself and wife. His two indigent, adult daughters continued to reside with him, and were dependent upon him. After his wife died he married again, and made an application for a second homestead. It was held that the first proceeding was a bar. Torrance v. Boyd, 63 Ga. 22. The court said: "This would keep the first homestead and exemption on foot so long as the daughters, or either of them, continued indigent and dependent. and remained with their father, deriving their support from him, and having no other home. Pending that period, the family. as constituted when the homestead and exemption were secured, would not be dissolved. Changes in its members might occur by death, birth, or marriage; but a wife coming in would simply take the place of the wife who went out, and no new family would be founded."

So, evidence that the debtor resided on the land with his wife and six children, that he owned no other home, and that he claimed it as exempt, was held equivalent to proving that he was a bona fide housekeeper with a family. Crouch v. Meguiar-Harris Co. 19 Ky. L. Rep. 819, 42 S. W. 91.

In determining the amount of exempt personal property, it was held that the actual family of the debtor was to be considered as the family to provide for, even though there were members for whom the plaintiff would not be legally bound to provide. Stilson v. Gibbs. 53 Mich. 280, 18 N. W. 815. The court said: "The persons as to whom the question was made were children of the plaintiff, and were properly with him if they had no home elsewhere. Besides. there is always a contingent liability for the support of children who are over age, in case they become a public charge."

In Sears v. Hanks. 14 Ohio St. 298. 84 Am. Dec. 378, under Swan & C. Stat. 1145. where it was held that a debtor could claim a homestead in property, after a conveyance of the same by him to his minor children was set aside for fraud as against his creditors, referring to the homestead act, the court said "Its benefits can only be claimed by heads of families; married persons living together as husband and wife; and widowers or widows having an unmarried minor child, or children, residing with them as part of their family."

c. Wife with dependents.

There is no uniformity or rule, up to this time, as to allowing a wife a homestead. It seems that the majority of the cases hold that supporting a dependent family will entitle her to the exemption as the head of a family, but this has been denied in other cases. This right is now given her in Georgia by the Constitution. She has been allowed exemption as the head of a family under the peculiar statutes of the various states, where she has been "deserted," or was a "resident," or a "housekeeper."

In the following cases her homestead was held exempt for the family:

Thus, under Ky. Stat. § 1702, providing an exemption of so much land owned by the debtors who are actually bona fide housekeepers with a family, it was held that a married woman who was a debtor was entitled to a homestead. Herring v. Johnston, 24 Ky. L. Rep. 1940, 72 S. W. 793. The court said: "It is true, where the husband is living, he is still bound, notwithstanding the removal of the most of the former legal disabilities of married women, to provide a home and support for his family, his wife included. But many of them do not do it. Married women have been given more and more rights over their property, and more

Trask v. Trask, 90 Iowa, 318, 48 Am. St. Rep. 446, 57 N. W. 841; Blaney v. Honks, 14 Iowa, 400.

On petition for rehearing.

Where one enters into possession by license or authority of a cotenant, his possession is presumed to be lawful.

Berthold v. Fox, 13 Minn. 501, 97 Am. Dec. 243, Gil. 462; Murray v. Nickerson, 90 Minn. 197, 95 N. W. 898.

Acting as the intervener acted when he took the keys, and afterward tendered a deed to be signed, was an acceptance, or exercise of the option, if the intervener had only an option.

Goodpaster v. Porter, 11 Iowa, 161; McCormick Harvesting Mach. Co. v. Richardson, 89 Iowa, 525, 56 N. W. 682; Vance v. Newman, 72 Ark. 359, 105 Am. St. Rep. 42, 80 S. W. 574; Ellis v. Bryant, 120 Ga. 890, 48 S. E. 352; Cross v. Snakenberg, 126 Iowa, 636, 102 N. W. 508; Carter v. Love, 206 Ill. 310, 69 N. E. 85; Fulenwider v. Rowan, 136 Ala. 287, 34 So. 975; Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469; Anderson v. Wallace Lumber & Mfg. Co. 30 Wash. 147, 70 Pac. 247; Harris v. Greenleaf, 117 Ky. 817, 79 S. W. 267.

If, by act of the grantor, he intended to devest himself of title, it is a delivery.

9 Am. & Eng. Enc. Law, 2d ed. p. 153; Owen v. Perry, 25 Iowa, 412, 96 Am. Dec. 49; Mercer v. Mercer, 29 Iowa, 557; Newton v. Bealer, 41 Iowa, 334; Logsdon v. Newton, 54 Iowa, 448, 6 N. W. 715; Farmers' & T. Bank v. Haney, 87 Iowa, 101, 54 N. W.

power to contract and trade as if single. The design of the legislature has been to enlarge their opportunities and privileges to the end that their conditions might be improved. It could never have been their purpose to give married women the almost unrestricted right to contract debts, and not to afford to them the same exemptions from debt that are given to men. If the woman assumes debts, having a family, she ought to be and is entitled to just the same exemptions as a man with a family."

So, under this statute, it was held that a wife who owned land could also be an actual bona fide housekeeper with a family, and that such would be her status if the husband failed to provide a home for the family. Lee v. Hughes, 25 Ky. L. Rep. 1201, 77 S. W. 386. The court said: "It is not material whether or not the husband of appellee contributes to any extent to the support of the family. In view of the fact that she owes the debt due the appellants, and that she is a bona fide housekeeper, with a family, resident in this commonwealth, and the owner of the lot in controversy, and was occupying it as a homestead at the time it was levied upon and sold under the appellant's execution, we know of no reason why she should not be entitled to it as a homestead."

And, under S. C. Const. art. 1, § 20, providing that a reasonable amount of property as a homestead shall be exempt from seizure, and art. 232, § 32, providing that "the family homestead of the head of each family" residing in this state, not exceeding $1,000, shall be exempt, where the husband and wife resided upon the wife's land, and a judgment was obtained against the wife, it was held that the exemption should be construed to extend to a wife living with her husband who owned no property, and that the family homestead owned by the wife might be designated as "the family homestead of the head of the family,"—the husband, in the sense that it is his place of residence and that of the family of which he is the head; that it is the home of himself and family. Norton v. Bradham, 21 S. C. 381.

So, it was held that the wife had the character of the head of the family while occupying the property as a home with her husband, so as to entitle her to designate the homestead and exempt it from sale for a debt of herself and husband. McPhee v. O'Rourke, 10 Colo. 301, 3 Am. St. Rep. 579, 15 Pac. 420. This was under Colo. homestead statutes, § 1, providing that every householder in the state of Colorado, being the head of a family, shall be entitled to a homestead, etc., and § 4, providing that when any person dies seised of a homestead, leaving a widow, or husband, or minor children, such widow, or husband, or minor children shall be entitled to the homestead. The court said: "So we conclude that, in the nature of things, and in the legislative mind, the husband and wife both possess the character of a householder and head of a family,—at least, to the extent to enable either of them owning the home they occupy as such, to designate it as a homestead; and that the statute, as is clearly apparent from the language used in § 4, above quoted, is expressive of such view."

But the contrary was held in Turner Bros. v. Argo, 99 Tenn. 443, 14 S. W. 930, where, in an action to set aside a sale of goods and an attachment on land, the wife claimed a homestead. It was held that the husband was the head of the family, and she was not entitled to a homestead out of her own land, nor was the husband entitled to a homestead out of the land belonging to his wife.

A wife having a family depending on her was held to come within the term "family," where a married woman for years supported herself and minor children. Wilson v. Wilson, 101 Ky. 731, 42 S. W. 404. This was under Ky. Stat. § 1697, providing, the following property of persons with a family resident in this commonwealth shall be exempt from execution (giving a list). The court said: "That member of a family who does actually support the others, and without whose exertion and means they would have no support, can, though a *feme covert*, be fairly regarded and treated, according to the language as well as reason of

61; Trask v. Trask, 90 Iowa, 318, 48 Am. St. Rep. 446, 57 N. W. 841; Parker v. Parker, 56 Iowa, 111, 8 N. W. 806; Steel v. Miller, 40 Iowa, 402; Adams v. Ryan, 61 Iowa, 733, 17 N. W. 159; American & Co. v. Frank, 62 Iowa, 202, 17 N. W. 464.

Messrs. J. R. Hanley & Son, for defendant, appellee:

Mrs. Scott, as widow, with adult son and daughter dependent upon her for support, could acquire a homestead, and hold it exempt as the head of the family.

Fullerton v. Sherrill, 114 Iowa, 511, 87 N. W. 419; Tyson v. Reynolds, 52 Iowa, 431, 3 N. W. 469; Holloway v. Holloway, 86 Ga. 576, 11 L.R.A. 518, 22 Am. St. Rep. 484, 12 S. E. 943; Fox v. Waterloo Nat. Bank, 126 Iowa, 481, 102 N. W. 424; Childers v. Henderson, 76 Tex. 664, 13 S. W. 481; Arnold v. Waltz, 53 Iowa, 706, 36 Am. Rep. 248, 6 N. W. 40; Cross v. Benson, 68 Kan. 495, 64 L.R.A. 567, 75 Pac. 558; Moyer v. Drummond, 32 S. C. 165, 7 L.R.A. 747, 17 Am. St. Rep. 850, 10 S. E. 952; Wade v. Jones, 20 Mo. 75, 61 Am. Dec. 584; Connaughton v. Sands, 32 Wis. 387; Doolin v. Dugan, 12 Ky. L. Rep. 749; Fox v. Waterloo Nat. Bank, 126 Iowa, 481, 102 N. W. 424; Brooks v. Collins, 11 Bush, 622.

Payment of wages is not a criterion of family headship.

Fox v. Waterloo Nat. Bank and Doolin v. Dugan, *supra*.

Ladd, J., delivered the opinion of the court:

The husband of Mary A. Scott died in 1898. From that time until April, 1903,

the statute, a 'person with a family.' Any other interpretation or application would be a sacrifice of the substance for a shadow."

So, the wife of a deaf mute who was an imbecile, was held to be the head of a family. Hardin v. Wolf, 29 La. Ann. 333. The court said: "The law looks to the head of the family, to the person who is the debtor, and upon whom rests the burden of maintaining the family; and its terms are broad enough to include that person, whether husband, or wife, or widow, or a man or woman never married."

This case was distinguished in Taylor v. McElvin, 31 La. Ann. 283, *infra*, on the ground that here the husband was a deaf mute and an imbecile, who could give no assistance in providing for the wants of the family.

In some cases a married woman is held not to be the head of a family; but the fact that she supports a dependent family will, under some constitutions or statutes, entitle her to exemption.

A married woman having a separate estate and living with her husband and six minor children, four of whom were daughters, the husband being physically unable to work, and having no property nor means of support, was held not to be entitled to a homestead as the head of a family, but was held entitled to a homestead out of her own property if it appeared that her minor daughters were dependent upon her. Johnson v. Little, 90 Ga. 781, 17 S. E. 294. Ga. Code, § 1753, provides that the husband is the head of the family, and Ga. act 1866 declares that all property of the wife should be and remain her separate estate. Ga. Const. 1868 provides a homestead only to each "head of a family, or guardian, or trustee of a family of minor children." The Constitution of 1877 allows this, and adds, —"any person having the care and support of dependent females of any age, who is not the head of a family."

So, a married woman having the care and support of her dependent daughters was entitled to a homestead out of her separate estate. Sparks v. Shelnutt, 99 Ga. 629, 25 S. E. 853. In this case the application showed that the minor children living with the petitioner and her husband were dependent on her for support by reason of the husband's physical weakness, and that all the property belonged to the petitioner.

In Willbanks v. Untriner, 98 Ga. 801, 25 S. E. 841, it was said that a married woman could be allowed a homestead out of her separate estate where she had the care and support of dependent females.

But a wife was denied an exemption as head of a family where there was no one depending on her for support.

A married woman residing in the state, having no children, and whose husband was a nonresident, was held not to constitute a family, within the contemplation of Ala. Code, § 2462, exempting certain property for the use of families in this state. Keiffer v. Barney Bros. 31 Ala. 192. The court said: "She has no child, and no husband, in this state. As far as the answer discloses, there is no person in the state of Alabama dependent upon her, or occupying such relation to her as to admit such person to a participation with her in the use of the property. It is thus clear that, if the property were reserved from sale, it would be for the use of Mrs. Keiffer, and not for the use of a family. It is the unmistakable object of the statute to reserve property from liability to the payment of debts, for the use of families in the state, and not for the use of isolated individuals without any dependencies."

And, a wife having no children of her own was held not to be the head of a family, where the family consisted of children of her husband by a former marriage. Lathrop v. Soldiers' Loan & Bldg. Asso. 45 Ga. 483. This was on the ground that the wife was not entitled to a homestead out of the wife's property, where her husband was living and she had no children of her own, and where she was under no legal or moral obligation to support the children of her husband by a former marriage. Nor was she the head of a

she operated the Scott house, a hotel in Muscatine. In April, 1902, she purchased lot 9 in block 71, but did not move into the house thereon until April 7, 1903. Shortly afterwards she was taken sick, and died May 13th of the same year. The contention of the plaintiff is that this lot was not her homestead at the time of her death, and therefore the interest of George E. Scott, one of her ten surviving children, therein should be subjected to the lien of her judgment. Our statute provides that the homestead is exempt from the precedent debts of the heirs of the owner. All of Mary A. Scott's children had attained their majority. One son, Frank E. Scott, and a daughter, Mrs. Fahey, and the latter's daughter, had been living in the house with her for over a month, when she died. It was her home, and the controversy is whether her relations with these children were such that she and they, or either of them, constituted a family; for in this state the exemption of the homestead is to the family. A single person is not a family, and therefore cannot claim a homestead, unless continuing in possession as surviving spouse. Fullerton v. Sherrill, 114 Iowa, 511, 87 N. W. 419; Emerson v. Leonard, 96 Iowa, 311, 59 Am. St. Rep. 372, 65 N. W. 153. "Family" has been defined as a collective body of persons who live in one house under one head or manager. Tyson v. Reynolds, 52 Iowa, 431, 3 N. W. 469; Parsons v. Livingston, 11 Iowa, 104, 77 Am. Dec. 135. But this is not accurate, for strangers might thus band them-

family of these minor children while he was living. The court said: "It appears from the evidence in the record that the city lot is the separate property of Mrs. Lathrop, that she has no children, but her husband has children by a former marriage. She is under no legal or moral obligation to support his children. She was not the head of a family of the minor children of her husband within the meaning of the 1st section of the act of 1868, and her husband and his children had no title to the property."

A married woman was held not entitled to a homestead out of her own property as the head of a family, under Ga. Const. 1877, giving an exemption to families and where there is a dependent female, where her application showed that her husband was the head of the family and had refused to take a homestead, but did not show that the applicant had the care and support of her children or dependent females, or that her husband was unable to support herself and children. Robson v. Walker, 74 Ga. 823.

And, a married woman residing in Virginia, while her husband resided in Mexico, having six children, all of age, and none of whom dependent upon her for support, was held not to be a householder or head of a family, under Va. Const. art. 11, providing that the general assembly shall prescribe on what conditions the householder and head of the family shall set apart and hold for himself and family a homestead. Oppenheim v. Myers, 99 Va. 582, 39 S. E. 218.

A married woman was held not entitled to an injunction against the sale of property claimed to be her homestead, where there were minors in the family, and the husband managed the farm and had an exempt homestead of his own. Taylor v. McElvin, *supra*. This was on the ground that she had not a family dependent on her for support.

So, it was held that the homestead was not conferred upon a married woman, and that the husband was the head of the family on whom devolved the support of the family, in Fuselier v. Buckner, 28 La. Ann. 594. This was under La. act December, 1865, providing that 160 acres of ground bona fide owned by the debtor having a family, a mother, or father, or person or persons dependent upon him for support, and also certain personal property, shall be exempt and also providing that no debtor shall be entitled to the exemption whose wife owns more than $1,000.

But the fact that there is a family depending on the wife for support is not always held sufficient to constitute her the head of a family; and some cases refuse the exemption.

So a wife was held not to be the head of the family under the homestead law, notwithstanding she supported her minor children, and the husband was lazy and did not sleep in the same house with his wife, but in a cabin in the back yard. Barry v. Western Assur. Co. 19 Mont. 571, 61 Am. St. Rep. 530, 49 Pac. 148.

And a wife who supported her husband and their children was held not to be the head of the family as against her creditors, in Muir v. Howell, 37 N. J. Eq. 39. This was under N. J. Rev. p. 391, providing that goods and chattels, not exceeding $200. of any debtor having a family residing in this state, shall be reserved as well after as before the death of the debtor, for the use of the family.

Some other cases allow the family homestead to the wife as the head of a family where she has been abandoned, deserted, or separated from her husband, or where she is supporting minor children.

So, a married woman, abandoned by her husband and having a child, was held to be the head of a family under the exemption law, in Nash v. Norment, 5 Mo. App. 545.

And, a wife and children occupying the homestead, where the family had been deserted by the husband, was held entitled to claim the exemption of the homestead. Hollis v. State, 59 Ark. 211, 43 Am. St. Rep. 28, 27 S. W. 73. The court said: "As the protection of the family is the object of the homestead law, so it has been held that desertion of the family by the husband, still leaving the family occupying the homestead, is not an abandonment of the homestead."

So, it was held that a married woman

selves together and live under the direction of a leader. To constitute one or more persons, with another, living together in the same house, a family, it must appear that they are being supported by that other in whole or in part, and are dependent on him therefor, and, further, that he is under a natural or moral obligation to render such support. Fox v. Waterloo Nat. Bank, 126 Iowa, 481, 102 N. W. 424.

Does the evidence indicate that such a relation existed between Mrs. Scott and those who lived with her? The record has convinced us that Frank E. Scott, though over forty years old, was dependent on the deceased for his support. He had been married, but was divorced. He was lazy, addicted to the excessive use of intoxicating liquors and morphine, and was reputed a gambler. He had kept a butcher shop, but, upon his father's death in 1898, returned to the Scott house, where he lived until his mother's removal to the premises in controversy. For several years one Weaver had charge of the hotel office, and Frank did chores about the hotel. After Weaver left he took charge of the office, kept the books, and received money, but one Kline was allowed part of his board for sleeping in the office and caring for him when disabled by the use of alcohol or morphine. That during this time his mother supplied him with money is doubtless true, and he may have construed that received as wages. Indeed, he testified that she had paid him "different prices at different times,—about $10 a week and my

abandoned by her husband, and supporting her children, was the head of a family, and entitled to the exemption of her horses. Frazier v. Syas, 10 Neb. 115, 35 Am. St. Rep. 466, 4 N. W. 934. This was under Neb. Gen. Stat. 618, Code, § 530, providing that no property hereafter mentioned (including horses) shall be liable to execution against any person being a resident of this state and the head of a family.

The same was held under Neb. Civ. Code, § 521, providing that all heads of families who have no lands exempt as a homestead shall have exempt from sale on execution $500 in personal property. Hamilton v. Fleming, 26 Neb. 240, 41 N. W. 1002.

So where the statute provides that she may claim exemption on desertion.

A deserted wife, without children, was held to constitute a family, under Ill. Rev. Stat. chap. 52, § 13, providing as exempt $100 worth of property selected by the debtor, and, in addition, when the debtor is the head of a family and residing with the same, $300 worth of other property; and § 15, providing that, when the head of the family shall die, desert, or not reside with the same, the family shall be entitled to all the privileges conferred upon the head of the family residing with the same. Berry v. Hanks, 28 Ill. App. 51.

So, where the debtor had mortgaged his premises and they were sold, and in the meantime he absconded leaving a wife and children, it was held that the wife was entitled to the $1,000 arising from the surplus of the sale, under Ill. Rev. Stat. chap. 52, § 2, providing that, in case the husband or wife shall desert his or her family, the exemption shall continue to the occupant, and the homestead act, providing that every householder having a family shall be entitled to an estate of homestead to the extent of $1,000. People v. Stitt, 7 Ill. App. 294. The court said: "They have had to look after themselves, and to earn their own living, and the homestead itself has been sold under mortgage. The family understand that he has entirely abandoned them. The evidence, we think, is abundant to establish the fact of abandonment. It matters not what his motives were for leaving, whether it was dissatisfaction with his family, or fear of criminal prosecution, the effect is the same on his family. They need a homestead as much in the one case as the other."

In Bechtoldt v. Fain, 71 Ga. 495, it was held that a married woman could not have a homestead out of her own property unless she was living separate from her husband, under Ga. Code, § 2019, prohibiting a married woman from having a homestead assigned out of her property, unless she was living apart from her husband. This case was distinguished in Johnson v. Little, 90 Ga. 781, 17 S. E. 294, *supra*, because it arose under the Constitution of 1868, which did not have the provision as in the Constitution of 1877.

So a wife has been held to be within the terms of a statute giving an exemption to a resident who is married, or the head of the family.

Thus, a wife separated from her husband by an agreement, purchasing and occupying premises by herself and family, as a homestead, was held to be a householder and the head of a family, under the Illinois act providing that every householder having a family shall be entitled to an estate of homestead. Kenley v. Hudelson, 99 Ill. 493, 39 Am. Rep. 31. In this case the complainant had one child, which she retained; and she purchased the property and moved on it with her child, when she rented the land and moved to a small town for the purpose of schooling her son. The court said: "Here the complainant was a householder and the head of a family, and the statute will have to receive an unnatural and a forced construction to hold that she is not entitled to protection, when she falls directly within its terms. The fact that complainant had a husband living is not sufficient to deprive her of the rights given by the statute to a householder having a family.

A boarding-house keeper, who had a husband living with her, and was a resident of the state, was held entitled to exemption under Ark. Const. art. 9, § 2, providing that any resident of this state, who is married or the head of a family, shall be entitled,

board;" that "mother always paid all of her children wages; that mother paid me wages up to her death, and I know she paid my sister Mrs. Fahey every Saturday night." Nowhere does he undertake to state that any agreement was had as to what he was to receive, or what was in fact paid or when; and, aside from his designation of what she gave him as wages, his testimony is not inconsistent with the thought that she merely gave him enough to supply his wants, which may have been more or less than wages. During the six weeks prior to his mother's death, he did nothing but chores about the house, and since then he had continued in that occupation for his board with his sister. Of course, he always has been intending to leave, but, through the persuasion of mother and sister, remained "until he got ready to settle." He admits that he threatened the defendant that he would "swear to a lie," rather than allow him to succeed, and this, with his appearance on the stand, doubtless led the district court to reject the story of having been merely an employee of his mother, and adopt the more reasonable conclusion, deducible from the record, that, through excesses, he had become practically incapable of caring for himself, and was being maintained by his mother, because of the natural obligation to her child. The relation of Mrs. Fahey was not shown to have been that of a dependent, though she lived with her. But the two were enough to, and did, constitute a family, within the

etc. Memphis & L. R. R. Co. v. Adams, 46 Ark. 159. The court said: "The argument is, that Mrs. Adams is entitled to neither of these exemptions: Not to the first because she is a married woman; nor to the second, because she is not the head of a family; that exemption laws, being for the benefit of the family as an entity, must be restricted to heads of families; otherwise, the same family might enjoy a double exemption, in case both parents are alive and the owners of property. This reasoning, it will be observed, is bottomed on the assumption that the use of the phrase, 'married, or the head of a family,' is nothing more than an instance of the tautology so common in legislative enactments, the intention being simply to declare that marriage should, of itself, constitute a man the head of a family."

Where the wife owned the land and the husband owned the building, it was held that she could assert a claim to the homestead as against her creditors, where her husband did not make any adverse claim. Kruger v. LeBlanc, 75 Mich. 424, 42 N. W. 853. This was under How. (Mich.) Anno. Stat. § 7721, providing that a homestead, not exceeding 40 acres and a dwelling house, owned and occupied by any resident of this state, shall be exempt from sale on execution, and § 7723, providing that, when a levy may be made on a decree of foreclosure not valid as against the homestead, such householder may notify the officer. The court said: "If Mrs. Kruger owns the buildings as well as the land, and this is all the real estate owned by either herself or her husband, and they are living upon it, she has the right to claim it as her homestead, and it is exempt to the value of $1,500; and this is her right, even if her husband is the head of the family, and manages the farm."

So where the statute provided an exemption for a "householder," or "housekeeper."

This was under Ill. Rev. Stat. 1874, p. 497, providing that every householder having a family shall be entitled to an estate of homestead in the land owned, possessed, and occupied by him or her as a residence. It was held that a wife living with her husband could be a householder; and it was not necessary that she should be the head of a family. Zander v. Scott, 165 Ill. 51, 46 N. E. 2.

A married woman owning separate real estate, and residing upon it with her husband and children, was entitled to the exemption, under Miss. act 1857, providing exemption to a citizen of this state, male or female, being a householder and having a family, and act 1865, providing exemption to the head of every family, being a white person and a housekeeper. Partee v. Stewart, 50 Miss. 717. The court said: "The husband is the head of the family in the sense that the wife and children are subject to his marital and paternal authority. But he has no authority and control over the wife's property, or the application of it to the support and nurture of the family, unless by her consent. If the land occupied is the domicil of the family, it is her residence, with supreme control, except that she cannot mortgage or alien without his approbation."

But her claim to an exemption has been denied on the ground that she was not the head of the family, where her husband also had a homestead, and where she asserted a claim for exemption of personal property.

Thus where a husband had a homestead assigned to him, it was held that his wife was not the head of a family so as to have another homestead allotted to her out of her property. Neal v. Sawyer, 62 Ga. 352. The court said: "The husband is recognized by law as the head of the family. If a wife having children by a former as well as by a present husband can be said to be the head of any family, most certainly it is not the head of a mixed family consisting of herself and her minor children by both husbands. She is a member of her living husband's family, and so are the children which she bears to him."

Property was assigned to a widow having three children, and she remarried, and then claimed that the personal property was exempt from a judgment against her. under Iowa Code, § 3072, providing that the debtor who is the head of a family may hold cer-

meaning of the law. Fox v. Waterloo Nat. Bank, *supra*, and cases cited.

Rulings on objections to questions propounded to different witnesses, and also the taxation of costs, are assigned as errors, but not argued, and for this reason not decided. The proof, independent of such evidence, however, was sufficient to show that deceased, who was seventy-nine years of age, was occupying the premises as her home; and as she, with her dependent son, constituted a family, the court rightly decided that the property was exempt as a homestead.

(2) In January preceding her death Mrs. Scott had entered into a contract for the sale of the east half of lot 9 and lot 8 in block 106 to John F. De Camp. The sum of $50 had been paid, but possession was not given, nor anything said concerning possession. The agreement recited: "I have sold to John F. De Camp . . . my brick building and lot . . . for the sum of $3,000, and have received as purchase price thereof the sum of $50, to be forfeited, provided the purchase price of $2,950, is not paid on or before the 1st day of July, 1903. And, upon payment of the said $2,950, within the time herein stated, I am to execute a good and sufficient warranty deed of the said property to the said J. F. De Camp, for which I bind myself, my heirs, executors, or assigns." The house was vacated by the tenant in April, and Mrs. Scott died in May. Upon her death Mrs. Fahey handed to Mrs. De Camp the keys to the house, but this was

tain property. It was held that her husband was the head of the family. Van Doran v. Marden, 48 Iowa, 186.

d. Widower with dependents.

A widower having persons dependent on him, whom he is under moral or legal obligation to support, by the weight of authority, is held to be the head of a family and entitled to the exemption. For rights of the surviving widower, see subd. III. a. In some cases it is held that a husband, having acquired a homestead, will still constitute the head of a family, although he may lose his wife and have no others depending on him for support. Under some statutes a widower is recognized as the head of a family.

In Barney v. Leeds, 51 N. H. 253, the court said: "And if the husband is the head of the wife (Ephesians, V. 23), and therefore the head of a family, so, also, is the widower the head of his one motherless child, and thus the head of a family."

A man having no wife, but having a child dependent upon him for support, where he and his child boarded at different houses, was held to constitute a family, under Ala. act 1833, providing: "The following articles shall be retained by and for the use of every family in this state free and exempt from levy and sale. . . ." Sallee v. Waters, 17 Ala. 482. This was on the ground of dependence, and that it was not necessary that all the dependents should live under the same roof.

An applicant having an adult daughter and her three minor children, who were in indigent circumstances and dependent upon him for support, and who were living in his household, and were unable to support themselves by reason of physical disability, was held to be the head of a family. Blackwell v. Broughton, 56 Ga. 390. The court said: "If the family in whose behalf a homestead can be set apart must consist of those whom the head is under the strictly legal obligation to support, the father is as much bound to maintain in his house his daughter, as his mother; the former is more naturally a member of his household, where she was born, than the latter, who raised him under a different rooftree, that of his father, and only on the death of her husband, lived with the son."

So, a widower who employed a family to keep house for him and his adopted daughter, who was dependent upon him for support, was held to be a householder with a family; and the absence of the child on a visit to its natural mother did not change its domicil. Bunnell v. Hay, 73 Ind. 452. The court said: "It was the duty of the appellant to support the child which was his by adoption; and the case, therefore, falls within the rule, sanctioned by many authorities, that he is to be deemed a householder upon whom rests the duty of supporting the members of his family or household."

A widower living with his three children at the house of his father-in-law, paying their board and furnishing them with necessaries, was held to constitute a householder, in Lowry v. McAlister, 86 Ind. 543. The court said. "A person who has members of his family dependent upon him for support, and who does support them, is a householder within the meaning of the law."

A widower with two daughters of tender age was held to be a housekeeper having a family residing with him, where he left them in his mother's care and sent one of them to school from her home, while he occupied a single room about a mile distant as an office and dwelling, where he lodged, cooked, and ate his meals. Seaton v. Marshall, 6 Bush, 429, 99 Am. Dec. 683. The court said: "His children being infants and subject to his control, and not appearing to have any permanent home elsewhere than with him, their domicil was with him, although their sex and tender age, together with their father's situation, seem to have caused him, very properly, to place them for the time being in the immediate care of his mother; and this partial separation from him did not, in our opinion, change their place of residence."

It was held that a debtor whose wife had died, and whose family had narrowed down to one daughter, an invalid brother, his

not shown to have been authorized by the heirs or legal representative of deceased. Not having been turned over by the owners in pursuance of the terms of the contract, or by the authority of the intervener or heirs other than Mrs. Fahey, nothing was acquired thereby, and actual possession was not taken until long after the levy.

Intervener insists that the agreement effected an equitable conversion, as a result of which the purchaser became the owner of the land, and Mrs. Scott merely held title in trust to secure payment of the purchase price, and this passed to her legal representative as personal property. Had the contract effected a sale of the land, this would have been true. Miller v. Miller, 25 N. J. Eq. 354; Williams v. Haddock, 145 N. Y. 144, 39 N. E. 825; Bender v. Luckenbach, 162 Pa. 18, 29 Atl. 295, 296; Donohoo v. Lea, 1 Swan, 119, 55 Am. Dec. 725. In such a case equity considers the vendor, as to the land, a trustee for the purchaser, and the vendee, as to the money, a trustee for the seller. In other words, the vendee is the equitable owner, and the vendor merely retains title as security for the price, and his interest in the land is not subject to levy of writ of execution or attachment. Baldwin v. Thompson, 15 Iowa, 504; Woodward v. Dean, 46 Iowa, 499; Rand v. Garner, 75 Iowa, 311, 39 N. W. 515. See cases collected in note to Bowen v. Lansing, 57 L.R.A. 643. But this agreement was purely executory in character, and in no way bound the intervener to complete the purchase. Upon

mother-in-law, and a housekeeper, was entitled to a homestead. Stults v. Sale, 92 Ky. 5, 13 L.R.A. 743, 36 Am. St. Rep. 575, 17 S. W. 148. The court said: "Here the debtor was invested with the right. It existed when this suit was brought. He has done nothing to release or forfeit it, and, in our opinion, is still entitled to it, being yet a housekeeper in the property, although by misfortune he no longer has a family."

A man having a daughter-in-law and grandchild dependent upon him for support, and residing on the land and occupying it as a homestead, and temporarily leaving the house, but retaining a room, was held entitled to a homestead. Ragsdale v. Watkins, 25 Ky. L. Rep. 506, 76 S. W. 45. The court said: "While it is necessary that a homesteader should have persons dependent upon him for support, and residing with him, in order to constitute a family, it is not necessary that this should be true in order to retain an existing right to a homestead. In this case the testimony is uncontradicted that a dependent daughter-in-law and grandchild resided with him; and we are of the opinion that appellee did not lose his right to a homestead because he took up a temporary residence in another place for the purpose of more conveniently conducting his business." In this case it does not clearly appear whether or not the debtor was a widower.

And having minor children dependent upon him for support was held sufficient to entitle a widower to a homestead, under La. Const. art. 219, providing such exemption to the debtor having a family, with "persons dependent" on him for support. Woods v. Perkins, 43 La. Ann. 347, 9 So. 48. The court said: "The fact that he encourages them as they grow to manhood to earn their own living in part does not render them independent of parental authority, and take them out of the class of 'dependent persons.' It still exists, and the minors by law, are dependent upon their parents. They are within the meaning of the homestead exemption, 'persons dependent.'"

So it was held that a daughter eighteen years old, residing with her father and giving him her services, was a person dependent upon him for support, although she might physically be able to earn her own living. The fact that the father was temporarily occupying an adjoining place on account of his house having been destroyed by a storm was held not to affect his right of homestead. Lyons v. Andry, 106 La. 356, 55 L.R.A. 724, 87 Am. St. Rep. 299, 31 So. 38. The court said: "The father is legally charged with the duty of supporting her until she should become of age. There is no direct testimony to the fact that he actually supports her, but, as he is shown to earn his own living, and she lives with him, we must presume that he has continued to perform the duty which the law imposes upon him. We think the daughter is legally dependent upon him for support."

In a garnishment proceeding it was held that a widower with his adult daughter, whom he supported, and who kept house for him, constituted a family. Cox v. Stafford, 14 How. Pr. 521.

So having two children for whom the father provided, although they were temporarily absent to be educated, was held to constitute a family under the law exempting the family library. Robinson's Case, 3 Abb. Pr. 466.

And a widower temporarily residing in a town while his farm house was being rebuilt, and supporting an adopted niece, who was temporarily absent at school at the time, was held to be the head of a family. Fant v. Gist, 36 S. C. 576, 15 S. E. 721. This was on the ground that a moral duty to support the members, arising from ties of consanguinity or affinity, or perhaps other similar relations, would be sufficient.

And a widower with children, one of them a minor, was held to be the head of a family, within Tenn. act 1870, § 80, and Tenn. Const. exempting a homestead occupied, to the value of $1,000. Flannegan v. Stifel, 3 Tenn. Ch. 464.

And a widower keeping house with his sister was held to have a family, where she acted as his housekeeper, and he supported her in turn for her labor and services. Far-

payment of the balance stipulated, she must execute a conveyance; but the only result of his failure to do so was the forfeiture of the amount paid. Specific performance might not have been enforced against him. Clearly, then, the contract did not vest in him any interest in the land. It merely specified how he might acquire it. Richardson v. Hardwick, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. Rep. 213; Stembridge v. Stembridge, 87 Ky. 91, 7 S. W. 611; Bostwick v. Frankfield, 74 N. Y. 207; Sweezy v. Jones, 65 Iowa, 272, 21 N. W. 603.

But, if regarded as something more than a mere option, it was but an agreement to sell in the future, and not a present sale. The distinction between these two classes of contracts was pointed out in Nunngesser v. Hart, 122 Iowa, 647, 98 N. W. 505, where the court declared that in a contract to sell the vendor remained the owner of the land and liable for the payment of the taxes, though the rule is otherwise where the agreement amounts to a present sale. Miller v. Corey, 15 Iowa, 166; Sackett v. Osborn, 26 Iowa, 146. Possession is an important circumstance to be considered in determining the character of the contract, though not always to be regarded the test, for there may be a present sale with the right of possession postponed, the same as payment of the purchase price may be. Marks v. Tichenor, 85 Ky. 536, 4 S. W. 225; Harris v. King, 16 Ark. 126; Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582. As Mrs. Scott did not cease to be the owner until

mer v. Hale, 14 Tex. Civ. App. 73, 37 S. W. 164.

But a widower having no one dependent upon him whom he is legally or morally bound to support is held, by the weight of authority, not entitled to the exemption, and not to be the head of a family, under the statutes. There are other cases which hold that, having once acquired a homestead, the loss of persons dependent upon him, whom he is legally or morally bound to support, does not make him lose his position as head of the family. There are other cases where he is recognized by statute as the head of a family; and there are some cases which construe the statutes as including a widower. In some of the latter the statute authorizes an exemption to an owner, resident, or a householder.

The following cases hold that a widower keeping house, but having no persons residing with him whom he is under legal or moral obligation to support, is not the "head of a family" under the exemption laws.

After the death of the wife it was held that the surviving husband was not protected. Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304. This was under Cal. Const. art. 11. § 15, providing that the legislature shall protect, by law, from forced sale, a certain portion of the homestead and other property of all heads of families, and Comp. Laws, 850, providing an exemption of the homestead and other property from forced sale, and that the head of the family is called the owner of the homestead. The court said: "But, unless the person is the head of the family, the right of homestead cannot exist. And cannot the same person, at one time, be the head of a family, and not at another? And if the privilege is an incident to a certain state, and that state itself ceases, why should not the incident fall with it? . . . It is true that the party once had a family, and he also once had protection for that family; but, since the family has ceased to exist, the protection is not needed. The law intended to protect individuals while bearing certain relations towards each other. When that relation ceases, the cause of the protection is gone."

So where there was no one dependent upon him, a widower was held not to be the head of a family. Santa Cruz Bank of Savings v. Cooper. 56 Cal. 339. This was under Cal. Stat. 1862, p. 519, act May 12, § 5, providing that no unmarried person shall be entitled to a homestead, unless such person has the care and maintenance of his or her minor child, or of a minor brother or sister, or a minor child of a deceased brother or sister, or of a father, or mother, or of a grandfather or a grandmother, or of an unmarried sister, then residing on the homestead property with such person. In this case the widower had children, but they had reached majority.

Where a father applied for a homestead as the head of a family consisting of himself and daughter, and it was shown that at the time of the granting of the homestead the daughter was living in another county and her husband had deserted her, and, after the homestead was allowed she moved to her father's house, it was held that he was not the head of a family when he applied, or when the homestead was allowed. Walker v. Thomason, 77 Ga. 682. The court said: "A single person who had no family was not entitled thereto."

So, a widower was held not to be a householder with a family, where he broke up housekeeping and left his two children, who were nineteen and twenty years of age, to care for themselves. and rented a house and a housekeeper, and her two friends came and resided with him. Holnback v. Wilson, 159 Ill. 148, 42 N. E. 169.

A party who, after the death of his wife, placed his two children with relatives. disposed of most of his household goods, and lived at different places as a boarder, but not with his children, was held not to be the head of a family. Gibson v. Cross, 8 Kan. App. 548, 54 Pac. 796.

And, where children resided with the debtor, but there was no natural or legal obligation on him to support them, it was held that he was not a bona fide housekeeper with a family. Bosquett v. Hall, 90 Ky. 566. 9 L.R.A. 351, 29 Am. St. Rep. 404, 13 S. W. 244. The court said: "In legal con-

death, the land as such descended to the heirs, and the interest of George E. Scott was subject to the levy.

It is insisted, however, that he previously had conveyed his interest to De Camp. A deed from the ten children to De Camp had been signed by half of them, and was received by intervener from a brother on the 15th day of June with instructions, after signing, "to forward to the next one." He did so, with directions to "rush the deed along." It was returned to De Camp after the levy of the writ of attachment, and shortly thereafter he remitted to each, other than George E. Scott, his share of the deferred payment and to him a part, and moved into the house with his family July 9th. The circumstances were such as to indicate an intention on the part of George E. Scott that the deed be delivered upon being signed and acknowledged by all the children, but this did not happen until after the levy of the writ of attachment. An instrument will not be regarded as delivered, when anything remains to be done by the parties who propose to deliver it. Overman v. Kerr, 17 Iowa, 485; Hutton v. Smith, 88 Iowa, 241, 55 N. W. 326; Tewksbury v. O'Connell, 21 Cal. 60.

Nor is there anything in the record tending to show an acceptance prior to the time

templation, whomsoever it is the natural or moral duty of the debtor to support, or is dependent upon him for support, may be considered and treated as a member of his family.' Bell v. Keach, 80 Ky. 42. And accordingly an infant brother or sister, or an aged and helpless parent, or even a bastard child, may and has been held to constitute a family, in the meaning of the statute." The case does not show the fact, but the debtor probably was a widower.

A widower having two children, both married, and residing with one of his daughters, her husband, and child, and an old lady, was held not to have a family, entitling him to a personal exemption, on the ground that he was not under any natural or legal obligation to support any of them. Carter v. Adams, 9 Ky. L. Rep. 91, 4 S. W. 36. The court said: "For he is not under any natural or legal obligation to support either of them,—his daughter and child being dependent upon her husband, who is bound to support them, and the old lady having no natural or legal claims on him for a support."

And, where a widower was under no legal or moral obligation to support his married daughter, it was held that he was not a bona fide housekeeper with a family. Louisville Bkg. Co. v. Anderson, 106 Ky. 744, 44 S. W. 636. In this case the debtor rented his house, but retained a part for his own use, and boarded with his tenants for the rent, and his married daughter came to live with him, bringing his grandchild by another daughter, whose parents were living and able to provide for her, and his daughter cooked for him, assisted by the grandchild. It was further held that he could not claim to be a housekeeper with a family where his daughter at intervals lived with her husband, and where the relations between herself and husband were kind, although he was dissipated and sometimes did not contribute to her support.

A childless widower having resided with him a young married woman and her husband, the former of whom had been reared by him as an informally adopted daughter, was held not to have a family. Hill v. Franklin, 54 Miss. 632. This was under Miss. Code 1871, § 2135, providing that every citizen of this state, male or female, being a householder and having a family, shall be entitled to the homestead exemption. This was on the ground that he had no one residing with him whom he was legally or morally bound to support.

This rule was applied in Powers v. Sample, 72 Miss. 187, 16 So. 293, where an aged widower living on his land with his son, who had a wife and two children, and who paid the father no rent for the land, was held not to be a householder and the head of a family, under Miss. Code 1892, § 1970, providing that every citizen of this state, male or female, being a householder and having a family, shall be entitled to an exemption. The court said: "But we do not think it can be said that an old man of seventy-two years is under any duty, legal or moral, to support an adult son and his family whose health and faculties are unimpaired, and who are fully equal to the burden of providing for themselves. Nor do we think the facts here disclosed show the appellee to have been the 'householder,' the head of the family, entitled by his position to the control of the domestic establishment of which he was a member. There cannot be two heads to the family, and if the appellee was the householder, the son was not."

The same was held in the case of a childless widower, under Okla. Stat. 1893, § 2844, exempting property to the head of every family. Betts v. Mills, 8 Okla. 351, 58 Pac. 957.

And, a widower taking a friend and her infant niece to his house, conveying his property to his daughter, who reconveyed to him on her marriage, was held not to constitute a family. Whitehead v. Nickelson, 48 Tex. 517. The court said: "Nor can it be said that, because a party may, in consideration of the services of hirelings, or of persons permissively residing with him, pay them wages, or contribute in whole or in part to their support, there is a family, as contemplated in the Constitution."

So the rule requiring a legal or moral obligation on the part of one claiming the exemption to support the others for whom it is claimed was applied where a widower, having a minor boy whom he had not legally

it was returned to De Camp, and acceptance is quite as essential to the passing of title as the transfer of the deed. Rittmaster v. Brisbane, 19 Colo. 371, 35 Pac. 736. Manifestly De Camp would not have cared for the property until all the heirs had joined in its execution, and acceptance by him prior to that time is not to be inferred. Nor, on the other hand, can it be assumed that any of the heirs intended the deed to become effective prior to its execution by all. Until then the option to purchase had not been exercised, and prior thereto the land was subject to levy of the writ. Ex parte Hardy, 30 Beav. 206; Bras v. Sheffield, 49 Kan. 702, 33 Am. St. Rep. 386, 31 Pac. 306.

It may be that for some purposes an equitable conversion, effected by an election to exercise an option to buy, will relate back to the date of the contract, though as to that the authorities are in conflict; but it cannot operate to dissolve an attachment levied on land prior to such election, and while the grantor retains the ownership. See note to Bowen v. Lansing, 57 L.R.A. 651. We conclude that the interest of defendant in the land was subject to the levy.

Affirmed.

Petition for rehearing denied.

adopted, was held not to have a family. Mullins v. Looke, 8 Tex. Civ. App. 138, 27 S. W. 926.

But there are other cases which hold that he alone may constitute the family, or his household with him, where he has acquired a homestead and then has lost from his family those whom he is under a legal or moral obligation to support.

So, a debtor living upon a homestead with his wife and son was held not to lose the same by the death of the wife, and the coming of age and departure of his son, so long as the father continued to occupy the premises as his home. Silloway v. Brown, 12 Allen, 30. The court said: "Although a homestead estate cannot be acquired except by a householder having a family, yet when once acquired, and still occupied by him, it has been held not to be defeated or lost by the death or absence of his wife and children."

An old man continued to live on the farm after the death of his wife, and his son's family occupied the same house, and the provisions were furnished sometimes by the father and sometimes by the son. It was held that the father was entitled to the homestead. Beckmann v. Meyer, 75 Mo. 333. The court said: "It seems to be settled, on general principles, that a homestead, once acquired by the head of a family, will not be defeated or lost by the death or absence of his wife and children, if he continue to occupy it. Any other construction would render a husband who has been deprived of his family by accident or disease, or by their desertion without any fault of his, liable to be instantly turned out of his homestead by his creditors."

And a widower with children was held not to be the head of a household, and not entitled to an exemption, where he contributed only a small amount of money as a present to his children, who were living at another place with their grandmother. Gregg v. Brickley, 27 Ind. App. 154, 59 N. E. 1072.

And under Kan. Const., exempting homesteads only when occupied as a residence by the family of the owner, it was held that a widower whose children had grown to maturity and moved away, and who did not depend upon him, was not entitled to retain the homestead. Herrin v. Brown, 44 Fla. 782, 103 Am. St. Rep. 182, 33 So. 522; Ellinger v. Thomas, 64 Kan. 180, 67 Pac. 529. In the latter case the court said: "There is no more reason for continuing the homestead exemption to a sole adult survivor of the family than there would be to confer it on him in the first instance."

And, a debtor having a son and daughter living with him for a number of years, on the land which was farmed by the father and son, the daughter being housekeeper, until both daughter and son married and left the father, was held to be the head of a family. Bank of Versailles v. Guthrey, 127 Mo. 189, 48 Am. St. Rep. 621, 29 S. W. 1004. In this case both son and daughter looked up to and regarded the father as head of the family, and both of them worked without wages as members of the family. This was under Mo. Rev. Stat. 1889, § 5435, providing that the homestead of every householder or head of a family, used as a homestead, shall be exempt.

The same was held in Suter v. Quarles, 22 Ky. L. Rep. 1080, 58 S. W. 990.

A debtor acquiring a homestead, and afterwards becoming a widower, but having a family consisting of a married son and his wife, and the wife and children of another married son who was temporarily absent, and one or more servants, was held to be the head of a family. Dorrington v. Myers, 11 Neb. 388, 9 N. W. 555. The court said: "Neither the death of the wife, nor her abandonment of her husband, nor the arrival at full age, and the departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead of the protection of the exemption law." This was under Neb. Gen. Stat. 616, providing that the homestead, owned and occupied by any citizen of the state being the head of a family, shall not be subject to levy or sale.

A widower who married after the levy of an execution was held to be the head of the family at the date of the levy, and was entitled to the exemption. Rollings v. Evans, 23 S. C. 316. The court said: "Taking the term 'family,' then, in its ordinary sense, which includes persons living

in one house, and under one head or manager, we think the circuit judge was right in holding below that the defendant was the 'head of a family.' His son was living with him as a part of his family, and, his son being a married man, no doubt entitled to have his wife and children with him, if he had any children, certainly this constituted a family, of which the defendant was the head."

After a man and wife acquired a homestead the wife died leaving no children. It was held that the husband, occupying the house with servants, and a niece and her husband, was entitled to the homestead. Taylor v. Boulware, 17 Tex. 77, 67 Am. Dec. 642. The court said: "If he had been without servants or anyone with him after the death of his wife, it would still have been his homestead so long as it continued to be his residence, and protected from a forced sale."

So where he is recognized as the head of a family by statute.

There are some cases where there was no one dependent on the debtor, but the construction of the statute was held to constitute him the head of a family. South Dakota Comp. Laws, § 2467, provides that every family, whether consisting of one or more persons, in actual occupancy of a homestead, as defined in this section, shall be deemed to be a family within the meaning of this chapter (chap. 23, Pol. Code). A single person in the occupancy of a homestead, as defined in the act, was held to be a family within the meaning of the act, and, prior to the amendment of 1890, was entitled to hold the same exempt from forced sale on execution for a debt incurred subsequently to the occupation of such homestead. As to the effect of this amendment no decision was necessary. Hesnard v. Plunkett, 6 S. D. 73, 60 N. W. 159. The claimant in this case was a widower, and his wife died prior to his acquiring the homestead claimed, and he had no children.

A widower renting a house, and having as his family his widowed niece with her three children, and servants which were hired by him, was held to be the head of a family, under Ga. Code, § 2013, providing a homestead exemption to the head of a family. Re Taylor, 3 Nat. Bankr. Reg. 157. The court said: "To constitute a head of a family, it is not necessary that a man shall have either a wife or a child. If he reside in a house of which he is proprietor, and have no other inmates than hired servants, he is in law the head of a family. See Re Cobb, 1 Nat. Bankr. Reg. 414. But as Mrs. Carswell and her children are not related by blood to Dr. Taylor, however strong his social relations may be, and with whatever affection he may regard them, he is not legally bound to support them, nor can they be regarded as his legal heirs. Hence, he is not entitled to any enlargement of his exemption on account of the three children of Mrs. Carswell."

Iowa Code, § 3073, providing that the word "family," used in the section relating to exemptions, does not include strangers or boarders lodging with the family, was held to imply that it did include persons living in the family who were not strangers or boarders. So, it was held that a widower and his servant, and his son and his son's wife, who lived with him but paid no board, constituted a family under this statute. Tyson v. Reynolds, 52 Iowa, 431, 3 N. W. 469. In this case it was not disputed that, if there was a family, the claimant was its head.

And where an association of persons which constituted a family was broken up, whether by separation or the death of some of the members, it was held that the right of homestead continued in the former head of the family, provided he still resided at the old home, under Ark. Const. 1874, art. 9, § 3, providing that the homestead of a resident married man or head of a family shall not be subject to sale under process. Stanley v. Snyder, 43 Ark. 429.

And under Wis. Rev. Stat. chap. 134, § 23, providing a homestead exemption to the owner, resident, or householder, it was held that a widower having no children at home, and boarding and lodging in his own house, was entitled to the exemption. Myers v. Ford, 22 Wis. 139. The court said "that a man may be an 'owner,' 'resident,' or 'householder,' without being married."

For grandparent, see subd. II. f.

e. Widow with dependents.

The weight of authority seems to be that, in order to entitle the widow to be treated as the head of a family, and entitled to the homestead, she must be supporting someone who is dependent upon her, and whom she is under a moral or legal obligation to support. There are a few cases where the construction of the statute giving to a family a homestead implied that a widow having a family would be entitled to a homestead, and where it was not held necessary, under these statutes, that she should have those around her dependent upon her for support.

In the following cases it has been held that a widow having persons dependent upon her, who she is under a moral or legal obligation to support, is the head of a family.

A widow having four children, all of age, two of them living with her, and one, a widow making her mother's home her residence, was held to constitute a housekeeper with a family, under the Kentucky homestead law. Brooks v. Collins, 11 Bush, 622. The court said that under Ky. Gen. Stat. chap. 38, art. 13, § 6, providing that property shall be exempt from execution against a bona fide housekeeper with a family resident within this commonwealth, "the evident purpose and meaning of the lawmaking power in placing this exempted property beyond the reach of creditors was to enable the head of the household to provide for himself and his family, or those who are living with him and dependent upon him for a support; and the debtor, being a bona

fide housekeeper, and occupying the land as a homestead with his wife or his children, adults or infants, or with his brothers and sisters, father and mother, grandfather or grandmother, or those dependent upon him, and whom by reason of his relation to or connection with, he is under a natural or legal obligation to maintain, must be regarded as a bona fide housekeeper with a family, and entitled to a homestead."

So, a widow owning and residing on land as a housekeeper, having a married son, who with his wife and eight infant children resided with her, and whom she supported, was held to be a housekeeper with a family, where the son was physically unable to support his wife and children. Riley v. Smith, 9 Ky. L. Rep. 615, 5 S. W. 869. The court said: "It seems to us that to decide that the moral and natural duty of appellant to support her infant grandchildren, does not under such circumstances, exist, and, as a result, that both she and they must be deprived of the only shelter they have, would be a perversion of the beneficent object of the law; and the court properly set apart to her a homestead in the land."

And a widow supporting her children and grandchildren, who were under her care and maintenance, was held to be the head of a family. Chamberlain Bkg. House v. Zutavern. 59 Neb. 623, 81 N. W. 858.

And, under N. Y. act 1842, chap. 157, providing exemption to a person having a family for which he provides, it was held that a woman who supported her infant child was entitled to the exemption, and the plaintiff and her infant son constituted a family. Cantrell v. Connor, 6 Daly, 224, 51 How. Pr. 45.

And under Tenn. act 1833, chap. 80, providing for the exemption of certain property of the head of the family engaged in agriculture, it was held that a widow having children living with her, dependent on her for protection and support, and subject to her control, was the head of a family. Bachman v. Crawford, 3 Humph. 213, 39 Am. Dec. 163. In this case personal property was attempted to be levied upon. The widow lived with her aged father, who owned the house and land, and, by his permission, she and her children lived in the house with him, and caused such portion of the land to be cultivated by her sons as she chose. The court said: "So, two families with equal rights and claims may reside together, and, although thus associated, they all constitute in a large sense one family; still the father, or mother, as the case may be, exercising a distinct control over the children and servants belonging to them, constitutes each a distinct family, and the manager of each a 'head of a family.'"

A widow purchasing a home, and, after a levy, adopting a child, whom she intended to raise, was held to be the head of a family. Wolfe v. Buckley, 52 Tex. 641. The court said: "We are not prepared to say that this did not constitute such family as would be entitled to the protection of this property as a homestead, even without the adoption of the child Anna; or that, if this adoption was necessary for this purpose, under the circumstances, there was such bad faith in the transaction as would amount to a fraud upon any previously acquired rights of the judgment creditor."

And a widow was held entitled, as the head of a family, to have a homestead set apart to her out of her separate estate, as a person having the care of dependent females, if in her case this ground for the allowance of a homestead existed. Willbanks v. Untriner, 98 Ga. 801, 25 S. E. 841. This was under the Georgia Constitution, allowing a homestead to one supporting dependent females.

A widow having two infant children living with her, and who were dependent upon her for support, was held to be a householder or head of a family. Oppenheim v. Myers, 99 Va. 582. 39 S. E. 218.

But where there was no one dependent upon the widow, whom she was under a moral or legal obligation to support, she was held not to be the head of a family.

A widow coming to this state, and leaving her children in another state, not intending to bring them with her, and not contributing to their support, was held not to constitute a family. Rock v. Haas, 110 Ill. 528. This was under Ill. Stat. chap. 52, providing that every householder having a family shall be entitled to an estate of homestead in the land occupied by him or her as a residence; and such exemption shall continue, after the death of such householder, for the benefit of the husband or wife surviving, so long as he or she continues to occupy such homestead, and to the children until the youngest shall become twenty-one years of age.

So, under Iowa Code, § 3072, giving an exemption of personal property to a debtor who is a resident of this state, and is the head of a family, it was held that a widow who lived alone and had no family was not the head of a family. Emerson v. Leonard, 96 Iowa, 311, 59 Am. St. Rep. 372, 65 N. W. 153. In this case the children died before the husband. The court said: "There cannot be a head of a family when there is no family. It is not material that there was once a family, if it has ceased to exist. The exemption is to the resident of this state who is, not to one who has been, but is not, the head of a family. The statute refers to a present, not to a past, condition. It is true that § 1989 of the Code provides that a widow or widower, though without children, shall be deemed a family while continuing to occupy the house used as a homestead at the time of the death of the husband or wife. But that provision has no application to exemption of personal property."

So, a widow who purchased a house and lot about a year after the death of her first husband, and occupied the premises with her two daughters until they married, and rented all but one room, and boarded with the tenants to whom she rented, was held not entitled to claim a homestead as the head of a family. Fullerton v. Sherrill, 114

Iowa, 511, 87 N. W. 419. The court said: "Nor do the facts of this case bring the defendant within the terms of § 2973 of the Code, providing that 'a widow or widower, though without children, shall be deemed a family while continuing to occupy the real estate used as a homestead at the death of the husband or wife,' as the premises were not acquired until after the husband's death, and are not shown to have been purchased with proceeds of the sale of another homestead. Her status as a widow, then, has no bearing on the case."

Louisiana Rev. Stat. § 1691, providing a homestead in favor of the debtor having a family, or mother, or father, or persons dependent upon him for support, was held to mean persons actually dependent under some sort of natural claim or right; and that the debtor would not be allowed to assume the support of persons having no natural claim upon her, as a foundation for a homestead claim. Decuir v. Benker, 33 La. Ann. 320. In this case the plaintiff was a widow seventy-five years old, and had three unmarried daughters, the oldest forty-five and the youngest twenty-six years of age, who were maintained by her. They were healthy, attended to home work, picked cotton on their mother's place, did washing, and took in outside sewing for pay. The court said: "Adults, male or, if unmarried, female, who have robust health and all usual faculties, lie under the necessity of supporting themselves, unless they find others willing to support them who can do so, without making such service a foundation for exempting their property from liability to the payment of their just debts."

In Galligar v. Payne, 34 La. Ann. 1057, it was held that a widow having a family consisting of "three minor children, one of them her own daughter, and two orphan girls whom she had raised from infancy, and who from that period" had been members of her household, was not entitled to a homestead. Her daughter married during the suit, and the other children had no natural or legal claim for support against the plaintiff. La. Rev. Code, ¶ 3556, provides that "family, in a limited sense, signifies the father, mother, and children. In a more extensive sense, it comprehends all the individuals who live under the authority of another, and includes the servants of the father of the family. It it also employed to signify all the relations who descend from a common root." There was a dissenting opinion. This case was, in effect, overruled in Hebert v. Mayer, 48 La. Ann. 938, 20 So. 170 (subd. II. f), where it was held that the exemption remains if, as in this case, there were dependent members of the family on the day of the seizure of the property; and that the obligation to support is a higher obligation than the payment of debts, and so high that "it must have a continuing effect for a short time, at least, after the head of the family no longer has someone to support."

A widow residing in her house with no other persons save her employees and servants was held not to be the head of a family within the meaning of Mo. Rev. Stat. § 2343, reserving from execution certain property when owned by the head of a family. Murdock v. Dalby, 13 Mo. App. 41. This was on the ground that the statute implied that the persons constituting the group which was designated were related to each other by blood or affinity. In this case a distinction was made between this section and § 2689, reserving from execution the homestead of every householder or head of a family.

This case was distinguished in State use of Smythe v. Kane, 42 Mo. App. 253, subd. II. g, saying that the former case simply emphasized the distinction between the head of a household and the head of a family, in deciding that one who had not other persons living with him than servants, while unquestionably the head of a household, was not the head of a family, as the latter term implies the relation of status as distinguished from a relation created by contract.

And where the purchaser under a trust deed made by a widow brought an action against her to try title, and she set up the claim of homestead, it was held that the allegations that she was a widow and had living with her a daughter and four grandchildren as members of the family did not import such a state of facts as would constitute her the head of a family. Ramey v. Allison, 64 Tex. 697. This was on the ground that the widow did not allege that the members of her family were dependent on her for support, and that she was under a moral or legal obligation to support them.

In the following cases, under the peculiar statutes and constitutions of the various states, the widow is regarded as the head of a family without deeming it necessary that she should be supporting someone whom she is under a moral or legal obligation to support:

So, under 68 Ohio Rev. Stat. § 5435, providing that a husband and wife living together, a widow or a widower living with an unmarried daughter or unmarried minor son, may hold exempt a homestead, it was held that a widow was entitled to exemption although she was not living with an unmarried child. Allen v. Russell, 39 Ohio St. 336. The court said that it would repunctuate the statute if necessary to render the meaning clear.

Dependency of family was held to be unnecessary, under S. C. Const. art. 2, § 32, providing that the family homestead of the head of each family residing in this state shall be exempt, where it was held that a widow having no children was entitled to a homestead. Bradley v. Rodelsperger, 3 S. C. N. S. 226.

And a widow who was the head of a family consisting of herself and servants was held to constitute a family. Race v. Oldridge, 90 Ill. 250, 32 Am. Rep. 27. In this case the widow kept a boarding house, and she had living with her two female servants, without wages, and a lady friend, besides boarders. Ill. Rev. Stat. 1878, chap. 52, provides that the following personal property

shall be exempt from execution; and, in addition, when the debtor is the head of a family and resides with the same, $300 worth of other property may be selected by the debtor.

A widow who was keeping house upon her dower land without children of her own living with her, but with a family consisting of the orphan children of a sister and of her late husband's sister, was held to be the head of the family, under Tenn. Const. 1870, art. 12, § 11, providing that a homestead in the possession of each head of a family shall be exempt from sale, and act 1870, chap. 80, § 3, providing that whenever real estate of such head of a family is levied upon, his or her homestead shall be set apart in the following manner. Ex parte Brien, 2 Tenn. Ch. 33. The court said: "The phrase, 'head of a family,' would clearly embrace a husband with a wife and children, or a husband with a wife alone, occupying a homestead. But it has never been considered as confined within these narrow limits. Under the act of 1833, chap. 80, exempting certain personal property in favor of the 'head of a family engaged in agriculture,' it was held by our supreme court that a widow who, with her children, lived with her father on his farm, and in the same house, and assisted in carrying on the farm by the aid of her sons, was entitled to the benefit of the exemption."

For grandparent, see subd. II. f.

f. Grandparent and child.

A grandfather or grandmother having a grandchild depending upon him or her for support is held to be the head of a family.

So, under the treaty with the Creek Indians, May 24, 1832, allowing to the head of a Creek family certain lands, a woman having orphan grandchildren residing with her was held to have a family. Ladiga v. Roland, 2 How. 581, 11 L. ed. 387. The court said: "We cannot seriously discuss the question, whether a grandmother and her grandchildren compose a family, in the meaning of that word in the treaty, it must shock the common sense of all mankind to even doubt it. It is as incompatible with the good faith and honor of the United States, and as repugnant to the Indian character, to suppose that either party to the treaty could contemplate such a construction to their solemn compact as to exclude such persons from its protection, and authorize any officer to force her from her home into the wilds of the far west. Such an exercise of power is not warranted by the compact, and the pretext on which it was exercised is wholly unsanctioned by any principle of law or justice."

And a widow supporting a grandchild thirteen years of age was held to be the head of a family. Smith v. Wright, 13 Tex. Civ. App. 480, 36 S. W. 324.

A widow supporting her grandchild as a member of her family was held to have a family, notwithstanding the child's father, who was divorced, had a decree of court awarding the custody of the child to him. Cross v. Benson, 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558. The court said: "The fact of her actual dependence upon her grandparents, and their consequent moral responsibility for her nurture, was sufficient."

A homestead was taken by a husband as the head of a family, where a minor female grandchild, who lived with him, was also dependent on him. It was held that after the death of his wife, while the grandchild was still a minor and dependent upon him, he was the head of a family. Hall v. Matthews, 68 Ga. 490.

And where slaves were living together as husband and wife, and had children, and the wife died, and a minor grandson, whose parents were dead, was dependent upon his grandfather, it was held that the plaintiff was the head of a dependent family. Hebert v. Mayer, 48 La. Ann. 938, 20 So. 170. This was on the ground that the law, in its humanity, does not seem to contemplate that the homestead exemption shall cease immediately after the death of the dependent member of the family, or shall cease because a dependent member of the family has become old enough to earn something toward the support of himself and the parent by whom he has been reared.

A grandfather supporting his grandchild and having a son who was absent at work, where a creditor made way with the grandchild, was held not to have lost his homestead right. Wilkinson v. Merrill, 87 Va. 513, 11 L.R.A. 632, 12 S. E. 1015. The court said: "The householder had acquired this homestead as the head of a family. His son is absent at work. His little grandchild has died,—it may be, criminally destroyed by a designing creditor. He still occupies the homestead personally as his residence, and his homestead retains its existence. This defendant's son may return to the paternal roof, or others may be brought there, and his homestead will continue, at least, as long as it is his residence."

A widower supporting his grandchild and her mother, his daughter, whose husband had left her penniless, and whom he was under a natural and moral obligation to support, was held to be a housekeeper with a family. Sweeney v. Ross, 12 Ky. L. Rep. 861, 15 S. W. 357.

And a widower supporting a granddaughter, who was dependent upon him for support, and who cooked and washed for him, was held to be a housekeeper with a family. Collins v. Gibson, 21 Ky. L. Rep. 1338, 54 S. W. 945. This was on the ground that he had residing with him a person whom he was under either natural or moral obligation to support, and that, where he had acquired a homestead, the loss of his wife did not deprive him of the right.

And the same was held where a widower had been supporting a granddaughter, whom he had raised from infancy. Adams v. Clark, (Fla.) 37 So. 734.

g. Single persons.

A debtor having someone residing with

him and depending on him, whom he is legally and morally bound to support, is held to be the head of a family although he or she may be single.

So, the parent of an illegitimate child is held to have a family where the child is dependent on such parent for support. Ellis v. White, 47 Cal. 73.

And a man having children by a woman with whom he was living in adultery was held to have such a family as would entitle him to a homestead. Lane v. Philips, 69 Tex. 241, 5 Am. St. Rep. 41, 6 S. W. 610. The court said: "No stronger natural or moral obligation could rest on the appellant than that which he is under to support his children who live with him, illegitimate though they be; and we are unwilling to hold that nothing short of a legal obligation to support them will suffice to make them constituents of his family."

And where a man lived with his housekeeper for twenty years, passing her off as his wife, and had a son by her, who was nineteen years of age, whom he was under an obligation to support, he was held to be a housekeeper with a family. Bell v. Keacn, 80 Ky. 42.

And a son supporting his mother and others in the family is held to be the head of a family.

This was held under Wis. Rev. Stat. chap. 134, § 32, subdivs. 8, 9, exempting personal property of the debtor and his family. Connaughton v. Sands, 32 Wis. 387.

And the same was held in Barry v. Hale, 2 Tex. Civ. App. 668, 21 S. W. 783, where the court said: "It is true, it is not stated in so many words that appellant's mother had no other property, and was dependent upon him for a support. but we believe that this is the fair construction that should be placed upon the evidence."

And this was held under S. C. Const., allowing exemption of property to one who is the head of the family. Scott v. Mosely Bros., 54 S. C. 375, 32 S. E. 450. The court said: "While a husband is the head of a family, a son, who takes care of and protects a widowed mother, may also be the head of a family of which such mother is a member."

An adult son occupying jointly a flat in the city with his mother and adult brother, paying the rent and household expenses, was held to be the head of a family of which his mother was the other member. State use of Smythe v. Kane, 42 Mo. App. 253. The court said: "The man who controls, supervises, and manages the affairs of a household consisting of several members of a family is the head of a family, even though he be neither husband nor father."

An unmarried man contributing to the support of his mother, sisters, and brother, who resided with him on the land, was held to be the head of a family. Broyles v. Cox, 153 Mo. 242, 77 Am. St. Rep. 714, 54 S. W. 488.

And where an adult son, after the death of his father, owned and lived upon a tract of land, supporting his mother and single sister, it was held that he was the head of the family, and that, after his mother and sister died, the homestead, once acquired, could not be lost by the absence of his family. Baldwin v. Thomas, 71 Ark. 206, 72 S. W. 53.

An old bachelor having a mother and two sisters, all of age, living in the same house with him, and providing for them for years, was held to be the head of a family. Marsh v. Lazenby, 41 Ga. 153. The court said: "A husband, a widow, a guardian or trustee, who represents those who are dependent upon him or her for a support, and is the head of a family of such dependents, is entitled to a homestead; and we see no reason why the same rule does not apply in favor of the head of any other household of dependents whom it is his legal duty to support."

An unmarried man living with his mother was held to be the head of a family, in Hyser v. Mansfield, 72 Vt. 71, 47 Atl. 105, and Bunker v. Coons, 21 Utah, 164, 81 Am. St. Rep. 680, 60 Pac. 549. The latter case was under Utah Rev. Stat. 1898, § 1154, defining the head of a family to be "every person who has, residing on the premises with him or her and under his or her care and maintenance, either his or her child, . . . mother, etc."

And a brother supporting his sisters is held to be the head of a family.

An unmarried brother supporting an unmarried sister, both of them adults, was held to be the head of a family, in Moyer v. Drummond, 32 S. C. 165, 7 L.R.A. 747, 17 Am. St. Rep. 850, 10 S. E. 952. This was on the ground that she was dependent upon him for a support which he provided for, and that he, as head of the household, managed and controlled it, hired the necessary servants, and provided for the table.

A man keeping house and supporting his widowed sister and her four small children was held to be the head of a family. Wade v. Jones, 20 Mo. 75, 61 Am. Dec. 584. The court said: "In our opinion, it is not necessary that the relation of husband and wife, or father and child, or mother and child, should exist in every case, to constitute a family. The man who controls, supervises, and manages the affairs about the house, is the head of a family, and such a man need not necessarily be a husband or a father."

And a bona fide housekeeper with an unmarried sister and two brothers, all under twenty-one years of age, living with him, whose parents were dead and whose support and education he had assumed, they being without means, was held entitled to the exemption given for the benefit of a family. McMurray v. Shuck, 6 Bush. 111, 99 Am. Dec. 662.

And a bachelor occupying a house with his two sisters, who were supported by him, was held to be the head of a family, and a householder having a family. Wike Bros. v. Garner, 179 Ill. 257, 70 Am. St. Rep. 102, 53 N. E. 613.

And a brother supporting his younger

brother and sister, aided by his older sister, was held to be the head of a family, although his mother resided at another place and helped in part to sustain the children. Duncan v. Frank, 8 Mo. App. 286.

And a bachelor taking care of his widowed sister, who made his house her home, having her furniture there and a room furnished, but visiting relatives, was held to be the head of the family, under Wagner's (Mo.) Stat. p. 603, giving a homestead to each housekeeper or head of family resident in the county. Bailey v. Comings, 16 Nat. Bankr. Reg. 382. The court said: "The case turns upon the question whether Mrs. Metcalf was part of the bankrupt's family. She lived there years before her marriage. It was her home prior to that event. After her husband's death she went there, and her brother received her as a member of his family, gave her a room, and she was in charge of his household and domestic affairs. She intended to remain there. She had no home of her own. Her household goods were there. She paid no board, and was not expected to. Her health failed, and she went, under the advice of her physician, to Monroe. Her relations to her brothers there were very different from her relations with her brother the bankrupt. Mrs. Metcalf says in her testimony that the bankrupt's house was regarded by her as her home, and she explains her absence therefrom by the condition of her health."

And a sister supporting her sister is held to be the head of a family. Chamberlain v. Brown, 33 S. C. 597, 11 S. E. 439.

And an aunt supporting nieces or nephews is held to be the head of a family.

So, an unmarried woman, undertaking to support and train her nephews and nieces, whose mother was insane, was held to be the head of a family notwithstanding the children owned property. American Nat. Bank v. Cruger, 31 Tex. Civ. App. 17, 71 S. W. 784. This was on the ground that, having undertaken to rear, train, and nurture them, and having contributed largely to their support and maintenance, undoubtedly there rested upon her a moral obligation to continue to do so so long as they were in a state of dependence; and the word "dependence," as here used, was not restricted to support and maintenance,—food and clothing. It was intended to include moral and mental training, and that care and nurture which would be prompted by the feeling of affection which the testimony indicated existed between this aunt and the children of her unfortunate sister.

And it was held that where a maiden lady assumed, and had fulfilled for six years, a moral obligation to support a minor nephew, who looked to her for support, she constituted a family, although the boy had a father living physically able to and legally responsible for the support of his son. Stodgell v. Jackson, 111 Ill. 256. This was under Ill. homestead act, § 1, providing that every householder having a family shall be entitled to an estate of homestead. It was held that three things must concur: First, that the person must be a householder; second, that he must have a family; and third, that he must occupy the premises as a residence.

And where plaintiff was a maiden lady whose sister died at her home, and who brought up her two nieces as her own, it was held that she was the head of a family, within the meaning of Iowa homestead law. Arnold v. Waltz, 53 Iowa, 706, 36 Am. Rep. 248, 6 N. W. 40. This was on the ground that the aunt stood in the relation of a parent to her nieces, having assumed and taken upon herself that obligation.

But the debtor must have someone dependent whom he is legally and morally bound to support; and he is held not to be the head of a family unless this condition exists.

In Abercrombie v. Alderson, 9 Ala. 981, a single man was held not entitled to an exemption. This was on the ground that no condition of dependence was shown to exist.

So, an unmarried man having no inmate of his house dependent upon him was held not to be the head of a family, although he had servants in his employ. Cochran v. Miller, 74 Ala. 50. The court said: "The homestead exemptions of force in 1859 were expressly reserved for the use of the family. Rev. Code, § 2880; Code 1876. § 2844. Mr. Miller was never the head of a family; never had a family, under the uniform rulings of this court. He had never married, and there was no inmate of his house dependent on him for support. Hired laborers, or servants, do not constitute a family within our statutes. Mr. Miller's homestead was not exempt from either claim it is sought to be made subject to."

And under Ark. Const. 1868, art. 12, § 2, prohibiting a married man or head of a family encumbering his homestead, it was held that a party occupying a house, having two nephews, one of them a minor, and his father living with him, was not the head of a family where the other members of the household were not dependent upon him for support. Harbison v. Vaughan, 42 Ark. 539. This was on the ground that to constitute a family, within the meaning of such statute, something more was required than a mere aggregation of individuals residing in the same house; that there must be an obligation upon the head of the house to support the others, or some of them, and a corresponding state of dependence on the part of the members so supported.

A bachelor having no person dependent upon him for support was held not to be the head of a family. It was further held that the Georgia act of 1870, declaring a single person to be the head of a family, was unconstitutional, as the judiciary could only interpret the Constitution and laws. Calhoun v. McLendon, 42 Ga. 405. The court said: "This court has laid down the law to be that a single person, without dependents of kindred whose maintenance the law imposes on him, is not the head of a family in the contemplation of the Constitution. And, while we have great respect for the lawmaking power, we cannot defer to its

construction of the Constitution or laws. That power is lodged in the judiciary, and we need not multiply authorities to demonstrate a principle so clear that its assertion would be weakened by the implied necessity of an argument."

And an unmarried man furnishing necessaries for housekeeping, which house was kept by his brother and his brother's wife, was held not to be the head of a family, under Iowa Laws 1854, 1855, chap. 61, providing a homestead exemption to the head of a family. Whalen v. Cadman, 11 Iowa, 226. The court said: "The head of a family primarily is the husband or father. One may be such head, however, without being either. Thus, the mother may become such upon the death of the husband. So, a son having mother, and brothers and sisters, or either, depending upon him for a support, and living in a household which he controls, might be such head. And thus we might state many cases where the party claiming the exemption would be legally entitled to it, and still not be the husband or father. And yet in each case he must, for the purposes of this inquiry, stand in the place of the father. He must be the master in law of the family."

And a physician who had a housekeeper was held not entitled to the exemption of a horse where he did not prove that he had a family. Gunn v. Gudehus, 15 B. Mon. 447. This was under Ky. Rev. Stat., title, "Executions," art. 14, § 1, p. 325, exempting the same personal property from execution which is exempt from distribution, and title, "Descent and Distribution," § 11, sub. 5, p. 281, exempting from distribution, in favor of the widow and infant children, certain animals. This was on the ground that, as a family was required under previous statutes, it must also be deemed essential under the Revised Statutes by their reference to the exemption from distribution. The court said: "Although the Revised Statutes do not expressly require that the debtor claiming the exemption shall be a housekeeper with a family."

And under Mass. Stat. 1855, chap. 238, § 1, providing that there shall be exempt a homestead occupied as a residence by the debtor, he being a householder and having a family, it was held that an unmarried woman who lived upon the premises with her mother, and had no children, was not entitled to a homestead under the statute. Woodworth v. Comstock, 10 Allen. 425.

And under 2 N. Y. Rev. Stat. 254, § 169, exempting the wearing apparel of a householder and his family, it was held that an adult debtor who resided with his stepmother was not a householder within the meaning of the statute. Bowne v. Witt, 19 Wend. 475. The court said that the stepmother was evidently the head of this family.

A bachelor being a householder, having employees and laborers, but having no children, was held not to be the head of a family under S. C. act 1868, p. 22. Garaty v Du Bose, 5 S. C. N. S. 493. The court said: "The respondent here is a single man,—no person under the same roof with him, and no one on his premises, save servants and employees. Their continuance with him is but temporary. He may change them from time to time, and they, at their own will, may depart his service. There is absent that peculiar feature, which can be better understood than described, which distinguishes the family even from those who may dwell within the limits of the same curtilage."

A single man living on a tract of land and taking a child to rear, educate, and clothe, and having a housekeeper and servants, was held not to be the head of a family, under S. C. Const., providing that the family homestead of the head of each family residing in this state shall be exempt, etc. Re Lambson, 2 Hughes, 233, Fed. Cas. No. 8,029. In this case the claimant did not show that the child was adopted under a statute.

And an Indian youth residing in his mother's family, who was clearly its head, and who did not marry until after the treaty of 1819, was held not to be the head of an Indian family; and the registration of his name for a reservation was unauthorized. Riley v. Elliston, 2 Yerg. 431.

In Wilson v. Cochran, 31 Tex. 677, 98 Am. Dec. 553, it was held that a single man having no wife, or children, or servants was not entitled to a homestead, under Tex. Const. 1845 and 1866, art. 7, § 22, providing that the homestead of a family, of a certain named extent or value, shall not be subject to any forced sale for any debts. This was on the ground that there was no collective body of persons living together within the same curtilage, subsisting in common, directing their attention to a common object.

The same rule was applied in Re Dawley, 94 Fed. 795.

An unmarried man having orphan children apprenticed to him, and keeping house, was held not to be the head of a family and entitled to an exemption under the Texas statutes. Re Summers, 3 Nat. Bankr. Reg. 84. The court said: "According to my understanding of this provision, and in so far as it has been construed and acted upon by the supreme court of this state, the right to a homestead, resulting from the having 'a family,' depends either on the fact of marriage, or, in default of marriage, upon the charge and protection of others adopted as children, or of those who, by reason of kindred, have some interest in and claim to the premises of the person with whom they reside."

An unmarried man having no person dependent upon him, who was living with him, was held not to be a householder or a head of a family under Va. Const. art. "Homestead," giving an exemption to a "householder or a head of a family." Calhoun v. Williams, 32 Gratt. 18, 34 Am. Rep. 759. The court said: "What is more usual than to send messages of regard or affection by the writer to the household? Such messages are universally meant for the family,—the

inmates of the house. And if they constitute the household, who can be meant by the 'householder' but the 'head of the family?' But, whilst we hold that by the 'householder' is meant the head of a family, we do not mean to say that every head of a family must be, necessarily, a householder."

Some cases hold that the debtor must be legally bound to support those about him in order to constitute him the head of a family.

So, where an applicant was under no legal obligation to support those residing with him, he was held not entitled to a homestead as the head of a family. Dendy v. Gamble, 64 Ga. 528. In this case the applicant claimed to be the head of a family consisting of his sister, a widow, and her three minor children, who were indigent and mainly dependent upon petitioner for support. The court said: "If the applicant could obtain a homestead as the head of a family of persons whom he was not legally bound to support, then he might enjoy it for his own benefit exclusively, and refuse, with impunity, to support those for whose benefit he claimed to have obtained it."

A single person is held to come within the statute or Constitution giving the exemption to a "resident," "citizen," or "householder," where he has residing with him persons whom he is legally or morally bound to support.

So, a brother caring for his minor sister, who lived with him when not at school, was held to constitute the head of a family entitled to a homestead under Ark. Const. art. 12, § 2, providing that the homestead of any resident of this state, who is a married man or head of a family, shall not be encumbered, except, etc.; and § 3, providing that every homestead not exceeding 160 acres of land, owned or occupied by any resident of this state, shall be exempt from sale, etc. Greenwood v. Maddox, 27 Ark. 648. The court said: "But the question whether a man not married, or the head of a family, is entitled to a homestead exemption from execution, is directly presented by the record in this case; and we have deemed it a duty to decide it, though it may rarely happen that a man will be the solitary occupant of his home and dwelling place, unaccompanied by any of the persons ordinarily constituting a family."

In Harbison v. Vaughan, 42 Ark. 539, *supra*, the case of Greenwood v. Maddox, *supra*, was distinguished, as that case arose under Const. 1868, art. 12, § 3, which extended the exemption to all residents of the state, and did not restrict the benefit to married men or heads of families.

An unmarried man over twenty-one years of age, living together with his sister for several years, each owning some personal property, and each by their labor contributing toward household expenses, he appearing to direct and control affairs, was held to constitute the head of a family where he was a white man. Graham v. Crockett, 18 Ind. 119, 2 Gavin & H. (Ind.) Stat. p. 368, provides that an amount of property, not exceeding $300, owned by any resident householder, shall not be liable to sale on execution. The statute does not seem to refer to a white man, but another statute was construed in the case in relation to competency of witnesses in controversies between white men and negroes.

Whether a man is married or single, if he is a resident householder, he is held to be entitled to an exemption under the Indiana statute. Abell v. Riddle, 75 Ind. 345.

So, a bachelor who, with a hired servant, occupied a house and maintained a household, was held to be a householder under the Indiana exemption law. Kelley v. McFadden, 80 Ind. 536.

Under Tex. act 1839 (Hartley's Dig. art. 1270), providing that there shall be reserved to every citizen, or head of a family, certain exempt property, it was held that it was immaterial whether the debtor was a married man or single, as no distinction was made between single men and heads of families. Cobbs v. Coleman, 14 Tex. 594. The court said: "The homestead, exempted by the Constitution, is reserved for heads of families; but not so, the exemptions of this statute, and even the constitutional homestead, may be vested in a single person, as in case of the decease of a husband, leaving a widow without any children, or of a father, leaving but one child,—the homestead of the Constitution, and, in fact, all property exempt from execution, is to be set apart for such widow, or such child, as the case may be."

In Howard v. Marshall, 48 Tex. 471, *supra*, it was said that in Cobbs v. Coleman, 14 Tex. 594, the opinion was expressed that act of 1839 (Paschal's Dig. art. 3798) applied to single men, and was not repealed by the Constitution of 1845, but in 1866 (Paschal's Dig. art. 3798a) a different law was enacted under which Wilson v. Cochran, 31 Tex. 680, 98 Am. Dec. 553, held that a single man without a family had no homestead. In 1870 the statute was changed, reenacting the constitutional provision, and exempting to any citizen, not the head of a family, certain personal property; but under this there can be no homestead exemption save to a family.

And under Kan. Comp. Laws 1879, p. 920, providing that the head of a family shall include any person who has charge of children, relatives, or other persons living with such person, it was held that a party whose mother, aged sixty-two, and his unmarried sister, lived with him, constituted a family of which he was the head, where he supported them and such support was necessary. Seymour v. Cooper, 26 Kan. 539.

In Wagener v. Parrott, 51 S. C. 489, 64 Am. St. Rep. 695, 29 S. E. 240, it was held that it was not necessary to have persons dependent on the debtor, where the family consisted of the debtor's adopted daughter and her husband. The court said: "His Honor, the circuit judge, seemed to be inclined, judging from the language employed by him in his charge to the jury, to require that there must be some dependence of the

adopted child for its support and maintenance on the adopting parent, in order for such adopted child to be regarded as a member of a family, when a homestead was to be allowed the head of such family. But such view is not sound; in order to maintain it, it would be necessary that there should be recognized a difference, in the eye of the law, between a child born to one and a child adopted by one."

In some cases the "family" relation was held not to exist where the dependent members were not residing with the debtor.

An unmarried man, living in one town and supporting his mother and unmarried sister in another town, was held not entitled to the exemption under Ga. Laws, given to the head of a family. Jones v. Gray, 3 Woods, 494, Fed. Cas. No. 7,463. The court said: "He, a single man, without family of his own, lives in one town, and supports, by his contributions, his mother and unmarried sister, who live in another town, and are inmates of the family of a married sister of the bankrupt. To call a man so situated the head of a family is, in my opinion, unwarrantably extending the meaning of the phrase."

And under Kan. Civil Code, § 490, and Justices' Code, § 157, providing an exemption from garnishment where the earnings are necessary for the support of the debtor's family, it was held that the debtor's family did not have to reside all in this state, but that a single man, whose father and mother and unmarried sister resided in Illinois, and the son had not resided with them for seven years, was not a part of his father's family, so as to entitle him to an exemption. Zimmerman v. Franke, 34 Kan. 650, 9 Pac. 747. This was on the ground that the statute does not embrace separate individuals who have no common home.

Under Mo. Rev. Stat. § 5435, it was held that the head of a family is one who controls, supervises, and manages the affairs of the household, and need not necessarily be a husband or father. But an adult daughter, who is a part owner of the premises on which her parents reside, but who does not reside with them, and who aids her brother in supporting them, is not the head of a family, so as to entitle her to a homestead. Ridenour-Baker Grocery Co. v. Monroe, 142 Mo. 165, 43 S. W. 633.

In one case it was held that a single person could not claim to be the head of the family where the statute evidently referred solely to the marriage relation.

Thus, a single man was held not to be entitled to an exemption, under N. D. Comp. Laws 1887, § 2449, providing that the homestead of every family resident in this territory, as hereinafter defined, shall be exempt from judicial sale; and § 2450, providing that a widow or widower, though without children, shall be deemed a family while continuing to occupy the house used as such at the time of the death of the husband or wife; and § 2467, providing that every family, whether constituted of one or more persons, in actual occupancy of a homestead, as defined in this chapter (chap. 37, Sess. Laws 1875), shall be deemed and held to be a family. McCanna v. Anderson, 6 N. D. 482, 71 N. W. 769. The court said: "If respondent's contention be correct, then it was unless to define a widow or widower as a family, in § 2450, because no family relation was necessary in order to stamp the homestead character on the land. . . . We find respondent's construction makes the section inconsistent with other sections of the chapter; and, while his construction strikes down at once and forever all necessity for the existence at any time of any family, as the word is generally understood, in order to give the land its homestead character, yet, almost every section in the chapter, including section 2467 itself, is pregnant with suggestions that the family and the family relations must exist as the very basis of any homestead exemption rights. . . . Section 2458 says: 'The owner, or the husband or wife, may select the homestead,' etc. This language is construed to mean that the owner need not be either the husband or wife. It will not admit of this construction."

Two single men were held to constitute a family, under a Mexican colony grant of 1824 by the Mexican government to colonists for the colonization of 300 families, where it was claimed that a headright certificate had been obtained by fraudulently representing the grantees as heads of families when they were single men. It was held that the construction and understanding of the law in Texas, down to 1825, was to make a grant to two or more single men uniting in a petition, as to a family, and under this construction the titles had been acquired and respected. Hardiman v. Herbert, 11 Tex. 659.

h. Other combinations.

In Bybee v. Wadlington, 2 Posey, Unrep. Cas. (Tex.) 464, it was said: "But the interpretation given by the supreme court to the term 'head of a family' in its relation to questions involving the homestead law justify us in saying, it is by no means clear that a married son, managing a household and assuming the care of its affairs, when composed of an aged parent and dependent infant nephews, is not, in the sense of the law, the head of a family."

i. Temporary separation.

Estrangement, or temporary separation, is generally held not to disrupt the family relation so as to disqualify the debtor from claiming an exemption. But this was denied in an Iowa case; and the exemption has been denied in some cases on the ground of residence or occupation of the premises.

So, a party whose wife had left him, having an infant son, was held to be a married man and the head of a family, under Ark. Const. art. 9, § 3. Gates v. Steele, 48 Ark. 539, 4 S. W. 53. The court said: "On the first point we have no difficulty. Steele was

a married man and the head of a family. He owed his wife and minor son protection and support. The wife, though living separate, might have returned to her duty at any moment."

A man having a wife was held to be the head of a family, notwithstanding the fact that his wife had deserted him and resided in another state, and that he was living in improper relations with another woman. Whitehead v. Tapp, 69 Mo. 415.

And, a white man who married an Indian woman, by whom he had children was held to be the head of a family under the Cherokee Indian treaties of 1817 and 1819, reserving to each and every head of an Indian family a section of land, where he had a camp and slaves on the land, although his wife had left him and married an Indian. Blair v. The Path Killer, 2 Yerg. 407.

So, where a married man with a family absented himself on account of a family quarrel, and was staying at the house of his sister, he was held to be a housekeeper with a family, where there was no evidence that he had ceased to recognize the residence of his wife and children as his home. Carrington v. Herrin, 4 Bush, 624. The court said: "It would, in our opinion, do violence to the beneficent object of the law to so construe it as to allow a mere neglect or dereliction of duty on the part of the head of a family, even if it be a temporary abandonment of his home, to deprive the wife and children of the rights which it was intended by the statute to secure to them."

And, where a man's wife, in his absence, moved across the street into a new house which they had built, and on his return home he took his own bed back for the purpose of occupying his residence in the old homestead, and has continued to occupy the same ever since, and his wife did not live with him upon it, it was held that his homestead was where he himself lived. Pardo v. Bittorf, 48 Mich. 275, 12 N. W. 164.

A householder having a family, under the Michigan exemption law, was held to apply to a husband residing in that state, who supported his family in Canada out of his wages. Pettit v. Muskegon Boom. Co. 74 Mich. 214, 41 N. W. 900. The court said: "The term 'householder' sometimes covers the case of a man without a family of wife or children, who keeps up a house; but it also embraces, usually, the head of an actual family dependent on him, whether housekeeping or not. No doubt many legal phrases may be construed differently, according to context and subject-matter. But the purpose of the exemption in the garnishee law is so plainly to enable husbands, or other heads of families, to support the family, as well as in case of house occupancy to meet its expenses, that no reasoning can make it plainer."

And a husband renting rooms and eating at a restaurant, supporting his minor children and wife, the latter having gone to Boston and not expecting to return until after the death of her mother, was held to be the head of a family. State use of Codding v. Finn, 8 Mo. App. 261. The court said: "The man who has a wife and child dependent on him for support is the head of a family, though they do not reside under the same roof. This wife and child not appearing to have any permanent home elsewhere than with plaintiff's relator, their domicil was with him, though there may have been a temporary separation for economical or other causes."

And an alien whose wife and children still remained in England, from whence he came, was held to be the head of a family actually residing here, although his family did not accompany him, where he intended to abandon his residence in England and bring his family here. People ex rel. Dobson v. McClay, 2 Neb. 7. This was under Neb. Const. art. 1, § 14, providing that no distinction shall be made between resident aliens and citizens, in reference to possession, enjoyment, and descent of property.

Where the husband had gone to another state, and the constable seized upon a cow while the wife was moving with her children to her father's house near by, it was held that the absentee leaving his wife and children living together as a family was a householder, and they were his household. Woodward v. Murray, 18 Johns. 400. The court said: "So long as they remain together as a family, without being broken up and incorporated into other families, the privilege remains."

But in Linton v. Crosby, 56 Iowa, 386, 41 Am. Rep. 107, 9 N. W. 311, a husband whose wife lived separate and apart, from him and having no children, was held not to be the head of a family under Iowa Rev. § 3305, and § 3072, providing exemption if the debtor is a resident of this state and the head of a family. This was on the ground that he did not contribute to his wife's support, and he had lodged elsewhere for seven years.

And in some cases the homestead claim has not been allowed where the wife had not obtained a residence as required by the statutes. The question in these cases is one of occupation and residence, rather than "family."

So, where a husband purchased property, his wife being a nonresident, and, about the time of the execution of a mortgage by him, she was on her way to join him in this state, and resided upon the property thereafter, it was held that he was not entitled to the homestead, under Cal. Const. art. 11, § 15, providing that the legislature shall protect, by law, from forced sale, a certain portion of the homestead and other property of all heads of families, and homestead act April, 1851, providing that exemption shall not extend to a mortgage lawfully obtained. Cary v. Tice, 6 Cal. 625. The court said: "The premises never were impressed with the character of a homestead until actual residence upon them by the family."

And the same was held under Cal. exemption act 1854. Benedict v. Bunnell, 7 Cal. 245.

And under Kan. Comp. Laws 1879, § 1 p. 437, providing a homestead in the property

occupied as a residence by the family of the owner. Farlin v. Sook, 26 Kan. 397. The court said: "The homestead laws apply only to families, and not to single individuals; and apply only where the family occupies the homestead as a residence, and not where the family resides somewhere else."

And the same was held where the family intended to come to this state, but before they came the husband executed a deed of conveyance. It was held that the property had never been occupied as a residence by the family. Koons v. Rittenhause, 28 Kan. 359.

A debtor having a son of age, who was not shown to be dependent upon him, and having a family in another state, was held not entitled to an exemption under Ala. Dig. 167, § 42, providing certain exemptions for the use of every family in the state. Allen v. Manasse, 4 Ala. 554. The court said: "The fact that the plaintiff has been accompanied by his son during his residence within the state, does not constitute them a family within the sense of the statute. To constitute such a family there must be a condition of dependence; and no mere aggregation of individuals will create this relation. Nor can the circumstance that a family exists elsewhere have any material influence on the case. They are possibly dependent upon the plaintiff; but they are not a family within this state, and therefore are not within the letter or the spirit of the act."

III. Rights acquired by survivorship.

a. By a widower.

Under some statutes, a widower was held to be the head of a family, and to retain his homestead on the death of his wife, or to obtain one in her property. But this was without regard to his having a family of persons dependent on him for support.

A widower without children, occupying property as a homestead for himself and his mother, was held to be the head of a family, under Iowa Code, § 1245, providing that the homestead of every head of a family shall be exempt from judicial sale. Parsons v. Livingston, 11 Iowa, 104, 77 Am. Dec. 135. The court said: "A man is regarded as the head of a family, though without wife or children, as long as he continues to occupy the house used as such at the time of the death of his wife. Code, § 1240. The plaintiff did not, however, occupy the property now in dispute at the time of the death of his wife, and cannot claim it under the provisions of this section. But he is here recognized as the head of a family, without any person living with him or being in any manner under his control." At the time this debt was contracted the debtor was occupying the premises, he and his mother living thereon, making it his and her home. There was a collective body of persons who lived in his house and under his control, and the debtor was the head and manager thereof. The court does not exempt the homestead on the ground of the dependency of the family, but rather that, by reason of the Code, § 1240, a widower is recognized as the head of a family, although he is not entitled to a homestead under that particular section.

Under the Illinois statute allowing a homestead to "every householder having a family," occupying premises as a residence, where the plaintiff moved on the land, having a wife and eleven children, and his wife died, and the children all reached their majority, and the land was rented, but the owner returned at times to the place as his home, but had no family living with him, it was held that, although he had ceased to be a householder with a family, yet he was a householder under the statute, and entitled to the exemption. Kimbrel v. Willis, 97 Ill. 494. In this case, referring to the statute, the court said: "That section provides that, upon the death of the original owner of the homestead, the homestead exemption shall continue after the death for the benefit of the husband or wife surviving, so long as he or she continues to occupy the homestead. It is not so long as he or she also remains a householder having a family, but simply so long as he or she continues to occupy the homestead, entirely irrespective of the condition of being a householder having a family. There may be no surviving child and no family, still the homestead exemption is continued to the surviving wife or husband, so long as she or he continues to occupy the homestead."

And under Tex. Const. 1876, art. 16, § 52, providing that, on the death of the husband or wife, or both, the homestead shall descend as other real property, but shall not be partitioned among the heirs during the lifetime of the surviving husband or wife so long as the survivor may use the same, it was held that this provides for a survivorship in the husband, and not on the condition that he is the head of the family; and the surviving husband is entitled to the homestead. Blum v. Gaines, 57 Tex. 119; Kessler v. Draub, 52 Tex. 575, 36 Am. Rep. 727.

A husband surviving his wife, who left no children, made application for a homestead on land which he had conveyed to his wife while she was living. The claim was resisted by her father, who was not dependent upon her for support. It was held that the petitioner could be regarded as constituting the family of the deceased. Re Lamb, 95 Cal. 397, 30 Pac. 568. This was under Cal. Code Civ. Proc. § 1474, authorizing the superior court to assign the homestead for a limited period to the family of the deceased. This ruling was on the ground that the object of the statute was to preserve the family home for the use and benefit of the survivor or survivors of those occupying it as such; and the right of the surviving husband or wife to retain this home for such period as the court might direct did not depend upon the fact that there were children or others who might share in its use.

So, where a homestead was acquired, it was held that a widower, who was the head of the homestead, having a son and daughter

of age, was entitled to the exemption under Tenn. Code, 2114a, prohibiting the alienation of a homestead where the relation of husband and wife exists, and providing for the continuance of the homestead by providing for its sale for the payment of debt upon the death of the head of the family without widow or minor children. Webb v. Cowley, 5 Lea, 722. The court said: "The statute fairly admits of the construction that, after the right of homestead has once been acquired by the head of the family, and the homestead occupation is still continued, the right will not be lost by the death or absence of wife and children."

A widower having no children, but keeping house with a housekeeper, was held entitled to a homestead, under Ky. Gen. Stat. chap. 38, art. 13, § 15, providing that the homestead of a woman shall in like manner be for the use of her surviving husband and children. Ellis v. Davis, 90 Ky. 183, 14 S. W. 74. But he was held not to be a "bona fide housekeeper with a family," as regards land left by his wife, under Ky. Gen. Stat. chap. 38, art. 13, § 16, providing that the exemption shall apply to "actual bona fide housekeepers (with a family) of this commonwealth."

b. By a widow.

1. Generally.

In some states a widow is held to be the head of the family, under statutes of descent and distribution providing a homestead for the surviving family. And this is held without regard to her having children dependent on her. But in Georgia she must come within the constitutional provision, art. 9, § 1, giving a homestead to anyone having females dependent on him or her for support, and who is not the head of a family. The widow's residence is material in order that she may secure the homestead.

So, where a husband and wife occupied a homestead, it was held that she was the head of the family at his death. Cross v. Benson, 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558.

A family removed to another state on account of disturbances caused by the War, and after the death of the husband, the widow, having no children, returned and resided on the homestead and kept house with her adult brother. It was held that she was the head of a family, under Mo. Rev. Stat. 1879, § 2689, providing that the homestead of every housekeeper or head of a family shall be exempt. Teake v. King, 85 Mo. 413.

So, it was held that a widow without children was entitled to retain the homestead of her husband. White v. Plummer, 96 Ill. 394. This was under Ill. Rev. Stat. chap. 52, § 2, providing that the exemption shall continue after the death of the householder, for the benefit of the husband and wife surviving, so long as he or she occupies the premises.

A widow without children was held to be the family of her deceased husband, in Moore v. Parker, 13 S. C. 490. This was under S. C. act 1868 (14 Stat. at L. 20), providing that the right of homestead of the head of any family existing at his death shall continue for the benefit of his widow and minor children.

And where, at the time of the death of the deceased, his household consisted of his wife, a female relative whom he had supported for years, his mother, a housekeeper, and two male and female servants, they were held to be a family. Kain v. Fisher, 6 N. Y. 597. This was under 2 N. Y. Rev. Stat. 82, § 6, subdiv. 6, providing that, if a man having a family shall die leaving a widow or minor children, certain property shall not be assets, and § 10, providing that if there be a widow and no minor children, the exempted articles shall be her property.

A widow having no children was held entitled to the exemption, under the Nevada act regulating the settlement of estates, § 123, providing that the court may set apart for the use of the family of the deceased personal property which is exempt from execution as a homestead; and, if there is no law exempting property from execution, the following shall be set apart for the use of the widow or minor children, and shall not be subject to administration. Walley's Estate, 11 Nev. 260.

The residence, by the widow, on the premises for years, was held to entitle her to claim the homestead notwithstanding her remarriage. Nicholas v. Purczell, 21 Iowa, 265. 89 Am. Dec. 572. This was under Iowa Rev. § 2295 (1263), providing that, upon the death of either husband or wife, the survivor may continue to occupy, or possess and occupy, the whole homestead until it is otherwise disposed of according to law.

The surviving widow was, as to the homestead, held to be as much the head of the family, and entitled to control the rents and profits of the same, as was the husband when living. Floyd v. Mosier, 1 Iowa, 512. This was under Iowa Code, §§ 1263–1266, and 1329, providing that, upon the death of the husband or wife, the survivor has the right to continue and possess the homestead until it is otherwise disposed of according to law, and, if there is no survivor or issue, it is liable to be sold for the payment of debts.

It was held that an intestate was, at the time of his death, the head of a family residing this state, within the meaning of this section, where he and his wife occupied the land as a whole. Miller v. Finegan, 26 Fla. 29, 6 L.R.A. 813, 7 So. 140. The court said: "That husband and wife, living together, constitute a family within the spirit and intent of homestead legislation, whether it be in the form of organic or of more mutable law, is a sound and recognized proposition."

And a widow was held to constitute the family, on the death of her husband, where her children were all of age. Aultman v. Price, 68 Kan. 640, 75 Pac. 1019.

But under the Georgia Constitution it is

necessary for the widow to have someone dependent on her.

This was held in Kidd v. Lester, 46 Ga. 231, the court saying: "The manifest intention of the Constitution was to provide for the families of minor children; and, to authorize the applicant to have a homestead, he or she must be the head of a family, or guardian, or trustee, of a family of minor children; and this intention is the more apparent because it is made the duty of the general assembly, by the Constitution, to provide, by law, for the setting apart of the homestead for the sole use and benefit of said families, as aforesaid, but not for the use and benefit of those who have no families whom they are legally bound to support."

A nonresident widow was held not entitled to claim the homestead as against a second wife having a family residing in this state. Stanton v. Hitchcock, 64 Mich. 316, 8 Am. St. Rep. 821, 31 N. W. 395. In this case a man left his wife in New York, who expected to join him in Michigan. He built a house, and, without a divorce, married again, his second wife supposing him to be single. They had children, and occupied the house until he died. The court said: "After this marriage the first wife had no purpose of living with him at all. She never looked upon, or used, or sought it as a home, and never got the homestead rights of a surviving widow in it."

2. A widow having children.

In some states a widow having children is entitled, as the head of the family, to the homestead on the death of her husband, and this without regard to the dependency of the children; and in some cases the right is not lost by the children becoming of age or removing from the premises. In other cases it is held necessary that the children should be dependent on her. It is also held, as in SHEEHY v. SCOTT, that the dependent child may be an adult. Where the widow is the head of the family, and the statute does not give the minor children a specific interest in the property, she may abandon the homestead and cause the exemption to cease.

So, where adult married children brought an action against their widowed mother for partition of a homestead, it was held that when children arrive at the age of maturity, and leave the family of their father and mother, and become a separate family, they are no longer a part of the old family, and the widow becomes the head, and is entitled to the homestead. Hoffman v. Neuhaus, 30 Tex. 636, 98 Am. Dec. 492.

So, a widow was held to be a housekeeper with a family, although the children had removed from the premises, in Slattery v. Keefe, 201 Ill. 483, 66 N. E. 365.

And a widow having children was held to be the head of a family, in Jeffries v. Ellen, 29 S. C. 501, 7 S. E. 828. In this case it was not shown whether or not the children were dependent upon her for support; but the court quotes: "A childless widow is entitled to a homestead as against her deceased husband's debts."

And, under Mass. Gen. Stat. chap. 104, § 12, providing that the estate or right of homestead of any householder, existing at his death, shall continue for the benefit of his widow and minor children, until the youngest child is twenty-one years of age, and until the marriage or death of the widow, it was held that where a widow and minor child were left, and the child had a guardian appointed, and moved off the premises, the widow could retain the same. It was further held that the right of possession and enjoyment was in those only of the family who remained in occupation of the homestead. Abbott v. Abbott, 97 Mass. 139.

A widow was held to be the head of a family where her children had all removed from the premises, and one daughter, for whom she had been caring, had been placed in an asylum. Holmes v. Nichols, 93 Mo. App. 513, 67 S. W. 722. The widow lived adjacent to the homestead with her son, in a room furnished by her.

A widow continued to reside in the house after the death of her husband, with two unmarried daughters, and one of them afterwards married and she and her husband paid board, but the other daughter was supported and provided for by the mother as long as she lived. It was held that the widow was the head of the family at the time of her death, under Fla. Const. art. 10, § 1, providing that a homestead owned by the head of a family residing in this state shall be exempt from forced sale under process of any court. De Cottes v. Clarkson, 43 Fla. 1, 29 So. 442. In this case it was held that the provision "dependent for support," incorporated into the statutes and construed in the case of Duval v. Hunt, 34 Fla. 85, 15 So. 876, which was an action for damages for negligence, was not employed in the Florida Constitution in connection with the term "head of a family." The court said: "We do not feel authorized to establish an invariable test based solely on dependence, and especially legal dependence. The true test of who is the head of a family, within the contemplation of our homestead provision, must be found in the facts and circumstances of the case."

Under Ga. Const. 1868, it was held that, so long as any one of the family for whose use and benefit the homestead was created should survive,—either the wife or one of the dependent minor children, and especially the widow,—the homestead estate was not terminated. Haslam v. Campbell, 60 Ga. 650.

A widow caring for and supporting her minor stepchildren after her husband's death was held to be the head of a family, and entitled to a homestead in his realty for the benefit of herself and the minors. Holloway v. Holloway, 86 Ga. 576, 11 L.R.A. 518, 22 Am. St. Rep. 484, 12 S. E. 943. The court said: "While there was no legal obligation on the part of this widow to support the minor children of her husband, yet we think that, inasmuch as she undertook to keep

them together, and to care for and support them, as the evidence shows she did, they all remained members of the testator's family, and she thereby became the head of that family, and, under the laws of this state, was entitled to a homestead as the head of a family."

3. A widow and children.

In some states on the death of the owner of a homestead the property is held exempt for the widow and children. She is then the head of the family. This has been held where the family consisted of stepchildren.

A widow becoming the head of a family was held to be entitled to a homestead the same as her husband. One half was vested in the widow, and the other half in the children, of the deceased. Sossaman v. Powell, 21 Tex. 664.

A widow occupying one room in the house, and renting the rest of the farm to a party who used her stock, and having adult children who had left their mother, was held to be the head of a family. Collier v. Latimer, 8 Baxt. 420, 35 Am. Rep. 711. This was under Tenn. Code, § 2110a, providing that a homestead in the possession of each head of a family shall be exempt, and § 2288, providing that property exempt from execution shall, on the death of the husband, be exempt in the hands of the widow for herself and in trust for the benefit of children, or of the widow, or of both.

A widow was held to be the head of a family in contemplation of Idaho Rev. Laws 1874, 1875, § 1, p. 627, providing that the homestead of either husband or wife may be set apart for the benefit of the surviving husband or wife and his or her legitimate children. Coughanour v. Hoffman, 2 Idaho, 290, 13 Pac. 231. In this case it was contended that a homestead given to a wife could not be given to the widow. The court said: "It is admitted that the widow is the mother of the three children, all of whom are living with her, and dependent upon her for support. We think that she is clearly the head of the family."

And where a widow had a homestead set apart for her as the head of a family consisting of herself and two minor children, it was held that her homestead right was not devested by reason of the children becoming of age. Groover v. Brown, 69 Ga. 60. The court said: "So she was a beneficiary for whom the estate was set apart, as well as the *quasi* trustee or head of the family, in whom the legal title was vested as long as the beneficiaries existed as such. The children so existed until they arrived of age; the widow as long as she remained a widow."

And under Tenn. act 1813, chap. 119, § 2, providing for the setting apart of crops and provisions for the support of the widow and her family, and act 1837, chap. 13, § 1, providing the same for crops and property, it was held that minor children of a widow by her former husband, residing with her, were a part of her family; and that it made no difference whether the children were offspring of a former marriage, or were the children of the intestate. Sanderlin v. Sanderlin, 1 Swan, 441.

And the same was held where the husband acquired a homestead, and on the death of his wife married again, and died leaving two minor children by the second wife. Bank v. Shelton, 87 Tenn. 393, 11 S. W. 95.

In Wood v. Wheeler, 7 Tex. 13, it was held that during the existence of the marriage the husband was the head of the family, but, on its dissolution by death, the surviving wife was placed in that position, and, as such, she had all its incident rights and privileges. The court said: "They are coequals in life; and at death the survivor, whether husband or wife, remains the head of the family." This was under Hartley's Dig. 1107, act 1846, providing that, in case there shall not be among the effects of the deceased the specific articles exempted by the Constitution and laws, then the sale shall take place and the articles be procured; and the Constitution providing a homestead exemption not to exceed $2,000. This was community property; and it was held that the Constitution guaranteed the use of one half to the widow, and that she was entitled to hold the other half for the benefit of the children of the marriage. The court said the claim of the head of the family to the exempted property is superior in right to that of the creditors.

In Strawn v. Strawn, 53 Ill. 263, under the Illinois statute of descent and distribution, it was said: "Inasmuch as the children of the appellee were all of age, although some of them were still members of the maternal family, it is claimed that the provisions allowed should only be such as would be required for the sustenance of the widow alone. But we are of opinion the legislature intended, by the word 'family' to include such persons as constituted the family of the deceased at the time of his death, whether servants, or children who had attained their majority. In this, of course, we do not include boarders, but only the persons constituting the private household of the deceased."

And where a petition for a homestead asked that it be set apart for the widow and her two children; and the decree was, "is hereby set apart for the use of the family of the said John O'Connor, deceased;" and the family consisted of the widow and two children,—it was held that the term "family," in the decree, expressed the meaning and was used in the sense of the statute, and was therefore sufficiently explicit to describe the widow and children. Phelan v. Smith, 100 Cal. 158, 34 Pac. 667. This was under Cal. Code Civ. Proc. § 1468, providing for setting apart the homestead to the use of the family, etc. The court said that the term "family," throughout the chapter, is used as synonomous with and as representing the surviving wife or husband, and children if any.

And, under the Connecticut statute securing to the debtor and his dependent family

the personal use by him and them of such household furniture as is essential to their personal comfort, it was held that mere boarders were not within the meaning of the family, in the statute. Weed v. Dayton, 45 Conn. 293. This claim was set up by a widow whose family consisted of herself and daughter, and who kept boarders. The court said: "Reasonable provision may be made, according to circumstances, for wife and children, for domestics, for dependent relatives who may be residing with and constitute a part of the family, and for visitors."

Under Ga. Const. 1868, art. 7, § 1, providing that each head of a family, or guardian, or trustee of a family of minor children, shall be entitled to a homestead, it was held that where a husband and father applied for a homestead and died, the widow and children constituted a family as set out in the Constitution. Hodges v. Hightower, 68 Ga. 281. The court said: "The husband, as the head of the family, may be said to have the prior right to apply; on his failure or refusal the wife may apply, if he does not object. But, if the husband objects, the wife's right is denied. These several rights of the head of the family, wife, widow, guardian, or trustee, are thus provided with an appropriate remedy, distinct and clearly defined so long as the applicant remains in life."

4. Abandonment of husband.

The abandonment of a husband by a wife has been held not to deprive her of her rights as the family at his death. But the contrary was held in Texas.

A husband was held to be the head of a family where he had no children and his wife had abandoned him; and it was held that she was entitled, at his death, to his homestead. Brown v. Brown, 68 Mo. 388. In this case, after the wife left the husband, a tenant moved into his house, and the tenant's wife acted as housekeeper. This was under 1 Wagner's (Mo.) Stat. p. 697, providing that the homestead of every householder or head of a family, which is used as such homestead, shall be exempt.

And where a wife abandoned her husband, and he died leaving no children, and she claimed the right to the homestead, it was held that while the marriage relation existed the husband was the head of the family, although composed only of his wife, who had left him, and that the wife, living apart from him at his death, in the absence of minor children, was entitled to the homestead. Brown v. Stratton (Mo.) 8 Cent. L. J. 46.

The desertion of a husband by a wife, and the living apart from him at the time of his death, were held not to devest her of her homestead right. Lindsey v. Brewer, 60 Vt. 627, 15 Atl. 329.

But in Duke v. Reed, 64 Tex. 705, the abandonment of a husband by a wife, continuing until the death of the husband, was held to forfeit all claims to the homestead which he owned at the time of his death.

And a wife who voluntarily and without cause abandons her husband, and lives apart from him at the time of his death, is held not entitled to the homestead exemption given to a family. Newland v. Holland, 45 Tex. 588. The court said: "Unquestionably when the wife has voluntarily and without cause withdrawn from and destroyed the family, ceased to be a member of it, it would be mockery to say that she is reunited to, or become again a member of it, by the death of her husband, or can claim privileges and immunities which by law are only given to the family or some surviving constituent of it."

For separation from husband by nonresident widow, see Stanton v. Hitchcock, 64 Mich. 316, 8 Am. St. Rep. 821, 31 N. W. 395, subd. III. b, 1.

c. By children.

Under some statutes, the minor children of a decedent constitute a family; and in Texas the minority of children is not essential if they are unmarried females, and does not seem to be essential in South Carolina.

So it was held that where there was no father or mother the guardian became the head of the family, and the minor and himself would constitute a family,—the property being for the use of the child. Rountree v. Dennard, 59 Ga. 629, 27 Am. Rep. 401. This was under Ga. Code, § 5135, providing that each head of a family, or guardian, or trustee of a family of minor children, shall be entitled to a homestead. The court said: "A minor—particularly a very young one—would live with the guardian and be part of his family, and the property would be for a family, in contemplation of law, consisting of this guardian and child."

Where a widow, as the head of a family and the guardian of her minor children, applied, in 1872, for a homestead in her husband's property, who died after the Constitution of 1868 was adopted, it was held that she obtained a homestead as the head of a family in her own individual share, and a homestead as the guardian of her minor children in their undivided shares; and that, on attaining majority, the children's homestead terminated. Fountain v. Hendley, 82 Ga. 616, 9 S. E. 666.

Under Ga. Const. 1868, art. 5, § 1, providing a homestead and exemption, it was held that by a "family of minor children" was meant a family of orphan minor children,—a family who have no father; and that it was intended that this family should have a homestead out of the property of the father. Roff v. Johnson, 40 Ga. 555. The court said: "When the parent died his estate was burdened with this liability. But it is asked if one is entitled to a homestead in any property but his own. This question is based on a mistaken conception of our 'homestead' law. The 'homestead' in Georgia, is not a simple 'exemption.' The whole theory of the law is based upon the duty, the legal obligation of the parent, to support and maintain his wife and minor chil-

dren. He has the right to their labor, and he not only owes them a support by the laws of morality and nature, but by the laws of the land."

A legally adopted child was held entitled to claim exemption of a homestead during minority, under Ala. Code, § 2537, providing that such exemption shall continue only so long as the minor child, or children, or either, shall remain bona fide residents of this state. Cofer v. Scroggins, 98 Ala. 342, 39 Am. St. Rep. 54, 13 So. 115. In this case the father had abandoned his family, and his wife had died, and he had become a nonresident, and the adopted child remained in possession.

So it was held that the expressions "married," and "the head of a family," were not synonymous; and this was held to give a homestead to the surviving infant heirs during minority. Thompson v. King, 54 Ark. 9, 14 S. W. 925. This was under Ark. Const. art. 9, §§ 2, 3, providing that the personal property and homestead of any resident of this state, who is married or the head of a family, shall be exempt.

But adult children are generally held not to be a family within the meaning of the homestead law.

It was held that adult children were not entitled to a homestead under Ga. Const. 1868, where they were the sole survivors. Heard v. Downer, 47 Ga. 629. The court said: "The family, and the family alone, of the debtor, is the object and intent of the homestead. When and while that exists, the homestead exists, and when that ceases, the homestead ceases."

And where a widow and several minor children removed to her mother's residence, who was an aged widow, and, after her mother's death, the widow married, it was held that she was not entitled to a homestead in her mother's property. Roco v. Green, 50 Tex. 488. This proceeding was under Paschal's Dig. (Tex.) art. 5437, providing that the property exempted by the Constitution and laws does not form any part of the estate of a deceased person when a constituent of the family survives.

An adult son having a wife and children of his own cultivated a distant farm, and occasionally occupied the homestead of his mother, his father's surviving wife, and left some of his furniture in his mother's homestead. He was held not entitled to claim her homestead as his own, or to claim a joint homestead with her, so as to protect the interest as heir of his father in the homestead property. Brokaw v. Ogle, 170 Ill. 115, 48 N. E. 394. The court said: "To constitute a homestead, there must be a householder and a family. There cannot be two householders. . . . It certainly cannot be said that, having a family of his own, whom he supported by operating a distant and independent farm, he occupied any relation of dependence, so far as his mother was concerned."

Under the Kansas homestead law, where a man with an adult daughter occupied the homestead and died, it was held that while he was alive the daughter constituted a family of which he was the head, but after his death there was no longer any head of the family, and that her interest attached on his death, and she took the land devested of its homestead character, subject to his debts. Battey v. Barker, 62 Kan. 517, 56 L.R.A. 33, 64 Pac. 79. The court said: "We are not called upon to decide, nor do we find that the question has been passed upon by this court, that, where the head of a family residing on a homestead loses his wife and children, the right, once fixed by law, to hold their homestead as against creditors, is devested by such circumstances."

Three adult sisters remaining on the homestead after the death of their father and mother were held to constitute a family as against creditors of other bankrupt sisters. Re Rafferty, 112 Fed. 512. The court said: "The point for decision is whether, by continuing to reside together as one family, the children remaining at home did not create or continue a family; and as such did they not become entitled to hold the premises as the family home? The evidence shows that the one married daughter and the sons yielded up any claim they had to this realty, the purpose being to keep these premises as a home for the children, who were then of an age specially requiring a home for their protection. These premises never have been abandoned as a home by the family, nor has the family been dispersed through the action of its members."

And where a widower died leaving adult children, but no unmarried daughters, remaining with the family of the deceased, it was held that the homestead ceased under Tex. Const. art. 16, § 50, providing that the homestead of a family shall be exempt, and Tex. Rev. Stat. 1993–2009, providing that the homestead shall continue for the benefit of unmarried daughters remaining with the family of the deceased. Givens v. Hudson, 64 Tex. 471.

But, under these statutory and constitutional provisions, a widowed daughter living with her widowed father until his death was held to come within the provisions of the statute, and was one of the members of the family for whom the exemption was preserved. Childers v. Henderson, 76 Tex. 664, 13 S. W. 481.

In South Carolina children as a class, living on the homestead, are regarded as the family, without regard to minority.

This was held under S. C. act February 22, 1873 (15 Stat. 371), providing that, if the husband is dead, the widow and children, and, if the father and mother are dead, the children living on the homestead, whether minors or not, shall be entitled to have the family homestead exempted as if the husband or parents were living. Carolina Nat. Bank v. Senn, 25 S. C. 572.

Children will not be regarded as a family, under the statutes of descent, where their father has not acquired a residence. This was held in Veile v. Koch, 27 Ill. 129, under Ill. act February 21, 1849 (Scates's Comp.

Stat. 1202), providing for the descent and distribution of intestate's property, he being a householder and the head of a family. The deceased, a guest from Missouri occupying a room by sufferance in this state, with his daughter, intending to return to Missouri, was not the head of a family within the act. His younger daughter lived with another family, and the deceased used the stove and wood of his friend with whom he lived.

d. By a mother.

A mother was held not to be entitled to the property as a homestead as against creditors of her bachelor son, where she resided with him, caring for the house, and he providing for her and his sister. Roots v. Robertson, 93 Tex. 365, 55 S. W. 308. The court said: "If we concede, for the sake of argument, that J. A. B. Putman and his mother, while living together, constituted a family within the meaning of article 16, § 50 of the Constitution, so that the exemption expressed in that section would apply to the head of the family in his life, still the mother cannot hold the homestead after the death of her son."

e. By a dependent female.

In Georgia a dependent female constitutes a member of the family.

So, where a family is broken up either by the death of its dependent members, or by the sons reaching majority, in case they are otherwise *sui juris*, the homestead is at an end. Gresham v. Johnson, 70 Ga. 631. The court said: "We do not mean to hold that, if females composed a part of the family, they would be deprived of the benefits of the homestead whether they had attained their majority or not, or that it is at all indispensable that they should be the daughters of the head of the household; in their case, nothing more is required than that they were of the family for whose benefit the exemption was made; the charge continues, and the property is exempt from levy and sale, so long as one of them lives and remains single."

f. By orphan grandchildren.

A homestead was held to cease to exist where the husband and wife both died, and there were no unmarried or minor children remaining, no wards, grandchildren, or apprentices, nor any member of the family. Burns v. Jones, 37 Tex. 50. The court said: "We will not say that orphaned grandchildren, living with their grandparents at the time of their decease, may not be entitled to take a homestead right; but this right could not belong to adult married children, nor even to orphaned grandchildren whose home was not with their grandparents previous to and at the time of their death."

IV. Divorce.

A divorced wife or husband having dependent minor children is held in some cases to be the head of a family.

So, a husband divorced from his wife, having two of their minor children dependent upon him for their care and custody, was held to constitute the head of a family, and, as such, to be entitled to the homestead. Redfern v. Redfern, 38 Ill. 509. In this case the father had remarried, and the first wife brought ejectment, showing a deed from the husband and herself to a third party and from him to herself. The mother was living on the premises when the father returned from the Army, and she declined to live with him, and he broke into the house with an axe and had kept possession of the house ever since. The court said: "The defendant in error is the head of the family, and, as such, had a right to occupy the premises as his homestead. The divorce did not change his position; he still remained the head of the family, and, as the proof shows, had the care and custody of his minor children, and entitled to the unmolested use and possession of the premises. Whatever right the plaintiff in error may have had while she was the wife of the defendant, that was subordinate to his right while he lived, and continued to occupy the premises."

And a divorced wife having infant children committed to her care was held to be the head of a family, in Vanzant v. Vanzant, 23 Ill. 536. This was under Scates's Comp. Stat. (Ill.) 576, providing that such exemption shall continue after the death of such householder, for the benefit of the widow and family, until the youngest child shall become twenty-one years of age, and until the death of such widow; and no release shall be valid unless acknowledged by such "householder," and amendment of February 17, 1857, adding: "And his wife, if he have one." And it was held that, for the purpose of the act, she was the same as a widow.

In Bonnell v. Smith, 53 Ill. 375, the wife was the meritorious cause of the divorce, the custody of the child was committed to her, the benefit of the homestead was held likewise to inure to her. This was on the ground that she left it under a moral compulsion, at least, and, by decreeing it to her, as alimony, she was thereby rehabilitated to it.

This case was like Vanzant v. Vanzant, *supra*, where the wife had left the premises in consequence of ill treatment by her husband; but this court said, as she was the meritorious cause of the divorce, and the head of the family, the custody of the children having been committed to her, the benefit of the homestead would inure to her.

And a wife abandoned by her husband, occupying a homestead with a family of minor children and claiming a homestead right, was held to be the head of a family notwithstanding she subsequently obtained a judgment of divorce. Blandy v. Asher, 72 Mo. 27. This was under Mo. Rev. Stat. § 2689, providing that the homestead of every housekeeper or head of a family shall be

exempt; and any married woman may claim the land, if abandoned by her husband, as her homestead.

An adult daughter gave up teaching and went to live with her father after he had been divorced from his wife. It was held that the father was the head of the family and that he was morally bound to support the daughter. Fox v. Waterloo Nat. Bank, 126 Iowa, 481, 102 N. W. 424. The court said: "While in one case it was said that there need not, of necessity, be dependence or obligation growing out of the relation, we think that what was meant was that there need not be any legal obligation or condition of dependence; and this is what we now hold. But we do think that, generally speaking, there must be something more than the mere relation of master and servant. In other words, there must be a natural or moral obligation of support; and a condition of dependence and actual support is sufficient.

And where the husband was divorced from the wife, and he retained the care of the children, it was held that he was the head of the family, and did not cease to be such by reason of the divorce; and that the homestead law was intended for the benefit of the family,—the children as well as the wife,—and he was entitled to the same. Byers v. Byers, 21 Iowa, 268.

So, where the children were not disposed of in a decree of divorce, and they resided temporarily with their mother, it was held that the land allotted to the husband in a partition of the homestead on which he resided was exempt. Zapp v. Strohmeyer, 75 Tex. 638, 13 S. W. 9. The court said: "The head of a family, or the two heads of families that there may be after the divorce, are entitled to hold their homesteads against forced sale, without regard to the causes of divorce."

So where there is no one depending there is held to be no homestead.

A divorced wife without children, residing on the property until her subsequent marriage, was held not to be the head of the family, or a member of the family. Clemans v. Penfield, 111 Iowa, 511, 82 N. W. 947. In this case the court said that Iowa Code 1873, § 1989, changes the statute, and provides, in regard to homesteads, that such right shall continue to the party to whom it was adjudged in the decree of divorce during occupancy; but this statute was passed after a lien was acquired against the property. The court said: "There being no children, there was no family. The property lost its homestead character at the time of the divorce, because of the dissolution of the family, and because it was not thereafter occupied as such until Mrs. Penfield's remarriage."

A divorced husband resisting the collection of alimony of his wife cannot claim to be the head of a family where his adult daughter resides with him, but is able to support herself. Hyde v. Hyde, 60 Neb. 502, 83 N. W. 673. This is under Neb. Comp. Stat. chap. 36, providing that the head of a family includes "every person who had resided on the premises with him or her and under his care and maintenance, either (1) his minor children, . . . or (5) any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of and support themselves." In regard to the proposition that the debtor acquired a homestead before being divorced from his wife, it was held that this was not raised by the pleadings or record.

And where a divorced husband was living alone, and one child was decreed to the custody of the wife, and his other children, by a former wife, and which were minors, lived away from him, earning their own wages and supporting themselves, it was held that the debtor had ceased to be the head of the family under the Ohio statutes, providing exemption for the head of a family. Cooper v. Cooper, 24 Ohio St. 488. This case arose under a decree for alimony, but the court does not discuss that question.

In some cases it is held that a divorce severs the family relation, and that neither member is entitled to rights in the land of the other. It is held that the husband cannot claim the benefit of the exemption law as against the decree of the wife for maintenance.

A decree of divorce was granted, and the wife was given the control of the children, and they removed from the premises. It was held that they were no longer members of the husband's family, and that he could convey his rights in the homestead. Heaton v. Sawyer, 60 Vt. 495, 15 Atl. 166.

And a divorce, where the man and wife had no children, was held to destroy the family, the existence of which gave the right of exemption, and hence destroyed the right of homestead as to that family. Bahn v. Starcke, 89 Tex. 207, 59 Am. St. Rep. 40, 34 S. W. 103. In this case the decree of divorce set apart to the wife the land in controversy, but it was held to be subject to her debts. The court said: "Her interest as a wife in the homestead, if such it may be called, was destroyed when she ceased to be a wife, by a decree of divorce, and not by her husband's death. The title she acquired by the decree was an original title, and did not come to her as a homestead. At the very point of time at which she acquired it she became a single woman, and was no longer a constituent of a family."

In Shoemake v. Chalfant, 47 Cal. 432, where the homestead had been divided by a decree of divorce, it was held that the family for whose benefit the provisions of the homestead act were mainly designed was severed by the decree, and neither the husband nor the wife was entitled to reside on that portion of the homestead which was allotted to the other. The court said: "All the principal qualities of the homestead estate, except that of exemption from liability for debts, etc., having been destroyed by the decree, the latter, in our opinion, was also destroyed. The decree was as effectual in

its results as would have been a declaration of abandonment."

And where the wife was divorced, and the husband married again, it was held that the divorced wife had no homestead right. Stahl v. Stahl, 114 Ill. 375, 2 N. E. 160. The court said: "Our law does not admit the idea of a man having two wives at the same time. The surviving wife of a decedent is the one who was his wife at the time of his death. Mary Stahl was such one here, occupying the premises at that time with Christian Stahl; and she is the person for whose benefit the statute says the homestead estate shall continue so long as she continues to occupy the homestead."

In Spengler v. Kaufman, 46 Mo. App. 644, it was held that a debtor could not claim exemption as the head of a family supporting his mother and sister, as against a judgment in favor of his wife for maintenance. This was under Mo. Rev. Stat. 1889, § 2220, exempting wages from garnishment, provided the employee was the head of a family and resident of this state. It was held that the relation of husband and wife, or father and child, need not exist to constitute a family, or to constitute the managing and responsible person the head of a family; but that the obligation to support a wife was paramount to the obligation to support a mother and sister.

In some cases the exemption is based on the ground of occupancy, or on construction of similar statutes.

Thus, a husband acquiring his homestead as a householder with a family was held not to lose the same by his wife obtaining a decree of divorce and the custody of their child, and removing from the premises while he continued to occupy it. Doyle v. Coburn, 6 Allen, 71.

A divorced husband living upon land used by him as a homestead at the time of the divorce, and set apart to him in the division of the property between himself and wife on the dissolution of the marriage, was held entitled to an exemption as the head of a family, although the minor children did not reside with him, no matter whose fault occasioned the divorce. Hall v. Fields, 81 Tex. 553, 17 S. W. 82.

In Kirkwood v. Domnau, 80 Tex. 645, 26 Am. St. Rep. 770, 16 S. W. 428, the husband and wife resided upon a homestead which was community property, and there was a decree of divorce which did not dispose of the property; but the wife remained on the homestead with the minor children. The husband sold his interest, and it was held that the purchaser could recover the half interest held by the husband; but the wife's interest, it being a homestead and she being the head of a family, could not be sold.

And where the wife was divorced, and was awarded the custody of the minor child, it was held that the husband was still entitled to his homestead, under Iowa Rev. § 2278, providing that a widow or widower, though without children, shall be deemed to be the head of a family while continuing to occupy the house used as such at the time of the death of the husband or wife, and § 2295. Woods v. Davis, 34 Iowa, 264. The court said: "There seems to us greater reason why the defendant should be allowed to hold this property exempt from the debt sued on than if he had been left a widower without issue and continued to occupy it."

Where a divorce was set aside, it was held that the relation of husband and wife existed between the parties, and that the husband was the head of the family, and his property acquired before the debt was contracted was exempt. Whitcomb v. Whitcomb, 52 Iowa, 715, 2 N. W. 1000.

See Cross v. Benson, 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558, subd. II. f.

V. Summary.

The fundamental principle underlying a majority of the cases, in the absence of a specific statute, is that the debtor must have someone dependent upon him, whom he is under a legal or moral obligation to support, in order that he may be held to constitute the head of a family. A married man having a wife residing with him constitutes a family under the exemption laws. There is some conflict of authority as to the wife being the head of the family and asserting her right to a homestead. It seems that the weight of authority is that where she is the chief support of the family, and the infant children are dependent upon her, she will be regarded as the head of the family. So, where she has been deserted, and is supporting minor children, she is generally held to be the head of the family. But, where the husband has had the homestead assigned to him, she is not entitled to another homestead. A widower having persons dependent upon him, whom he is under a moral or legal obligation to support, is held to be the head of a family, and entitled to the exemption. In some cases a husband acquiring a homestead as the head of a family is held not to lose the same by the loss of all the members of his family. Under the weight of authority, a widow having someone who is dependent upon her, and whom she is under a moral or legal obligation to support, is treated as the head of a family, as in SHEEHY v. SCOTT. A grandfather or grandmother having a grandchild dependent upon him or her for support is held to be the head of a family. A single person is held to be the head of a family, where he is supporting others who reside with him, and who depend on him, and whom he is legally or morally bound to support. Where a widower claims homestead rights in the property, by reason of the statutes relating to descent and distribution and survivorship, he is held in some cases still to retain the title of head of the family, without having others dependent upon him for support. So, it is held that a widow acquires the same rights; but her rights largely depend upon the statute giving a homestead to a widow having someone dependent upon her, as in Georgia. In other cases the homestead is given to the widow

and children, or to the widow and minor children. The abandonment of a husband by a wife is held not to deprive her of her right to the homestead as a family at his death. The contrary is held in Texas. In some states orphan children constitute a family. Where a divorce has been granted, and the homestead rights have not been adjudicated in the divorce decree, the party in possession, having the charge of minor children, is sometimes held to have a family, and entitled to the homestead rights.

L. T.

ILLINOIS SUPREME COURT.

ALTON LIGHT & TRACTION COMPANY,
Appt.,
v.
FRANK OLLER, by Next Friend.

(217 Ill. 15, 75 N. E. 419.)

Street car—overcrowding—speed.

1. A street car company which has so overcrowded a car that passengers are compelled to stand upon the steps and platform is bound to regulate the speed of the car so as not to endanger persons so situated.

Instruction—ignoring issue.

2. An instruction which ignores an issue which there is evidence to support is properly denied.

Entering overcrowded car — negligence — jury.

3. Whether or not a person is negligent in entering an overcrowded car to become a passenger at the direction of the conductor is a question for the jury.

(October 24, 1905.)

APPEAL by defendant from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court for Madison County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. **Levi Davis** for appellant.

Mr. **David E. Keefe**, for appellee:

It is not negligence *per se* for a passenger to ride on the platform of a street car.

Pray v. Omaha Street R. Co. 44 Neb. 167, 48 Am. St. Rep. 717, 62 N. W. 447; North Chicago Street R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793; Zimmer v. Fox River Valley Electric R. Co. 118 Wis. 614, 95 N. W. 957; Nellis Street Railroad Acci. Law, p. 124; North Chicago Street R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672.

A transportation company should not allow its conveyances to be so overcrowded as to endanger the safety of the passengers on said conveyances.

Chicago & A. R. Co. v. Dumpser, 60 Ill. App. 93, Affirmed in 161 Ill. 190, 43 N. E. 698; Pray v. Omaha Street R. Co. *supra;* Graham v. Manhattan R. Co. 149 N. Y. 336, 43 N. E. 917; Chicago City R. Co. v. Morse, 197 Ill. 327, 64 N. E. 304.

A carrier of passengers is bound to exercise greater care when a passenger is forced to ride upon the steps or platform because he cannot find a seat in the car.

North Chicago Street R. Co. v. Polkey, *supra;* Nellis, Street Railroad Acci. Law, p. 124.

Case Note.—It is not negligence, as matter of law, for a street railway company to permit its cars to become overcrowded, the question of negligence in such case being generally left to the jury. Clark, Street Railway Acci. Law, 2d ed. § 49; Nellis, Street Railroad Acci. Law, § 24; Jacobs v. West End Street R. Co. 178 Mass. 116, 59 N. E. 639; Burns v. Boston Elev. R. Co. 183 Mass. 96, 66 N. E. 418; Lehr v. Steinway & H. P. R. Co. 118 N. Y. 556, 23 N. E. 889; Graham v. Manhattan R. Co. 149 N. Y. 336, 43 N. E. 917; Mt. Adams & E. P. Inclined R. Co. v. Reul, 4 Ohio C. C. 362; Anderson v. City & Suburban R. Co. 42 Or. 505, 71 Pac. 659; Sandford v. Hestonville, M. & F. Pass. R. Co. 136 Pa. 84, 20 Atl. 79b; Halverson v. Seattle Electric Co. 35 Wash. 600, 77 Pac. 1058.

But to undertake to carry on a street car a number of persons greatly in excess of the car's capacity, so that passengers are compelled to stand on the platform and steps of the car, is evidence of negligence. Pray v. Omaha Street R. Co. 44 Neb. 167, 48 Am. St. Rep. 717, 62 N. W. 447; East Omaha Street R. Co. v. Godola, 50 Neb. 906, 70 N. W. 491.

And it has been held that a street railway company which undertakes to carry passengers vastly in excess of the seating and standing capacity of its cars, and permits passengers to ride on the platforms, stopping its cars, when in such a crowded condition, that other persons may get on, is guilty of negligence which renders it liable for an injury to a passenger who boarded the car after it became crowded, and was pushed off the platform. Reem v. St. Paul City R. Co. 77 Minn. 503, 80 N. W. 638, 778.

So it has been held to be gross negligence for a street railway company to overcrowd and load down its cars with passengers beyond any reasonable and proper limit, so that it is unable to control and stop them readily as they approach an intersecting street, in case it may be necessary to do so to avert a collision or prevent an accident. Richmond R. & Electric Co. v. Garthright, 92 Va. 627, 32 L.R.A. 220, 53 Am. St. Rep. 839, 24 S. E. 267.

And a street railway company which overcrowds its cars, and permits people to ride on the platforms or steps, must exercise a high degree of care for their safety, and is

Boggs, J., delivered the opinion of the court:

The appellee, a boy of about the age of sixteen years, was awarded judgment in the sum of $6,500 against the appellant company for damages occasioned by personal injuries through the alleged negligence of the appellant company, and the judgment was affirmed by the appellate court for the fourth district. This appeal seeks the reversal of the judgment of affirmance.

The declaration contained two counts, and we think the testimony so far tended to prove the allegations of each of them that the court did not err in refusing to grant the motion entered by the appellant company for a peremptory verdict in its favor.

The appellant company is a common carrier of passengers for hire, and on September 7, 1903, was operating cars on its line for the transportation of passengers from Rock Springs park to the city of Alton. It

bound to take such additional precautions as may be necessary to protect its passengers from the results of such overcrowding. Geddes v. Metropolitan R. Co. 103 Mass. 391; Hansen v. North Jersey Street R. Co. 64 N. J. L. 686, 46 Atl. 718; Kinkade v. Atlantic Ave. R. Co. 9 Misc. 273, 29 N. Y. Supp. 747; Lucas v. Metropolitan Street R. Co. 56 App. Div. 406, 67 N. Y. Supp. 833; Merwin v. Manhattan R. Co. 48 Hun, 608, 1 N. Y. Supp. 267, Affirmed in 113 N. Y. 659, 21 N. E. 415; Cattano v. Metropolitan Street R. Co. 173 N. Y. 565, 66 N. E. 563; Anderson v. City & Suburban R. Co. *supra;* McCaw v. Union Traction Co. 205 Pa. 271, 54 Atl. 893; Reber v. Pittsburg & B. Traction Co. 179 Pa. 339, 57 Am. St. Rep. 599, 36 Atl. 245; Sandford v. Hestonville, M. & F. Pass. R. Co. *supra;* Bumbear v. United Traction Co. 198 Pa. 198, 47 Atl. 961; Halverson v. Seattle Electric Co. 36 Wash. 600, 77 Pac. 1058.

So, a company greatly overcrowding its cars is held to be guilty of gross negligence in running a crowded car so near the intersection of a switch with the main track that it cannot pass a car on the main track without injury to passengers riding on the footboards. Topeka City R. Co. v. Higgs, 38 Kan. 375, 5 Am. St. Rep. 754, 16 Pac. 667.

And a street railway company is liable for injury to a passenger who, because of the crowded condition of the car, was obliged to stand upon the running board, and was struck by a van standing in a street, where the motorman had signaled the van to leave the track, which it did, stopping in such a situation as to bring its rear end within about 2 feet of the track, since he was chargeable with notice that the distance between the car and the van was insufficient for persons standing upon the running board to escape contact with the van, unless, observing the same, they bent their bodies inward toward the car. Henderson v. Nassau Electric R. Co. 46 App. Div. 280, 61 N. Y. Supp. 690.

And the liability of a street railway company is generally sustained where it carries a crowded car, with people riding on the platforms or steps, around a curve at a high rate of speed, and, owing to the great speed or the jerking of the car, a passenger is thrown off and injured. Hesse v. Meriden, S. & C. Tramway Co. 75 Conn. 571, 54 Atl. 299; Brusch v. St. Paul City R. Co. 52 Minn. 512, 55 N. W. 57; East Omaha Street R. Co. v. Godola, 50 Neb. 906, 70 N. W. 491; McGrath v. Brooklyn, Q. C. & S. R. Co. 87 Hun, 310, 34 N. Y. Supp. 365; Lucas v. Metropolitan Street R. Co. 56 App. Div. 405, 67 N. Y. Supp. 833; Reber v. Pittsburg & B. Traction Co. *supra;* Halverson v. Seattle Electric Co. *supra;* Zimmer v. Fox River Valley Electric R. Co. 118 Wis. 614, 95 N. W. 957.

But it has been held that the company owes no duty to a passenger riding, with its permission, upon the step of a crowded car, to reduce the speed of the car from its usual and presumably lawful rate, so that it may lose its natural oscillation, and that the company is not liable for an injury to him by being thrown from the step by the jolting of the car when running at its usual rate of speed, the jolting not being due to any unusual condition of the car, rails, roadbed, or management, but being only such as is natural to a car traveling at that rate of speed. Moskowitz v. Brooklyn Heights R. Co. 89 App. Div. 425, 85 N. Y. Supp. 960.

And a street railway company was held not liable for injury to a boy who, while standing upon the platform of a crowded car, with his foot upon a step, and leaning against the dasher, was pushed from the car, underneath the wheels, by passengers rushing from the car at a transfer station, unless the conduct of the passengers was unusual and disorderly, and could have been prevented by the persons in charge of the car, which was a question for the jury. Kandall v. Frankford, S. & P. City Pass. R. Co. 139 Pa. 464, 22 Atl. 639.

The measure of care exacted from elevated street railway companies to protect passengers from the dangers of overcrowding seems to be somewhat greater than that exacted from the owners of surface roads; a discrimination being made on the ground that an elevated road is built on private property, to which the company controls access, and where a crowd cannot congregate in dangerous numbers without paying fare in advance, and that the company has power to limit the number of people who shall be permitted to be upon the station at one time. Viemeister v. Brooklyn Heights R. Co. 91 App. Div. 510, 87 N. Y. Supp. 162; Dawson v. New York & Brooklyn Bridge, 31 App. Div. 537, 52 N. Y. Supp. 133.

The question of a passenger's contributory negligence in riding on a crowded car or in failing to take precautions for his safety when so riding is not considered here.

was Labor Day, and the labor organizations had a picnic at the park. The appellee was in attendance, and about 9:30 o'clock P. M. became a passenger on one of appellant's cars to be transported to his home in the city of Alton. The evidence tended to show the following state of facts: The seats were all occupied when appellee entered the car. That the car was kept standing at the park entrance for some five minutes or more, and that the conductor kept calling out: "Crowd on! This is the last car for the city." That, when the car left the park, the seats were all occupied, and the aisles and platforms were crowded. That the appellee was crowded out onto the steps of the front platform. That two boys were seated on the step on which the appellee was also standing. That he paid his fare and was entitled to and asked for a transfer to another line. The evidence tended to show that while on the trip to the city, and while the car was going up a grade, the motoneer turned on all the electrical power that the motor would permit, and that, while the car was in rapid motion, the conductor crowded out onto the front platform and cried out, "Transfers!" That appellee, who had been holding onto the handle of the car, released one hand to take a transfer ticket from the conductor. That at this moment the car gave a lurch and threw other passengers, who also stood on the platfirst count) and knocked him from the car, or the lurching and rapid motion of the form, against the appellee (as charged in the car threw him therefrom (as charged in the second count), and that he fell with his left foot under the car, across the rail, and the wheel of the car passed over his left foot, rendering amputation necessary, and his left leg was amputated a few inches below the knee.

The servants of the appellant company invited passengers to occupy the car beyond its capacity, and knowingly permitted, if they did not induce, passengers to stand on the platforms and steps of the car. In such case the carrier assumes the duty of exercising, for the protection and safety of the passengers, that degree of care that is demanded by the circumstances. North Chicago Street R. Co. v. Polkey, 203 Ill. 225. 67 N. E. 793. The obligation of a common carrier, which rested on the appellant company, was to do all that human care, vigilance, and foresight could reasonably do. consistent with the mode of conveyance and the practical operation of the road, to convey appellee and the other passengers in safety to his and their destination. Slight care and foresight only was necessary to arouse apprehension that the passengers on the platform and steps of the car would be endangered by any excessive speed, and that speed even more moderate than the usual rate of speed was the more prudent and safe course for the safety of such passengers. It was the duty of the appellant company to regulate the speed of its car in view of the fact that it had encouraged its patrons to overcrowd the aisles, platforms, and steps. The high degree of care which the law enjoined upon it for the safety of its passengers should have been the paramount consideration. The practical operation of the car did not require that a rapid rate of speed should be employed. Whether it was negligence on the part of the appellee, as a passenger, to stand on the steps or platform of the car, was a question of fact, for the decision of the jury (North Chicago Street R. Co. v. Polkey, *supra*), and not of law, to be determined by the court. The cause was properly submitted to the jury.

It is complained that the court gave instructions Nos. 3a and 4. These instructions are as follows: "(3a) The court instructs the jury that the acts of negligence charged against the defendant in plaintiff's declaration are negligence in permitting its cars, on which the plaintiff rode, to be overcrowded, and negligence in running its car on which the plaintiff rode, at an excessive rate of speed. (4) The court instructs the jury that if you believe, from the preponderance of the evidence in this case, that the plaintiff, Frank Oller, on the 7th day of September, 1903, became a passenger on one of defendant's cars, and that, while he was a passenger of such car, he, while exercising due care for his own safety, was injured by the negligence of the defendant, as charged in plaintiff's declaration, or some count thereof, then in law the defendant is liable for such injury, and the jury should so find by their verdict." Counsel says that No. 4, standing by itself, was not objectionable, but that, considered in connection with No. 3a, it was seriously hurtful to the appellant company. Counsel insists that instruction 3a applies to both counts of the declaration, and does not state fully the essential elements of the negligence charged in either count; that the jury were likely to understand from instruction 4, considered in connection with instruction 3a, that proof that the car was overcrowded merely would sustain the issue made under the first count. Both counts of the declaration charged that the company was guilty of negligence in causing and permitting the car to be overcrowded. The first count charged that the motion of the car forced the other passengers against the appellee, and thus pushed him from the car. The second count charged like negligence in overcrowding the car,

and that the motion of the car, the speed being rapid and dangerous, threw the appellee from the car. The overcrowding of the car and the motion or movement of the car were elements of negligence in both counts, and the manner in which the motion operated to throw the appellee from his place on the steps was stated differently in the two counts. The first count was based upon the theory that the appellant company induced and permitted the car, the platforms, and the steps thereof to be so crowded with passengers that the movement or motion of the car at an ordinary rate of speed was dangerous to passengers, and that therefore the appellant company failed in its duty towards its passengers by attempting to run the car, so overcrowded, in the same manner and with the same speed and motion as would have been employed had it contained no more passengers than it was intended to accommodate and convey in safety. The second count charged the same negligence as to the overcrowding of the car, and alleged in addition that the company negligently propelled its car at even a greater than the ordinary rate of speed. Instruction No. 3a, therefore, though not carefully drawn, did not misdirect the jury as to the issues.

Instruction No. 8, asked by the appellant company and refused, would have advised the jury that, if they believed from the evidence that it was not proved that a crowd of persons on a car pushed and forced the appellee from the car, they should return a verdict of not guilty. This instruction, if given, would have ignored and denied recovery if the appellee was thrown from the steps of the car by the rapid and excessive rate of speed thereof, as charged in the second count of the declaration. There was, as we have seen, evidence tending to support the negligence charged in the second count, and instruction No. 8 was therefore properly refused. Other instructions given for the appellant advised the jury that they should not return a verdict for the appellee unless he had proved his case by a preponderance of the evidence.

The eleventh instruction asked by the appellant company and refused sought to have the court direct the jury that, if the car was crowded at the time the appellee entered the same to become a passenger, then the appellee could not recover. It may be doubted whether there was proof on which to base this instruction; but, aside from that, in view of the fact that the conductor invited persons to become passengers after the car had become crowded, the court could not say as a matter of law, as the instruction asked him to do, that there could be no recovery. It was a question of fact whether appellee would, under such circumstances, have been guilty of negligence in going upon the car.

The judgment should not be reversed because the court refused to give instruction No. 14 asked by the appellant company. Instructions Nos. 5 and 6, which were given in the same behalf, correctly advised the jury as to the matters properly intended to be given by instruction No. 14. In addition to that, instruction No. 14, if given, would have advised the jury (to quote therefrom) "that the mere fact that the car was overcrowded, if proven, is not proof of negligence on the part of the defendant," and it was so framed, as to authorize a verdict for the appellant company without consideration of the allegation of negligence in moving the car at a rapid and dangerous rate of speed, and the proof in support of that charge of negligence.

The record is free from error reversible in character, and the judgment of the Appellate Court is affirmed.

ILLINOIS SUPREME COURT.

WALTER W. SPEARS, Plff. in Err.,
v.
PEOPLE OF THE STATE OF ILLINOIS.

(220 Ill. 72, 77 N. E. 112.)

Former acquittal—embezzlement and forgery.

1. Acquittal of a sales agent upon a charge of embezzlement and larceny in retaining funds collected from customers is no bar to a subsequent prosecution for forgery in making false notes of the customers, although the two indictments relate to the same transaction.

Abstract instruction—error.

2. Refusal of a general and abstract instruction is not reversible error.

Forgery—intent.

3. That a sales agent who, after collecting money from a customer, forged his note and turned it in to enable himself to retain the money for his own accommoda-

Case Note.- The case of SPEARS v. PEOPLE is an important one owing to the lack of authority as to the effect of an acquittal of the charge of larceny as a bar to a prosecution for forgery growing out of the same transaction. A careful search has failed to reveal any cases directly in point. In Huff v. Com. 19 Ky. L. Rep. 1064, 42 S. W. 907, a very similar question was considered. In that case the court held that an acquittal under an indictment charging the offense of uttering a forged check with the fraudulent intent of procuring goods, wares, and merchandise from the transferee of the check, is a bar to a subsequent prose-

tion, sufficiently shows intent to defraud to sustain a conviction of forgery, although he also intended to take up the note when it fell due.

Attorney—argument—fine.

4. A client cannot complain of prejudice in the action of the court in fining his counsel because of his failure to obey the admonitions of the court as to the use of objectionable argument to the jury.

(February 21, 1906.)

ERROR to the Criminal Court for Cook County to review a judgment convicting defendant of forgery. Affirmed.

The facts are stated in the opinion.

Messrs. **Burres & McKinley** for plaintiff in error.

Messrs. **Frank Crowe** and **Albert H. Meads**, with Messrs. **W. H. Stead**, Attorney General, and **John J. Healy**, for defendant in error:

The record in the larceny and embezzlement case was properly excluded and the jury instructed to disregard any evidence thereof.

4 Bl. Com. 336; United States v. Randenbush, 8 Pet. 288, 8 L. ed. 948; Burns v. People, 1 Park. Crim. Rep. 182; People v. Saunders, 4 Park. Crim. Rep. 196; Freeland v. People, 16 Ill. 382; Guedel v. People, 43 Ill. 226; Hite v. State, 9 Yerg. 357; Campbell v. People, 109 Ill. 573, 50 Am. Rep. 621; Bishop, New Crim. Law, § 1052; Durham v. People, 5 Ill. 172, 39 Am. Dec. 407.

Magruder, J., delivered the opinion of the court:

This is an indictment, returned at the April term of the criminal court of Cook county by the grand jury of that county against the plaintiff in error for forgery. The trial, which took place at the July term, 1905, of said court, resulted in a verdict finding the plaintiff in error guilty, as charged in the indictment; and after motions for new trial and in arrest of judgment were overruled, judgment was rendered on the verdict in the usual form, sentencing the plaintiff in error to the penitentiary at Joliet for the crime of forgery. Motion was entered by plaintiff in error to vacate the sentence, which motion was continued to the September term, 1905, of said court, and overruled. Exceptions were taken to the judgment, and to the overruling of the motion to vacate. The present writ of error is sued out for the purpose of reviewing said judgment of the criminal court of Cook county.

The indictment contained two counts. The first charged that plaintiff in error on August 26, 1903, in Cook county, did feloniously, fraudulently, and falsely make, counterfeit, and forge a certain promissory note as follows:

Chicago, Ill., Aug. 26, 1903.

Four months after date, for value received, I promise to pay to the order of the National Cash Register Co., Dayton, Ohio, thirty dollars at Chicago.

Geo. C. Demuth.

—with intent to damage and defraud the National Cash Register Company, a corporation organized under the laws of the state of New Jersey, contrary to the statute, etc. The second count charges that the plaintiff in error feloniously and fraudulently did pass the said false and forged promissory note on August 26, 1903, in Cook county, then and there knowing the same to be false and forged, with intent to damage said National Cash Register Company, contrary to the statute, etc.

First. The first and main ground for reversal, urged upon our attention by counsel for plaintiff in error, is that the trial court refused to allow counsel for plaintiff in error to introduce the record of a former trial of the plaintiff in error, resulting in his acquittal upon the charge of larceny by embezzlement, and to refer to the same in his opening statement to the jury. At the close of the case the jury was excluded for the purpose of a hearing by the court of a motion by counsel for plaintiff in error to

cution under an indictment based upon the same facts for the offense of obtaining goods, wares, and merchandise by means of fraudulent pretenses. This conclusion is based on the ground that the offense charged in the first indictment and that charged in the second occurred at the same time, in the same place, and in the same manner, and the property charged as having been obtained in the second indictment is alleged to have been obtained by the identical utterances of the defendant which were the basis of the charge in the first, and therefore, as jeopardy attached in the first case, and the guilt or innocence of the defendant could have been declared under indictment in that case, the plea of jeopardy and former acquittal was a complete bar to a subsequent prosecution. This conclusion is in harmony with the general test; that is, to determine whether the facts alleged in the second indictment would, if given in evidence, have warranted a conviction on the first; and if this is so, then the crimes may properly be said to be identical, and acquittal of one is a bar to the prosecution of the other. See Clark, Crim. Proc. p. 396; 1 Bishop, New Crim. Law, 1051; 2 Russell, Crimes, § 41; 12 Cyc. Law & Proc. p. 280.

take the case from the jury upon the ground of such former trial and acquittal. The theory upon which the record in the larceny and embezzlement case was sought to be introduced in the case at bar was that such evidence would have supported a plea of *autrefois acquit*.

According to the statement of counsel for the plaintiff in error in support of said motion, it appears that, prior to November, 1903, the plaintiff in error for some time had been an employee of the National Cash Register Company, and in December, 1903, was indicted for larceny and embezzlement. Plaintiff in error had been engaged as salesman in the service of said company during the years 1903 and 1904, selling for the company cash registers manufactured by it, he being the company's agent and salesman in the city of Chicago. He was authorized not only to make sales, but to collect the cash on sales made by him, and to take promissory notes in payment of registers sold. On or about August 26, 1903, as such agent, he sold a cash register to said George C. Demuth, and received cash for the same for the full amount of the purchase price, a part of which he at once remitted to the company, but retained the remainder. He made several promissory notes, including the one set out in the indictment, which purported to be executed by said Demuth, payable to the National Cash Register Company, bearing date August 26, 1903, and handed them to the cashier of said company at its branch office in Chicago, instead of turning over all of the cash received on making the sale. It is not denied by plaintiff in error, but admitted by him in his testimony, that he signed the name of George C. Demuth himself, and that the notes were not really executed by Demuth. It does not appear from the evidence that he informed the company, when he turned these notes in, that they were not signed by Demuth, but had been signed by himself, nor does it appear from the evidence that the company at that time knew that the notes were not the genuine notes of George C. Demuth. It is claimed by the plaintiff in error that when the first of this series of notes became due he went to the office of the company and paid it, the amount being $30.00. This claim, however, is disputed by the state, whose statement upon this subject is that the first note was included in a statement of other indebtedness and collections made by plaintiff in error, which amounted to $340, and for which he turned in a customer's check of $15, and his own check of $325, on September 19, 1903, which check came back from the bank unpaid, and marked, "Not sufficient funds," as he had at that time in the bank only $2.92; so that, in fact, as is claimed by the state, none of the notes to which plaintiff in error signed the name of Demuth were ever paid. At the first trial plaintiff in error was charged with embezzling and stealing the sum of $200 of the company, which, it was claimed, he had received from Demuth on the sale of a cash register, and it is now said that he was then indicted, tried, and acquitted on a charge of embezzlement and larceny, growing out of the same transaction; and, in support of the defense of *autrefois acquit*, counsel for plaintiff in error offered in evidence the indictment, verdict, and judgment, and bill of particulars, as introduced on the former trial, which the court below in the trial of the case at bar declined to receive in evidence.

The first trial was for larceny and embezzlement, while the indictment and trial in the case at bar were for the crime of forgery. It is clear that the acquittal in the former indictment and trial is no bar to the present prosecution. To sustain the plea of *autrefois acquit* the offenses must be identical, and the fact that an instrument was offered in evidence in a former trial will not prevent a prosecution for unlawfully passing it. United States v. Randenbush, 8 Pet. 288, 8 L. ed. 948. "Unless the first indictment was such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second." 2 Russell, Crimes, 41; 1 Russell, Crimes, 831; King v. Vandercomb, 2 Leach, C. L. 708; Burns v. People, 1 Park. Crim. Rep. 182. In Com. v. Roby, 12 Pick. 496, it was said by Chief Justice Shaw: "If the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law, to say that the offenses are so far the same that an acquittal of the one will be a bar to the prosecution for the other." In the same case it was also said by the same distinguished judge: "In considering the identity of the offense, it must appear by the plea that the offense charged in both cases was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact." People v. Saunders, 4 Park. Crim. Rep. 196.

The same views above announced have been held and adopted by this court. In Freeland v. People, 16 Ill. 380, we said (page 382): "Greenleaf states the rule to be that, if the defendant, upon the first indictment, could not have been convicted of the offense described in the second, then an

acquittal or conviction upon the former is no bar to the latter. 3 Greenl. Ev. § 36. And this we hold to be the true rule. If the defendant could not, by any legal possibility, have been convicted, upon the former prosecution, of the offense charged in the second, he can in no just sense be said to be in peril of a second conviction on the same offense." It is clear that on the former trial, which was an indictment for larceny and embezzlement, plaintiff in error could not have been convicted of forgery; and hence a plea of *autrefois acquit* could not have been maintained in the case at bar.

In Guedel v. People, 43 Ill. 226, it was held that, where a person was indicted for a murder, committed by shooting with powder and shot from a gun, and was acquitted, and was afterward indicted for the same murder, and convicted, and in the second indictment the offense was alleged to have been done by beating upon the head with a gun, the two indictments stated different offenses, and the acquittal on the first one was no bar to the second; the prisoner never having been in legal jeopardy.

In Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621, the case of Freeland v. People, *supra*, was referred to, and the doctrine therein announced was approved by this court, it being there said (page 572 of 109 Ill., and page 624 of 50 Am. Rep.): "The rule laid down by Blackstone as to pleas of this character has been adopted by this court in Freeland v. People, *supra*, and is, with reference to former acquittal or conviction, it 'must be upon a prosecution for the same identical act and crime.' All the authorities hold that, to entitle a defendant to the benefit of this plea, it is necessary the crimes charged in the first and second indictments should be the same; and that, if the crimes charged in the first and second indictments are so distinct that the evidence of the one will not support the other, a conviction or acquittal of the one will not bar a prosecution of the other; or, adopting the language of this court in Freeland v. People, the rule may be stated to be, that to make the plea a bar proof of the facts alleged in the second indictment must be sufficient in law to have warranted a conviction upon the first indictment of the same offense charged in the second, and not of a different offense. The general rule adopted for ascertaining the identity of the offenses is as stated by Archbold, in his work on Criminal Pleading, 106, where it is said: 'The true test by which the question whether the plea is a bar in any particular case may be tried is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first.' Substantially, the rule has been stated in the same way by Chitty in his work on Criminal Law, and as stated by both authors it has been adopted by this court." The fact, that the plaintiff in error was acquitted on the former trial, where the indictment was for larceny and embezzlement, cannot be held to be evidence of the want of an intent to damage and defraud in the case at bar.

In view of the authorities above quoted, to the effect that the acquittal in the embezzlement case was no bar to the prosecution of this forgery case, we are of the opinion that the trial court committed no error in its ruling upon this subject.

Second. It is contended on the part of the plaintiff in error that the trial court erred in giving the eighth instruction, which was given for the people upon the trial below. The instruction is long, and it is not necessary to set it out here. It is sufficient to say that it is the same instruction as the eighth instruction, set out and commented upon by this court in Siebert v. People, 143 Ill. 571, 32 N. E. 431, where we said of the eighth instruction so set out, and identical with eighth instruction given for the people in the case at bar: "This instruction is fully sustained by Hirschman v. People, 101 Ill. 568, and Rider v. People, 110 Ill. 11, and we shall content ourselves by referring to these cases to sustain the action of the court in giving the instruction."

Third. It is next insisted that the trial court erred in refusing to give instructions numbered 15, 16, and 17, asked by the defendant below upon the trial. These instructions related to the question of intent, and were fully covered by other instructions given in the case, and, therefore, no error was committed by their refusal. Painter v. People, 147 Ill. 444, 35 N. E. 64; Carlton v. People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346; Schintz v. People, 178 Ill. 320, 52 N. E. 903. By other instructions given, the court told the jury as matter of law that, by the statute of Illinois, every person who shall falsely make, alter, forge, or counterfeit a promissory note with intent to prejudice, damage, or defraud any person, body politic or corporate, whether the said person, body corporate or politic resides in this state or not, shall be deemed guilty of forgery. The jury were thus told that there must be an intent to defraud. One of the refused instructions merely defined a criminal offense in the language of the statute, as consisting in a violation of the public law, in the commission of which there should be a union or joint operation of act and intention, or criminal negligence. While this instruction was unobjectionable,

and may well have been given, yet it is so general and abstract in its nature that its refusal cannot be regarded as error. In Moore v. People, 190 Ill. 331, 60 N. E. 535, we said in regard to a similar instruction: "It is not desirable to give instructions which merely inform the jury on legal subjects, and are not to be applied to the case or evidence, and it is not error to refuse an instruction of that kind." One of the instructions whose refusal is complained of told the jury that upon the question of intent, the law presumes a man to intend the reasonable and natural consequences of any act intentionally done. This same principle was embodied in another instruction given to the jury, which was as follows: "The court instructs the jury that the law presumes a man to intend the reasonable and natural consequences of any act intentionally done."

The refused instructions now under consideration proceed upon the theory that although the defendant forged the notes, he may not have intended, at the time he signed the notes, to injure or defraud the National Cash Register Company, but that he merely signed them for the purpose of benefiting himself. That is to say, it is said that when he signed the notes and turned them over to the company, he intended to pay the notes himself when they became due, although he did not at the time inform the company that they were not signed by Demuth, and that he intended to pay them. His own testimony conflicts with the theory thus embodied in the instructions. Plaintiff in error, when upon the stand, admitted that he signed Demuth's name to the notes, and made the following statement: "My turning the note in was for the purpose of an accommodation, and my intentions were nothing but to defer the payment for my own accommodation." This clearly shows that there was an intent to defraud. This statement by plaintiff in error, after acknowledging that he had forged the note, was sufficient evidence to convict him of an intent to defraud. He forged the note, and appropriated the money to his own use, handing over the forged note in the place and stead of the money which he had collected. In contending that he intended to pay the company in instalments as the forged notes fell due, he merely indicates that he held the hope, so often entertained by criminals who appropriate money belonging to others, that he might return the money, and thereby escape detection. He may have hoped to cover up his shortage by paying from month to month instalments to the cash register company, and thus lead them to believe that the notes were genuine, because they were met as they fell due; but even if he had succeeded in what he then hoped to do, such an intended course on his part is no defense against this prosecution for forgery, as he admits that he wanted to defer payment for his own benefit. That is to say, he wanted to use the money of the company for his own purposes. It is immaterial what may have been his intention when he signed the note and while it remained in his possession. The mere making and possession do not necessarily prove an intent to defraud. But the refused instructions ignore the question as to his intention when he passed or uttered the note by delivering it to the company. The intention to injure or defraud in such cases is usually proved "by showing that the forged instrument was uttered." Fox v. People, 95 Ill. 71.

Fourth. The state put upon the stand a witness by the name of Holmes, who testified as to the handing over to the company of the check and notes by the plaintiff in error to balance the account with the company. Upon the cross-examination of this witness, counsel for plaintiff in error asked him if he had not come to Chicago from Cleveland, Ohio, to testify. The question was objected to as immaterial and the court sustained the objection. Even if the witness should have been allowed to answer the question, the refusal of the court to permit him to do so could have done plaintiff in error no harm, as, in a subsequent part of his examination, the witness stated that he did come from Ohio, and this statement was admitted without objection, so that, if there was any force in behalf of the plaintiff in error in the fact that the witness did come from Ohio, such fact was proven, and presented as proven to the jury.

Fifth. In his argument to the jury counsel for plaintiff in error made the following statement: "If Spears owes the National Cash Register Company anything, it is fair to assume that he is under bond, and it is protected in that way, and can get its money very quickly." The court admonished counsel for plaintiff in error that this line of argument was objectionable, because there was no evidence in the record whatever that any bond had been given, and therefore it was not fair to assume in the presence of the jury that such bond had been given. Such statements were calculated to prejudice the jury by leading them to believe that the National Cash Register Company would not be damnified in any way, because it had a bond to fall back upon. After several admonitions from the court to refrain from this objectionable line of argument, counsel for the plaintiff in error proceeded to talk in the same vein about the bond, when there was no evidence that any bond had been

given. Upon his refusal to obey the admonitions of the court thus given to him, the court fined him for contempt, and he paid the fine in open court. This circumstance is relied upon by the plaintiff in error as tending to show that the action of the court prejudiced the case of the plaintiff in error in the minds of the jury. We are unable to say that the court erred in respect to this matter. Counsel, in a most aggravating way, had disregarded the admonitions of the court, and it was the duty of the court to preserve and maintain its own dignity.

After a careful consideration of this record, we see no good reason for reversing the judgment of the court below. Accordingly, the judgment of the Criminal Court of Cook County is affirmed.

DELAWARE SUPREME COURT.

ELSIE D. SHUSTER, Plff. in Err.,
v.
PHILADELPHIA, BALTIMORE, & WASHINGTON RAILROAD COMPANY.

(— Del. —, 62 Atl. 689.)

Master—directions to attach car to train —construction.

1. A telegram directing a conductor to take on a car with a broken drawbar next his cabin car means next behind at the end of the train, and the superintendent sending it cannot be charged with negligence in case the conductor places the car in front of the cabin car, where it injures a fellow employee.

Fellow servants.

2. The conductor and brakeman on a freight train and the master of a freight yard are fellow servants of the car inspector in the yard.

Master—notice of defective car.

3. A railroad company, is not negligent in failing to give notice to its car inspectors of the dangerous condition of a car which it has placed in a train to be taken to the shop for repairs, where it has cards upon it indicating its defective condition.

Same—rule as to location of cars.

4. A railroad company is not bound to adopt a rule prescribing the location, in a train, of defective cars.

Same—rule prohibiting inspectors on cars.

5. A railroad company is not negligent in failing to provide a rule forbidding car inspectors to ride upon trains which are being run on to the tracks for inspection.

(January 16, 1906.)

ERROR to the Superior Court for New Castle County to review a judgment in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's husband. Affirmed.

The facts are stated in the opinion.

Messrs. **W. W. Knowles** and **William S. Hilles**, for plaintiff in error:

It was the duty of the railroad company to give notice to an employee who might be

Case Note.—It is obvious that the master's liability for an injury to an employee through a misunderstanding of an order must depend in the first instance on whether the misunderstanding was warrantable. And even though such misunderstanding is justifiable, the master may still be relieved from liability by the contributory negligence of, or assumption of risk by, the servant. On the other hand, where the misinterpretation of orders by a coemployee is the cause of the accident, the master may not be excused by the fact that such misinterpretation was unjustifiable, if circumstances require him to take additional precautions against any possible misunderstanding. Such statement of the law, it is submitted, is supported by the following cases:

In McLeod v. Ginther, 80 Ky. 399, it was held that the sending of a despatch reading as follows: "Fish, extra east; can have until ten, 10, o'clock, A. M. to make Beards for Number 2 and Number 4," which was construed by the conductor and engineer as giving them until ten minutes after ten o'clock to reach Beards, in consequence of which they collided with a train proceeding in the opposite direction, killing the engineer of the train first mentioned,—was negligence for which the railroad was liable.

But in Harris v. Norfolk & W. R. Co. 88 Va. 560, 14 S. E. 535, it was held that the railroad was not liable for the death of an engineer killed in a collision due to his misunderstanding of an order, under the following circumstances: The engineer, who was in charge of an east bound train, received a telegram from the superintendent stating that at a given point a new section had been interposed in a west bound train originally consisting of three sections. Under the rules of the company the new section became Number 1, and the other sections were each advanced a number after leaving the point of interposition. He was directed to pass sections 1 and 2 at a point intermediate the point of interposition, and given the right of way to the point of interposition over section 3. On arriving at the point of interposition he received further orders giving him the right of track to a further station, over section Number 3. Proceeding with his train, he collided with the original section 2, which, as it had not passed the point of interposition, had not yet, under the rule of the company above stated, received the official designation of section 3. In the light of

injured in the course of his employment by the conditions existing of the dangerous character of the car.

Labatt, Mast. & S. §§ 117, 240; 1 Shearm. & Redf. Neg. § 203; Rodney v. St. Louis S. W. R. Co. 127 Mo. 676, 28 S. W. 887, 30 S. W. 150; Denver & B. P. Rapid Transit Co. v. Dwyer, 20 Colo. 132, 36 Pac. 1106; Rosenbaum v. St. Paul & D. R. Co. 38 Minn. 173, 8 Am. St. Rep. 653, 36 N. W. 447; State use of Abell v. Western Maryland R. Co. 63 Md. 433; Edwards v. Tilton Mills, 70 N. H. 575, 50 Atl. 102; The Oriental v. Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117; Hammill v. Louisville & N. R. Co. 93 Ky. 343, 20 S. W. 263.

Messrs. **Ward & Gray**, for defendant in error:

Defendant was not liable.

Wheatley v. Philadelphia, W. & B. R. Co. 1 Marv. (Del.) 305, 30 Atl. 660; Weldon v. Philadelphia, W. & B. R. Co. 2 Penn. (Del.) 1, 43 Atl. 156; Creswell v. Wilmington & N. R. Co. 2 Penn. (Del.) 210, 43 Atl. 629.

Spruance, J., delivered the opinion of the court:

This action was brought by the plaintiff, the widow of Mahlon C. Shuster, for the recovery of damages for the death of her husband, alleged to have been caused by the negligence of the defendant company. Under instruction of the court the jury rendered a verdict for the defendant. To this instruction and the rulings of the court as to the admission and rejection of certain testimony, the plaintiff excepted. At the time of the accident which caused the death of Shuster, and for several years before that time, he was in the employ of the defendant as a car inspector. As such inspector, it was his duty to examine cars at the Edgemoor yard of the defendant, near the city of Wilmington, for the purpose of ascertaining whether they were in proper condition to be used in the business of the defendant. The yard contained eighteen or twenty tracks, and was divided into two sections. As a train came in, it was run upon one of these tracks, inspected, and made up for its passage to the point of its destination. On July 22, 1903, a Pennsylvania Railroad box freight car, with the drawbar pulled out and part of the end sill off, was at Seaford, Delaware. On the same day Alfred Larimore, the conductor of a freight train from Delmar, bound north, received at Seaford from R. L. Holliday, superintendent of the Delaware Division of the defendant company, a telegram, giving the number of said car and directing him as follows: "Move this car from Seaford to Edgemoor. Take it on next to your cabin car." The conductor testified that he understood this to mean that he should place said car next ahead of the cabin car, and he, with the assistance of two of his train crew, did so place it in his train, and made it fast to the cabin car, which was the last car of the train, by means of a chain which he had found about the truck of the damaged end of the injured car. When, by whom, or for what purpose, the said chain had been put upon the injured car, is not disclosed by the evidence. The damaged car appears to have been attached to the cabin car as securely as was possible by means of said chain, and the journey from Seaford to the Edgemoor

a rule of the company that the west bound trains had right of track over east bound trains, and of the circumstances above detailed, the court reached the conclusion, upon a demurrer to the evidence, that the construction placed by the engineer of the east bound train on his orders was unjustifiable.

In Galveston, H. & S. A. R. Co. v. Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33, a verdict for plaintiff, whose minor son, a laborer, riding on a construction train, was killed in a collision with a freight train which, after remaining at a named point until 11:30 A. M., as ordered, was proceeding westward when it came into collision with the work train, which had had orders to remain at work until 11:30 A. M. and then proceed eastward to such given point, was sustained.

A conflict between this and the SHUSTER CASE may be noted, in that in the Arispe Case it was held that the question as to whether the orders given by the superintendent to the conductors and engineers of the colliding trains were ambiguous, conflicting, and calculated to mislead, was one of fact, for the jury.

An instance where a servant, misunderstanding his orders, was held guilty of contributory negligence, is found in Davidson v. St. Louis, 56 Fed. 720, where a deck hand on a steamer, who was ordered to paint the smokestack, misunderstanding the directions that were given him, placed a heavy ladder against the smokestack, which caused it to break off when he ascended.

But where a master orders a thing to be done by a servant, he will not be exonerated from liability for injuries to the servant arising from doing the act, merely because the servant does not do it in the particular way directed by the master. The question in every case is whether the servant pursued the less dangerous course. Citizens' Gaslight & Heating Co. v. O'Brien, 118 Ill. 174, 8 N. E. 310.

The administrator of an engineer killed in a collision in consequence of an operator's misunderstanding of orders was held entitled to go to the jury upon the question of the defendant's negligence in not sending an order to the men in charge of the train as well as to the operator, as a precaution against mistake, in Sutherland v. Troy & B. R. Co. 46 Hun, 372.

yard was made without accident, notwithstanding the fact that there was more slack or play between these cars than there would have been had they been connected by means of the usual coupling. Arriving at the Edgemoor yard, the yard master ordered the conductor to back his train on track No. 4, saying that everything was clear. This was in the evening, after dark, about 8:05, according to one witness, and about 8:35, according to another. Thereupon the train was backed slowly in on said track, at the rate of between 4 and 5 miles an hour; the brakeman, Murphey, standing on the top of the disabled car as a lookout, and Shuster and another car inspector, who had boarded the train while backing in on said track, sitting on the platform of the cabin car next to the disabled car, when the moving train came in violent collision with a car or cars standing on said track, and the shop car, the sill of which was from 4 to 8 inches higher than the sill or platform of the cabin car, rode over and demolished the cabin car, and so injured Shuster and the other car inspector that they both died shortly thereafter.

It is clear that the proximate cause of the accident was the negligence of the yard master in directing the conductor to run his train upon track No. 4, and informing him that it was clear, when there was standing upon it a car or cars with which the train was liable to collide. Whether there was negligence on the part of the brakeman standing on the top of the disabled car is not clear from the evidence. If the conductor misinterpreted the telegram of the superintendent, and placed the injured car before, when he should have placed it behind, the cabin car, and coupled them together by means of the chain, instead of the usual and uninjured coupling on the good end of the injured car, he was guilty of negligence, which, to say the least, materially contributed to the fatal accident. But the yard master, the brakeman, and the conductor were all fellow servants of the car inspector Shuster, and, if his death was the result of the negligence of any or all of these persons, the defendant would not for this cause be liable in this action. Wheatley v. Philadelphia, W. & B. R. Co. 1 Marv. (Del.) 305, 30 Atl. 660; Creswell v. Wilmington & N. R. Co. 2 Penn. (Del.) 210, 43 Atl. 629. On the other hand, Mr. Holliday, the superintendent, was not a fellow servant of Shuster, but a vice principal; and, if the death of Shuster was caused by the negligence of the superintendent, the defendant would be liable. McKinney, Fellow Servants, p. 292; 3 Elliott, Railroads, § 1321; 4 Thomp. Neg. § 4951. It therefore becomes important to determine whether the superintendent was guilty of negligence in sending to the conductor the telegram given above.

It is within the province of the court to construe written instruments, and it is our duty, with the aid of the testimony in the case, to determine, if we can, the meaning of said telegram. While the order of the superintendent was to take the disabled car on next to the cabin car, it did not state whether it was to be placed before or behind the cabin car. A fair interpretation of the order would be that the disabled car, being next to the cabin car, should be placed where it could be safely carried. There is no evidence that this car was crippled, except at one end, and we can see no reason why it should not have been put behind, and with its uninjured end next to the cabin car, and attached to it by the usual coupling. The uncontradicted testimony is to the effect that the accident would probably not have occurred had the shop car and the cabin car been coupled together with the usual coupling, and that the usual, safe, and proper place for a car with a broken coupler is behind the cabin car. Conductor Larimore testified that, if he had been using his own judgment, he would have put said car behind the cabin car, but that he understood the said telegram to mean that he should put it next before the cabin car, and for that reason he did so. We think that the said telegram was sufficiently explicit, and was not misleading, and that the conductor erred in his interpretation of it, and that in so doing, and in putting said car before the cabin car, and in attaching them together as was done, he was guilty of negligence; but, as before stated, he was the fellow servant of Shuster, and such negligence is not sufficient to charge the defendant in this action.

It is claimed by the plaintiff that the defendant was guilty of negligence in failing to give to its car inspectors proper notice of the dangerous condition of the injured car. It is in evidence that it was the custom of the defendant to give notice to all concerned of the condition and destination of crippled cars by placing upon them what were known as "shop cards," which denoted that they were injured and were to be taken to the shops for repair; and also that the crippled car in this case had on each side of it, in the usual place, a shop card of this character. It will be observed that in this case the injured car, at the time of the accident, was not being used by the defendant in its business. It was empty, had been laid off at Seaford because it was not fit for use, and

was being carried to the shop for repairs. This case differs essentially from that of Rodney v. St. Louis S. W. R. Co. 127 Mo. 676, 28 N. W. 887, 30 N. W. 150, where the defendant was held liable for injuries to an employee while coupling a damaged car. In that case the car had some time before been laid off as damaged and marked as such, but at the time of the accident it was without any danger mark, and was being used in the ordinary business of the company. Under all the circumstances of this case we think that there was no negligence on the part of the defendant in failing to give other notice of the damaged car than was given.

It was urged by the plaintiff that the defendant was guilty of negligence because it failed to provide proper rules for the conduct of its large and complicated business, in that it had no written or printed rule fixing the place in a train in which a crippled car should be put, or prohibiting car inspectors from riding upon a train while it was being run in upon the track for inspection. As the proper place in a train for a crippled car would depend upon the character of its injury, it would be impracticable to prescribe by a general rule the place in which all such cars should be placed. It appears to have been usual for the car inspectors to ride upon trains while being run in on the tracks for inspection, and that this, if not absolutely necessary, was a convenience to them in the prosecution of their work. We are of the opinion that there was no negligence on the part of the defendant in failing to provide rules.

Having found that the death of Shuster was not occasioned by any negligence for which the defendant is liable in this action, it is not necessary to consider whether there was contributory negligence on the part of Shuster. Nor is it necessary for us to consider the assignments of error relating to the rulings of the court below as to the admission and rejection of testimony, as this subject was not discussed in the argument before us, and none of said rulings appear to affect in any way the question as to the negligence of the defendant.

We are of the opinion that there was no evidence upon which the jury would have been justified in finding a verdict for the plaintiff, and that the jury were properly instructed to find for the defendant, and that the judgment below should be affirmed; and it is so ordered.

4 L.R.A.(N.S.)

OREGON SUPREME COURT.

GEORGE D. SPRAGUE et al., Respts.,
v.
SOPHRONIA JESSUP, Appt.

(— Or. —, 83 Pac. 145.)

Specific performance—denial by defendant.

1. The mere denial of a contract by one against whom it is sought to be enforced will not prevent its specific enforcement if the court is satisfied of the truth of the allegations of the complaint.

Sale—statute of frauds—possession.

2. Possession alone of land under a verbal contract, when delivered by the vendor to the vendee, is an act of part performance which will take the case out of the statute of frauds.

(Bean, J., dissents.)

(November 27, 1905.)

Case Note.—It is not infrequently held that the denial by the defendant of the existence of the parol contract of which complainant seeks specific performance will defeat such relief; but the cases so holding are, generally at least, cases in which there was no evidence of part performance or other equitable consideration to take the contract out of the operation of the statute of frauds, and which assume that the failure of the defendant to deny the existence of the parol contract operates as a waiver of the objection based upon the statute of frauds. Cases of this class are not in point here. When, as in SPRAGUE v. JESSUP, part performance or other equitable consideration is relied upon to take the parol contract out of the statute of frauds and permit its specific enforcement, it is very generally assumed that the mere denial by the defendant of the existence of the parol contract will not defeat specific performance. It was expressly so held in Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258, although the court there said that the question was a vexed one. The doubt intimated by the court may have arisen from the cases of the class first mentioned in the note, though the case at bar was one in which part performance was relied upon to take the contract out of the statute of frauds.

In Haight v. Child, 34 Barb. 186, it was held that where, in an action for the specific performance of a contract for the sale of lands, the answer of the defendant sets up a contract essentially different from that stated in the complaint, the latter, if by parol, cannot be specifically enforced. But this seems to have reference to the class of cases first mentioned, and not to cases where part performance is relied upon to

APPEAL by defendant from a decree of the Circuit Court for Marion County in plaintiffs' favor in a suit to enforce specific performance of a contract to convey real estate. Affirmed.

Statement by Moore, J.:

This is a suit to enforce the specific performance of an alleged oral agreement to convey real property. The facts are: That the defendant, Mrs. Sophronia Jessup, a widow, was, on January 13, 1902, the owner in fee of the east half of lots 7 and 8 in block 7, in the city of Salem, the possession of which she delivered to Mrs. Margaret Fennell, who, on the following day, moved into the house on the land, which she occupied until September 20, 1903, when she died intestate, leaving two sons, two daughters, and three grandsons, the latter being the children of a deceased daughter, all of whom, since the death of their ancestor, have had control of the premises. Mrs. Jessup commenced an action against these heirs and their tenants April 8, 1904, to recover the possession of the real property, and the defendants therein having answered, also as plaintiffs herein, filed a complaint, in the nature of a cross bill in equity, alleging that the possession of the premises was delivered to Mrs. Fennell pursuant to the terms of a parol contract, whereby Mrs. Jessup stipulated to convey the land to her March 1, 1902, by a good and sufficient deed, in consideration of $5,350, of which sum $200 was paid January

take the case out of the operation of the statute of frauds.

But though the defendant's denial of the existence of the parol contract sought to be specifically enforced will not prevent such relief, yet, specific performance not being a matter of absolute right, but resting within the discretion of the court, the courts almost uniformly, in stating the degree of proof required to establish the existence of the parol contract in order to warrant such relief, use terms implying that more than a mere preponderance of evidence is necessary.

Thus, the contract must be clearly proved. Rogers Locomotive & Mach. Works v. Helm, 154 U. S. 610, Appx., and 22 L. ed. 562, 14 Sup. Ct. Rep. 1177; Pressed Steel Car Co. v. Hansen, 128 Fed. 444; Senior v. Anderson, 115 Cal. 496, 507, 47 Pac. 454; Allen v. Webb, 64 Ill. 342; Dunn v. McGovern, 116 Iowa, 663, 88 N. W. 938; Pereau v. Frederick, 17 Neb. 117, 22 N. W. 235; Worthington v. Worthington, 32 Neb. 334, 49 N. W. 354; Eyre v. Eyre, 19 N. J. Eq. 102; Cooper v. Carlisle, 17 N. J. Eq. 525; Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297.

The existence of the contract must be clearly and satisfactorily proved. Dalzell v. Dueber Watch Case Mfg. Co. 149 U. S. 315, 37 L. ed. 749, 13 Sup. Ct. Rep. 886; Deeds v. Stephens, 10 Idaho, 332, 79 Pac. 77; Long v. Duncan, 10 Kan. 294; Smith v. Crandall, 20 Md. 482; Reese v. Reese, 41 Md. 554; Hopkins v. Roberts, 54 Md. 317; Taylor v. Von Schraeder, 107 Mo. 206, 16 S. W. 675; McTague v. Finnegan, 54 N. J. Eq. 454, 35 Atl. 542; May v. Cavender, 29 S. C. 598, 7 S. E. 489; Mudgett v. Clay, 5 Wash. 109, 31 Pac. 424; Bowen v. Warner, 1 Pinney (Wis.) 606.

The agreement must be clearly and explicitly established. Gill v. McAttee, 2 Md. Ch. 255.

The evidence of the contract must be clear and precise. Sands v. Sands, 112 Ill. 225.

It must be clear, certain, and unequivocal. Langston v. Bates, 84 Ill. 524, 25 Am. Rep. 466; Shovers v. Warrick, 152 Ill. 355, 38 N. E. 792.

It must be clear, certain, and unambiguous. Barrett v. Geisinger, 148 Ill. 98, 35 N. E. 354.

The contract as alleged must be fully established. Semmes v. Worthington, 38 Md. 298.

The evidence must be clear, full, and free from suspicion. Harris v. Elliott, 45 W. Va. 245, 32 S. E. 176.

Evidence must be clear, definite, and conclusive. Briles v. Goodrich, 116 Iowa, 517, 90 N. W. 354.

The evidence must not be doubtful, but full, clear, and convincing. Knight v. Knight, 51 W. Va. 518, 41 S. E. 905.

Where all the proof leaves it in doubt whether an alleged agreement to convey lands was an obligatory contract or a declaration of a purpose to confer a benefit, specific performance will not be decreed. Wolfinger v. McFarland, 67 N. J. Eq. 687, 54 Atl. 862.

The proof must be full, satisfactory, and indubitable. Purcell v. Miner (Purcell v. Coleman) 4 Wall. 517, 18 L. ed. 436.

The contract must be sufficiently and satisfactorily proved. Ackerman v. Ackerman, 24 N. J. Eq. 315.

The evidence must be such as to leave no reasonable doubt as to the existence of the contract. Beall v. Clark, 71 Ga. 818; Waters v. Howard, 1 Md. Ch. 112; Semmes v. Worthington, *supra;* Brewer v. Wilson, 17 N. J. Eq. 180; Morrison v. Searight, 4 Baxt. 476.

In Dalzell v. Dueber Watch Case Mfg. Co. *supra.* the Supreme Court said that the fact that the case was one on which different minds might well reach a contrary opinion on the merits furnished a strong reason for denying specific performance.

The contract must be established with reasonable certainty. Shropshire v. Brown, 45 Ga. 175.

The existence of the contract must be established by the clear preponderance of the evidence. Fleischman v. Moore, 79 Ill. 539.

A mere preponderance of evidence is not sufficient. Dewey v. Spring Valley Land Co. 98 Wis. 83, 73 N. W. 565.

Something more than a bare preponder-

13, 1902, $2,500 was payable March 1st of that year, and the remainder March 1, 1903, the last payment to be secured by a mortgage of the real property, and to bear interest for one year; that Mrs. Fennell, on March 1, 1902, tendered to Mrs. Jessup $2,500, and also offered to execute the mortgage specified, but the latter refused to make the deed, whereupon the entire sum, including interest, was deposited with the clerk of the circuit court for Marion county as a consideration for the conveyance. The answer denied the material allegations of the complaint, and, the cause being tried, Mrs. Jessup was required to execute to the heirs of Mrs. Fennell a warranty deed to the premises, from which decree she appeals.

Mr. L. H. McMahan, for appellant:

Specific performance will be refused where the contract is vitiated by uncertainty.

Odell v. Morin, 5 Or. 98; Plymale v. Comstock, 9 Or. 320; Wagonblast v. Whitney, 12 Or. 88, 6 Pac. 399; Kelly v. Ruble, 11 Or. 91, 4 Pac. 593; Adams v. Adams, 17 Or. 254, 20 Pac. 633.

At no time did Mrs. Jessup and Mrs. Barr arrive at a clear understanding of what they intended to do.

Fry, Spec. Perf. §§ 417, 418; Pom. Spec. Perf. §§ 112, 113, 126; Waterman, Spec. Perf. §§ 196, 198.

On motion for rehearing.

If, from all the evidence given by both plaintiff and defendant, the court is left in doubt as to the entire contract, or even as to any of its material terms, it will not grant the remedy.

Pom. Spec. Perf. 2d ed. § 236; Knoll v. Harvey, 19 Wis. 100; Shepherd v. Benn, 9 Gill, 43; 2 Story, Eq. § 761.

Messrs. George G. Bingham and P. H. D'Arcy, for respondents:

An agreement for the sale of land must be certain and definite, and the testimony offered must be sufficient and ample.

Odell v. Morin, 5 Or. 96; Plymale v. Comstock, 9 Or. 321.

The courts will not allow the statute of frauds to be used as a cover for fraud and bad faith.

Wagonblast v. Whitney, 12 Or. 88, 6 Pac. 399.

An agreement which the statute of frauds would affect is taken out of the same by part performance.

Wallace v. Scoggins, 17 Or. 476, 17 Am. St. Rep. 749, 21 Pac. 558; Cooper v. Thomason, 30 Or. 162, 45 Pac. 296.

Moore, J., delivered the opinion of the court:

It is admitted that the sum of $200 was received by Mrs. Jessup January 13, 1902, but it is insisted by her counsel that this sum was paid on account of the purchase of certain carpets, furniture, etc.; that the possession of the premises was delivered to Mrs. Fennell pursuant to a lease thereof, and that no agreement was entered into for the sale of the real property. These state-

ance of the evidence is required to entitle the plaintiff to a decree declaring a resulting trust and for specific performance. Rice v. Rigley, 7 Idaho, 115, 61 Pac. 290.

There must not only be full evidence, but a decided preponderance in favor of the existence of the contract; affording to the mind a conviction not less satisfactory than that which arises from a contract in writing. Loose conversations, inadvertent assertions, inchoate agreements, ought to be carefully guarded against; and where it is understood that a court of equity will not lend its aid to enforce a parol agreement unless it be established by plenary evidence, a salutary caution will be inspired in those who, in good faith, make such contracts in the future. Dark v. Bagley, 7 N. C. (3 Murph.) 33.

The proof must be clear, definite, and conclusive, and must show a contract leaving no *jus deliberandi* or *locus pœnitentiæ*. It cannot be made by mere hearsay or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had no reason to recollect from interest in the subject-matter. Purcell v. Miner, *supra*.

Loose declarations and admissions of a person, said to have been made shortly prior to his death, are insufficient unless strongly corroborated by evidence of so cogent a character as to leave no room for reasonable doubt in the mind of the chancellor who hears the cause. Berry v. Hartzell, 91 Mo. 132, 136, 3 S. W. 582.

The uncorroborated testimony of complainant himself as to the existence of a verbal contract for the conveyance of land, contradicted by the testimony of a disinterested witness, is insufficient to establish the existence of the contract on a bill for specific performance. Phœnix Ins. Co. v. Rink, 110 Ill. 538.

The testimony of the plaintiff, corroborated by admissions of defendant, made in conversations with third persons, is insufficient to establish the existence of the contract, where it is denied by the defendant under oath as a witness. Wilmer v. Farris, 40 Iowa, 309.

Specific performance will be denied where the evidence is unsatisfactory as to whether the alleged contract was ever entered into, and twenty years have elapsed since it was said to have been made. Pennypacker v. Maupin, 96 Va. 461, 31 S. E. 607.

But a mere conflict of testimony as to the existence of the contract is not of itself a sufficient ground for refusing relief. It is sufficient if, from the whole evidence of the case, the contract can be determined with reasonable certainty. Mudgett v. Clay, 5 Wash. 109, 31 Pac. 424.

ments are denied by plaintiffs' counsel, who maintain that Mrs. Jessup agreed to sell the premises and certain carpets, furniture, etc., to Mrs. Fennell for an entire consideration of $5,350, receiving in part payment a sum of money evidenced by the following memorandum:

Salem, Oregon, Jan. 13, 1902.

Received of Mrs. M. Fennell $200, to bind bargain on house.

Mrs. S. Jessup.

—and that the possession of the real property was delivered to the purchaser in pursuance of a parol agreement to convey the premises to her.

The testimony shows that for some time prior to January 13, 1902, Mrs. Jessup had been trying to sell her real property, for which she asked $5,500, and that Mrs. Fennell desired to purchase it, but was unable to do so, unless she could sell a farm for which she had been demanding $5,000. The latter was offered $4,500 for her property, and, concluding to accept the bid, she so notified the persons making it, who gave her $50 on account of the purchase, agreeing to pay $2,500 March 1, 1902, and the remainder in a year therefrom. Mrs. Fennell, having effected a sale of her farm, immediately paid Mrs. Jessup $200, taking the receipt hereinbefore set out, and three days thereafter a contract was prepared, which contained, *inter alia*, the following clause: "In case the said Fennell shall not be able to sell her farm on or about the 1st day of March, 1902, and make payments herein agreed, then it is understood that the said Fennell has the right to occupy the said real estate from January 15, 1902, to April 15, 1903, at $20 per month, the amount paid on the above to be applied on the furniture purchased." Mrs. Jessup refused to sign such writing, and so notified Mrs. Fennell, who thereafter made some changes in and improvements upon the house. It is impossible to reconcile the conflicting testimony given by the respective parties. Mrs. Fennell's daughters, who conducted the negotiations for her, each testify that the consideration agreed upon for the purchase of the land in question was $5,350, including the carpets and furniture, and that of this sum they paid for their mother the specified $200. Mrs. Jessup testifies that she leased the premises to Mrs. Fennell for a term of fifteen months, and gave possession thereof, receiving $200 for the carpets and furniture which she sold. The testimony further shows that Mrs. Jessup, going to a room by herself, prepared the receipt mentioned, but she says she wrote it at the request of Mrs. Fennell's daughter, who suggested the form thereof. As an excuse for incorporating into the receipt the words "to bind bargain on house," Mrs. Jessup further states that before January 13, 1902, she had never transacted any business, that her husband died about three months prior thereto, after an illness of about a year, and that his sickness and death so injured her health and affected her mind that, with her ignorance of business affairs, she wrote the receipt as requested. The use of the phrase "to bind bargain on house" might relate to a lease of that building, if the $200 had been paid on account thereof, but these words are rendered inapplicable to such a contention by Mrs. Jessup's testimony, which is to the effect that the sum was paid for the carpets and furniture. The wording of the receipt, therefore, corroborates the theory of the plaintiffs that the payment which it evidences was made as a part of the purchase price of the premises.

The mental condition of a party against whom the specific performance of an oral contract to convey land is sought is an element to be considered in determining the circumstances attending the making of the agreement, to discredit the transaction. Waterman, Spec. Perf. § 159. No testimony was given tending to show to what extent Mrs. Jessup's mind was affected by the care of her husband during his last illness, or to what degree her reason was impaired in consequence of his death, except her general statements as indicated. As tending to show that Mrs. Fennell's understanding in relation to the agreement entered into January 13, 1902, was for the purchase of the property, the testimony discloses that she sold her farm for $500 less than she had been asking for it, in order to raise the money with which to purchase the property in question. It further appears that in September, 1901, she rented, for the term of one year, a new cottage, for which she purchased new carpets, and caused them to be laid on the floors, secured new shades, which she hung at the windows, procured wood for use in the winter, which she caused to be sawed, split, and stored away, and that she was living in the cottage with her family when she entered into the contract alleged in the complaint. Mrs. Fennell moved into the Jessup house January 14, 1902, and, as she could use only one of her new carpets therein, she sold the others, and the window shades thtat she had used in the cottage for a few months, at about one third of their original cost, and also moved the wood which she had stored for winter's use. It would appear that after January 13, 1902, when the receipt was given, Mrs. Fennell, fearing that the persons who had agreed to purchase her farm might forfeit the small payment made and fail to keep their part of the contract, sought to avoid a

suit by Mrs. Jessup for specific performance by treating the agreement to purchase the property in question as a lease thereof, in case Mrs. Fennell could not raise the money, and to consider the payment of $200, made on account of the purchase, as the consideration for the carpets and furniture. Mrs. Winnifred O. Barr, a daughter of Mrs. Fennell, testified, however, that the writing was suggested by Mrs. Jessup, and the latter does not contradict the statement. An attorney who prepared the contract testified that he made it at Mrs. Barr's solicitation, but that the provision quoted, binding upon Mrs. Jessup, was inserted without prompting from anyone. The memoranda referred to tend to corroborate Mrs. Jessup's theory, but the modification adverted to, never having been consummated, did not constitute a contract, or change the terms of the agreement of January 13, 1902.

The denial of Mrs. Jessup, and the assertion of Mrs. Fennell's daughters, in respect to the agreement claimed to have been entered into, require a consideration of the circumstances attending the transaction and of the testimony, which corroborates or contradicts that of the respective parties. It seems improbable that Mrs. Fennell, when she had rented a new cottage which she had completely furnished, and which she was entitled to occupy for about nine months, should desire to move into another rented house, when, by so doing, it would entail such an expense as she incurred. So, too, it appears inexplicable that she should agree to sell her farm for $500 less than she had been demanding for it, when she was under no obligation to do so, unless the sale was effected to enable her to purchase Mrs. Jessup's property. As a circumstance tending to show the value of Mrs. Fennell's farm, the testimony shows that in a few months after she disposed of it, without any improvement having been made thereon, one of the purchasers conveyed an undivided one-third interest therein to his cotenants for $2,000, thus indicating that the land was worth more money than she received for it. The receipt given to evidence the payment of $200, though not conclusive, is an admission corroborative of the testimony of plaintiffs' witnesses to the effect that Mrs. Jessup purposely signed it, as therein stated, "to bind bargain on house." Gideon Steiner, who had been engaged in business in Salem many years, appearing as plaintiffs' witness, testified that, having met Mrs. Jessup on the street, she informed him that she had sold her property, and, in answer to his inquiry as to whether she had not received about $5,000 for it, replied: "Yes; I got more than that." Fred Hurst, a real estate dealer, as plaintiffs' witness, testified that Mrs. Jessup listed her property with him for sale; that he found a buyer therefor who would pay $5,000, and so notified her by telephone, whereupon she replied that she had secured a purchaser, and hung up the receiver without disclosing who it was. Mrs. Jessup, referring to the statement respecting the sale of the property imputed to her by Steiner, testified that she did not remember of having any such conversation with him, and she does not attempt to deny Hurst's statement that she informed him she had secured a purchaser for the property.

We think a careful examination of all the evidence, viewed in the light of the circumstances attending the transaction, necessarily leads to the conclusion that Mrs. Jessup, on January 13, 1902, agreed to sell to Mrs. Fennell her real property and the carpets and furniture in her house for $5,350, receiving the sum of $200 in part payment thereof, and that the purchaser and her family moved into the house in pursuance of the terms of such agreement, and not in accordance with any lease thereof. The certainty of such a contract must be established by evidence sufficient to satisfy a court of equity of the truth of the allegations of the complaint. Odell v. Morin, 5 Or. 96; Plymale v. Comstock, 9 Or. 318. If the denial of a party against whom the specific performance of an oral contract to convey real property is sought to be enforced is sufficient to defeat the right, it is quite probable that this equitable remedy would soon cease to be efficacious. It is possible that the conclusion we have reached may be doing an injustice to Mrs. Jessup, whose statements made under oath in relation to the lease of the premises may be true, and the testimony of plaintiffs' witnesses in respect to the alleged sale of the land false; but courts are governed by judges who are only human, and whose deductions, based on issues of fact, depend upon evidence which they deem to be true, and, if they mistake in their honest convictions in respect to the testimony produced, the fault lies in the method of determining the fact, rather than in the agency employed.

It will be remembered that all the permanent changes to the house were made by Mrs. Fennell after she knew that Mrs. Jessup had refused to sign the written memorandum. The part execution of an oral contract to convey land, which is sufficient to take the case out of the statute of frauds, must be some act done upon the premises with the actual or constructive assent of the party against whom the specific performance of the terms of the agreement is sought to be enforced. Waterman, Spec. Perf. § 261; Wagonblast v. Whitney, 12 Or. 83, 6 Pac. 399. In the case at bar there is nothing

but the mere possession of the premises by Mrs. Fennell that can be regarded as having been taken with the knowledge and consent of Mrs. Jessup, and it remains to be seen whether or not that act, in connection with a payment of a part of the purchase price and a tender of the remainder, constitutes such part performance of the oral agreement as to entitle plaintiffs to the equitable relief invoked. The parties to this suit not being related by affinity or consanguinity, no presumption of a license to occupy the premises can be indulged, as in cases where the owner of real property permits a person to whom he owes a legal or a moral duty to take possession thereof, in which latter instance, possession, in the absence of valuable improvements to the estate, is not a sufficient part performance. Barrett v. Schleich, 37 Or. 613, 62 Pac. 792; Pugh v. Spicknall, 43 Or. 489, 73 Pac. 1020, 74 Pac. 485. A text writer, in speaking of the acts which amount to part performance of an oral contract to convey real property, says: "Possession alone of land, under a verbal contract, when delivered to the vendee, . . . is an act of part performance which takes the case out of the statute of frauds, even without the additional circumstances of the payment of consideration or the making of improvements. This rule is settled by an overwhelming weight of authority in England and in this country, but has been disapproved by the courts of one or two states, which have, until recently, only possessed a very limited equity jurisdiction." Pom. Spec. Perf. of Contracts, 2d ed. § 115. The cases cited by the learned author in the notes to this section amply support the legal principle announced.

We think the testimony shows that the parol agreement relied upon is certain and definite in its terms, that the acts proved as part performance were done under and in pursuance of the identical contract alleged in the complaint, and that a refusal to execute the deed agreed upon would operate as a fraud upon the plaintiffs, and hence the decree should be affirmed; and it is so ordered.

Bean, J., dissenting:

The specific performance of a parol contract for the conveyance of real estate will not be enforced under any circumstances unless the terms of the contract are shown, by full, complete, and satisfactory proof, to have been so precise that neither party could reasonably misunderstand them. Odell v. Morin, 5 Or. 96; Wagonblast v. Whitney, 12 Or. 83, 6 Pac. 399; Knight v. Alexander, 42 Or. 521, 71 Pac. 657. I am not satisfied that this requirement has been met by the testimony in this case.

A petition for rehearing having been filed, **Hailey, J.**, on March 20, 1906, handed down the following additional opinion:

This case was argued, submitted, and decision rendered while my predecessor was Chief Justice, and the petition for rehearing was filed after my appointment. I have carefully examined and considered the record of the case, together with the motion and argument filed for rehearing, which is based mainly upon the insufficiency of the evidence to support the decree entered, it being claimed that Mrs. Fennell and Mrs. Jessup did not enter into a contract that was clear, certain, and unambiguous in its terms, for the reasons: First, the evidence does not show that Mrs. Fennell entered into any contract with Mrs. Jessup, but rather that Mrs. Fennell's daughters made the contract, if any was made, and stress is laid upon the use of the words "we" and "us" by the daughters, as referring to themselves, and not to their mother. Second, there is no sufficient evidence of authority on the part of the daughters, to act as agents for their mother. It is also urged that there is no proof that Mrs. Fennell ever took possession of the property, and that there is no proof of the identity of the property in controversy.

Before specific performance of a contract will be decreed it must be shown by full, complete, and satisfactory proof to be clear, certain, and unambiguous in its terms. This is the unquestioned law to be applied to the facts in this case. The testimony of the defendant shows that she was anxious to sell her home place, the property in controversy, for she had placed it in the hands of a real estate agent for that purpose, and had personally called upon Mrs. Fennell and talked with her, and at other times with her daughters, about selling it to her, the price she asked being $5,500.00. She also knew that Mrs. Fennell "had been trying to sell the farm for a long time," and they talked back and forth, and finally she agreed to take $5,300.00, but they would not give it, and she went home, and Mrs. Winkler, one of Mrs. Fennell's daughters, came over, and defendant finally said, "I will split the difference and we will call it $5,150.00; but that had nothing to do with the furniture. The furniture was a different thing altogether. . . . They said they could not buy unless they sold the farm." Defendant further testified that she received from Mrs. Barr $200.00 and gave her a receipt written by defendant, acknowledging payment of that sum by Mrs. M. Fennell to bind the bargain on the house. That, on the day following the payment of the $200, Mrs. Fennell and her family moved onto the premises and took possession. In answer

to a question asked her, if the contract prepared by Mrs. Barr on the 16th, and which she refused to sign, had been so written that it would have bound them to take the land upon the terms in it. would she have signed it, she said, "I presume I would. I do not know exactly. I presume I would." Her reason for not signing the contract being, as stated in answer to a former question, "I thought they had all the advantages. They seemed to be taking advantage of me, my ignorance of business; I suppose they wanted to bind me, and not themselves. Not agreeing to take it unless they wanted to, I thought it was a little too one-sided." Then again, in answer to the question, "What was the price you were willing to take for the land?" she answered, "I agreed to take $5,150.00." The testimony on the part of the plaintiffs shows that Mrs. Fennell owned a farm and was desirious of buying the property in controversy if she could sell her farm, and with that end in view she had talked with defendant and had her daughters talk with her, and on the 13th of January, 1902, Mrs. Fennell received from Mr. Goin the sum of $50.00 as part payment of the purchase price of $4,500.00 for her farm, $2,500.00 of which was to be paid on March 1, 1902, and the remainder one year from that date; and that, relying upon this sale of the farm, she, through her daughters, entered into the contract with the defendant to pay the defendant $5,350.00 for the property in controversy, including the carpets and furniture, and upon that day did pay $200.00 as a part of the purchase price, and received the receipt above mentioned, and on the following day removed from the house in which she was then living into the purchased property, and there made improvements, and also sold at a loss personal property which she had in her other residence.

It is shown by the testimony of two disinterested witnesses for the plaintiffs that the defendant stated to them that she had sold her property.

That the defendant was dealing with Mrs. Fennell is shown by her own testimony wherein she testifies to visiting Mrs. Fennell for the purpose of selling her the property, and also by the receipt she gave for the $200.00, both of which facts show she did not think she was dealing with Mrs. Fennell's daughters. The use of the words "we" and "us" by these daughters evidently referred to their mother, for defendant understood they were acting for their mother, who was to furnish the means to purchase the property by selling her farm. The foregoing testimony, together with that set out in the former opinion, I think proves a contract between defendant and Mrs. Fennell which was clear, certain, and unambiguous in its terms: and such proof is full, complete, and satisfactory. The contention on the part of defendant, in explanation of the possession of the premises by Mrs. Fennell, is that she rented her the premises for a period of fifteen months, beginning January 15, 1902; but the proof of this is neither full, complete, nor satisfactory, and is contradicted by the two disinterested witnesses heretofore mentioned.

It is urged, however, that there is no proof that Mrs. Fennell ever took possesion of the property. This contention is not well-founded for the evidence shows that defendant sought to sell to Mrs. Fennell, issued a receipt for $200.00 to her, and looked to her as the responsible party and principal who was to furnish the money, and these facts, coupled with her subsequent entry thereon, are sufficient proof of her taking possession.

The only remaining question, then, is that of the identity of the property in controversy. This suit is brought by plaintiffs for the specific performance of a contract to convey certain real property described in the complaint, and to restrain defendant from prosecuting an action of ejectment against the plaintiffs to recover possession of the same premises. The complaint describes the premises, and after setting forth the commencement of the ejectment action by defendant as plaintiff against plaintiffs as defendants, to recover possession of the premises described, alleges a contract whereby defendant sold and agreed to convey "said real premises" to one Margaret Fennell, whose heirs are among the plaintiffs. The answer admits the commencement of the ejectment action, "to recover possession of the same lands and premises in question in this suit;" and that defendant "was, on the 15th day of January, 1902, and for a long time prior thereto had been, the owner in fee simple and in possession of the lands and premises described in the complaint herein." Since there is only one price of property described in the complaint, and defendant admits that her action in ejectment was for the purpose of recovering the possession "of the same lands and premises in question in this suit," I think there can be no question about the identity of the property in controversy, as it is admitted by the answer, and it is unnecessary for any of the witnesses to describe it with particularity. The only property in controversy between the parties was that described in the complaint, the correct description of which is admitted by the answer and referred to as the same lands and premises in question in this suit.

I therefore concur in the opinion of Mr. Justice **Moore**, heretofore written herein, and the motion for rehearing is denied.

OREGON SUPREME COURT.

STATE OF OREGON, Respt.,
v.
MOSES TAYLOR, Appt.

(— Or. —, 84 Pac. 82.)

Arson—attempt.

An attempt to commit arson is made by employing and paying persons to do the act, furnishing them materials and a horse, showing them how to start the fire, and starting them on their way, although the persons employed do not in fact intend to carry out their agreement, and one is acting with the knowledge of the owner of the building, for the purpose of entrapping the others.

(January 2, 1906.)

APPEAL by defendant from a judgment of the Circuit Court for Umatilla County convicting him of an attempt to commit arson. Affirmed.

The facts are stated in the opinion.

Messrs. **Carter, Raley, & Raley and Peterson & Peterson,** for appellant:

The overt act necessary to constitute one of the elements in an attempt at arson must be an act toward the actual crime,—that is, toward the burning.

1 McClain, Crim. Law, § 224; Patrick v. People, 132 Ill. 529, 24 N. E. 619; 1 Wharton, Crim. Law, § 181; State v. Baller, 26 W. Va. 90, 53 Am. Rep. 68; Kelly v. Com. 1 Grant, Cas. 484; Hicks v. Com. 86 Va. 223, 19 Am. St. Rep. 891, 9 S. E. 1024; Com. v. Eagan, 190 Pa. 10, 42 Atl. 374.

For a man to make up his mind to commit

Case Note.—The majority of the cases as to what is sufficient to constitute an attempt to commit arson arise under the various statutory provisions of the different states.

In McDermott v. People, 5 Park. Crim. Rep. 102, which follows People v. Bush, 4 Hill, 133, both of which cases are cited in STATE v. TAYLOR, where the statute reads "every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, and shall be prevented or intercepted in executing the same, shall be, upon conviction, punished," it was held that proof that the defendant furnished combustible materials to another, and promised him a reward if he would set fire to a certain building, was sufficient to warrant conviction of the charge of attempted arson.

And in Mackesey v. People, 6 Park. Crim. Rep. 114, under the same statute, it was held that, where the prisoner gave matches to a third person and hired him to set fire to certain property, the conviction of the defendant of the crime of attempted arson was proper, although there was no actual burning.

But in McDade v. People, 29 Mich. 50, where the statute reads "every person who shall set fire to any building, . . . or shall, by any other means, attempt to cause any building to be burned, shall be punished," etc., it was held that an information which alleged that the defendant solicited a third party to set fire to and burn a certain building, and furnished him with oil and matches with which to do the act, was insufficient upon which to base a charge of attempted arson.

In Com. v. Hutchinson, 6 Pa. Super. Ct. 405, it was held that soliciting another to commit the misdemeanor of setting fire to a store was itself a misdemeanor and indictable, although there was no statute to that effect; but the court based its decision upon the broad ground that the distinction between felonies and misdemeanors was merely arbitrary, and the crime of arson, though the specific act charged was classed as a misdemeanor, was a very serious offense.

The point frequently arises where the sufficiency of the indictment is questioned. In Mary v. State, 24 Ark. 44, 81 Am. Dec. 60, the court granted an arrest of judgment upon conviction on an indictment charging that defendant set fire to a certain building with intent to injure the owner thereof. The court held that, as under the statute defining arson, actual burning must be charged, and under the statute defining attempted arson, intent to burn must be charged, the indictment was fatally defective under either statute.

In People v. Giacamella, 71 Cal. 48, 12 Pac. 302, it was held that under the penal code of that state the information for an attempt to commit arson was sufficient which alleged that the defendant "did in the nighttime . . . wilfully, maliciously, and feloniously attempt to burn, with intent then and there to destroy a building."

In Com. v. Weiderhold, 112 Pa. 584, 4 Atl. 345, it was held that an arrest of judgment was properly made where the defendant had been acquitted on the first count of an indictment charging him with a felonious attempt to burn an outhouse connected with a dwelling, and had been convicted upon the second count, which alleged the same offense, but which omitted the word "felonious," the court holding that the word "felonious," being used in the Penal Code to define the crime, must be used in the indictment in order to sustain the crime charged.

In Kinningham v. State, 119 Ind. 332, 21 N. E. 911, it was held that an indictment which charges in general terms that the defendant "did unlawfully, feloniously, and wilfully attempt to set fire to, and burn and destroy, a certain building," was bad on the ground that no unlawful act was charged, as an attempt was no more than an intention, and a guilty intention alone was insufficient. And when the case came before the court again in 120 Ind. 322,

a crime and to make preparations to commit it is not an attempt.

Reg. v. Roberts, Dears. C. C. 539, 7 Cox, C. C. 39; Reg. v. Eagleton, Dears. C. C. 515; United States v. Stephens, 8 Sawy. 116, 12 Fed. 52; 1 McClain, Crim. Law, § 224; 1 Clark & M. Criminal Law, § 123; Uhl v. Com. 6 Gratt. 706; 3 Am. & Eng. Enc. Law, 2d ed. p. 263.

Procuring or loading a gun or buying poison or walking to a particular place with intent to kill another is not enough to make one guilty of an attempt to commit murder.

Reg. v. Cheeseman, 9 Cox, C. C. 100; Stabler v. Com. 95 Pa. 318, 40 Am. Rep. 653; Hicks v. Com. *supra;* Reg. v. Taylor, 1 Fost. & F. 511.

Solicitation to commit a crime is not indictable as an attempt.

Cox v. People, 82 Ill. 191; Hicks v. Com. *supra;* Smith v. Com. 54 Pa. 209, 93 Am. Dec. 686.

Even if accompanied by offers of reward.

State v. Butler, 8 Wash. 194, 25 L.R.A. 434, 40 Am. St. Rep. 900, 35 Pac. 1093; State v. Baller, *supra;* Groves v. State, 116 Ga. 516, 59 L.R.A. 598, 42 S. E. 755; People v. Youngs, 122 Mich. 292, 47 L.R.A. 108, 81 N. W. 114; Stabler v. Com. *supra.*

There must have been a completed crime by someone before anyone can be punished as an accessory or as a principal for being concerned in the crime.

Love v. People, 160 Ill. 508, 32 L.R.A. 139, 43 N. E. 710; Epeiden v. State, 3 Tex. App. 156, 30 Am. Rep. 126; People v. Collins, 53 Cal. 185; Allen v. State, 40 Ala. 334, 91 Am. Dec. 476; Rex v. Egginton, 2 East, P. C. 666; Reg. v. Johnson, Car. & M. 218; M'Daniels' Case, Fost. C. L. 121; Reane's Case, 2 East, P. C. 734; Kemp v. State, 11 Humph. 320.

Messrs. **Gilbert W. Phelps** and **John McCourt**, for the State:

The overt act which is relied upon as an attempt need not be an act which is a part of the criminal transaction itself, but may be one which, although remote, leads up to it; and solicitation of another to commit a crime, accompanied by an act directed toward the crime, though very remote, is sufficient to constitute the attempt to commit a crime.

State v. Bowers, 35 S. C. 262, 15 L.R.A. 199, 28 Am. St. Rep. 847, 14 S. E. 488; People v. Bush, 4 Hill, 133; McDermott v. People, 5 Park. Crim. Rep. 102; People v. Lawton, 56 Barb. 126; People v. Moran, 123 N. Y. 254, 10 L.R.A. 109, 20 Am. St. Rep. 732, 25 N. E. 412; People v. Sullivan, 173 N. Y. 122, 63 L.R.A. 353, 93 Am. St. Rep. 582, 65 N. E. 989; People v. Gardner, 144 N. Y. 119, 28 L.R.A. 699, 43 Am. St. Rep. 741, 38 N. E. 1003; People v. Mills, 41 Misc. 195, 83 N. Y. Supp. 947; People v. Webb, 127 Mich. 29, 86 N. W. 406; People v. Stites, 75 Cal. 570, 17 Pac. 693; Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55; Com. v. Flagg, 135 Mass. 545; Com. v. Randolph, 146 Pa. 83, 28 Am. St. Rep. 782, 23 Atl. 388; Com. v. McLaughlin. 105 Mass. 460; Griffin v. State, 26 Ga. 493; State v. Hayes, 78 Mo. 307.

Even solicitation alone has by many courts been held a sufficient act toward a crime to constitute an attempt.

Bishop, Crim. Law, 7th ed. § 767; King v. Higgins, 2 East, 5; Rogers v. Com. 5 Serg. & R. 463; Josslyn v. Com. 6 Met. 236;

22 N. E. 313, it was held that, under the clauses of the Indiana law which provide the penalty for the crime of arson, and which read "the property so burned being of the value of $20 or upwards," and "upon conviction therefor shall be imprisoned in the state prison not more than twenty-one years nor less than one year, and fined not exceeding double the value of the property destroyed," no crime is committed unless property of the value of $20 is actually burned.

In Com. v. Flynn, 3 Cush. 529, it was held that it was not necessary in an indictment for an attempt to commit arson, under Rev. Stat. chap. 133, § 12, of that state, to describe the materials used.

In State v. Johnson, 19 Iowa, 230, where the statute provides that if any person sets fire to any building or to any material with intent to cause any such building to be burned, he shall be punished, it was held, that a crime was charged by an indictment alleging that the defendant, intending to set fire to the barn, placed a lighted candle in hay and grain which were in the barn, intending to set fire to the hay, and so to the barn.

In State v. Dennin, 32 Vt. 158, where the statute reads "if any person shall wilfully and maliciously set fire, with intent to burn, to the dwelling house of another," it was held that it was not necessary, in order to convict a person of the charge of attempted arson, that there should have been an actual burning, but it was necessary only to show that fire was applied directly to, or in immediate contact with, the building.

In Kinchien v. State (Fla.) 39 So. 467, where the statute reads "whoever wilfully and maliciously burns the dwelling house or any building adjoining such dwelling house, or wilfully and maliciously sets fire to any building by the burning whereof such dwelling house was burned," it was held that the indictment was sufficient to sustain the conviction of arson, which charged that the defendant did unlawfully, wilfully, and maliciously set fire to and attempt to burn a certain dwelling house.

In Benbow v. State, 128 Ala. 1, 29 So. 553, and in Young v. Com. 12 Bush, 243, it was held that the defendant might be convicted of attempted arson under an indictment charging arson.

Com. v. McDonald, 5 Cush. 365; State v. Wilson, 30 Conn. 500; Kunkle v. State, 32 Ind. 220; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; Com. v. Jacobs, 9 Allen, 274; People v. Jones, 46 Mich. 441, 9 N. W. 486; State v. Beal, 37 Ohio St. 108, 41 Am. Rep. 490; State v. Utley, 82 N. C. 556; Clark v. State, 86 Tenn. 511, 8 S. W. 145; Queen v. Goodall, 2 Cox, C. C. 41; Reg. v. M'Pherson, Dears. & B. C. C. 197; Reg. v. Collins, Leigh & C. C. C. 471; Rex v. Holden, Russ. & R. C. C. 154.

Mr. A. M. Crawford, Attorney General, also for the State.

Bean, Ch. J., delivered the opinion of the court:

Section 2159, Bellinger & C. Anno. Codes & Statutes, reads: "If any person attempts to commit any crime, and in such attempt does any act towards the commission of such crime, but fails or is prevented or intercepted in the perpetration thereof, such person, when no other provision is made by law for the punishment of such attempt, upon conviction thereof shall be punished," etc. Under the provisions of this section the defendant, Taylor, was indicted and convicted of an attempt to commit the crime of arson. The proof was that he entertained an enmity against John Bannister, one of his neighbors, because of some testimony Bannister had given in a divorce suit. Apparently for revenge, he desired to burn and destroy Bannister's barn and wheat. He solicited one McGrath to do the burning, who, in turn, asked one Palmer to assist in the commission of the crime. Palmer informed his employer, a friend of Bannister, of the proposed plan, and was advised to allow the matter to proceed, and that arrangements would be made to apprehend the parties. After some preliminary negotiations Taylor, McGrath, and Palmer met in the back room of a saloon in Athena on July 30, 1904, and Taylor there engaged McGrath and Palmer to burn Bannister's barn and wheat, agreeing to pay them $100 for so doing, and at the same time showed them how to start a slow-burning fire with a pair of overalls, saying he had tested it. After the conference at the saloon the parties separated, agreeing to meet that night about 12 o'clock at Taylor's place, from which McGrath and Palmer were to start to Bannister's for the purpose of consummating the crime. Palmer advised Bannister's friends of what was about to take place, and they made arrangements to lie in wait and intercept the parties. At the appointed time Palmer went to Taylor's place and there met Taylor and McGrath, who were waiting for him. Taylor had his own horse saddled and ready for McGrath to ride. He produced a pair of overalls, and after again showing McGrath and Palmer how to use them in starting a fire tied them on the saddle of his horse and paid McGrath $100 in money. McGrath and Palmer then started towards Bannister's with the purpose, so Taylor supposed and believed, of setting the fire, with a parting expression from him of "Good luck go with you." Taylor "laid awake two hours to see the fire," but as McGrath and Palmer were going towards Bannister's they noticed fresh tracks in the road, and when they approached within 20 feet of the barn observed two or three buggies in the barnyard, which frightened McGrath, who was afraid to go on with the enterprise for fear they were being watched, and so it was abandoned. McGrath and Palmer were both witnesses for the prosecution. Palmer testified that he never had any intention of committing the crime, and McGrath said that he did not intend to set the fire, but that the arrangement was that it should be started by Palmer. Upon these facts the question for decision is whether the defendant was legally convicted of an attempt to commit the crime of arson.

The question as to what constitutes an attempt to commit a crime is often intricate and difficult to determine, and no general rule has or can be laid down which can be applied as a test in all cases. Each case must be determined upon its own facts, in the light of certain principles which appear to be well settled. An attempt is defined as an "intent to do a particular criminal thing, with an act toward it falling short of the thing intended." 1 Bishop, New Crim. Law, § 728. Or, according to Wharton: "An attempt is an intended, apparent, unfinished crime." 1 Wharton, Crim. Law, 9th ed. § 173. Another author says: "An attempt to commit a crime is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the substantive crime." 3 Am. & Eng. Enc. Law, 2d ed. p. 250. An indictable attempt, therefore, consists of two important elements: First, an intent to commit the crime; and, second, a direct, ineffectual act done towards its commission. To constitute an attempt, there must be something more than a mere intention to commit the offense, and preparation for its commission is not sufficient. Some overt act must be done toward its commission, but which falls short of the completed crime. It need not be the last proximate act before the consummation of the offense, but it must be some act directed toward the commission of the offense after the preparations are made. It is often difficult to determine the differ-

ence between preparation for the commission of a crime and an act towards its commission. There is a class of acts which may be done in pursuance of an intention to commit a crime, but not, in legal sense, a part of it, and do not constitute an indictable attempt; such as the purchase of a gun with the design of committing murder, or the procuring of poison with the same intent. These and like acts are considered in the nature of mere preliminary preparation, and not as acts toward the consummation of the crime. It is upon this principle that most of the cases cited by the defendant rest, although some of them seem to have carried the doctrine to the utmost limit. Patrick v. People, 132 Ill. 529, 24 N. E. 619; McDade v. People, 29 Mich. 50; People v. Youngs, 122 Mich. 292, 47 L.R.A. 108, 81 N. W. 114; State v. Lung, 21 Nev. 209, 37 Am. St. Rep. 505, 28 Pac. 235; Stabler v. Com. 95 Pa. 318, 40 Am. Rep. 653; Hicks v. Com. 86 Va. 223, 19 Am. St. Rep. 891, 9 S. E. 1024; State v. Baller, 26 W. Va. 90, 53 Am. Rep. 66.

In the case at bar we have something more than mere intention or preparation, so far as the defendant is concerned. His part in the transaction was fully consummated when he employed McGrath and Palmer to commit the offense, gave them the materials with which to do it, showed them how to start a slow-burning fire, paid them a compensation for their services, furnished a horse for one of them to ride, and started them on their way. He had thus done all that he was expected to do, and his felonious design and action was then just as complete as if the crime had been consummated, and the punishment of such an offender is just as essential to the safety of society. The failure to commit the crime was not due to any act of his, but to the insufficiency of the agencies employed for carrying out his criminal design. One may commit a crime by his own hand or that of another, employed, aided, or encouraged by him. If he endeavors or attempts to commit it himself and is interrupted or frustrated, he would clearly be guilty of an indictable attempt, and, if he uses another person to accomplish the same purpose, and the other fails to carry out his design, whether purposely or otherwise, the result is the same. State v. Bowers, 35 S. C. 262, 15 L.R.A. 199, 28 Am. St. Rep. 847, 14 S. E. 488. The statute under which the defendant was indicted was probably taken from that of the state of New York. It had received a judicial construction in that state long before it was enacted here. In People v. Bush, 4 Hill, 133, decided in 1843, the defendant was indicted for an attempt to commit the crime of arson. The proof was that he requested one Kinney to set fire to a barn, gave him a match for that purpose, and promised to reward him. The court held the conviction legal, although the defendant never intended to be present at the commission of the offense and Kinney never intended to commit it; Mr. Justice Cowen saying: "The act imputed to Bush was no doubt an attempt to commit an offense. It is admitted that he endeavored to make himself an accessory before the fact; and to become an accessory is, in itself, an offense. A mere solicitation to commit a felony is an offense, whether it be actually committed or not. This was held in the King v. Higgins, 2 East, 5. In the case before us there was more. The solicitation was followed by furnishing the instrument of mischief. The question of principal and accessory does not arise, as it would have done provided the crime had actually been committed. Had it been committed, the attempt would have been merged in an actual felony, —a crime of another species. There would have been a principal arson by Kinney and an accessorial offense by Bush. The attempt of the latter was to have both crimes committed, and, the question of principal and accessory not being in the case, I see nothing against considering the matter in the light of the ordinary rule that what a man does by another he does by himself; in other words, the course taken to commit the arson by the hand of Kinney was the same thing, in legal effect, as if Bush had intended to set the fire personally, and had taken steps preparatory to that end."

The same principle was again applied in McDermott v. People, 5 Park. Crim. Rep. 102. In that case the defendant solicited another to commit the crime of arson, offering in consideration thereof to deed and assign over to him certain property, and said he had camphene and other combustibles in his room. The court held the defendant properly convicted of an attempt to commit arson, saying: "The two important and essential facts to be established to convict a person of an offense are, first, an intent to commit the offense; and, second, some overt act consequent upon that intent towards its commission. So long as the act rests in bare intention, it is not punishable. *Cogitationis pœnam nemo patitur.* It is only when the thought manifests itself by an outward act in or toward the commission of an offense that the law intervenes to punish. As we cannot look into the mind to see the intent, it must, of necessity, be inferred from the nature of the act done, and, if that be unlawful, a wicked intent will be presumed. These are fundamental legal principles. Now, applied to the facts of this case, what do we find? We find that the defendant intended

to commit the crime of arson. Indeed, he had committed the offense 'already in his heart.' What were the overt acts toward the commission? He had prepared camphene and other combustibles, and had them in his room, and then he went a step further and solicited McDonnell to use those combustibles to burn the building, promising him, if he would do so, to 'give him the deeds of the place, and assign to him his right in the same.' We have, then, the fixed design of the defendant to burn this barn, and overt acts toward the commission of the offense, and a failure in the perpetration of it. The offense, then, is fully made out, for the intent to do the wrongful act, coupled with the overt acts toward its commission, constituted the attempt spoken of by the statute." These cases and the doctrine upon which they are grounded have been recently reaffirmed in People v. Gardner, 144 N. Y. 119, 28 L.R.A. 699, 43 Am. St. Rep. 741, 38 N. E. 1093, and People v. Sullivan, 173 N. Y. 122, 63 L.R.A. 353, 93 Am. St. Rep. 582, 65 N. E. 989.

Missouri has a similar statute. In State v. Hayes, 78 Mo. 307, the defendant solicited one McMahan to set fire to a building, furnished him a can of oil for the purpose, and gave him instructions for the burning. The court held that he was properly convicted of an attempt, although McMahan was acting under the advice of the police, and did not himself intend to commit arson. The court said: "The evil intent which imparts to the act its criminality must exist in the mind of the procurer. And how the fact that the party solicited does not acquiesce or share in the wicked intent, exonerates the solicitor, baffles reason.

The state of Georgia has a statute likewise taken from New York. In Griffin v. State, 26 Ga. 493, the New York cases are approved. The defendant intended to commit the crime of larceny by abstracting goods from a storehouse through the agency of one Jones. He took an impression of the key to the door of the building, and made a key for the purpose of opening it, which he sent in a box of fruit to Jones, who feignedly agreed to become a participant in the accomplishment of the contemplated crime. It was held that the defendant was guilty of an attempt to commit the crime, and that Jones's intent had nothing to do with his offense.

The statute of Massachusetts provides that "whoever attempts to commit an offense prohibited by law, and in such attempt does any act toward the commission of such offense," shall be punished as therein provided. In Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55, the evidence was that the defendant had arranged combustibles in a building in such a way that they were ready to be lighted, and, if lighted, would have set fire to the building and contents. The plan, however, required a candle which was standing on a shelf about 6 feet away from the combustibles to be placed on a piece of wood in a pan of turpentine and lighted. The defendant offered to pay a young man in his employment if he would go to the building, seemingly some miles from the place of the dialogue, and carry out the plan. This was refused. Later the defendant and the young man drove toward the building, but, when within about a quarter of a mile of the place, defendant said he had changed his mind and drove away. This was the only act he ever did toward accomplishing what he had in contemplation, and yet the court held that it was sufficient to convict him of an attempt to burn the building and its contents, with intent to injure the insurers of the same.

We conclude, therefore, that the conviction of the defendant was right, and the judgment will be affirmed.

Hailey, J., took no part in this decision.

A petition for rehearing having been filed, **Bean,** Ch. J., on January 30, 1906, handed down the following additional opinion:

The doctrine of State v. Hull, 33 Or. 56, 72 Am. St. Rep. 694, 54 Pac. 159, and similar cases, has no application to the facts of this case. That was an indictment for larceny. The representative of the owner of the property alleged to have been stolen solicited the defendants to commit the offense. The property was taken by them by the express direction of the owner and with his assent. There was, therefore, no trespass in the taking and no crime committed. Here, however, the defendant, Taylor, planned the alleged arson and solicited McGrath and Palmer to assist him in its commission. Palmer informed his employer of the proposed plan and was advised to join Taylor and McGrath in appearance. This did not excuse Taylor for what he did personally. 1 Bishop, Crim. Law, 5th ed. § 262.

The petition is denied.

NEBRASKA SUPREME COURT.

ROYAL HIGHLANDERS, Plff. in Err.,
v.
DANIEL ALBERT SCOVILL et al.

(66 Neb. 213, 92 N. W. 206.)

Waiver by officer of benefit society.

1. Officers of subordinate lodges of

Headnotes by DAY, C.

Case Note.—There are many cases dealing with the authority of a subordinate

benevolent societies have no authority, by reason merely of such office, to waive any of the provisions of the rules and regulations of the order which enter into and form a part of the contract of membership.

Receipt of dues from dying member.

2. When one of such rules was that after suspension for nonpayment of dues a member could only be reinstated while in good health, the receipt of her dues for reinstatement by the subordinate lodge's secretary while she was in a dying condition was no waiver of such requirement of good health.

(November 6, 1902.)

ERROR to the District Court for Hamilton County to review a judgment in favor of plaintiffs in an action brought to recover the amount alleged to be due on a mutual benefit certificate. Reversed.

The facts are stated in the opinion.

Messrs. **Hainer & Smith** and **Talbot & Allen**, for plaintiff in error:

To secure reinstatement after suspension, it is absolutely necessary that the member be in good health and pay all arrearages.

Neither waiver nor estoppel can exist without equal knowledge on the part of all connected with the transaction in which the doctrine is sought to be urged.

May, Ins. § 505; Henshaw v. Bissell, 18 Wall. 255, 21 L. ed. 835; Robertson v. Metropolitan L. Ins. Co. 88 N. Y. 541; First Nat. Bank v. Farmers & M. Bank, 56 Neb. 149, 76 N. W. 430; Nebraska Wesleyan University v. Parker, 52 Neb. 453, 72 N. W. 470; Davidson v. Young, 38 Ill. 152; Northwestern Mut. L. Ins. Co. v. American, 119 Ill. 329, 59 Am. Rep. 799, 10 N. E. 228; Brant v. Virginia Coal & I. Co. 93 U. S. 326, 23 L. ed. 927; Bigelow, Estoppel, 4th ed. 444; Carlson v. Supreme Council, A. L. of H. 115 Cal. 466, 35 L.R.A. 643, 47 Pac. 375; Grand Lodge, A. O. U. W. v. King, 10 Ind. App. 639, 38 N. E. 352; Rice v. Grand Lodge, A. O. U. W. 92 Iowa, 417, 60 N. W. 726; Wells v. Independent Order of Foresters, 25 Can. L. J. N. S. 209; Grand Lodge, A. O. U. W. v. Jesse, 50 Ill. App.

lodge, or of its officers, to waive forfeiture for nonpayment of assessments. There are cases which hold that while the lodges and their officers are agents of the supreme lodge, yet their authority is limited by the by-laws of the society, with which each member is presumed to be acquainted.

In Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369, the court held that the clerk of the local camp was an agent of the head camp for the collecting and remitting of dues and assessments, but his authority was limited by the by-laws, and the members and beneficiaries were charged with a knowledge of such by-laws, and no act of the local clerk in excess of such authority could be construed as a waiver by the head camp. And this decision is quoted with approval and followed in Supreme Lodge K. of H. v. Jones (Ind. App.) 69 N. E. 718.

And in Borgraefe v. Supreme Lodge, K. & L. of H. 22 Mo. App. 127, which is cited in ROYAL HIGHLANDERS v. SCOVILL, it was held that no act of the officers of a subordinate lodge could dispense with the member's duty to comply with the laws of the supreme lodge, nor cause a waiver of forfeiture for nonpayment of assessments. Similar decisions were rendered in State ex rel. Young v. Temperance Benev. Asso. 42 Mo. App. 485; Grand Lodge A. O. U. W. v. Jesse, 50 Ill. App. 101; United Moderns v. Pike (Tex. Civ. App.) 76 S. W. 774; Chadwick v. Order of Triple Alliance, 56 Mo. App. 463; Brown v. Grand Council Northwestern L. of H. 81 Iowa, 400, 46 N. W. 1086.

In Lavin v. Grand Lodge, A. O. U. W. 104 Mo. App. 1, 78 S. W. 325, it was held that where it was the duty of the subordinate lodge to collect and remit dues and assessments to the supreme lodge, the officer making such collections was not an agent of the grand lodge, and an action upon his part in receiving dues and assessments after maturity would not constitute a waiver of the requirements of payment. And a similar decision was rendered in Sovereign Camp, W. W. v. Rothschild, 15 Tex. Civ. App. 463, 40 S. W. 553, where the financial secretary accepted from a suspended member a part of his arrearages.

The decision sometimes hinges upon whether or not the officers of the supreme lodge know that the officers of the subordinate lodge are in the habit of accepting dues after maturity. In Eaton v. Supreme Lodge K. of H. 22 Cent. L. J. 560, Fed. Cas. No. 4259a, it was held that the collecting agent of the local lodge was not an officer of the supreme lodge, and, if he received assessments from members after maturity, which was expressly forbidden by the rules and regulations, such an act would not be a waiver of forfeiture by the society unless it was shown that the officers of the supreme lodge had knowledge of such facts and acquiesced therein. It was similarly held in Graves v. Modern Woodmen, 85 Minn. 396, 89 N. W. 6; Supreme Council of R. A. v. Taylor, 57 C. C. A. 406, 121 Fed. 66; Harvey v. Grand Lodge, A. O. U. W. 50 Mo. App. 472.

But in Boyce v. Royal Circle, 99 Mo. App. 349, 73 S. W. 300, it was held that if the supreme officers continued to receive dues with knowledge that they were paid out of time, a waiver of the forfeiture of benefits might be inferred from such acts.

In Fraternal Union v. Hurlock, 33 Tex. Civ. App. 78, 75 S. W. 539, it was held that the action of a local collector in receiving the dues of one member who was delinquent, without requiring him to go through the regular form of reinstatement, did not show a custom which would bind the order, especially as the supreme officers did not know of the facts.

101; Sovereign Camp, W. W. v. Rothschild, 15 Tex. Civ. App. 463, 40 S. W. 553; McDonald v. Supreme Council O. of C. F. 78 Cal. 49, 20 Pac. 41; Equitable Life Assur. Soc. v. McElroy, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631; Haydel v. Mutual Reserve Fund Life Asso. 98 Fed. 200; Hartford F. Ins. Co. v. Small, 14 C. C. A. 33, 30 U. S. App. 127, 66 Fed. 490; New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789; Klein v. New York L. Ins. Co. 104 U. S. 88, 26 L. ed. 662; Thompson v. Knickerbocker L. Ins. Co. 104 U. S. 252, 26 L. ed. 765; McMahon v. Supreme Tent K. of M. 151 Mo. 522, 52 S. W. 384; Livesey v. Omaha Hotel Co. 5 Neb. 50; Henry & C. Co. v. Fisherdick, 37 Neb. 207, 55 N. W. 643; Hamilton v. Home F. Ins. Co. 42 Neb. 883, 61 N. W. 93.

An officer selected because of his fitness cannot delegate his authority by appointing a subagent.

Ruthven Bros. v. American F. Ins. Co. 92 Iowa, 316, 60 N. W. 663.

Officers of a mutual benefit insurance company have no authority to waive by-laws and provisions adopted by the members for their mutual protection.

Mulrey v. Shawmut Mut. F. Ins. Co. 4 Allen, 116, 81 Am. Dec. 689; Baxter v. Chelsea Mut. F. Ins. Co. 1 Allen, 294, 79 Am. Dec. 730; Lyon v. Supreme Assembly R. S. of G. F. 153 Mass. 83, 26 N. E. 236; Westchester F. Ins. Co. v. Earle, 33 Mich. 150; Sparks v. Despatch Transfer Co. 104 Mo. 531, 12 L.R.A. 714, 24 Am. St. 351, 15 S. W. 417; Ceeder v. H. M. Loud & Sons Lumber Co. 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575; Sherman Center Town Co. v. Swigart, 43 Kan. 292, 19 Am. St. Rep. 137, 23 Pac. 569; Bacon, Ben. Soc. §§ 151, 426; Sovereign Camp, W. W. v. Rothschild, *supra;* Brewer v. Chelsea Mut. F. Ins. Co. 14 Gray, 203; Burbank v. Boston Police Relief Asso. 144 Mass. 434, 11 N. E. 691; McCoy v. Roman Catholic Mut. Ins. Co. 152 Mass. 272, 25 N. E. 289; Busby v. North American L. Ins. Co. 40 Md. 572, 17 Am. Rep. 634; Union Mut. L. Ins. Co. v. McMillen, 24 Ohio St. 67;

In Field v. National Council, K. & L. of S. 64 Neb. 226, 89 N. W. 773, it was held that the financial secretary of a local lodge has no implied authority to waive the by-laws of the society.

In Wallace v. Fraternal Mystic Circle, 121 Mich. 263, 80 N. W. 6, it was held that the society could not defend in an action on a policy on the ground of forfeiture, where there was a delay of forty days in the payment of assessments, and the local lodge had the right within ninety days to reinstate members suspended for nonpayment, and had held forth the idea by long continued acceptance of after-due assessments that such delay did not work a forfeiture, although the by-laws declared that, where a member was delinquent for twenty days in the payment of an assessment, he forfeited all benefits under the policy.

In Rice v. Grand Lodge, A. O. U. W. 103 Iowa, 643, 72 N. W. 770, it was held that the fact that the local lodge had been in the habit of receiving assessments from a member after they had become due did not waive a subsequent forfeiture for the nonpayment of the assessments as they became due.

In Bost v. Supreme Council R. A. 87 Minn. 417, 92 N. W. 337, it was held that the course of conduct of the defendant society in allowing members to become delinquent could be changed by adopting a new by-law providing for prompt payment of assessments, so that a delinquent member could not claim the benefit of past waivers to excuse future delinquencies.

There are cases, however, which strongly hold that the local lodge, being the agent of the supreme lodge to collect the assessments, can waive forfeiture for nonpayment by accepting past-due assessments. In Whiteside v. Supreme Conclave I. O. of H. 82 Fed. 275, it was held that the action of the collector of dues and assessments in granting to the insured an extension of time within which to pay his assessments, in violation of the by-laws of the society, was binding upon the society, regardless of that provision of the by-laws which held that the collector was the agent of the insured, and not of the society.

And in Beil v. Supreme Lodge, K. of H. 80 App. Div. 609, 80 N. Y. Supp. 751, it was held that acts of a subordinate lodge are acts of the supreme lodge, and the acceptance and retainer of past-due assessments act as a waiver of the forfeiture.

In Supreme Tribe v. Hall, 24 Ind. App. 316, 79 Am. St. Rep. 262, 56 N. E. 780, where, after the death of the insured, the officers of the local lodge demanded and received past-due assessments, the court held that the forfeiture for nonpayment of dues had been waived by the action of the officers of the local camp.

In Grand Lodge A. O. U. W. v. Lachmann, 199 Ill. 140, 64 N. E. 1022, it was held that the subordinate lodge was the agent of the grand lodge, and notice by the subordinate lodge to delinquent members that assessments due February 28 must be paid by March 25 would be a waiver of the by-law which provided for immediate payment of such assessments; and Daniher v. Grand Lodge A. O. U. W. 10 Utah, 110, 37 Pac. 245, is to the same effect.

And in Cauveren v. Ancient Order of Pyramids, 98 Mo. App. 433, 72 S. W. 141, it was held that where the deceased had made payment of his past-due assessments, and the local scribe promised to send him proper papers to be filled out for his reinstatement, and neglected to do so, and it appeared that other similar cases had occurred without objection on the part of the company, that such acts constituted a waiver of the requirements.

In Seehorn v. Supreme Council C. K. of

Home F. Ins. Co. v. Garbacz, 48 Neb. 827, 67 N. W. 864; Borgraefe v. Supreme Lodge K. & L. of H. 26 Mo. App. 218; Bouton v. American Mut. L. Co. 25 Conn. 542; Miller v. Hillsborough Mut. F. Assur. Asso. 42 N. J. Eq. 459, 7 Atl. 895; Illinois Masons' Benev. Soc. v. Baldwin, 86 Ill. 479; Joyce, Ins. § 1382, p. 1455; Wiggin v. Knights of Pythias, 31 Fed. 122; Manson v. Grand Lodge A. O. U. W. 30 Minn. 509, 16 N. W. 395.

This officer could not have waived the suspension when the woman was, at the time of the attempted reinstatement, actually, on her deathbed.

Equitable Life Assur. Soc. v. McElroy, *supra;* Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387; Marshall v. Women's Mut. Ins. & Acci. Co. 26 Jones & S. 406, 11 N. Y. Supp. 700; Pollock, Contr. p. 491; Loewer v. Harris, 6 C. C. A. 394, 14 U. S. App. 615, 57 Fed. 367; French v. Vining, 102 Mass. 135, 3 Am. Rep. 440; Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610; Daniels v. Hudson River F. Ins. Co. 12 Cush. 416, 59 Am. Dec. 197; Clark v. Union Mut. F. Ins. Co. 40 N. H. 333, 77 Am. Dec. 721; Joyce, Ins. §§ 1844–1847, 1861, 1862; Keith v. Globe Ins. Co. 52 Ill. 518, 4 Am. Rep. 624; Bebee v. Hartford County Mut. F. Ins. Co. 25 Conn. 51, 65 Am. Dec. 554; Mutual F. Ins. Co. v. Deale, 18 Md. 26, 79 Am. Dec. 673; Supreme Lodge K. of P. v. Quinn, 78 Miss. 525, 29 So. 826; Miles v. Mutual Reserve Fund Life Asso. 108 Wis. 421, 84 N. W. 163; Rockwell v. Mutual L. Ins. Co. 20 Wis. 336; Lewis v. Phœnix Mut. L. Ins. Co. 44 Conn. 73; Crossman v. Massachusetts Ben. Asso. 143 Mass. 435, 9 N. E. 753; Unsell v. Hartford Life & Annuity Ins. Co. 32 Fed. 443; Ronald v. Mutual Reserve Fund Life Asso. 132 N. Y. 378, 30 N. E. 739; Rice v. Grand Lodge, A. O. U. W. 92 Iowa, 417, 60 N. W. 726; Busby v. North America L. Ins. Co. 40 Md. 572, 17 Am. Rep. 634; Adam's Exp. Co. v. Trego, 35 Md. 69; Security Ins. Co. v. Fay, 22 Mich. 467, 7 Am. Rep. 670; Garbutt v. Citizens' Life & Endowment Asso. 84 Iowa, 293, 51 N. W. 148; Hartford Life & Annuity Ins. Co. v. Unsell, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671; Toelle v. Central Verein, 97 Wis. 322, 72 N. W. 630; Chadwick v. Order of Triple Alliance, 56 Mo. App. 463; Queen Ins. Co. v. Young, 86 Ala. 424, 11 Am. St. Rep. 58, 5 So. 116; Henry & C. Co. v. Fisherdick, 37 Neb. 209, 55 N. W. 643; Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387; Borgraefe v. Supreme Lodge, K. & L. of H. 22 Mo. App. 141; Field v. National Council, K. & L. of S. 64 Neb. 226, 89 N. W. 773; McDonald v. Supreme Council O. of C. F. 78 Cal. 49, 20 Pac. 41; Harvey v. Grand Lodge, A. O. U. W. 50 Mo. App. 477; Supreme Lodge K. of H. v. Keener, 6 Tex. Civ. App. 267, 25 S. W. 1085; Eaton v. Supreme Lodge K. of H. 22 Cent. L. J. 560; Hansen v. Supreme Lodge K. of H. 140 Ill. 301, 29 N. E. 1123; Lyon v. Supreme Assembly R. S. of G. F. *supra;* Brotherhood's Case, 31 Beav. 365; Burbank v. Boston Police Relief Asso. 144 Mass. 437, 11 N. E. 691; McCoy v. Roman Catholic Mut. Ins. Co. 152 Mass. 272, 25 N. E. 289; Swett v. Citizens' Mut. Relief Soc. 78 Me. 541, 7 Atl. 394; Kocher v. Supreme Council C. B. L. 65 N. J. L. 649, 52 L.R.A. 861, 86 Am. St. Rep. 687, 48 Atl. 544; Belleville Mut. Ins. Co. v. Van Winkle, 12 N. J. Eq. 333; Hale v. Mechanics' Mut. F. Ins. Co. 6 Gray, 169, 66 Am. Dec. 410; Brewer v. Chelsea Mut. F. Ins. Co. 14 Gray, 203; Miller v. Hillsborough Mut. F. Assur. Asso. 42 N. J. Eq. 459, 7 Atl. 895, 44 N. J. Eq. 224, 10 Atl. 106, 14 Atl. 278.

Messrs. J. H. Grosvenor, J. A. Whitmore, and D. A. Scovill, for defendants in error:

Payment to the clerk, employee, or a member of the family of the agent, if

A. 95 Mo. App. 233, 68 S. W. 949, where the local lodge had permitted a member to fall into the habit of delay in his payments, it was held that the member had a right to notice before he was suspended, although, under the by-laws, the mere act of nonpayment of assessments worked a suspension and forfeiture.

In McDonald v. Supreme Council, O. of C. F. 78 Cal. 49, 20 Pac. 41, it was held that an acceptance by the association of past-due assessments would be a waiver of the forfeiture, and the court makes the distinction between that case and Borgraefe v. Supreme Lodge, K. & L. of H. 22 Mo. App. 127, cited in the principal case, holding that in the Borgraefe Case there was no acceptance of the past-due assessments by the company, and the decision is wholly based, apparently, upon the fact of the acceptance.

In Modern Woodmen v. Jameson, 48 Kan. 718, 30 Pac. 460, it was held that forfeitures are not favored by the law, and the acts of the local lodge in continuing to treat a member delinquent in the payment of his assessments as a member of the lodge, and in accepting assessments from him, work a waiver of the forfeiture; and the decision in Erdmann v. Mutual Ins. Co. 44 Wis. 376, is to the same effect.

In O'Connor v. Supreme Conclave K. of D. 102 Ga. 143, 66 Am. St. Rep. 159, 28 S. E. 282, it was held that whether the act of a local officer in receiving past-due assessments was binding or not depended upon the relation which the local officers bore to the supreme lodge, which could be shown only by the by-laws of the society.

authorized, is as effective as if paid to the agent in person.

German Ins. Co. v. Rounds, 35 Neb. 752, 53 N. W. 660; Anderson v. Supreme Council O. of C. F. 135 N. Y. 107, 31 N. E. 1092; Supreme Lodge, K. of H. v. Davis, 26 Colo. 256, 58 Pac. 595.

The fraternity, through its officers, cannot ignore the question of good health, accept payment of arrearages and future assessments and dues, issue a receipt that the member is officially informed places his insurance in full force, and, without notice to the insured, reserve to itself the right, after the death of the insured, to declare the policy forfeited and void if it shall deem it to its advantage so to do.

Life Ins. Clearing Co. v. Altschuler, 55 Neb. 344, 75 N. W. 862.

The clerks of the local camps are, in the matter of collecting and remitting assessments and waiving of forfeitures, the agents of the society.

Modern Woodmen v. Coleman, 64 Neb. 162, 89 N. W. 641; Supreme Lodge K. of P. v. Withers, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611; Modern Woodmen v. Tevis, 49 C. C. A. 256, 111 Fed. 113; Supreme Tribe, B. H. v. Hall, 24 Ind. App. 316, 79 Am. St. Rep. 262, 56 N. E. 781; Coverdale v. Royal Arcanum, 193 Ill. 91, 61 N. E. 915; Supreme Lodge K. of H. v. Davis, 26 Colo. 252, 58 Pac. 595.

Having accepted full payment without question as to health, and issued an unconditional receipt therefor, the right of forfeiture was waived.

Metropolitan Safety Fund Acci. Asso. v. Windover, 137 Ill. 417, 27 N. E. 538; Schultz v. Caledonian Ins. Co. 94 Wis. 42, 68 N. W. 415; Modern Woodmen v. Lane, 62 Neb. 89, 86 N. W. 943; Rice v. New England Mut. Aid Soc. 146 Mass. 248, 15 N. E. 624; Modern Woodmen v. Colman, *supra*; Mee v. Bankers' Life Asso. 69 Minn. 210, 72 N. W. 74; Manon v. Grand Lodge A. O. U. W. 30 Minn. 509, 16 N. W. 395; Bailey v. Mutual Ben. Asso. 71 Iowa, 689, 27 N. W. 770; Rasmusen v. New York L. Ins. Co. 91 Wis. 81, 64 N. W. 301; Life Ins. Clearing Co. v. Altschuler, 55 Neb. 341, 75 N. W. 862; Burlington Voluntary Relief Department v. White, 41 Neb. 547, 43 Am. St. Rep. 701, 59 N. W. 747.

Day, C., filed the following opinion:

Daniel A. and Elizabeth P. Scovill brought this action in the district court for Hamilton county against the Royal Highlanders to recover upon the benefit certificate issued by the defendant to Olive M. Scovill, in which the plaintiffs were named as beneficiaries. The trial court instructed the jury to return a verdict in favor of the plaintiffs, upon which judgment was rendered, to review which the defendant has brought error to this court.

The defendant is a mutual fraternal association, organized under the laws of this state, with its principal place of business or head office in the city of Aurora, Nebraska. Like most of the mutual fraternal insurance associations, the defendant organization is founded upon the lodge system; having a supreme or executive castle, with subordinate lodges located at different places throughout the country. In addition to the fraternal, benevolent, and social features which the association inculcates, it also undertakes, under certain conditions, to provide indemnity in case of disability or death of its members. One of the subordinate or tributary castles is located at Aurora, which is known as Helen Castle, No. 68, of the Royal Highlanders. Olive M. Scovill, previous to her marriage to George H. Decker, became a member of this tributary castle, and on January 26, 1899, there was issued to her by the defendant a benefit certificate whereby the defendant agreed in case of her death to pay a certain sum to the beneficiaries named in the certificate. The certificate provided that, in case of death occurring after one or before two years from the date of the certificate, the sum of $500 should be paid to the beneficiaries. The certificate also contained a condition as follows: "The payment of all or any part of this certificate is conditioned under the provisions that the owner thereof shall have, in every particular, complied with the edicts, rules, and regulations governing the membership of this fraternity now in force, or that may hereafter become a part of the same. . . . Both the edicts and applications are made a part of this certificate." The rules and edicts of the supreme castle, among other things, provided for the payment by its members of certain assessments or fixed quarterly dues, which sums were to be paid by the member to the secretary of the tributary castle of which he was a member within a given period, and provided that "any member failing to pay the same within the time in which it is due shall stand suspended from all the benefits of the fraternity." The insured did not pay the assessment levied against her for the month of May, and which, under the rules of the association, became due and payable on or before June 1st, and for such failure she was duly suspended, and on June 13th notice of her suspension was given, which

notice was received by her upon the following day. After becoming a member of Helen Castle, No. 68, the insured removed to Omaha, and was residing there at the time of her death. On June 18th or 19th she was taken ill with premature childbirth, necessitating a severe operation on the 19th. On the 20th the attending physician detected septic symptoms, which continued to grow worse, and at 6:30 o'clock P. M. on June 21st the insured died. At 3 o'clock on the afternoon of her death the attending physician called up by telephone D. A. Scovill, one of the beneficiaries, and informed him of the serious illness of his daughter, and suggested that, if she had any insurance, he ought to look after the payment of her premium. On the afternoon of June 21st, Mr. Scovill called at the head office of the Royal Highlanders, and inquired the amount necessary to be paid to reinstate the insured, and was informed that all matters of payments of assessments and dues should be made through the secretary of the tributary castle, and directed him to call upon Mrs. Glover, the secretary of Helen Castle, No. 68. Mrs. Glover resided some distance from the business portion of the city, and, as a matter of convenience for the members of the castle, she left her books and receipts at her husband's store, where assessments could be paid. Although not specially authorized to do so by the action of the lodge, Mr. Glover, in the absence of his wife, received payments made by any of the members, and issued receipts to them therefor in the name of his wife, as secretary of the castle. Mr. Scovill called at the store, and, not finding Mrs. Glover, asked Mr. Glover the amount necessary to be paid to reinstate his daughter. Mr. Glover examined the books, and informed Mr. Scovill that the assessments and quarterly dues amounted to $1.30, which Mr. Scovill then paid; and thereupon Mr. Glover, in the name of his wife, as secretary of the castle, issued a receipt to Olive M. Scovill, showing payment of assessments for May and June, and the quarterly dues payable June 3d, and delivered a receipt to Mr. Scovill. There is a conflict in the testimony as to whether Mr. Scovill made the payment before or after he received the telephone message from the physician. At all events he did not indicate to Mr. Glover any knowledge or information he may have had respecting the condition of his daughter's health, and no inquiry was made by Mr. Glover as to the health of the insured.

In the view we have taken of the case, the question as to Mr. Scovill's knowledge of the condition of his daughter's health seems entirely immaterial. In making the payment he acted as the agent of the insured, and his knowledge of her condition does not seem to us to have any special bearing upon her rights to be reinstated. Her right to become reinstated depends upon the edicts and regulations of the supreme castle. One of the edicts provides "that any member suspended for nonpayment of monthly payments or dues may be reinstated, if in good health and not engaged in any of the prohibited occupations, by the payment of all arrearages of every kind within sixty days of suspension." It would seem, therefore, that the right of the insured to become reinstated depended upon two conditions: First, she must have been in good health at the time; and, second, the payment of all arrearages within the time limited. By the plain and clear meaning of the edict, the good health of the member at the time of the payment must exist, as a condition precedent to the right of reinstatement. When the insured tendered the amount of the assessments due, she impliedly, at least, represented that the conditions existed upon which she had the right to be reinstated; *viz.*, that she was in good health. The evidence is clear and undisputed that at the time of the payment of the assessment the insured was hopelessly ill and dying, and lived but a few hours thereafter.

It is insisted, however, by the plaintiffs, that the acceptance of the assessment by Mr. Glover was a waiver of the condition of good health. We cannot agree with this contention. The members of a mutual benefit association are conclusively presumed to know its rules and regulations, and the assured, therefore, must have known that her good health was a condition precedent to her right to reinstatement. She was not acting, therefore, in good faith to the lodge, in tendering the payment of her dues, in view of the condition of her health. This fact alone, in our opinion, would be sufficient to defeat her right of recovery. We do not doubt the general rule that the provisions in a policy of insurance which are made for the benefit of the company can be waived by the company, but such conditions can be waived only by officers of the company having authority to do so. Granting that Mr. Glover had the rights of the secretary of the lodge, it nowhere appears that he had authority to waive any of the provisions of the contract entered into between a member and the supreme lodge. In the case of Field v. National Council, K. & L. of S. 26 Neb. 226, 89 N. W. 773, the

rule is announced which we think the correct one to apply to mutual fraternal insurance companies, where the whole scheme is founded upon mutuality and good faith of its members. In that case Borgraefe v. Supreme Lodge, K. & L. of H. 22 Mo. App. 127, is cited with approval, in which it is said: "The subordinate lodges are, no doubt, the agents of the supreme lodge in dealings with the members for many purposes; and in those cases where the subordinate lodges act through their ministerial officers, and where the latter act in conformity with the rules governing the lodges and the order, these officers may become, *pro hac vice*, the agents of the subordinate lodges. But it is not shown to us that these officers are anywhere endowed with the power to set aside the rules of the order, or that the subordinate lodges are endowed with such a faculty. On the other hand, it is perceived, by the provision of the laws of the order above quoted, . . . that no grand lodge has power even to alter or amend the laws governing the subordinate lodges. The doctrine of waiver, which is often appealed to to prevent forfeitures in the case of policies of insurance, has no application to the forfeitures of memberships in these orders. The laws and rules governing the different branches of such an order are in the nature of contracts among all the members, and, considering the wide-spread extent of these organizations, and the very great extent to which these schemes of benevolence have taken the place of life insurance, especially among the working classes, it is highly important, as a principle of public policy, that in cases of this kind their rules and regulations should be substantially upheld by the judicial courts." State ex rel. Young v. Temperance Benev. Asso. 42 Mo. App. 485; Karcher v. Supreme Lodge K. of H. 137 Mass. 368; Hall v. Supreme Lodge K. of H. 24 Fed. 450; Rood v. Railway Pass. & F. C. Mut. Ben. Asso. 31 Fed. 62.

We think, under the facts proved, the court should have directed a verdict for the defendant. We therefore recommend that the judgment of the district court be reversed, and the cause remanded for further proceedings according to law.

Hastings and Kirkpatrick, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the cause remanded for further proceedings according to law.

Petition for rehearing denied.

WISCONSIN SUPREME COURT.

JOHN P. SCHEUER, Respt.,
v.
JOHN COCHEM, Appt.

(126 Wis. 209, 105 N. W. 573.)

Partnership to buy real estate—validity.

1. A parol contract by which two persons enter into a partnership to purchase real estate, one to furnish the money and take the title, and convey a half interest to the other upon receiving his share of the purchase price, is void under the statute of frauds.

Same—statute of frauds—specific performance.

2. The mere fact that one of the parties who entered into a parol agreement to purchase real estate, who is to receive title to his share when he pays his portion of the purchase money, receives some rent collected by the other and makes some repairs, does not show such possession as will take the contract out of the statute of frauds and enable equity to decree its specific performance.

(November 14, 1905.)

Case Note.—Since it is well settled that an ordinary partnership may be formed by parol, and may purchase and hold real estate, and that such real estate will be regarded in all respects as other partnership property, there seems to be no reason why a parol partnership formed for the express purpose of dealing in lands should be invalid. Yet there are some cases that hold, like SCHEUER v. COCHEM, that a parol contract to enter into a partnership to deal in real estate is void under the statute of frauds. The leading case on this side of the question is Smith v. Burnham, 3 Sumn. 435, Fed. Cas. No. 13,019, where a bill filed by one member of such a partnership prayed for an account, and that, if any lands remained unsold, defendant might be decreed to convey to plaintiff his just and equitable share. The question was very fully considered by Mr. Justice Story, who said that this was a case of the declaration or creation of a trust in lands not arising or resulting by implication or operation of law, and he repudiated the argument that the several interests attached only to the proceeds by saying that the agreement, if good at all, attached also to the lands at the time of the purchase, and that it was then an agreement for an interest by way of trust in land, and that it was in virtue of this trust estate, and this only, that a right could attach to a moiety of the proceeds. His conclusion was that the whole title of plaintiff resolved itself into a parol trust created by an express agreement of the parties in the purchase and sale of the lands on joint account, which was within the statute of frauds.

The principle of this decision was followed in Rowland v. Boozer, 10 Ala. 695;

APPEAL by defendant from a judgment of the Circuit Court for Manitowoc County in plaintiff's favor in an action brought to dissolve a partnership and secure an accounting. Reversed.

Statement by Cassoday, Ch. J.:

This action was commenced April 28, 1902, to dissolve an alleged copartnership in a house and lot described and for an accounting. Issue being joined and trial had, the court found as matters of fact, in effect: (1) That April 25, 1900, the defendant requested the plaintiff to become jointly interested in the purchase of the premises described; that it was orally agreed that he should do so; that by the terms of the agreement they were to own, handle, manage, care for, rent, repair, and sell the premises as copartners, each paying one half of the purchase price and all necessary expenses, including insurance and taxes; that the net profits arising therefrom and from the sale thereof should be divided equally between them; that the defendant should advance the whole of the agreed purchase price of $300, and that the plaintiff should repay to him one half thereof with interest at 6 per cent, and that the title should be taken in the name of the defendant; that when the plaintiff should fully pay his share of the purchase price, then the defendant was to convey to him an equal undivided one half thereof. (2) That in accordance with such agreement the defendant purchased said real estate, and took the title in his own name with the agreement that he would so convey the equal undivided one half upon receiving the $150 and interest. (3) That immediately after the purchase they entered into possession and retained the same until December 12, 1901; that during such time numerous repairs and improvements were made upon the same; that during that time the plaintiff, in addition to his personal services, paid, laid out, and expended

Bird v. Morrison, 12 Wis. 139; Seymour v. Cushway, 100 Wis. 580, 69 Am. St. Rep. 957, 76 N. W. 769; Roub v. Smith, 61 Mich. 543, 1 Am. St. Rep. 619, 28 N. W. 676; Gray v. Palmer, 9 Cal. 639; and Young v. Wheeler, 34 Fed. 98. But Gray v. Palmer was expressly disapproved in Bates v. Babcock, 95 Cal. 484, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605, and Young v. Wheeler, though not expressly disapproved, is discredited as an authority by a later decision in the Colorado courts, holding a parol partnership to deal in real estate valid. Meagher v. Reed, 14 Colo. 335, 9 L.R.A. 455, 24 Pac. 681.

In Louisiana, under the Civil Code, such partnership agreements must be in writing. Pecot v. Armelin Bros. 21 La. Ann. 667.

And in Schultz v. Waldons, 60 N. J. Eq. 71, 47 Atl. 187, it is held that where there is no previous partnership or joint enterprise between two parties, and they agree by parol that one of them shall purchase and take title in his own name to a single piece of real estate, and hold the same for the benefit of both, and the other party contributes no money to the enterprise, the statute of frauds prevents the latter from successfully claiming an interest in the land.

And a parol agreement between two persons owning two separate pieces of real estate to form a partnership for the sale of the two lots, and to divide the profits resulting from the sale, is held, in Goldstein v. Nathan, 158 Ill. 641, 42 N. E. 72, Affirming 57 Ill. App. 389, to be within the statute, and void. But the court expressly recognized that a partnership for the purpose of dealing in lands might be formed by parol, but said there was a wide distinction between an agreement for one to become interested in the profits of certain land already owned by another, and an agreement to share in the benefits to be derived from land to be thereafter acquired.

Some cases make a distinction between an agreement to share the profits of such a parol partnership to deal in lands and an agreement to divide the land itself.

Thus, in Everhart's Appeal, 106 Pa. 349, it was held, in case of such a partnership, that, although the plaintiff could not establish his interest in the lands by parol evidence, this rule did not apply to an agreement for a division of the profits arising from the sale of the lands.

And even where a partnership is held not to be established, it has been held that a joint undertaking by several persons to buy certain lots and erect a building thereon, title to the property to be taken in the name of one of the parties, but the profits from the rents thereof to be divided in certain proportions among all, is not within the statute, since the profits only are to be divided, and not the land itself. Eaton v. Graham, 104 Ill. App. 296. Though where the land itself is to be divided the agreement is void as within the statute. Morton v. Nelson, 145 Ill. 586, 32 N. E. 916; McKinley v. Lloyd, 128 Fed. 519.

But cases of this kind, where the agreement is not treated as one of partnership, are not intended to be included in this note, which is limited to cases where a partnership is conceded or proved to have been intended by the parties.

In opposition to those cases which deny the validity of such parol contracts of partnership is the great weight of authority in both England and America. 1 Collyer, Partn. 6th ed. § 1, p. 7; 1 Bates, Partn. § 302; Browne, Stat. Fr. 5th ed. § 262; Dale v. Hamilton, 5 Hare, 383; Archibald v. McNerhanie, 29 Can. S. C. 564; McElroy v. Swope, 47 Fed. 380; Bates v. Babcock and Meagher v. Reed, *supra;* Speyer v. Desjardins, 144 Ill. 641, 36 Am. St. Rep. 473, 32 N. E. 283; Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169, Affirming 79 Ill. App. 139; Holmes v. McCray, 51 Ind. 358,

for repairs and improvements, insurance, and taxes $40.66, and the defendant expended for similar purposes, exclusive of his personal services, $50.58. (4) That all rents, profits, and income from said premises were paid to the defendant, who accounted therefor to the plaintiff, and paid him one half thereof, except $5.33, which sum is charged to defendant in this accounting. (5) That about June, 1901, the plaintiff paid the defendant $9 interest for one year on the $150, and January 22, 1902, the plaintiff tendered to the defendant $157.50, being the full amount due to the defendant for the one-half interest in the premises. (6) That December 12, 1901, the defendant sold and conveyed the premises to his sister for $375, secretly, and without consulting the plaintiff. (7) That before bringing this action the plaintiff demanded of the defendant a settlement of said partnership affairs, but the defendant refused to do so, and denied the existence of any partnership agreement, and claimed that he had the title to the premises, and should hold what the law gave him; that the defendant recognized and performed such copartnership agreement until shortly before his conveyance to his sister. (8) That December 12, 1901, the value of the premises was $500. (9) That there was no special agreement that either party should be compensated for his personal services so rendered, and there are no special circumstances from which such agreement can be implied. (10) That the defendant should be charged with the value of such real estate, $500, also with the sum of $5.33, rent received by him and not accounted for, and the defendant should be credited with $50.58 and the amount of the plaintiff's debt to him, $157.50, and one half the net assets, $207.05, and the plaintiff is entitled to recover from the defendant the sum of $90.20 with costs. And as conclusions of law the court found, in effect, that the plaintiff is entitled to

19 Am. Rep. 735; Richards v. Grinnell, 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668; Jones v. Davies, 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484; Garth v. Davis, 27 Ky. L. Rep. 505, 85 S. W. 692; Fountain v. Menard, 53 Minn. 443, 39 Am. St. Rep. 617, 55 N. W. 601; Newell v. Cochran, 41 Minn. 374, 43 N. W. 84; Hirbour v. Reeding, 3 Mont. 15; Chester v. Dickerson, 54 N. Y. 9, 13 Am. Rep. 550; Babcock v. Read, 99 N. Y. 609, 1 N. E. 141; Traphagen v. Burt, 67 N. Y. 30; Larkin v. Martin, 46 Misc. 179, 93 N. Y. Supp. 198; Ostrander v. Snyder, 73 Hun, 378, 26 N. Y. Supp. 263; Bailey v. Weed, 36 App. Div. 611, 55 N. Y. Supp. 253; Falkner v. Hunt, 73 N. C. 571; Flower v. Barnekoff, 20 Or. 132, 11 L.R.A. 149, 25 Pac. 370; Davenport v. Buchanan, 6 S. D. 376, 61 N. W. 47; Case v. Seber, 4 Wash. 492, 30 Pac. 646.

And it is well settled that an agreement between two or more persons to explore the public domain and discover and locate mining claims, for the joint benefit of all the parties, does not fall within the statute of frauds, and need not be in writing. Murley v. Ennis, 2 Colo. 300; Meagher v. Reed, *supra;* Meylette v. Brennan, 20 Colo. 242, 38 Pac. 75; Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195; Hirbour v. Reeding, *supra;* Gore v. McBrayer, 18 Cal. 582; Settembre v. Putnam, 30 Cal. 490; Moritz v. Lavelle, 77 Cal. 10, 18 Pac. 803; Shea v. Nilima, 133 Fed. 209. In some of these cases—as Meagher v. Reed and Hirbour v. Reeding—such a contract is called a partnership contract, and treated as governed by the same principles governing any partnership contract to deal in real estate, while in others the contract seems not to be considered one of partnership. Thus in Shea v. Nilima the court says of such a contract: "This is not a partnership to deal in lands. It is alleged in the complaint to be 'a prospecting and mining partnership.' But it matters not what name is given to it by the parties; it must be left to the court to determine its general nature from the facts. Whether it is called a 'contract,' an 'agreement,' or a 'partnership,' the law steps in and from the facts determines the rights of the respective parties thereunder. . . . If by words, acts, and deeds they joined together in a common purpose and agreed to share equally in the enterprise, they were, in a certain sense, partners, and such a partnership may be formed without any written articles between the parties. . . . The mutual agreement between . . . [the parties] was not, strictly speaking, a mining copartnership, in the full sense of that term, or an ordinary common-law partnership, or a 'grubstake' agreement." In some of the other cases the contract is not spoken of as a partnership at all.

In opposition to these cases is Craw v. Wilson, 22 Nev. 385, 40 Pac. 1070, which holds an oral agreement of partnership for the purpose of locating mining claims as within the statute of frauds and void.

As stated in the note in 16 L.R.A. 745, where this subject is discussed and the authorities reviewed, the conflict between the two lines of cases is more apparent than real, the disagreement between the authorities being caused by the different ends sought by the litigants, rather than by any real conflict in principle. If the agreement of partnership does not involve the conveyance by one partner to another of any interest in the real estate itself, the contract is usually held valid, and all suits seeking relief which may be legitimately sought by a partner are upheld; while, on the other hand, if the contract contemplates a transfer of an interest in the land itself from one partner to another, it is held invalid, and a suit brought to enforce it dismissed.

judgment dissolving the partnership; that the plaintiff recover from the defendant $90.20 due the plaintiff upon the adjustment of the copartnership account, and that the plaintiff recover his costs and disbursements in the action. From the judgment entered thereon accordingly the defendant appeals. The findings, in so far as they found or pertain to a partnership in said real estate, are severally excepted to, and by agreement the evidence as to such matters was taken, subject to objection.

Mr. **A. L. Hougen**, for appellant:

A partnership interest in real estate can be created or granted only by an instrument in writing, subscribed by the parties.

Bird v. Morrison, 12 Wis. 138; Treat v. Hiles, 68 Wis. 344, 60 Am. Rep. 858, 32 N. W. 517; Clarke v. McAuliffe, 81 Wis. 104, 51 N. W. 83; Seymour v. Cushway, 100 Wis. 580, 69 Am. St. Rep. 957, 76 N. W. 769; Smith v. Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

Messrs. **Nash & Nash**, for respondent:

Executed or partially executed contracts of partnership for dealing in lands are sustained.

Smith v. Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288; Wall v. Minneapolis, St. P. & S. Ste. M. R. Co. 86 Wis. 48, 56 N. W. 367; Pom. Contr. § 30.

Where there has been such part performance that it would operate as a fraud upon either party to allow the other to repudiate it, the contract will be enforced in equity.

Paine v. Wilcox, 16 Wis. 202; Daniels v. Lewis, 16 Wis. 140; Martineau v. May, 18 Wis. 54; Seaman v. Aschermann, 51 Wis. 678, 8 N. W. 818.

Cassoday, Ch. J., delivered the opinion of the court:

As indicated in the foregoing statement, the court found that on April 25, 1900, the parties orally agreed to become jointly interested, as partners, in the purchase of the house and lot in question, the defendant to advance the whole of the agreed purchase price of $300, and take the title in his own name; and the plaintiff to repay to him one half thereof with interest at 6 per cent, and when fully paid the defendant was to convey to him an equal undivided one half thereof. The court further found that, after making such oral contract, the "defendant purchased the real estate described in the complaint from one Wenzel Pisarik." The complaint alleged that on April 25, 1900, the defendant was the owner of such real estate; and being the owner, "he and this plaintiff entered into a copartnership agreement," in respect to such real estate, similar to the one found by the court. The answer expressly admits that on April 25, 1900, the defendant was "the owner in fee of the real estate" described, but denied the making of any such partnership agreement; and alleged that if any such contract was made it was "merely verbal, and not in writing," and hence void under the statute. Whether, at the time of making such verbal agreement, the defendant was the owner in fee of such real estate, or subsequently purchased and acquired the title to the same, does not seem to be very material, since, in either case, the attempt was made to bind the defendant by verbal contract to convey to the plaintiff the undivided one half of the house and lot in question, "upon receiving from him one half of the purchase price, to wit, the sum of $150 with interest thereon at the rate of 6 per cent per annum," from the date of such purchase. The important question in the case is whether such verbal agreement was within the statute which declares that "no estate or interest in lands, . . . nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same or by his lawful agent thereunto authorized by writing." Rev. Stat. 1898, § 2302. It was held by this court, at an early day, that "an agreement for a partnership in dealings in real estate is within the statute of frauds, and void unless in writing;" and "the fact that the parties making such agreement are engaged at the time in a mercantile partnership does not take it out of the statute." Bird v. Morrison, 12 Wis. 138. In a later case, where land was purchased for a partnership of lawyers with partnership funds, it was held that "an oral agreement between two persons to purchase land together, each to pay half of the purchase money, and to take the title in the name of one for their joint use and benefit, is void under the statute of frauds." Clarke v. McAuliffe, 81 Wis. 104, 51 N. W. 83. To the same effect, McMillen v. Pratt, 89 Wis. 612, 630, 62 N. W. 588; Seymour v. Cushway, 100 Wis. 580, 69 Am. St. Rep. 957, 76 N. W. 769. In the case of Smith v. Putnam, 107 Wis. 155, 162–164, 82 N. W. 1077, 83 N. W. 288, cited by counsel on both sides, the partnership was proved and both parties proceeded without objection until the hearing of the motion to confirm the referee's report, when the defendants objected to the adjudication of the amount due. "All the transactions were so completed as to make nothing necessary but

the ascertainment of a money balance due from one partner to another. Held, that defendants' conduct was such as to waive any objection to the form of action which they might have made by reason of the fact that the claim grew out of a partnership." The statute also declares that "nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance of such agreements." Rev. Stat. 1898, § 2305. This section neither abridges nor adds to the powers of courts of equity in relation to verbal contracts concerning lands. Smith v. Finch, 8 Wis. 245. The question recurs whether the plaintiff could have maintained an action for specific performance. It has often been held that the mere payment of a portion or the whole of the purchase price, unaccompanied by any other act, is not such part performance of a parol agreement for the sale of lands as takes the case out of the statute. Blanchard v. McDougal, 6 Wis. 167, 70 Am. Dec. 458; Smith v. Finch, *supra;* Brandeis v. Neustadtl, 13 Wis. 142; Horn v. Ludington, 32 Wis. 73; Cutler v. Babcock, 81 Wis. 195, 29 Am. St. Rep. 882, 51 N. W. 420; Harney v. Burhans, 91 Wis. 348, 352, 64 N. W. 1031. Such payment, together with a delivery of the possession by the vendor to the vendee, has been held to be such part performance as takes the case out of the statutes, especially if followed by making improvements. Blanchard v. McDougal, *supra;* McWhinne v. Martin, 77 Wis. 182, 196, 46 N. W. 118, and cases there cited; Harney v. Burhans, *supra,* and cases there cited. But to have that effect the possession must be taken pursuant to such parol contract. Thus it has been held that "when the purchaser by parol is a tenant in possession of the vendor, his continued possession will be referable to the tenancy, and not to the contract of purchase." Blanchard v. McDougal, *supra.* To the same effect, Knoll v. Harvey, 19 Wis. 99.

It has been held in one of the cases cited, that "a bill for specific performance cannot be maintained where the contract to purchase is verbal, and the buyer has sent to the vendor part of the purchase money, and notes and mortgage to secure the balance, unless he has also been let into possession of the premises." Smith v. Finch, *supra.* In the case at bar, the court found that, immediately after the purchase of the real estate, the plaintiff and defendant entered into the possession of the same, and made numerous repairs and improvements. But it is obvious from other findings mentioned, as well as the evidence, that this finding is a mere conclusion, based upon the assumption that the verbal agreement made the plaintiff and defendant partners in the joint ownership of the house and lot. It is undisputed that during all the time in question the title was in the defendant. He collected the rents and managed the property, and finally conveyed it to his sister. The mere facts that he paid some of the rent to the plaintiff, and that the plaintiff made some repairs, did not put the latter in possession. As stated in several of the cases cited, full payment of the purchase price is not sufficient to take a case out of the statute, so that specific performance will be decreed, unless accompanied by actual possession or some act whereby the vendee has received an injury for which a court of law cannot give a complete remedy. Harney v. Burhans, *supra,* and cases there cited. Here the plaintiff's only claim to any interest in the land is referable to and predicated upon the alleged verbal contract. This action is based wholly upon that contract, which was void under the statute. This is the only question calling for consideration.

The judgment of the Circuit Court is reversed, and the cause is remanded, with direction to dismiss the complaint.

GEORGIA SUPREME COURT.

ATLANTA BUGGY COMPANY, Plff. in Err.,
v.
HESS SPRING & AXLE COMPANY.

(124 Ga. 338, 52 S. E. 613.)

Contract—mutuality—discretion to ratify.

1. Where a written contract was entered into between a purchaser of certain goods and a person who signed for the seller, which contained a provision that the contract "shall only be considered binding on the seller when signed by one or more of its officers;" and it did not appear that it was ever so signed, or that there was

Headnotes by LUMPKIN, J.

Case Note.—Power of principal to ratify unauthorized contract of agent so as to raise cause of action in his own favor against the adverse party.—As stated in the case in hand, there is a difference of opinion as to whether a principal may, by ratifying an unauthorized contract made by an agent, raise a cause of action in his own favor as against the adverse party, the weight of authority, however, favoring his right to do so.

An extreme view of the retroactive efficacy of the subsequent ratification is taken in England, where it has been held that

any consideration for the promise of the purchaser, except the contemplated mutual obligations to be assumed by the seller,—the contract was unilateral. The seller not being bound, neither was the purchaser; and the latter might withdraw from it before it became mutually binding by acceptance in the manner agreed on.

Same—attempt to ratify—effect.

2. Where the proposed vendor brought suit for breach of such contract against the vendee; and by amendment alleged that the person who signed the contract with the vendee was the agent of the plaintiff, with full power to represent it in making the contract for the articles specified in it, and binding it thereto; and that the contract he made was fully ratified by the plaintiff and accepted by it as binding on it,—such amendment did not show that the contract was, or ever became, one whereby one became bound to sell and the other to buy the specified property. The allegation that the person signing the contract on behalf of the plaintiff was authorized so to do, and that the contract was ratified by the plaintiff, did not change its written terms, but left as one of them that it should not be binding on the seller until signed by one or more of its officers.

Same—change in terms.

3. Authority to make the contract had reference to it as made, and ratification confirmed it as made. Neither anterior authority nor subsequent ratification would operate to change the terms of the written contract without the knowledge or consent of the other party, and adversely to it.

Same—partial performance.

4. Two written contracts of a similar character being involved, the fact that under one of them the vendee specified certain articles which he desired, and which were furnished, rendered it binding on the parties to the extent only of the accepted specification.

(November 20, 1905.)

ERROR to the City Court of Atlanta to review a judgment in favor of plain-

a principal adopting an unauthorized contract of his agent may enforce it against the other party, although such other party has attempted to withdraw from the contract before the ratification, since the ratification relates back to the original contract. Bolton v. Lambert, L. R. 41 Ch. Div. 295; Re Tiedemann [1899] 2 Q. B. 66.

In Breithaupt v. Thurmond, 3 Rich. L. 216, it is held that although, if the adverse party refuses to abide by a contract made by an unauthorized agent before its ratification, he cannot be compelled to do so, yet, after the principal assents to the contract, and offers to perform everything which his supposed agent has undertaken that he shall do, it is too late for the other party to disclaim the contract on the ground that it was originally not binding on the principal.

In State v. Shaw, 28 Iowa, 67, it is held that a state may ratify an unauthorized loan of its money made by a public officer, and enforce a mortgage taken by him; such ratification having the same effect as an original authority.

And in Wisconsin v. Torinus, 26 Minn. 1, 37 Am. Rep. 395, 49 N. W. 259, it is held that a state which has ratified a sale of its property, made by a public officer without authority, may enforce a note taken by him.

The power of a principal to validate an unauthorized contract by a subsequent ratification is also upheld in Andrews v. Ætna L. Ins. Co. 92 N. Y. 596, in which the right of an insured person to recover premiums on the ground that, an unauthorized clause having been inserted in the policy by the insurer's agent, there was no meeting of the minds upon the contract, and therefore no consideration for the premiums paid, was denied. The court says: "The principal, upon being informed of an act of an agent in excess of his authority, has the right to elect whether he will adopt the unauthorized act or not; and, so long as the condition of the parties is unchanged, he cannot be prevented from such adoption because the other party to the contract may, for any reason, prefer to treat the contract as invalid."

In Smith v. Savin, 69 Hun, 311, 23 N. Y. Supp. 568, it is held that an undisclosed principal may adopt the unauthorized act of his agent in pledging securities, so as to acquire the right to bring an action against the pledgee for their conversion.

In Universal Beer Keg Co. v. Brown, 9 N. Y. S. R. 91, it is held that a principal ratifying an unauthorized contract may recover damages for its nonperformance.

The following cases may be referred to as tending to support the affirmative of the question under discussion: Foulke v. DeWitt (Cal.) 52 Pac. 476, holding that the objection that the contracting agent was not authorized in writing to purchase land is obviated by the complaint in the action brought by the principal to compel a conveyance; Alliance Marine Assur. Co. v. Louisiana State Ins. Co. 8 La. 1, 28 Am. Dec. 117, holding that ratification of an unauthorized contract of reinsurance must take place before the loss has occurred, in order to be effectual; Baldwin v. Schiappacasse, 109 Mich. 170, 66 N. W. 1091, holding that a principal cannot bind the adversary party by a ratification after such party's withdrawal; Davis v. Walker, 131 Ala. 207, 31 So. 554, and Shuttleworth v. Kentucky Coal, I. & Development Co. 22 Ky. L. Rep. 1806, 61 S. W. 1013, holding that, if a principal does not ratify an unauthorized contract, no liability attaches to the adversary party.

The affirmative view is also upheld by Story on Agency, 9th ed. §§ 244, 248, and Wharton on Agency, § 76, while the opposite view, which is supported principally by

tiff in an action brought to recover damages for breach of contract. Reversed.

Plaintiff executed two contracts to sell to defendant certain springs and axles, and the defendant agreed in the same contract to purchase the same. The contracts provided: "It shall only be considered binding on the seller when signed by one or more of its officers." The contracts were signed by the Spring & Axle Company, per C. W. Cathcart, without disclosing his official character. After demurrer to the declaration, plaintiff amended by alleging that the contract was made by a duly authorized agent with full power to represent plaintiff in making the contract, and that said contract, when made, was fully ratified by plaintiff and accepted by it as binding upon it.

Further facts appear in the opinion.

Messrs. Smith, Hammond, & Smith, for plaintiff in error:

In order that a promise may be a sufficient consideration for a promise, it is essential that they shall be made at the same time; otherwise the one antecedently made will be without consideration and void.

6 Am. & Eng. Enc. Law, pp. 728–730; McCaw Mfg. Co. v. Felder, 115 Ga. 415, 41 S. E. 664.

There should be an absolute mutuality of engagement, so that each party may have an action upon the promise of the other; for, if one of the promises is void or unenforceable, the other is also.

Peacock v. Deweese, 73 Ga. 570; 6 Am. & Eng. Enc. Law, p. 730.

In a mutual executory contract ratification can be invoked by one party against the other, but by neither party in his own favor.

Dodge v. Hopkins, 14 Wis. 639; Lawson, Contr. § 177; Mechem, Agency, § 179.

Messrs. Slaton & Phillips, for defendant in error:

the Wisconsin cases hereinafter discussed, is adopted in Mechem on Agency, § 179.

In Dodge v. Hopkins, 14 Wis. 631, it is held that the ratification by a principal of an unauthorized sale of land will not make a contract obligatory on the other party without his assent, upon the theory that, the contract not being originally binding upon the principal, was void for want of mutuality, and hence could not acquire vitality by the act of one party alone. The court says: "The principal in such case may, by his subsequent assent, bind himself; but, if the contract be executory, he cannot bind the other party. The latter may, if he choose, avail himself of such assent against the principal, which, if he does, the contract by virtue of such mutual ratification becomes mutually obligatory. There are many cases where the acts of parties, though unavailable for their own benefit, may be used against them."

The views put forth in this case with regard to the rights of the respective parties seem somewhat inconsistent. If the ratification by the principal is to be regarded as ineffectual to give him any rights, the contract would still be void for want of mutuality, and it would logically follow that its reaffirmance by the adverse party could not lend it validity.

The case is also open to criticism as relying for authority on a decision containing distinguishing elements,—that of Townsend v. Corning, 23 Wend. 435. In that case it does not appear that there was any want of authority on the part of the agent, but the contract was held not to be binding upon the principals because their names and seals were not affixed, while it was not binding upon the agent, although he subscribed his name and affixed his seal thereto, because it contained no words of contract on his part. It was therefore a strictly unilateral contract, and properly regarded as coming within the rule that the courts will not enforce a contract which does not establish reciprocal rights. But such is not the case where a contract is entered into by an unauthorized agent, because the adverse party may, upon the principal's refusal to be bound, recover from the agent such damages as he has sustained on account of the latter's want of authority, so that the contract cannot be regarded as wanting in mutuality; and it is so held by the same courts which deny the efficacy of the principal's ratification, in Mason v. Caldwell, 10 Ill. 196, 48 Am. Dec. 330, *infra*, and Weiseger v. Wheeler, 14 Wis. 102, *infra*. This circumstance appears to have been entirely overlooked in Dodge v. Hopkins, *supra*, and the cases which follow it.

In Atlee v. Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110, it is held that damages are not recoverable by a principal ratifying an unauthorized contract for the purchase of land, for its breach.

The same doctrine was adopted in Cowan v. Curran, 216 Ill. 598, 75 N. E. 322, which denies the right of a principal to a specific performance of a contract for the purchase of land, entered into by an unauthorized agent.

In those jurisdictions where the right of a principal to hold the adversary party on an unauthorized contract is denied, the rule is subject to qualification where the agent has himself become personally responsible. Thus, where a guardian contracting without authority in his representative capacity becomes personally liable, the ward may ratify and enforce the contract. Mason v. Caldwell, *supra*.

And where the agent guaranteed the performance of a contract by his principal, the adversary party must be presumed to have acted upon such guaranty, and cannot, when sued by the principal for damages for nonperformance, set up the agent's want of original authority. Weiseger v. Wheeler, *supra*.

A contract otherwise unilateral is enforceable by bringing suit, showing that the party has waived his right not to be bound. Perry v. Paschal, 103 Ga. 134, 29 S. E. 703; Sivell v. Hogan, 119 Ga. 168, 46 S. E. 67; Western Assur. Co. v. Williams, 94 Ga. 129, 21 S. E. 370.

Lumpkin, J., delivered the opinion of the court:

It is necessary to consider only one question raised by the demurrer, namely, that it appears that each of the contracts provided that it should "only become binding on the seller when signed by one or more of its officers," that it was without consideration, unless there were mutual promises, and that the seller never made a promise or became bound, and therefore the defendant was not bound. No other consideration moving to the defendant is alleged or insisted on, except that there were mutual promises, and that each contract was binding on both parties. If this were not so, then there was no mutuality, and neither would be bound. Under the allegations of the original declaration, it is clear that no contract binding on both parties was set forth. Each of the contracts contained the provision above quoted as to when it should become binding on the seller. It is not alleged that it was ever signed by an officer of the seller, nor is there any allegation that Cathcart was such an officer. Was this cured by the amendment? It still did not allege that Cathcart was an officer of the seller, but that he was a duly authorized agent of the plaintiff, with full power to represent it in making the contract for the articles specified therein, and binding the company to make and deliver them. Concede that he had authority to make the contract, and also to bind the plaintiff to make and deliver the articles; did he exercise it so as to thus bind the plaintiff? Evidently not. The written contract which he actually made contained as one of its terms that it did not become immediately binding. If Cathcart was an agent, and had authority to contract absolutely for the making and delivery of the articles, he did not exercise it, but in fact contracted that his principal should not become then presently bound. The cases in which it has been held that, when there are provisions in an insurance policy declaring that none of its terms can be waived except in writing, there may, nevertheless, be a waiver by an agent, shown to be in fact authorized by the company to make it, in some other manner. Western Assur. Co. v. Williams, 94 Ga. 128, 21 S. E. 370, and like decisions, do not affect this case. That a party may, by himself or his agent duly authorized to do so, waive a provision of a contract in his favor, and that the other party may take advantage of such waiver, is quite different from an effort on the part of one party to a contract to waive one of its terms providing for a certain signature as precedent to its becoming binding on him, and thus, without notice to, or the assent of, the other party, to establish a right in his own favor which would not otherwise exist. This case is much more like that of Reese v. Fidelity Mut. Life Asso. 111 Ga. 482, 36 S. E. 637, in which it was held that when the application for a policy of insurance and the policy itself stipulated that it should not become binding on the company issuing it until the first premium had been actually received, during the good health of the applicant, this payment of the premium during his good health was a condition precedent to fixing liability on the company. See also Mutual Reserve Fund Life Asso. v. Stephens, 115 Ga. 192, 41 S. E. 679. In Perry v. Paschal, 103 Ga. 134, 29 S. E. 703, there was a consideration for the contract signed by the party sought to be bound, and the fact that both parties did not sign the agreement in regard to land was not fatal to a recovery, where the party not signing brought an equitable proceeding for specific performance. So in Sivell v. Hogan, 119 Ga. 167, 46 S. E. 67, the contract was based on a consideration, or at least the seal attached imported a consideration. It was held that "a unilateral contract, although required by the statute of frauds to be in writing, may be made mutual by the other party's doing some act which would take the case out of the statute, so far as he is concerned." But a tender of the purchase price, made after the time specified for delivery (if a tender would otherwise be sufficient), was held not to have that effect. For mutual obligation to furnish a consideration, they must be mutually binding.

It is further contended by plaintiff, that, if the allegation was not otherwise sufficient, the statement that it ratified the action of Cathcart showed the contract to be binding. If the act of Cathcart originally bound the plaintiff, ratification could give it no greater force. Pleading ratification of the act of one acting as agent implies that he originally was wanting in authority, or exceeded his authority. Otherwise, ratification would be unnecessary. As to whether, if one party to a contract is not bound by reason of want of authority in a person signing as his agent, he can afterward ratify such act and claim that the other party became bound, although the contract was not originally binding on both, the authorities are in conflict. In Wisconsin it has been held that "ratification of con-

tract, entered into by person acting as agent, but without authority so to do, made by the person for whom he assumed to act as principal, cannot validate the contract so as to bind the other contracting party without his assent." Atlee v. Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 109, 33 N. W. 110. Speaking of a vendee in a contract for the purchase of land, who has not signed the written contract, the same court says: "He ought not to be in a position where he can hold the other party to the contract, and compel its performance if advantageous to him, and at the same time be at liberty to avoid the contract on his part if disadvantageous. Both parties ought to be bound by the contract, or neither should be bound." Lowber v. Connit, 36 Wis. 183; Dodge v. Hopkins, 14 Wis. 630, 637, 641; Townsend v. Corning, 23 Wend. 435, 444; Governor & Company of Copper Miners v. Fox, 3 Eng. L. & Eq. 420; Mechem, Agency, § 179 (b). Judge Story thought the general rule to be that ratification related back to the act done, both for and against the principal, but with certain exceptions. Story, Agency, §§ 245 et seq. An elaborate discussion of the subject will be found in a note to Atlee v. Bartholomew, *supra*, in which the position of Mr. Mechem is criticized. See also Lawson, Contr. § 177; Andrews v. Ætna L. Ins. Co. 92 N. Y. 596; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Soames v. Spencer, 1 Dowl. & R. 32; Maclean v. Dunn, 4 Bing. 722, 29 Revised Rep. 714; 1 Am. & Eng. Enc. Law, 2d ed. pp. 12, 13. The Georgia cases hold, as a general rule, that ratification relates back to the act ratified, except where there is an intervening equity. Howard v. Cassels, 105 Ga. 412, 70 Am. St. Rep. 44 (2), 31 S. E. 562; Singleton v. Bank of Monticello, 113 Ga. 527, 38 S. E. 947 (2); Graham v. Williams, 114 Ga. 716, 40 S. E. 790; Civil Code, § 3019. As to the point made in the quotation from Lowber v. Connit, *supra*, compare decisions in Perry v. Paschal, 103 Ga. 137, 29 S. E. 703. We are not, however, required to decide whether in this case the seller could retain the right to ratify or reject until it developed which would be the more advantageous, and then ratify, if for its own interest, and thus by relation back make the contract mutual instead of unilateral. Suppose that the principal could ratify; what would it ratify? The exact contract which the person acting as agent made. What was that? It was that the written instrument should not become binding on the seller until signed by one or more of its officers. This agreement formed one of the terms of the written contract made by the person acting as agent. When his acts were ratified, it simply confirmed the contract which he made. It did not operate to make another contract, or to change the terms of the one made. Ratification confirms. It neither changes the contract nor makes a new one with different terms. The contract made, therefore, not having been binding on the seller, and there being no consideration, the purchaser was not bound, and could retire from it before it became a complete and mutually binding contract. Cooley v. Moss, 123 Ga. 707, 51 S. E. 625.

The case of George Delker Co. v. Hess Spring & Axle Co. 138 Fed. 647, is relied on by the plaintiff. That decision dealt with three points: That the contract was not too uncertain to be enforced; that the purchaser was not put on his election as to his action in certain events provided for in the contract; and the determination that the contract contemplated manufacturing the articles, and that the measure of damages was one adapted to a manufacturing contract, and not to an ordinary contract of bargain and sale. The questions dealt with in this opinion were not involved. The specification of certain articles under one of the contracts did not go further than to render it binding to the extent of the accepted specification. McCaw Mfg. Co. v. Felder, 115 Ga. 408, 41 S. E. 664.

Judgment reversed.

All the Justices concur, except **Beck**, J., not presiding.

MARYLAND COURT OF APPEALS.

EDWIN S. ZELL, Appt.,
v.
BALTIMORE STOCK EXCHANGE et al.

(102 Md. 489, 62 Atl. 808.)

Stock exchange—seat—resulting trust.

One who purchases in the name of his partner a seat in a stock exchange has, notwithstanding knowledge on the part of the officers of the exchange of the facts, no equity to prevent the enforcement of a rule of the exchange that a seat may be sold for the debts of the member holding it in favor of other members.

(January 10, 1906.)

Case Note.—Stock exchange; resulting trust in favor of one who purchases seat in name of another.—The conclusion reached in the case in hand is more or less directly supported by the few decisions to be found on the subject, which, although recognizing the existence of a resulting trust in favor of one who furnishes money for the purchase of a seat in a stock exchange in the name of another, to be used in carrying

APPEAL by complainant from an order of the Circuit Court, No. 2, of Baltimore City dissolving an injunction restraining the sale of a seat in the exchange. Affirmed.

The facts are stated in the opinion.

Messrs. **James W. McElroy** and **Frank Gosnell**, for appellant:

As the seat in controversy was purchased by Zell, paid for by him, and title taken in the name of Merceret, a resulting trust was created in favor of Zell.

First Nat. Bank v. Taliaferro, 72 Md. 169, 19 Atl. 364; German Sav. Bank v. Renshaw, 78 Md. 475, 28 Atl. 281; Brown v. Deford, 83 Md. 297, 34 Atl. 788; Textor v. Orr, 86 Md. 398, 38 Atl. 939; Hoffman v. Gosnell, 75 Md. 577, 24 Atl. 28; Central Trust Co. v. Arctic Ice Mach. Mfg. Co. 77 Md. 202, 26 Atl. 493; Hooper v. Central Trust Co. 81 Md. 559, 29 L.R.A. 262, 32 Atl. 505.

If a man knows a legal estate is in a third person at the time of purchase, he is bound to take notice of what the trust is.

Magruder v. Peter, 11 Gill & J. 243; Ringgold v. Bryan, 3 Md. Ch. 494.

The seat is property.

Page v. Edmunds, 187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. Rep. 200; Re Hurlbutt, 13 Am. Bankr. Rep. 50.

The rules of the exchange cannot avail.

Ex parte Saffery, L. R. 4 Ch. Div. 560; Tomkins v. Saffery, L. R. 3 App. Cas. 220.

Messrs. **W. Burns Trundle** and **Edwin T. Dickerson**, for appellees:

Plaintiff is estopped to claim anything contrary to the constitution.

Bayard v. Norris, 5 Gill, 468, 46 Am. Dec. 647.

The rules and regulations of the stock exchange are valid.

Hyde v. Woods, 94 U. S. 523, 24 L. ed. 264; Thompson v. Adams, 93 Pa. 55; Page v. Edmunds, 187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. Rep. 200; Pancoast v. Gowen, 93 Pa. 66; White v. Brownell, 3 Abb. Pr. N. S. 318, 4 Abb. Pr. N. S. 162.

The interest of each member is subject to the constitution and by-laws.

Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495, 17 N. E. 225; Haight v. Dickerman, 45 N. Y. S. R. 128, 18 N. Y. Supp. 559; Stonebridge v. Smith, 23 Jones & S. 294; Re Hayes, 37 Misc. 264, 75 N. Y. Supp. 312; Weigand v. Fraternities Acci. Order, 97 Md. 456, 55 Atl. 530; Leech v. Leech, 3 W. N. C. 542, note.

Jones, J., delivered the opinion of the court:

This case originated in a bill of complaint filed by the appellant here in circuit court No. 2 of Baltimore city, in which he alleged that on or about the 1st day of June, 1899, he purchased from Owen Daly, one of the appellees here and one of the defendants below, a seat or membership in the Baltimore Stock Exchange, and paid therefor the sum of $4,250; that for the sake of convenience the said membership or seat was placed in the name of Frank J. Merceret, with whom, about the time of said purchase, he had formed a partnership for the purpose of carrying on a general brokerage business in stocks and bonds, it being understood and agreed that the said Frank J. Merceret should transact the business of the firm on the Baltimore Stock Exchange; that, without the knowledge or consent of the appellant, said Merceret speculated in stocks and bonds upon his own account with the other individuals who are named as appellees, and in consequence became indebted to them in the sums specified in the bill; that in January, 1905, the said Merceret received from the said appellees notification by letter that they could no longer carry for him said indebtedness. Payment thereof was requested, and proceedings threatened in case of his failure to make such payment; that at the time the debts mentioned were contracted by Merceret the said appellees and each of them knew that the transactions giving rise to them were had solely on the individual account of the said Merceret and without the knowledge or consent of the appellant; that the said appellees knew that the seat or membership in the said stock exchange was not the property of Merceret, though standing in his name, but was the property of the appellant, and

on the business in which both are engaged, do not allow such trust to defeat bona fide claims of third parties.

Where a seat is purchased in the name of an employee, a trust results in favor of the employer which equity will enforce by compelling a transfer of the seat upon the termination of the employment. Weaver v. Fisher, 110 Ill. 146; Sproul v. Morris, 31 Pittsb. L. J. N. S. 310.

Thompson v. Adams, 93 Pa. 55, which is discussed and followed in ZELL v. BALTIMORE STOCK EXCHANGE, seems to be the only other case in which the rights of the equitable owner of the seat, as against the claims of members of the exchange, have been the subject of judicial consideration.

A somewhat similar case is that of Allien v. Wotherspoon, 18 Jones & S. 417, in which it is held that a member of a firm, who assents to the issuance of a certificate of membership in an exchange, purchased by the partnership, in the name of his partner, is estopped from asserting his right thereto as against one to whom it has been pledged by the holder to secure an individual loan.

that any dealings that the said appellees, or any of them, had with Merceret, were on his individual credit, and the said debts were not contracted with reference to the said seat or membership: that the appellant had addressed to the said appellees a letter to that effect in which he referred to the letter of the said appellees to said Merceret, and called their attention to his claim that, though the seat in question was "colorably" in the name of Merceret, it was the appellant's individual property, having been paid for by him, which he averred had all along been well known to each and all of the said appellees, and informing them that he would claim and maintain his rights in the premises; that, according to the constitution and by-laws of the Baltimore Stock Exchange, which was made defendant below and is one of the appellees here, "a seat or membership owned, belonging to, and the property of a member thereof, may be sold by" it, "and the proceeds of said sale applied to the contracts, debts, or obligations with or to other members of the exchange to the entire exclusion of the other creditors of such member;" and a copy of the said constitution and by-laws is filed as an exhibit with appellant's bill. The bill then charges that it is the intention of the appellees, who are the creditors of Merceret, to apply to the Baltimore Stock Exchange to make sale of the seat or membership of the same, belonging to the appellant, as he claims, but standing in the name of Merceret, and apply the proceeds thereof to the payment of the debts due to such creditor appellees unless they be restrained, etc. The bill then prays an injunction to so restrain them and the stock exchange from such action. A preliminary injunction was granted. The appellees, except Merceret, promptly filed answers to the bill and moved for a dissolution of the injunction. The appellees, who were creditors of Merceret, as well as the Baltimore Stock Exchange, each and all denied in their answers that they had any personal knowledge of the partnership between the appellant and Merceret or the terms thereof; or that, at the time the debts referred to in the bill of complaint were contracted, they knew that they were so contracted by Merceret without the knowledge and consent of the appellant; and denied that the seat or membership of the said stock exchange referred to in the bill was not the property of Merceret. On the contrary, they averred "that all the right, title, and interest therein, under the constitution and by-laws whereby membership was created, was and could only be in the said" Merceret. Testimony was taken upon the motion to dissolve the injunction, and the testimony of each of the said appellees was practically to the same effect as their answers in respect to their said respective denials. Upon the hearing of the motion, the preliminary injunction was dissolved. The appeal is from the order dissolving the same.

Prior to the dissolution of the injunction, the appellee Merceret had answered the bill under leave of court, but it is not material to refer particularly to such answer. The appellant himself testified as a witness, as follows: "I told Mr. Daly I was going to purchase a seat on the Baltimore Stock Exchange. Had he one for sale? I was so informed by Merceret. He said he had. I asked the price,—$4,250. He said it would cost $50 to have the seat transferred. I wanted to pay for that seat then and there, and he said he could not accept the money until Merceret was elected a member; that the seats were sold subject to admission." And again he said in his testimony: "I told Mr. Daly I wanted the seat to be known as my property; that I was buying it. Mr. Daly told me that it could not be arranged to be known as my property; that they recognized the board member, the man in whose name the seat was. Mr. Badart was present when I told Mr. Daly, and Mr. Orrick was present." It would seem to be obvious, upon this state of allegation and proof, that the rights of the parties before the court must depend upon the effect to be given to the constitution, by-laws, rules, and regulations of the stock exchange adopted for the government of its membership and defining and fixing the rights, privileges, and obligations attaching to membership therein. The stock exchange is a voluntary association governed by such constitution, by-laws, rules, and regulations as it may choose to adopt, and which, so far as not contrary to law or public policy, will secure to the members thereof exclusive rights and privileges which the courts have fully recognized. The constitution and by-laws of the Baltimore Stock Exchange are in evidence in this case. The one having more particular reference to the controversy here has been substantially set out in the appellant's bill, and is the one against the enforcement of which the injunction is here sought. Only one other will be specially referred to, which is as follows: "Every member shall, on the day of his admission and notification thereof by the secretary, sign the constitution of the exchange, and thereby pledge himself to abide by the same, and all subsequent amendments thereof, under penalty of forfeiture of his seat." The conditions

under which a seat or membership may be sold by the stock exchange in enforcement of the obligations of its members are provided for in its constitution; and there is no pretense here that the stock exchange is proceeding, or intends to proceed, in respect to enforcing the obligations incurred by Merceret, except in accordance with the provisions of its constitution applicable to the case. Now will the court interfere?

A case very analogous to the case at bar is that of Thompson v. Adams, 93 Pa. 55, in which it appeared that the plaintiff gave to Samuel A. Richards, who was a partner with William E. Thompson in the business of stockbrokers, the sum of $1,000 to purchase a seat in the board of brokers. The seat was purchased by Richards, and he continued to hold it by plaintiff's permission, without knowledge on part of the board of any other ownership or title, until his death in May, 1876. At that time he was indebted to various members of the board in the sum of $5,477.17. Under a section of the constitution of the board of brokers, when a member died, his seat might be sold by the secretary; and, after satisfying the claims of the members of the board, the balance should be paid to the legal representatives. The seat was sold. The question was whether the plaintiff was entitled to the proceeds or any part either in full or *pari passu* with the creditors of Richards. The court below denied the right of the plaintiff to, or to participate in, the proceeds of the sale. On appeal the judgment below was affirmed, and the court said: "The constitution and articles of a voluntary association, such as the Philadelphia Board of Brokers, are law as to the members. The plaintiff was not a member, but had furnished the money by which Richards obtained a seat. His contention is that he was the equitable owner of the seat, and had title to that which was received for it, and that the defendant had no right to apply the proceeds to debts due by Richards to other members in pursuance of the terms of the constitution of the club. But why not? Richards was the member of the board, the legal owner of the seat, and the plaintiff an entire stranger unknown to the association. The members gave credit to each other in part, no doubt, upon the faith of the liability of a member's seat to them for his debts. There is nothing unlawful or unreasonable in the regulation. The seat is not property in the eye of the law. It could not be seized on execution for the debts of the members. It is the mere creature of the board, and, of course, was to be held and enjoyed with all the limitations and regulations which the constitution of the board put upon it." It is sought to distinguish the case at bar from the one just referred to, in that the plaintiff there was a stranger to the exchange, and not a partner with the member in whose name the seat stood. It is not perceived how the circumstance of a partnership of a member of the exchange with another who is not a member can make any difference in principle as to his relations to the exchange. Being a partner with an outside party is nothing more than having a contract with such party subsisting at the same time with his contract with the exchange. He is under an obligation to observe his contracts and engagements with each party; and there can be no reason why his contract or obligations with the exchange and its members are to be subordinated to those he may have with others, whether they pertain to a partnership or otherwise. It would be impossible for a voluntary association to maintain its organization and enforce, on behalf of its members, rights pertaining to membership if this were to be so.

It is further argued that there was not, in the case cited, any evidence to show that the other members of the exchange had any knowledge of the plaintiff's equity. It has already been seen what the state of the testimony here is as to the facts upon which the appellant rests his equity; but, be that as it may, it is the exchange—the whole body of the membership—that has control, and the right of enforcement, of its laws and rules in the interest of each and all of its members; and such organization would be shorn of its function if the exercise of such right and control was to be affected by particular equities that might be made to appear in the relations of individual members, as individuals and not as members of the association, with outside parties.

There seems to be no want of harmony in the authorities as to the validity and contractual effect of the rules and regulations of a voluntary association of the character of the one here in question. In another case, very much in point (Hyde v. Woods, 94 U. S. 523, 24 L. ed. 264), the Supreme Court of the United States had under consideration a rule of a stock exchange which read as follows: "In sales of seats for account of delinquent members, the proceeds shall be applied to the benefit of the members of this board exclusive of outside creditors, unless there shall be a balance after payment of the claims of members in full." And the court, in giving effect to such rule in the particular case, said, speaking through Mr. Justice Miller: "The rule entered into and became an incident of the

property when it was created, and remains a part of it, into whose hands soever it may come. As the creators of this right—this property—took nothing from any man's creditors when they created it, no wrong was done to any creditor by the imposition of this condition." The same court, in a later case (Page v. Edmunds, 187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. Rep. 200), having before it more particularly the question of how far a seat in a brokers' exchange was to be treated as property, while holding in apparent disagreement with the *dictum* in the Pennsylvania case, to which it referred, that the seat was property, said undoubtedly it "was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chooses to put upon it." In the recent case in this court of Baltimore v. Johnson, 96 Md. 737–744, 61 L.R.A. 568, 54 Atl. 646, a similar view was expressed of the tenure of a seat in a stock exchange, after a review of many authorities,—reference being had there more particularly to the taxable quality of such seat,—where this court said, through Judge Boyd: "It is thus apparent that, while a membership in the exchange is in a sense property, it is qualified and limited and lacks one of the most valuable and usual characteristics of property,—the right of disposing of it as the owner deems proper, so long as he violates no law."

In view of the doctrine and principles thus enunciated and defining the nature of the holding of a seat in a stock exchange, it cannot avail the appellant to say, nor for the court to hold, in the circumstances of this case, that a resulting trust accrued to him, as he claims, by the payment of the money which purchased the seat or membership here in question; for, giving him the benefit of the theory which he sets up, what was purchased was not a clear, unfettered title to the seat, but one burdened with the obligations that membership in the exchange put upon the member holding it and subject "to be held and enjoyed with all the limitations and restrictions which the constitution of the board chooses to put upon it." The bill in the case does not allege, nor does he attempt to show, that he will not get this. As in no view can he get any more, there was no error in refusing the relief asked, and the order of the lower court dissolving the injunction will be affirmed.

Order affirmed, with costs to the appellees.

MISSOURI SUPREME COURT.

IRA M. COBE, Appt.,
v.
W. J. LOVAN, Respt.

(193 Mo. 235, 92 S. W. 93.)

Building association—transfer of contracts.

1. The board of managers of a building and loan association has no power to transfer to another association the contract of a borrowing stockholder.

Same—foreclosure—validity of direction of.

2. That the foreclosure of a building and loan association mortgage is ordered by its former president will not validate the proceeding if he is acting as agent of another association to which the former association has attempted to transfer its assets.

Deed—record—estoppel.

3. One who permits a void deed, executed in proceedings to foreclose a building and loan association mortgage on his property, to remain of record, is not es-

Case Note.—Right of building association to transfer loan made to member.—Two views are taken of the right of a building and loan association to transfer absolutely a loan made to a member. In one class of cases the question is regarded as one of corporate power generally, the rights of the members not being taken into consideration; in the other, the powers of the corporation are deemed to be essentially limited by its nature.

This divergence of opinion also extends to text-books on the subject. In Thompson on Building & Loan Associations, 2d ed. § 286, it is said that, the contract of the mortgagor being in a sense personal and not to be defeated by any assignment by the association, it is beyond the power of the association to sell the mortgage absolutely; that, in selling outright his mortgage, the association undertakes not only to sell its own interest, but to transfer the rights of the mortgagor, which it cannot do without his consent.

To support this view, however, the author cites only the case of Barton v. Enterprise Loan & Bldg. Asso. 114 Ind. 226, 5 Am. St. Rep. 608, 16 N. E. 486, in which the question under discussion is not directly involved, and which merely holds that mortgages held by an association, which are unenforceable by it because of an agreement of all the shareholders that the money advanced to members should be theirs absolutely if they paid all dues and interest and agreed to take the amounts so advanced in full for their stock, do not constitute assets for distribution.

Compare with the view above stated the suggestion made in Endlich, Bldg. Asso. 2d ed. § 335, that a borrowing member giving a mortgage stipulating for the repayment of a sum certain at a time certain is deemed to consent to the enforcement of such mortgage by an assignee according to

topped to assert its invalidity against one who purchases all the assets of the association for a lump sum without knowing the facts with reference to the particular claim, which is only an insignificant part of the assets transferred.

Deed—quitclaim—equities.

4. A quitclaim grantee of a title held by a building and loan association under a mortgage which it purchased from another association does not take free from the equity of the mortgagor to set up the invalidity of the transfer.

(February 22, 1906.)

APPEAL by plaintiff from a judgment of the Circuit Court for Howell County in defendant's favor in an action brought to recover possession of real estate. Affirmed.

The facts are stated in the opinion.

Messrs. **Orr & Luster**, for appellant:

The deed of trust read in evidence vested the legal title to the premises in question in the trustee therein named, and also vested in said trustee the power to sell.

Schanewerk v. Hoberecht, 117 Mo. 22, 38 Am. St. Rep. 631, 22 S. W. 949; Lanier v. McIntosh, 117 Mo. 508, 38 Am. St. Rep. 676, 23 S. W. 787; Kennedy v. Siemers, 120 Mo. 73, 25 S. W. 512; Springfield Engine & Thresher Co. v. Donovan, 120 Mo. 423, 25 S. W. 536; Biffle v. Pullam, 125 Mo. 108, 28 S. W. 323; Snyder v. Chicago, S. F. & C. R. Co. 131 Mo. 568, 33 S. W. 67; Hume v. Hopkins, 140 Mo. 65, 41 S. W. 784; Keet v. Baker, 141 Mo. 175, 42 S. W. 940; Long v. Long, 141 Mo. 352, 44 S. W. 341; Butler Bldg. & Invest. Co. v. Dunsworth, 146 Mo. 361, 48 S. W. 449; Markwell v. Markwell, 157 Mo. 326, 57 S. W. 1078; Fowler v. Carr, 63 Mo. App. 486; Price v. Blankenship, 71 Mo. App. 548; Huckabee v. Billingsly, 16 Ala. 414, 50 Am. Dec. 183; Robinson v. Cahalan, 91 Ala. 479, 8 So. 415.

Lovan is bound by recitals contained in the trustee's deed, and is estopped from contradicting the same by parol evidence.

Butler Bldg. & Invest. Co. v. Dunsworth, *supra;* Hull v. Pace, 61 Mo. App. 117; Sherwood v. Saxton, 63 Mo. 78; Day v. Brenton, 102 Iowa, 482, 63 Am. St. Rep. 461, 71 N. W. 538.

If plaintiff purchased without notice, defendant's right of redemption is cut off so far as this plaintiff is concerned.

Smith v. Boyd, 162 Mo. 154, 62 S. W. 439; Butler Bldg. & Invest. Co. v. Dunsworth, *supra;* Hamilton v. Lubukee, 51 Ill. 415, 99 Am. Dec. 562.

The request for the sale having been

its written terms. In such case he would, of course, be relegated to an action against the association for the enforcement of rights arising under his contract of membership.

In Thornton & Blackledge on Building & Loan Associations, § 290, it is said that it would seem that a building association is not limited to the assignment of its mortgages as collateral security, but possesses a general power of assignment.

The right of a building association, in the absence of statutory prohibition, absolutely to transfer its securities, is upheld in Bowlby v. Kline, 28 Ind. App. 659, 63 N. E. 723. In this case the court, after stating with approval the rule laid down in 1 Clark & Marshall on Private Corporations, § 158, that a corporation which has received bills, notes, bonds, or other choses in action in the course of its business has the same power as a natural person to negotiate or assign the same, provided it does so for a legitimate corporate purpose and violates no express restriction in its charter, goes on to say: "That in the legitimate conduct of its business it may become desirable and necessary for a building and loan association to negotiate and assign paper held by it, is illustrated by the facts of this case. Holding a first mortgage upon real estate, the owner of which dies insolvent, the holder of a junior lien proposes to buy its claim, thereby reaching the same result that would follow from a foreclosure sale, purchase, and redemption. No reason can be suggested why it should not have power to save itself from the annoyance and risk of litigation, and collect its money by selling and assigning its note and mortgage to him. The legislature, by the negative and restrictive language used in the act of 1897, recognized the prior existence of the right."

In Manahan v. Varnum, 11 Gray, 405, it is held that, in the absence of by-laws to the contrary, the trustees of a voluntary loan fund association may transfer the legal title to a mortgage held by them.

In Quein v. Smith, 108 Pa. 325, in which the validity of the assignment of a borrower's mortgage as collateral was sustained, it is said, *obiter*, that a solvent building association may appropriate the proceeds of a debt owing to itself in payment of a debt which it owes.

In Trowbridge v. Hamilton, 18 Wash. 686, 52 Pac. 328, it is held that a statute requiring building and loan associations to deposit their mortgages with the state auditor, or with an approved trust company in trust for all its members and creditors, precludes them from transferring such mortgages to third parties. Whether this might be done in the absence of such a statute is not discussed.

The effectiveness of such an assignment seems to be recognized by the Texas cases, which hold that where a building association, by voluntary sale of all its assets, terminates its power to mature its stock by collecting dues and earning profits from loans as contemplated by its plan of or-

made in the name of the association by its president, the law presumes that said request was in fact made by said association.

Sparks v. Dispatch Transfer Co. 104 Mo. 540, 12 L.R.A. 714, 24 Am. St. Rep. 351, 15 S. W. 417; Franklin Ave. German Sav. Inst. v. Board of Education, 75 Mo. 408; State ex rel. Bornefeld v. Kupferle, 44 Mo. 154, 100 Am. Dec. 265; Washington Sav. Bank v. Butchers' & D. Bank, 107 Mo. 145, 28 Am. St. Rep. 405, 17 S. W. 644; Winscott v. Guarantee Invest. Co. 63 Mo. App. 369; Hill v. Bank of Seneca, 87 Mo. App. 606; Roe v. Bank of Versailles, 167 Mo. 406, 67 S. W. 307; Bambrick v. Campbell, 37 Mo. App. 460.

By taking no steps to have the deed canceled, defendant is estopped and cannot redeem, as against the plaintiff, in the absence of a notice to the plaintiff of anything that would render said deed of trust or trustee's deed voidable or irregular.

26 Am. & Eng. Enc. Law, p. 980; Day v. Brenton and Hamilton v. Lubukee, *supra;* Kline v. Vogel, 90 Mo. 247, 1 S. W. 733, 2 S. W. 408; Ferguson v. Soden, 111 Mo. 214, 33 Am. St. Rep. 512, 19 S. W. 727; Bausman v. Eads, 46 Minn. 148, 24 Am. St. Rep. 205, 48 N. W. 769; Baker v. Cunningham, 162 Mo. 134, 85 Am. St. Rep. 490, 62 S. W. 445; Beatie v. Butler, 21 Mo. 320, 64 Am. Dec. 234.

Mr. **W. P. Campbell**, for respondent:

A sale of land under a trust deed, without the authority of the owner of the debt, is void.

Magee v. Burch, 108 Mo. 336, 18 S. W. 1078.

The assignee of a security given by a borrowing member of a building association has no authority to control the foreclosure.

Lovelace v. Pratt, 163 Mo. 70, 63 S. W. 383.

A purchaser of land, by taking a quitclaim deed, is charged with notice of the rights of the holder of the paramount title, and of all equities not in writing.

Stoppel v. Schroeder, 62 Mo. 147; Hope v. Blair, 105 Mo. 86, 24 Am. St. Rep. 366, 16 S. W. 595; Condit v. Maxwell, 142 Mo. 278, 44 S. W. 467.

Cessation of business by a building and loan association releases its members from further payment of dues.

Blakeley v. El Paso Bldg. & Loan Asso. (Tex. Civ. App.) 26 S. W. 292; Endlich, Bldg. Asso. § 502; Thompson, Bldg. Asso. 30.

ganization, the mutuality of the contract with the borrowing member is destroyed, and he is entitled to a rescission of the contract and an equitable adjustment of his account. North Texas Bldg. & L. Asso. v. Hay, 23 Tex. Civ. App. 98, 56 S. W. 580; North Texas Sav. & Bldg. Asso. v. Jackson (Tex. Civ. App.) 63 S. W. 344.

The view that a transfer of its loans by a building and loan association is *ultra vires* derives its strongest support from the case of Lovelace v. Pratt, 163 Mo. 70, 63 S. W. 383. The court says: "One of the points presented by this record is with respect to the authority of a building and loan association organized under the laws of this state, while a going concern, to sell and assign its notes or bonds executed by borrowing members for loans. . . . There are many descriptions of such an association, but none more comprehensive, we think, than that given in the case of State v. Redwood Falls Bldg. & L. Asso. 45 Minn. 154, 10 L.R.A. 752, 47 N. W. 540, which is as follows: 'The general design of such an association may be stated, with sufficient precision for our present purposes, to be the accumulation from fixed periodical contributions of its shareholders or members, and from the profits derived from the investment of the same, of a fund to be applied from time to time in accommodating such shareholders with loans, to enable them to acquire and improve real estate by building thereon; the conditions of the loan being such that the liability incurred therefor may be gradually extinguished by means of the borrower's periodical contributions upon his stock, so that when the latter shall be fully paid up the amount paid shall be sufficient to cancel the indebtedness.' Prior to the act of 1895 (Laws of 1895, p. 105), mutual savings fund, loan, and building associations had no power to borrow money to loan to its members or others because no such power was conferred upon them by their charters, or necessarily implied from the powers expressly granted (Grohmann v. Brown, 68 Mo. App. 630), and, if no such power was conferred or implied with respect to the authority to borrow money, they possessed no power, either by express statute or by implication, to engage in a banking or discount business. . . . The object and purposes of such an organization is utterly inconsistent with the idea that any part of its purpose is to engage in the sale of the notes of its borrowers. When a corporation attempts to use powers which it does not possess, as in this case to sell outright and assign the bonds of one of its stockholders, contrary to the plain intent and policy of the law, its action is *ipso facto* null and void. The sale, therefore, by the acting trustee at the request of Jefferson, was without authority, and passed no title; especially is this so, when the deeds of trust upon their face provide that, in case of default in the payments by Pratt of the instalments as they become due, the sale may be made at the request of the association."

Lamm, J., delivered the opinion of the court:

Cast below in ejectment for block 14 in Maxey's addition to the city of Willow Springs, Cobe appeals.

The petition was in conventional form, laying the ouster as of March 15, 1902. The answer admits possession, denies all other averments, and pleads certain affirmative defenses, which may be summarized as follows: (1) Adverse possession for ten years under a claim of ownership; (2) that plaintiff and those under whom he claims have not been seised or possessed of the premises within ten years; (3) that plaintiff claims title by virtue of a foreclosure by advertisement and sale under a trust deed, executed to the Willow Springs Building & Loan Association, a corporation organized under article 9, chap. 42, Rev. Stat. 1889, said deed of trust authorizing the sheriff of Howell county, for the time being, upon the request of said association, to make a sale on default of the payment of interest, dues, and penalties as provided in the deed of trust and the constitution and by-laws of said association, for a period of six months. That such sheriff sold and conveyed the premises, but his proceedings were void for the reason that he was not requested by said association, or by anyone authorized to act for the same, to advertise and sell said premises; (4) the sheriff's advertisement, sale, and conveyance, as acting trustee, are alleged to be void because there was no default; and (5) are void because they occurred several years after said association ceased to do business. Issue having been joined, the state of the proof was such that the court ruled against respondent's defense of the statute of limitations, thus leaving as the sole issue the validity of the trustee's deed from the then sheriff of Howell county, as acting trustee under the building and loan association deed of trust. Stated in free outline, appellant contends that the irregularities, if any, shown in the proceedings leading up to the sale, are not fatal to his right to recover, under the rule laid down in Schanewerk v. Hoberecht, 117 Mo. 22, 38 Am. St. Rep. 631, 22 S. W. 949, and later decisions following that case, and the cause should be reversed. Stated in free outline, respondent contends that such irregularities were shown as rendered the trustee's deed void under the rule laid down in Lovelace v. Pratt, 163 Mo. 70, 63 S. W. 383, and, hence, his judgment, nisi, should stand.

The facts, much condensed and to some extent stated in their legal effect, are as follows: Lovan resides in Willow Springs on the *locus in quo* as a homestead. Cobe resides in Chicago and is vice president of the Assets Realization Company. Lovan and Ophelia, his wife, on the 25th day of March, 1890, conveyed the premises to Wilkinson, trustee, party of the second part, for the benefit of the Willow Springs Building & Loan Association, party of the third part, to secure a note dated March 17, 1890, due in one day to said association, promising to pay $300 for value received with interest from date at the rate of 10 per cent per annum, payable monthly on a given Monday, which note contains the following further promise: "And I promise to pay said association my monthly dues of $4 each month, as stockholder in said association, with all penalties assessed on my said stock, according to the constitution and by-laws of said association." The deed of trust contained a provision that if Lovan paid the interest when due and payable, and paid said dues and penalties according to the tenor and effect of the note, and said constitution and by-laws, then the deed should be void. But otherwise, if he failed to pay said interest when due, or failed to pay his monthly dues as stockholder as they accrue, then, in either event, the deed should remain in full force. A provision was inserted for the substitution of the sheriff as trustee upon the absence of Wilkinson from Howell county, providing that, in that event, "the then acting sheriff of said county, upon the request of the party of the third part, shall sell the property herein described, or so much thereof as may be necessary to pay said note, interest, and dues and penalties thereon." Provisions relating to notice, place of sale, and the executing of a deed to the purchaser are not questioned, and need not be set out. The trust deed also contained the usual narration that "any statement of facts or recital by said trustee in relation to the nonpayment of the money herein secured to be paid, and of the amount due herein, or any default in the conditions of this trust deed, the advertisement, sale, receipt of money, and execution of the deed to the purchaser shall be received as prima facie evidence of such fact." Certain by-laws of the Willow Springs Building & Loan Association were introduced in evidence. In a nutshell, they provided that there should be a president, a vice president, a secretary, and a treasurer and seven directors. That such officers and directors should constitute the board of managers of the business of the association. That every person who subscribed stock should then pay $1 on each share and thereafter pay a like sum to the association at each stated meeting of the board of managers. That the stated monthly meetings of the board of managers should be on the first Monday after the 15th of each month for the purpose of receiving member-

ships, monthly dues, and fines from the shareholders, interest on loans, and to loan the funds of the association, and the transaction of other business. Lovan owned three shares. The date of his membership does not appear, and hence no account of payments prior to his loan can be rendered, but on giving his note for $300 and executing his deed of trust, he received $135 from the association. Thereafter, at the stated meetings of the board of managers in Willow Springs, he paid $5 monthly for the months of April to November, 1890, inclusive, making his last payment on December 2, 1890. That date was also the last time the board of managers ever met to receive dues or for any other purpose. From that day to this, as gleaned from the corporate books, there was not a corporate act done or line written by the directors, or the board of managers, or by the corporation itself. The corporate story of what happened may be painfully spelled out in the following from its "Journal Book:"

Page 35 of Journal Book is in words and figures as follows: "Willow Springs, Sept. 18th, 1890. Board of Managers and Stockholders of Willow Springs Building & Loan Association met in called meeting for the purpose of considering the question of merging or transferring the Willow Springs Association into the Phœnix of St. Joe, Mo. Mr. Robinson, agent of the Phœnix, explained the Phœnix method of doing business and submitted a proposition for merging the Association into theirs. On motion of Mr. Teeter a committee consisting of W. E. Drew, E. H. Farnsworth and S. W. Wilkinson was selected to ascertain the wishes of the stockholders of this association as to merging the two associations. No other business, the meeting adjourned. E. H. Farnsworth, Sec."

Page 36 was as follows: "Willow Springs, Mo., Oct. 28th, 1890. Board of managers met. Quorum present. After some discussion motion to adjourn to Saturday night, November 1st, 1890. Carried. Adjourned. E. H. Farnsworth, per Patterson."

Page 37 was as follows: "Willow Springs, Mo., Nov. —, 1890. Board met. No quorum. On motion adjourned to meet on December 2nd, 1890. E. H. Farnsworth, Sec."

Page 38 was as follows: "Willow Springs, Mo., December 2nd. Board managers met. Quorum present. Minutes of Sept. 1st-18th and October 28th approved. Report of committee to arrange transfer to Phœnix filed and accepted. Show vote to transfer, Drew, Teeter. Wilkinson, T. Hughes absent. Randel, Rowe, Gaylord, Withaup, ab., Thomas. Yeas 8, absent 2. Bills allowed: S. W. Wilkinson $25.00 services. E. H. Farnsworth $55.00, services. S. W. Wilkinson $5.25 record. Moves to prepare release by secretary. Motion to accept prop. of Phœnix carried, D———, Teet. Wilk., G———, Thos., Farn., Six yeas. Motion to presdt. transfer bills rec. to Phœ. Motion carried to settle treasurer. Gorman and Layker. Report Treas. Allowed withdrawn.

John Kelly	$14 85
Frank Sass	40 90
I. S. McDonald	18 42
Mrs. S. E. Davids	16 75
H. J. Rowe	11 25
Farnsworth	20 48
	49 68
	22 65
	$194 98

Meditation, more or less profound, on the foregoing, may result in a conclusion that there was a building and loan association in St. Joseph, Missouri, known as the Phœnix; that on September 18, 1890, one Robinson, representing the Phœnix, appeared at Willow Springs before the board of managers, in which meeting possibly some stockholders participated, and there discussed with them a pending proposition of the Willow Springs Building & Loan Association's going out of business and "merging or transferring" itself in or over to the Phœnix; that thereupon a committee was appointed to ascertain the wishes of the stockholders; that another meeting was held by the board of managers in October, at which the matter was discussed but no action taken; that in November no quorum was present at the meeting; and that on December 2d the board of managers met, eight being present and two absent. If the narration in the record of this meeting, to wit, "Motion to accept prop. of Phœnix carried," be construed into the acceptance of a pending proposition (of unknown terms) on the part of the Phœnix Loan Association to take over the assets and assume the stock and other liabilities of the Willow Springs Building & Loan Association, it may be seen what happened. If the further narration therein, to wit, "Motion to presdt. to transfer bills rec. to Phœ.," be eyed closely and treated to a liberal gloss, it will be further seen what happened, to wit, that the president of the Willow Springs association was authorized by this cryptogram to transfer all the bills receivable belonging to the Willow Springs Association to the Phœnix Loan Association of St. Joseph, Missouri. What the next narration means, to wit, "Motion carried to settle treasurer," would depend somewhat

on the local usage of the word "settle," and does not call for present adjudication. Presently, after this original and astonishing mortuary literature was spread of record, and in the same year, the Phœnix Loan Association notified Lovan that it held his deed of trust and "wanted so much money." To this demand, he stood mute. The record shows that the Phœnix association at that time held Lovan's paper with indorsements thereon, presumably transfers made pursuant to the action of the board of managers heretofore noted. Shortly thereafter there appeared in Willow Springs the president of the Phœnix association and other of its representatives, who made demands upon Lovan and wanted to know what he was going to do. To these demands, he replied that he owed nothing to the Phœnix association; that he got no money from it; that the Willow Springs association had no right to transfer his loan to the Phœnix association; and, further, that he owed the Willow Springs association, but could not pay it because it was not there to pay. Thereat, the Phœnix people demanded an out and out deed to the property, which Lovan refused to make. They then asked "what he would do," and he replied, "nothing," whereupon they went their ways and he saw them no more. Matters remained *in statu quo* until April, 1891, when there appeared an advertisement by Wilkinson, trustee, foreclosing Lovan's deed of trust. On the morning of the sale day, Lovan notified said trustee to the effect that he had no right to sell under the mortgage, and had better not do it; that there was no Willow Springs Building & Loan Association. The purport of this conversation, as we construe it, is that Lovan based his objection on the theory that he had been ready to pay the Willow Springs association, in accordance with the constitution and by-laws, at the monthly meetings of its board of managers and as nominated in his bond, but had been unable to find it to do so. This notice resulted in the sale lapsing. Time ran on and finally, in 1897, one Drew, who was the president of the Willow Springs association at the time of its *felo de se*, then seven years gone, made a written request, over his title as such president, to the sheriff of Howell county to make a sale under the deed of trust on October 11, 1897. It seems Drew appeared in Willow Springs and gave an advertisement signed by such sheriff, as acting trustee, to the printer, and at that time notified him "that the association at St. Joseph had bought the stock of the Willow Springs association, and that he was representing the St. Joseph association; that he was closing matters up for them." Thereafter, on October 25, 1897, at a sale made, the property was struck off to the Phœnix Loan Association of St. Joseph, Missouri, at the sum of $50, and such sale was followed by a trustee's deed reciting, *inter alia*, that the powers of the trustee were executed "at the request of the legal holder of said indebtedness." This deed was placed of record, and matters again lagged along until July 15, 1899, when, upon the application of the state supervisor of building and loan associations, the Phœnix Loan Association was placed in the hands of receivers by the circuit court of Buchanan county. State ex rel. Gray v. Phœnix Loan Asso. 159 Mo. 102, 60 S. W. 74. Thereafter its affairs seem to have come within the jurisdiction of the United States circuit court at St. Joseph, and, on the 23d of February, 1902, a decree of the Federal chancellor was handed down confirming a sale to appellant herein of all the assets of the Phœnix Loan Association, and the existing special master in chancery and receivers were ordered to make conveyances effectuating such confirmed sale. Thereafter, by their several quitclaim deeds, said receivers and said special master in chancery conveyed the *locus in quo* to appellant, Cobe, who thereupon instituted this suit, with the result first aforesaid.

Was that result right? We think so, because:

1. An incorporated building and loan association differs from an ordinary corporation; among other ways, in the fact that in an ordinary business corporation, stock is subscribed and either paid for at the time, and thus becomes the property of the shareholder, or it is partly paid for and becomes his property subject to future calls upon his subscription, while in a building and loan association the stock subscriber is not the out and out owner of his stock from the start. He pays thereon a minimum monthly payment, and when these monthly payments, with his increment of gains accrued, equal the par value of the share of stock, he is entitled to receive that amount. 4 Am. & Eng. Enc. Law, 2d ed. p. 1004. If, in the meantime, a member has borrowed on his stock, it, by pledge or operation of the loan, remains the property, or quasi property, of the corporation, and the loan is returned by the payment of interest and stock dues, penalties, etc., the repayment of the loan culminating at the same time the stock itself matures, at which time, in theory at least, the corporation or a given series of its stock is liquidated,—that is to say, the nonborrowing stockholders have their stock redeemed and the borrowers have their loans canceled. The loans made to borrowers, evidenced by secured notes, to-

gether with all stock subscriptions calling for periodical dues, are assets of such corporation. It is self-evident that in a solvent corporation—a going concern—these assets must be kept together to subserve the underlying purposes of the corporation itself, and reach the end in view. If, for instance, these assets could be separated, then the liability on the stock subscription might pass off to, and become the property by assignment of, one vendee, while the same liability in another form, to wit, a note given by a borrowing stockholder, might pass to another vendee, and thus a double liability be asserted against a stockholder. In the case at bar there was no attempt on the part of the Willow Springs association to separate these liabilities. It parted with them, lock, stock, and barrel, to the Phœnix Loan Association. That is to say, the latter undertook to become the owner of the entire stock subscriptions, as well as all bills receivable based upon loans to subscribers.

We are not dealing with the case of an insolvent building and loan association whose right to collect stock subscriptions and continue business is arrested at a given time by the hand of the law, and whose assets are thereupon collected and marshaled for the purpose of winding up its affairs. There is not a hint in this record that the Willow Springs association was insolvent on December 2, 1890, at the time its board of managers assumed to part with its assets to a stranger corporation (whose power to purchase may well be doubted), and undertook to make its stockholders recognize a new and distant master residing in another corner of the state. No reason is suggested for this extraordinary performance, and we are cited to no authority giving a board of managers of a building and loan association such capricious power to end its life, to unsettle the vested rights of its members, and to make such rights depend not only on the business vicissitudes incident to the selling corporation, but to take on a new burden of dangers in business vicissitudes arising in the life of the buying corporation. What might have happened if a stockholders' meeting, duly called, had unanimously consented to such proceeding, and after a board of directors had, pursuant to authority by the corporation itself, carried out such scheme, we need not consider. Nor is it necessary for us to consider whether, in a court of equity, the buying corporation might have asserted and established, in a proper proceeding, equitable rights by subrogation or otherwise to the transferred assets. Nor is it necessary for us to consider whether a promissory note, evidencing some incidental indebtedness to a building and loan association and not a loan to a subscriber upon stock, might, or might not, be transferred by authorized indorsement. Take, for instance, the emergencies provided for by § 2811, Rev. Stat. 1889, where loans are allowed to be made to others, who are not shareholders, at such rate of interest as the directors may fix, in case there is no stockholder's demand. If loans so made had been rediscounted for the purpose of creating a fund to subserve a stockholders' demand, springing into existence during the life of such loan, a different question might arise. Nor are we dealing here with close questions relating to the right of a building and loan association to borrow money for legitimate corporate purposes and hypothecate stockholders' papers to secure such loan. We are dealing with the right to absolutely transfer a loan made to a stockholder and secured on his home, which, under the constitution and by-laws referred to and read into the note and deed of trust, he was entitled to repay to the board of managers of the Willow Springs Building & Loan Association, at Willow Springs, monthly in small instalments. And dealing with this case we are of the opinion that the attempted transfer of this mortgage loan by said board of managers to the Phœnix association was without shadow of legal right and wholly *ultra vires*. In our view, it is contrary to the reciprocal rights and duties existing between such corporation and its members, and, if the principle were once established, it would result in mischief.—lift the lid of a Pandora's box of ills. This is the general doctrine laid down in Thompson on Building Associations, 2d ed. § 286, and is the doctrine of this court. Lovelace v. Pratt, 163 Mo. 70, 63 S. W. 383. See also State ex rel. Walker v. Equitable Loan & Invest. Asso. 142 Mo., loc. cit. 342, 41 S. W. 916.

2. Appellant insists the case at bar is not on all fours with Lovelace v. Pratt, *supra*, and therefore that case ought not to control this. Let us see about that. The Lovelace Case was an ejectment suit, as is this. In that case the title of plaintiff to the *locus in quo* originated in the foreclosure of a building and loan mortgage, as does the title of plaintiff here. In that case, the building and loan association had transferred its mortgage security to another; so here. In that case, at the request of the transferee of such mortgage security, the trustee sold. The gist of the defense in that case was that the building and loan association had no authority to part with the security, and that a foreclosure so procured avoided the trustee's deed; so, too, here. And it is at this point appellant discovers what he urges is a controlling factor in the present case, and distinguishes it from the Lovelace Case,

to wit, in this case the foreclosure was directed by Drew, the one-time president of the Willow Springs Building & Loan Association. If, now, it be remembered that Drew, in directing the advertisement and foreclosure, admitted he was the agent of the Phœnix association, and was transacting his master's business, and if we add to that admission the further contention of appellant, to the effect that, if the title to the security did not pass by the transfer, it must have remained in the Willow Springs association, and, therefore, that association had the power and duty of directing a foreclosure, we have the present question presented to us in a nutshell. In disposing of it, it must be borne in mind that the law regards substance, rather than form,—the spirit and essence of a thing, rather than the mere dry letter. One may not do by indirection what he cannot do directly; or, as said by Valliant, J., in a case just handed down, "if it could not be done on a straight line, it could not be done in a circle." To all intents and purposes the act of foreclosure in this instance was procured by the Phœnix association, and was made for its purposes. Drew was its *alter ego*, and may not ambush or confuse his position by a mere official designation assumed for the nonce. *Qui facit per alium, facit per se.* The transaction finds its counterpart in a very ancient one in which, by uniting a borrowed hand to a real voice, a notable property transaction was brought about. As preserved in an authenticated record, it runs as follows: "And Jacob went near Isaac his father; and he [that is, Isaac] felt of him, and said, the voice is Jacob's voice, but the hands are the hands of Esau." The record of this last case further shows that Isaac's eyes were dim, and, because the hands extended to him were hairy, like Esau's, Jacob effected, in conjunction with a prior trade of birthright for a meal of bread and bean pottage, a transfer of Esau's interest, contingent and expectant,—those intended for use, as well as those intended for ostentation. If we may be permitted to loiter afield a moment, it may be said that Jacob by that transaction showed he was well named "the Supplanter" ("sub," under; *planta*, sole of the foot, or heel). The record has it that in the very act of birth he held Esau by the heel, and certainly, by afterwards laying him by the heels, he justified his name. But we are not called upon to review this venerable transaction and adjudicate upon it. Live business presses, and "sufficient unto the day is the evil thereof." Suffice it to say that we see no difference in principle between the Lovelace Case and the case at bar. And this is so, because, further, Drew received no direction from the Willow Springs association whatever. His acting in its name was a mere assumption on his part in the interest, as said, of the Phœnix association. By statute law existing at the time Lovan made his mortgage, foreclosures of stockholders' mortgages were placed under the supervision of the board of directors, and not under the supervision of the president. Section 2813, Rev. Stat. 1889, reads as follows: "If the borrower fails totally in his payments during the space of six months, or if the balance due by such borrower has been allowed to accumulate until it equals the sum of six months' dues and interest, then the board may, in its discretion, proceed at any time to advertise for sale, under deed of trust, the property pledged to the association by such borrower."

3. Lovelace v. Pratt, *supra*, must either be overruled, or the case before us must be controlled by it. Appellant contends that the Lovelace Case is out of line with Schanewerk v. Hoberecht, 117 Mo. 22, 38 Am. St. Rep. 631, 22 S. W. 949, but we think not. The answer in that case was a general denial, and this is true, generally speaking, of the cases following that. The answer in this case pleads facts showing that the trustee's deed under which appellant holds by mesne conveyances, quitclaim deeds, is void. Under Rev. Stat. 1899, § 605, a defendant may plead his legal defenses as well as his equitable defenses to a suit at law. As a general proposition, he need not ask for affirmative equitable relief, unless the case admits of it and he chooses to. It would serve no useful purpose to review the Schanewerk Case and the cases following it. That case does not decide that a defendant is cut out of an equitable defense setting forth facts which, if true, show that a certain deed, upon which plaintiff must rely, is void. That case does not decide that in order to make such equitable defense, when well pleaded, defendant must ask to redeem under every and all circumstances. From whom would defendant redeem in this case, for instance? If the Phœnix corporation got no title, because its sale was brought about in violation of law, it would follow necessarily that appellant got no title; and if he held no title, there was nobody in court from whom respondent could redeem. The learned judge who wrote the opinion in the Lovelace Case was on the bench at the time the Schanewerk Case was decided, and participated in the decision of the cases following that. He, with his learned associates in division No. 2, could not have been unaware of the doctrine announced in the Schanewerk Case, but evidently distinguished the Lovelace Case, and we think rightly so.

4. But, says appellant, by letting the trust deed remain unsatisfied of record since 1890, and by letting the recorded trustee's deed go unchallenged, as an *indicia* of ownership, respondent is estopped to now question the validity of either as against appellant, a purchaser without notice. To this contention respondent answers, in one form, in the pioneer figure, and warlike metaphor, following: "Lovan has done what many a good man has done under similar circumstances. He has sat quiet in his castle, blunderbuss in hand, while the wolves howled and prowled through the woods. It so happened that the vice president of the Assets Realization Company is the first to come within easy range."

The familiar elements of estoppel are wanting in appellant's case. It cannot be pretended that the *indicia* of ownership, allowed to remain of record in Howell county, misled appellant to his prejudice and caused a change in his position. He was a resident of Chicago. He dickered for the whole of the assets of the Phœnix association, and paid therefor the sum of $80,000. It is inconceivable, in the absence of positive proof, that the $50 purchase of the Phœnix association at Willow Springs had a feather's weight in that transaction. It comes well within the maxim, *De minimis*. Besides, appellant holds under quitclaim deeds, following the trustee's deed in question. He is no such innocent purchaser for value as would entitle him to avoid the effect of outstanding equities, but is charged with notice of the contents of the trust deed foreclosed, of the constitution and by-laws of the Willow Springs Building & Loan Association referred to in that trust deed, and with all that is disclosed by his chain of title, as well as of the statutes of the state, read into the transaction.

In conclusion, in our opinion, respondent, under the facts uncovered, should be allowed, so far as this case in its present aspect is concerned, to sit unmolested under his own vine and fig tree,—if such tree grows in Howell county (on which we express no opinion).

The judgment is accordingly affirmed.

All concur.

NEBRASKA SUPREME COURT.

REGENT SHOE MANUFACTURING COMPANY, Appt.,
v.
ROBERT B. HAAKER et al.

(— Neb. —, 106 N. W. 595.)

Trade name—unfair competition.

1. When a mercantile company has acquired a trade name in a particular locality, it is entitled to protection against unfair competition in its particular line of business by the use by a competitor of a name of such similar import as to probably deceive the public in such a manner as to work a fraud on the good will of such trade name.

Same—infringement.

2. It is an infringement on a legally acquired trade name to use in the same locality and in the same line of business another name of such similar import that the ordinary attention of persons or customers would not disclose the difference between the two names.

Same—retail and wholesale.

3. But to constitute an infringement on a trade name, it is necessary that the two places of business be in actual competition with each other; and where one of the concerns is engaged exclusively in retailing boots, shoes, and rubbers, and the other in the manufacture and wholesale jobbing of such goods, there is no such competition as will warrant an order restraining the latter at the suit of the former, although the names of the firms are of similar import, and although the retail firm had legally acquired its trade name before the organization of the wholesale company.

Headnotes by OLDHAM, C.

Case Note.—Use of same trade name by wholesale and retail concerns dealing in same goods.—The only case, aside from REGENT SHOE MFG. CO. v. HAAKER, involving this question, which a careful search has discovered, is Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 271, 53 L.R.A. 384, 82 Am. St. Rep. 346, 63 Pac. 480, in which it was held that the failure, for a period of ten years, of a retail boot and shoe dealer to protest against the use by a wholesale concern dealing in the same goods, located in a different part of the same city, of a trade name which conflicts with the name under which his business is conducted, will not deprive him of the right to restrain the use of such name in a rival retail business established by one who previously conducted the wholesale concern, since the wholesale business is separate and distinct from the retail business, and, in the absence of proof of injury, the complainant has no more right to object to the use of a similar trade name by one engaged in the wholesale business than he would if the same concern dealt in goods entirely different.

In reaching this decision, it is clear that the court applied the general rule as followed in REGENT SHOE MFG. CO. v. HAAKER, that actual or unfair competition in trade is necessary to constitute an infringement of a trade name. See Hopkins, Trademarks, 2d ed. § 121; Hesseltine, Trademarks & Unfair Trade, p. 256.

A case note on the right to acquire a trade name for a restricted locality notwithstanding its use by other parties in other localities will be found in 2 L.R.A.(N.S.) 964.

Injunction—clean hands.

4. When the owner of a trademark applies for an injunction to restrain a competitor from injuring his property by making false representations to the public it is essential that the complainant should not, in his trademark or his advertisements and business, be himself guilty of any false or misleading representations.

Same—exaggerated advertising.

5. It is, however, not every exaggerated puff of one's own goods that is to be regarded as such a false representation as will deny relief in a court of equity; it is rather such materially fraudulent statements, as to the character, quality, and make of the goods as tend, if untrue, to deceive the public to its injury.

Evidence.

6. Evidence examined, and held not sufficient to fully sustain the decree of the district court.

(January 3, 1906.)

APPEAL by plaintiff from a judgment of the District Court for Douglas County in favor of cross petitioner in a proceeding to enjoin the alleged wrongful infringement of a trade name. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. **McGilton, Gaines, & Storey**, for appellant:

Where the name is not the subject of exclusive ownership, equity will not enjoin its use, except only to prevent unfair competition.

Paul, Trademarks, ¶ 160; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166.

Before there can be unfair competition, there must be identity, or at least similarity, of business.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 467, 27 L.R.A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; Crawford v. Laus, 29 Misc. 248, 60 N. Y. Supp. 387; Church v. Kresner, 26 App. Div. 349, 49 N. Y. Supp. 742; Sartor v. Schaden, 125 Iowa, 696, 101 N. W. 511; Kann v. Diamond Steel Co. 32 C. C. A. 324, 61 U. S. App. 22, 89 Fed. 706; Pillsbury-Washburn Flour Mills Co. v. Eagle, 41 L.R.A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608; Centaur Co. v. Marshall, 38 C. C. A. 413, 97 Fed. 785; Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; Hygeia Distilled Water Co. v. Hygeia Ice Co. 72 Conn. 657, 49 L.R.A. 147, 45 Atl. 957; Bolander v. Peterson, 136 Ill. 215, 11 L.R.A. 350, 26 N. E. 603; Elgin Butter Co. v. Elgin Creamery Co. 155 Ill. 135, 40 N. E. 616.

The business of defendant under its trade name has been built up by false and misleading advertisements and representations whereby it has forfeited all right to the protection of equity in its good will.

Paul, Trademarks, ¶ 315; Newbro v. Undeland (Neb.) 96 N. W. 635; Clinton E. Worden & Co. v. California Fig Syrup Co. 187 U. S. 516, 47 L. ed. 282, 23 Sup. Ct. Rep. 161; Sartor v. Schaden, *supra;* California Fig Syrup Co. v. Frederick Stearns & Co. 33 L.R.A. 56, 20 C. C. A. 26, 43 U. S. App. 234, 73 Fed. 812.

Messrs. **Charles B. Keller** and **George W. Doane**, for appellees:

A right to the exclusive use, in a particular locality, of a trade name or sign, may be acquired.

Miskell v. Prokop, 58 Neb. 628, 79 N. W. 552.

Relief should not be denied because of representations made.

Manhattan Medical Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; Wormser v. Shayne, 111 Ill. App. 556; Dale v. Smithson, 12 Abb. Pr. 237; Curtis v. Bryan, 36 How. Pr. 39; Ford v. Foster, L. R. 7 Ch. 625; Meriden Britannia Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 406.

The word "regent" is the subject of exclusive ownership.

Viano v. Baccigalupo, 183 Mass. 161, 67 N. E. 641; American Waltham Watch Co. v. United States Watch Co. 173 Mass. 85, 43 L.R.A. 826, 73 Am. St. Rep. 263, 53 N. E. 141; Koebel v. Chicago Landlords' Protective Bureau, 210 Ill. 176, 102 Am. St. Rep. 154, 71 N. W. 362; Chadron Opera House Co. v. Loomer (Neb.) 99 N. W. 649.

Appellees' rights were infringed.

Chadron Opera House Co. v. Loomer and Miskell v. Prokop, *supra;* Roy Watch Case Co. v. Camm-Roy Watch Case Co. 28 Misc. 45, 58 N. Y. Supp. 979; Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L.R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; Taendsticksfabriks Aktiebolagat Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904; North Cheshire & M. Brewery Co. v. Manchester Brewery Co. [1899] A. C. 83; Ottoman Cahvey Co. v. Dane, 95 Ill. 203; Pettes v. American Watchman's Clock Co. 89 App. Div. 345, 85 N. Y. Supp. 900; Koebel v. Chicago Landlords' Protective Bureau, *supra;* Glen & H. Mfg. Co. v. Hall, 61 N. Y. 226, 19 Am. Rep. 278.

Oldham, C., filed the following opinion:

At and prior to the year 1897, the George Richardson Company was engaged in the manufacture of men's shoes at Dubuque, Iowa, and in May of that year the company began to brand or mark certain

of its makes with the name "Regent." It subsequently sought to obtain the exclusive right to this term as a trademark, and to the accomplishment of this end purchased a patent thereto from one Stephen E. Miller in the year 1900. After the purchase of the patent on this trademark, the Richardson company claimed the exclusive right to the use of the term "Regent" in marking its shoes. It registered this name as a trademark under the laws of six of the Western states, including Wisconsin, Colorado, Illinois, Minnesota, Michigan, and Iowa, in the months of July and August, 1903. At this time the Williams Shoe Company was engaged in the business of jobbing shoes in Omaha, and had been selling shoes marked "Regent" since its organization in 1902. Prior to that time its predecessor, the Williams-Hayward Shoe Company, had likewise been selling shoes marked with this brand. In April, 1904, a new corporation was formed under the name of "Regent Shoe Manufacturing Company," plaintiff in this cause of action, which bought out the rights of the Richardson company and the Williams Shoe Company. Under this new arrangement the entire plant of the Richardson company at Dubuque was moved to Omaha to engage in the manufacture and sale of men's boots, shoes, and rubbers. The articles of incorporation provided, among other things, that "the general nature of the business to be transacted shall be the manufacturing, buying, selling, handling, and consigning, of shoes, shoe findings, and rubber goods of all kinds and descriptions, both at wholesale and retail; . . . and may do any and all such other acts and things as may be incidental to the main powers of the corporation."

In 1897 the defendants and cross-petitioners in this cause of action, Robert B. Haaker and Catherine Haaker, engaged in the retail business of selling men's boots, shoes, and rubbers on the South Fifteenth street in Omaha, Nebraska, under the trade name of "Regent Shoe Company." Under this name they have advertised and built up a large and increasing trade in Omaha and vicinity. Their first stock of shoes were all branded "Regent." Part of these were purchased from the George Richardson Company, and part from other manufacturers using the same mark. Afterwards the defendants distinguished the Regent shoe which they offered for sale by their own patented trade mark, "Onimod." In April, 1900, a controversy arose between the Richardson company and the defendants as to the latter's right to sell Regent shoes not of the manufacture of the Richardson company; and, after the consolidation of the Richardson company and the Williams Shoe Company and the organization and incorporation of the Regent Shoe Manufacturing Company, the present cause of action was instituted to restrain the defendants from the use of the trademark "Regent" on shoes not purchased from and manufactured by the plaintiff. Defendants answered plaintiff's petition denying that plaintiff was entitled to the exclusive use of the trademark "Regent" by reason of its purchase of such right from the Richardson company, assignee of Stephen E. Miller, it being alleged that the trademark "Regent" was in common use by manufacturers of boots and shoes throughout the United States long before it was attempted to be patented by Miller. Defendants also, by way of cross-petition, asked, in substance, that plaintiff be restrained from engaging in the business of selling shoes in Omaha and vicinity under the name of Regent Shoe Manufacturing Company, as such name was used by plaintiff in fraud of the good will of defendants and for the purpose of deceiving the public and unfairly obtaining trade from the defendants. The cross bill also asked that the plaintiff be restrained from selling shoes to the firm of W. S. Striker Company, retailers, who, it was alleged, were conducting business and selling Regent shoes near defendants' place of business and in fraud of their rights, for the sole benefit of the plaintiff, the real owner of this retail store. On issues thus joined, and after some testimony had been taken, which clearly established that the trademark "Regent" had been in common use before its pretended patent by S. E. Miller, plaintiff dismissed its cause of action, and the suit proceeded on the relief prayed for in the defendants' cross bill. At the close of the testimony the court found all the issues in favor of the defendants, and entered a decree as prayed for in the cross bill; and to reverse this decree plaintiff has appealed to this court.

At the outset of the opinion it might be well to say that two questions once involved in this controversy are clearly established by the record and the admissions of the parties to the action. One is that the trademark "Regent" on shoes is a mark to which neither of these litigants has an exclusive privilege, and, so far as the sale of shoes bearing this brand is concerned, neither has any right against the other which courts of conscience can recognize. The second proposition is that the cross-petitioners have clearly shown themselves entitled to the use of the trade name of "Regent Shoe Company" for the purpose of retailing boots, shoes, and rubbers in the

city of Omaha, Nebraska, and its immediate vicinity, and that, as incident to this right, they are entitled to protection against unfair competition in their particular line of business by the use of a name so similar to their trade name as to probably deceive the public in such a manner as to work a fraud on the good will of the cross-petitioners. In Miskell v. Prokop, 58 Neb. 628, 79 N. W. 552, it was held that "a right to the exclusive use in a particular locality of a trade name or sign may be acquired;" and, further, that "a sign or trade name is not an infringement of another, if ordinary attention of persons or customers would disclose the differences." Applying this rule to the use of the plaintiff's name, "Regent Shoe Mfg. Co.," and defendants' trade name "Regent Shoe Co.," we could hardly think that ordinary attention of customers would likely disclose any difference between these two remarkably similar names. It is contended, however, by counsel for appellant that the plaintiff, Regent Shoe Manufacturing Company, is not a retailer of boots, shoes, and rubbers, but only a manufacturer and wholesale jobber of such goods, and consequently not in competition with defendants and cross-petitioners. This contention, in view of the testimony contained in the record, we are unable to concede. In the first place, the articles of incorporation of the plaintiff provide for selling at retail as well as at wholesale. In the second place, the testimony contained in the bill of exceptions shows that plaintiff has actually been selling at retail. True, the evidence does not show that it has been largely engaged in the retail business, yet it does show that it does sell at retail. This proof, coupled with the provision in the articles of incorporation providing for such sales, we think sufficient to sustain the finding of the trial court that plaintiff had been selling in unfair competition with defendants and cross-petitioners as a retail dealer. While we think the evidence sufficient to sustain the decree of the district court restraining the plaintiff from selling shoes at retail in the city of Omaha and the immediate vicinity, yet we think this is as far as the restraining order should have gone. The issue of unfair trade arises only on a showing of fraud, or deception, in the use of a trade name, trademark, or sign, by one in competition in the same line of trade; and, in so far as plaintiff was engaged in the business of manufacturing shoes and selling them at wholesale, it was not, and should not have been held to be, in unfair competition with defendants and cross-petitioners. Sartor v. Schaden, 125 Iowa, 696, 101 N. W. 511; Kann v. Diamond Steel Co. 32 C. C. A. 324, 61 U. S. App. 22, 89 Fed. 706.

It is next urged by counsel for appellant that the order of the court restraining plaintiff from selling Regent shoes to the W. S. Striker Company is wholly unauthorized under the evidence contained in the bill of exceptions. It appears from the testimony that this firm is engaged as retailers of boots and shoes on Sixteenth street in the city of Omaha, about two blocks from the place of business of cross-petitioners; that this firm is composed of persons part of whom have been in the employ of the Williams Shoe Company, or the Richardson company, prior to their consolidation into the incorporated company of plaintiff. The evidence shows that this firm advertised very prominently the sale at retail of Regent shoes; that the advertisements of this firm gave prominence to this brand of shoes sold, rather than to the name of the firm making the sales. It is also shown that plaintiff had furnished this firm with advertising matter for its brand of shoes. It further appears that most of the stock of this firm was sold to it by the plaintiff, but the evidence failed to show that plaintiff corporation was in fact the owner of the establishment. In view of this state of the record, we think that so much of the decree as prohibited the plaintiff from selling to this firm at wholesale is unauthorized. If this firm is advertising its merchandise in such a manner as to operate as a fraud on the sign and trade name of the cross-petitioners, an action might lie at the suit of the cross-petitioners against this firm for an infringement of its sign and trade name.

It is finally contended by counsel for appellant that there is no equity in the bill of cross-petitioners because in the promotion of their business, and for the purpose of attracting the attention of the public, frauds were committed in their advertisements in representing to the public that defendants were the manufacturers and makers of the shoes that were sold by them. It was shown in the testimony that defendants' advertising placards had contained, among other things, headlines marked "Maker to Wearer" and "Made by Us" and "Manufactured and Sold by Regent Shoe Company," and other similar expressions indicating that the goods sold by this firm were also manufactured by them, when in fact the cross-petitioners never were manufacturers of any of the goods which they offered for sale. There was, however, no testimony in the record to show that the public at large, or any customers of the defendants had ever been deceived or induced to trade with the de-

fendants because they believed the shoes sold from their store were actually manufactured by this firm. It is an elementary principle that he that asks equity must come with clean hands, and as well stated in Clinton E. Worden & Co. v. California Fig Syrup Co. 187 U. S. 516, 47 L. ed. 282, 23 Sup. Ct. Rep. 161: "When the owner of a trademark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trademark or in his advertisements and business, be himself guilty of any false or misleading representations." It is, however, not every exaggerated puff of one's own goods that is to be regarded as such a false representation as will deny relief in a court of equity. It is rather such materially fraudulent statements as to the character, quality, and make of the goods as tend, if untrue, to impose upon and deceive the purchaser. Such imposition might be made by representing the shoes sold by defendants to have been manufactured by some firm of known and established reputation, when they were not, or it might be by representing the wares to be of a material of which they were not made; but the mere fact of representing them as "made by us," when they were made by someone else, as defendant claims, under their special order and direction, is not misrepresentation of so grave a character as to deny defendants relief in a court of equity against an infringement of their trade name. Wormser v. Shayne, 111 Ill. App. 556.

We therefore conclude that the decree of the district court, in so far as it prohibited plaintiff from manufacturing and selling men's boots, shoes, and rubbers at wholesale under the name of "Regent Shoe Manufacturing Company," and also in restraining it from selling at wholesale to the firm of W. S. Striker Company, is not sustained by the law and the evidence, and we recommend that the judgment of the district court be reversed and the cause remanded with directions to enter a decree permanently enjoining plaintiff from selling, or advertising to sell, men's boots, shoes, and rubbers at retail in the city of Omaha and immediate vicinity under the trade name of "Regent Shoe Manufacturing Company."

Ames and Letton, CC., concur.

Per Curiam:

For the reasons given in the foregoing opinion, it is ordered that the judgment of the District Court be reversed, and the cause remanded, with directions to enter a decree permanently enjoining plaintiff from selling, or advertising to sell, men's boots, shoes, and rubbers at retail in the city of Omaha and immediate vicinity under the trade name of "Regent Shoe Manufacturing Company."

Petition for rehearing denied.

VERMONT SUPREME COURT.

BURTON J. GIBSON
v.
A. G. HOLMES et al.

(— Vt. —, 62 Atl. 11.)

Evidence—foreign record.

1. A certified copy of docket entries in a judicial proceeding in another state, from which to make a record, is not admissible as evidence of the facts which it is claimed the record would establish.

Arrest for debt—prior bankruptcy proceedings.

2. The mere fact that one arrested for debt had filed his petition in bankruptcy before his arrest is not sufficient to show that the arrest was illegal, where the pendency of the proceedings does not appear.

False imprisonment—liability of officer.

3. An officer who, without authority of plaintiff, upon arresting one on mesne process in a civil action, takes him to another county for safe-keeping, when the statute provides for his confinement in the county where arrested, is a trespasser *ab initio*, notwithstanding the writ follows the ancient general form.

Same—liability of plaintiff.

4. Plaintiff in a civil suit, who procures the arrest of defendant on mesne process, is a trespasser *ab initio* where, by direction of his attorney, the officer removes defend-

Case Note.—Abandonment of suit before entry as affecting justification under writ in defense of action for false imprisonment.—The court refers to no decisions on this point, counsel cited none, and a thorough search has failed to disclose any. The court does not state the ground of its decision on this point, but it is perhaps to be regarded as referable to the same general principle that determined its decision that the failure of the officer to make a proper return of the writ under which the arrest was made rendered him a trespasser *ab initio*. This general principle is also exemplified by cases like Stewart v. Feeley, 118 Iowa, 524, 92 N. W. 670, holding that to justify an arrest without a warrant or other process the person making the arrest must take the person arrested before the proper court or officer within a reasonable time, and, in the event of his failure to do so and his discharge of the plaintiff on his own motion, he becomes a trespasser *ab initio*.

ant to another county for safe-keeping, contrary to the provisions of the statute.

Writ—amendment of return.

5. A justice has no jurisdiction to permit the amendment of a return to a writ in an action which was abandoned before being entered in court.

Same—return.

6. To make return of a writ "according to law," as directed by its terms, the officer must state substantially all his doings within the scope of proper execution of it.

Same—failure to return.

7. An officer who does not make due return of a writ as commanded by its terms cannot justify under it, unless defendant has waived such return.

Same—liability of plaintiff.

8. A plaintiff who abandons a suit in which defendant has been arrested on mesne process, before it is entered in court, cannot justify under the writ in an action by defendant for false imprisonment.

(October 26, 1905.)

EXCEPTIONS by plaintiff to a ruling of the Franklin County Court directing a verdict for defendants in an action brought to recover damages for false imprisonment. Judgment reversed.

The facts are stated in the opinion.

Messrs. **C. G. Austin & Sons** and **A. A. Hall**, for plaintiff:

Where an officer seeks to justify under process, he must show that he has paid due and full obedience to the commands therein contained.

Briggs v. Mason, 31 Vt. 433; Ellis v. Cleveland, 54 Vt. 437; Wright v. Marvin, 59 Vt. 437, 9 Atl. 601; Kent v. Miles, 65 Vt. 582, 27 Atl. 194; Tubbs v. Tukey, 3 Cush. 441, 50 Am. Dec. 744; Munroe v. Merrill, 6 Gray, 238.

By a violation of the law in the execution of the writ, the officer is precluded from justifying thereunder.

Lamb v. Day, 8 Vt. 407, 30 Am. Dec. 479; Pierson v. Gale, 8 Vt. 509, 30 Am. Dec. 487; Bond v. Wilder, 16 Vt. 393; Nelson v. Dennison, 17 Vt. 73; Abbott v. Kimball, 19 Vt. 551, 47 Am. Dec. 708; Hall v. Ray, 40 Vt. 576, 94 Am. Dec. 440; Kenerson v. Bacon, 41 Vt. 573.

Messrs. **Hogan & Hogan** and **G. F. Ladd**, for defendants:

Since the writ was regular on its face and issued from a court having at least apparent jurisdiction, the officer was protected under that writ.

Fletcher v. Baxter, 2 Aik. (Vt.) 224; Pierson v. Gale, 8 Vt. 509, 30 Am. Dec. 487; Gage v. Barnes, 11 Vt. 195; Churchill v. Churchill, 12 Vt. 661; Marshall v. Town, 28 Vt. 17; Tarlon v. Fisher, 2 Dougl. K. B. 671; Cameron v. Lightfoot, 2 W. Bl. 1190; Emery v. Hapgood, 7 Gray, 55, 66 Am. Dec. 459; Wilmarth v. Burt, 7 Met. 257; Cassier v. Fales, 139 Mass. 461, 1 N. E. 922; Carle v. Delesdernier, 13 Me. 363, 29 Am. Dec. 508; Roberts's Dig. (Vt.) § 30, p. 489; Cooley, Const. Lim. 1st ed. 398; Woods v. Davis, 34 N. H. 328; Savacool v. Boughton, 5 Wend. 170, 21 Am. Dec. 181.

The officer, having found and arrested the plaintiff, had the undoubted right, under the command of his process, safely to keep him, and, for that purpose, might have lodged him, temporarily, in a jail, as he did, within his precinct.

Whitcomb v. Cook, 38 Vt. 477; Kenerson v. Bacon, 41 Vt. 573; Re Durant, 60 Vt. 176, 12 Atl. 650; Kent v. Miles, 68 Vt. 48, 33 Atl. 768, and 69 Vt. 379, 37 Atl. 1115.

Rowell, Ch. J., delivered the opinion of the court:

Trespass for false imprisonment. The defendants separately justified under a justice writ in favor of the defendant Holmes against the plaintiff, issued as a capias, brought to recover for goods sold and delivered, and served by the defendant Pharneuf by arresting the plaintiff in Orleans county. The plaintiff claims that he was in bankruptcy in Massachusetts, where he lived, and therefore was privileged from arrest, as his discharge would release him from the debt sued for. But he can take nothing by this claim, for it does not appear that he was in bankruptcy. The certified copy of the docket entries in the bankruptcy court of Massachusetts, introduced to show that he was in bankruptcy, was not admissible, as those entries were no record, but only minutes from which to make a record. Austin v. Howe, 17 Vt. 654; Armstrong v. Colby, 47 Vt. 359. Nor was the plaintiff's testimony that he filed his petition in bankruptcy before his arrest sufficient, though admitted without objection; for it does not appear when he filed it, and it might have been so long before the arrest that there had been a final adjudication on his application for a discharge, which would end his privilege, and the presumption of continuance cannot be invoked for want of sufficient *data*, if for no other reason.

But it was error to direct a verdict for the defendants, for the testimony tended to show, if it did not thereby appear, that the defendants were trespassers *ab initio*. At common law, when an officer arrests a man on mesne process in a civil action, he may make any place his prison; for the writ is, *ita quod, habeas corpus ejus coram*, etc., which is a general authority. But when the authority is special, he must imprison accordingly; and, if he imprisons elsewhere

or otherwise. he is a trespasser. Swinstead v. Lyddal, 1 Salk. 408; Bacon, Abr. "Trespass" (D). But our statute has changed the common law in respect of a general authority, and makes the authority special in such cases, notwithstanding the command of the writ remains the same; for it provides that, when a defendant is arrested on mesne process in a civil action, the officer shall commit him to jail in the county where the arrest is made, unless otherwise directed by law, if there is a legal jail there, unless he exposes sufficient property to secure the officer, or some person becomes surety to the satisfaction of the officer by indorsing his name on the writ as bail. Vt. Stat. 1701, 1703. It appearing that there was a legal jail in Orleans county, where the arrest was made, and it not being otherwise directed by law, it was the duty of the officer to commit the plaintiff there in default of exposing property or procuring bail; and it was the plaintiff's right to be committed there, unless he waived that right, and the testimony tended to show that he did not. Ellis v. Cleveland, 54 Vt. 437. But, instead of committing him there, by direction of Holmes's attorney, given pursuant to an understanding with Holmes, the officer took him to St. Albans and lodged him in the Franklin county jail for safe-keeping till the time of trial, where he remained about an hour in a cell, and then, by advice of counsel whom he consulted about leaving him there and about making his return if he did leave him there, the officer took him back to Richford, where he was released by order of Holmes or his attorney on July 30th, having been arrested at North Troy on July 28th. This, if done without the plaintiff's consent, made the officer a trespasser *ab initio*. Bond v. Wilder, 16 Vt. 393; Hall v. Ray, 40 Vt. 576; 94 Am. Dec. 440; Clayton v. Scott, 45 Vt. 386.

It is claimed that the officer might keep the plaintiff where he pleased, notwithstanding the statute, because, if he committed him to jail in Orleans county by delivering him to the keeper thereof within the same, and giving the keeper an attested copy of the writ with his return thereon, as he would have to do by statute, he would thereby have transferred the custody and control of him to the jailer, and so have put it out of his power to obey his precept by having him before the justice at the time and place of trial. But Re Jennison, 74 Vt. 40, 51 Atl. 1061, holds the other way. There the relator was arrested on a justice writ issued as a capias, and committed to jail for want of bail; and yet the court said it was the duty of the officer to obey his precept by producing the relator at the time and place of trial, and, because he did not, the relator was discharged, but by agreement of the parties. That case is express authority for the proposition that, by obeying the statute in respect of committing, the officer does not put it out of his power further to obey his precept by having the defendant before the justice at the time and place of trial. To hold otherwise would bring the precept and the statute into conflict, whereas they should be made to harmonize, if possible. And there is no difficulty in harmonizing them; for, although the officer, by taking the defendant out of jail for production in court, would be incapacitated to recommit him on the original writ, because that, being returned into court, could not be taken out for that purpose, yet the court, especially as it is a court of record, would have ample authority to order him committed for want of bail, and such commitment would be deemed to be on the original writ, the same as it is by statute when a surety on mesne process delivers the principal into court in discharge of himself. Although there seems to be no statute for this, yet the authority inheres in the court, as much as the authority did before the statute, to do what the statute says shall be done when the principal is surrendered, as shown by Abells v. Chipman, 1 Tyler (Vt.) 377. And see 1 Tidd, Pr. 285, 286; Cf. Worthen v. Prescott, 60 Vt. 68, 11 Atl. 690, and State v. Shaw, 73 Vt. 159, 50 Atl. 863, and following.

The cases referred to in support of said claim are not in point. What is said in Whitcomb v. Cook, 38 Vt. 477, about the officer having a right to put the defendant into any suitable place for safe-keeping, was said in respect of keeping him after notice that he would appear before the magistrate for examination for discharge from arrest, which suspended the right to commit until the examination was had. In Kenerson v. Bacon, 41 Vt. 573, commitment was made in disregard of such a notice, which was held to deprive the defendant of his right to go before the magistrate, because, as it would seem to have been thought, the officer could not take him out for that purpose. But this is not authority for saying that he could not take him out to produce in court, concerning which the precept commanded him, but did not command him concerning taking him before the magistrate for examination for discharge from arrest. In Re Durant, 60 Vt. 176, 12 Atl. 650, the process on which the arrest was made was a warrant in a criminal case. What is there said about its having "been repeatedly held in civil causes even that an officer may use the common jail for the safe-keeping of a person arrested under a capias, whom it is his duty to safely keep so to have him to appear at a time and place

named," referring to Whitcomb v. Cook, 38 Vt. 477, is disapproved, if it means less than a commitment in the statutory sense. In Kent v. Miles, 68 Vt. 48, 33 Atl. 768, and 69 Vt. 379, 37 Atl. 1115, the precepts were warrants in a criminal case, and the authority was general, as neither the warrants nor the law required commitment to jail. But the plaintiff was committed, and rightly, it was held. In the Miles Case the court expressly said that the case did not come within Vt. Stat. 1701, and said that that section relates to service of legal process when the officer is "directed by the process to commit to jail." Counsel seize upon this as making in their favor. But the language of the section makes it broader than that. It is, when "required by law to commit to jail." This embraces the case at bar; for, although the process did not require commitment to jail, the statute did.

And the defendant Holmes is a trespasser *ab initio*, as well as the officer, for he procured the suit to be brought and the arrest to be made, and is responsible for his attorney's direction to have the plaintiff taken to jail in St. Albans; for that direction was within the scope of his attorney's authority by virtue of his employment as such, who was thereby invested as Holmes's agent with large and liberal discretion and most ample authority in everything pertaining to the collection of the debt and the control and service of the process. Willard v. Goodrich, 31 Vt. 597, where it is held that the attorney of an execution creditor has full authority as such to direct the officer as to the time and manner of enforcing the execution, short of discharging it without satisfaction. Trespass for false imprisonment lies against the client and his attorney, when the latter sues out an illegal ca. sa. and causes the defendant to be arrested and imprisoned thereon. "The client commands the attorney; the attorney actually commands the sheriff's officer; the real commander is the attorney; the nominal commander is the plaintiff in the action; so attorney and client are both principals." Barker v. Braham, 3 Wils. 368, 377. In Bates v. Pilling, 6 Barn. & C. 38, attorney and client were held jointly liable in trespass for the issue and service of an execution by the attorney's agent after the demand had been paid, though neither of them directed or knew of its issue. In Crook v. Wright, Ryan & M. 278, it was held that, where a trespass was committed in the service upon the defendant therein of a fi. fa. sued out by an attorney, it was necessary, in order to make the execution creditors liable, to show that the attorney was retained in the case; and, when that appeared, the creditors were made trespassers by the act of their attorney. In Newberry v. Lee, 3 Hill, 523, it is held that, where an attorney of record illegally issues a fi. fa., and thereby renders himself liable as a trespasser, his client is liable also, without showing that he specially directed its issue. In Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185, it was held that, where plaintiff's property was taken and sold on an execution wrongly issued at the instance of the defendant's attorney, the defendant was liable in trespass. The court, speaking through Judge Cooley, said it seemed to be the result of the authorities that, when one puts his case against another into the hands of an attorney for suit, it is a reasonable presumption that the authority he intends to confer upon the attorney includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper, and necessary in the prosecution of the demand, and that consequently whatever adverse proceedings may be taken by the attorney are to be considered, as far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his acts, even though they prove to be unwarranted by the law. In Poucher v. Blanchard, 86 N. Y. 256, it was said not to matter that the sale of the boat in question was a pure trespass; for it had been frequently decided that a client may be responsible for a trespass committed by his attorney that he in no way authorized, except by his general employment of the attorney. It is said in Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72, that an attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in court or out, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action. In Morgan v. Joyce, 66 N. H. 538, 27 Atl. 225, it was held that the plaintiff, by employing an attorney to bring and prosecute a suit, authorized him to give directions for serving the writ, and was bound by them.

When the plaintiff was released from arrest, the suit was abandoned by the defendant Holmes, who did nothing more with it. Nor was the justice present at the time and place of trial, nor within two hours thereafter, nor was the case continued. So it was never entered in court, and was discontinued, and the jurisdiction of the justice lapsed. He had, therefore, no authority, six months afterwards and after this suit was commenced and being prepared by the defendants for trial, to allow the defendant Pharneuf to amend his return on the writ, by adding thereto that he safely kept and detained the plaintiff within his precinct until the 30th of July,

when he released and discharged him from custody by direction of Holmes's attorney. Fletcher v. Pratt, 4 Vt. 182; Orvis v. Isle La Mott, 12 Vt. 195. So the return as amended must be laid out of the case.

The testimony tended to show that the justice who signed said writ kept all the writs and files in cases before him in which Holmes's attorney in said suit was attorney for the plaintiffs, in said attorney's office, and that the writ in that case was returned by the officer to said attorney's office before the return day, where it was put with the justice's other files, with a return upon it stating only that at North Troy, in Orleans county, on July 28, 1902, "I served this writ by arresting the body of the within-named defendant, Burt Gibson, read the same in his hearing, and this my return indorsed thereon." It does not appear that the fact that the writ was returned to the office of said attorney was ever brought to the attention of the justice. But, treating that for present purposes as a sufficient returning to the justice, the officer's return was not sufficient to enable him to justify under the process. The writ commanded him to "make service and return according to law." This is the form prescribed by statute, which requires officers to execute and return writs and precepts "agreeably to the direction thereof," and subjects them to a penalty for making a false or an "undue return." Vt. Stat. 1075, 1076. To make "return according to law" is, not only to return the precept to the authority that issued it, but to return with it a statement by the officer of his doings in executing it. Turner v. Lowry, 2 Aik. (Vt.) 72, 75. And that statement must contain substantially all of his doings within the scope of proper execution, certainly; otherwise, the return will be "undue," within the meaning of the statute, and may be essentially false. Here the officer states nothing in his return but the mere fact of arrest and reading. Whether the defendant in that action exposed property, procured bail, was released by the magistrate on preliminary hearing, was committed for want of bail, or discharged by direction of the plaintiff in the action or his attorney, the return does not show, and but for the oral testimony we should not know what was done with him. It was the officer's duty to make a full and complete return of his doings, and, because he did not, his return is "undue," and insufficient for his protection. An officer who serves returnable process shall not protect himself by it, unless he shows that he has paid due and full obedience to its command. Ellis v. Cleveland, 54 Vt. 437. He must show that he has done all it was his duty to do. Tubbs v. Tukey, 3 Cush. 438, 50 Am. Dec. 744. He must show that he has done all that was required of him in order to complete and fulfil the duty imposed on him. Kent v. Willey, 11 Gray, 368, 373. He must show that he made return of his writ, and did all the law required him to do. Paine v. Farr, 118 Mass. 74. He must faithfully obey every lawful command of the statute and the process, or he will be left without protection. Boston & M. R. Co. v. Small, 85 Me. 462, 35 Am. St. Rep. 379, 383, 27 Atl. 349. There are exceptions to this rule; as when the parties settle the suit, and agree that the writ need not be returned. Paine v. Farr, *supra*. But that element does not appear in this case.

Nor is the officer's neglect to make a proper return a mere nonfeasance, any more than his neglect to return at all would be, in which case he would unquestionably be a trespasser *ab initio*. In Moore v. Robbins, 7 Vt. 363, 367, it is said that the neglect of an impounder to proceed with the distress according to the statute makes him a trespasser *ab initio*, because his neglect is not a mere nonfeasance, but is analogous to a sheriff's neglect to return a writ. So a tax collector, who neglects to offer a distress for sale within the time prescribed by statute, is not protected; for he is thereby deprived of a justification for the taking, and stands as though he took without authority, and therefore is a trespasser *ab initio*. Pierce v. Benjamin, 14 Pick. 356, 360, 25 Am. Dec. 396. So, an officer is a trespasser *ab initio* who neglects to sell property on an execution. Bond v. Wilder, 16 Vt. 393. The resolution in the Six Carpenters' Case, 8 Coke, 146a, that "not doing cannot make the party who has authority or license by the law a trespasser *ab initio*, because not doing is no trespass," is criticized because it is the disobedience, and not the act, that deprives of protection, and that disobedience can come from not doing, as well as from doing. But that resolution is followed in this state. The true view of the matter, when applied to the nonreturn or the insufficient return of process, seems to be that, if an officer arrests a person or seizes goods on a writ that it is his duty to return, he never has a justification under it, unless he discharges that duty; that it is inaccurate to say that he is made a trespasser *ab initio* by not returning, but, rather, that for want of a return, or a proper return, he never has a justification: that therefore, instead of saying that the want of a return makes him a trespasser *ab initio*, it would be more accurate to say that the presence of a return is necessary to make the taking lawful *ab initio*. Shorland v. Govett, 5 Barn. & C. 485.

But, although the defendant Holmes may not be responsible for the officer's neglect to make a proper return, yet, having abandoned his suit before entry, he cannot justify under the writ.

Reversed and remanded.

COLORADO SUPREME COURT.

NATIONAL BANK OF COMMERCE, Appt.,
v.
APPEL CLOTHING COMPANY et al.

(— Colo. —, 83 Pac. 965.)

Creditor's bill—surrender value of insurance policies.

A creditor's bill will not lie to reach the surrender value of the debtor's life insurance policies, which were, prior to the contracting of the indebtedness and not in contemplation thereof, made payable, in case of the debtor's death, to his wife and children, although he had power to change the beneficiaries, and, in case he lived out the term of the policies, the amounts due on them were payable to him.

(December 4, 1905.)

APPEAL by plaintiff from a judgment of the District Court for Arapahoe County in defendants' favor in an action brought to subject to plaintiff's claim the surrender value of insurance policies of its debtors. Affirmed.

Statement by Gabbert, Ch. J.:

The purpose of this action, commenced by

Case Note.—Right to subject to claims of creditors endowment or tontine policies of insurance.—On the theory that a policy of insurance payable during the lifetime of the insured, at the expiration of a certain period, is not really life insurance, but rather in the nature of an investment, the insurance being a mere incident of the contract, rather than the main purpose, it has been held that such policies do not come within the protection of statutes exempting life insurance from the claims of creditors.

Thus, in Talcott v. Field, 34 Neb. 611, 33 Am. St. Rep. 662, 52 N. W. 400, it is held that, where an endowment insurance policy is made payable to the wife of the insured, and she receives the endowment from the insurer during the lifetime of the husband, she takes such proceeds subject to the claims of her husband's creditors. In this case the court said: "Now, it may be conceded that, where a reasonable amount of insurance is effected upon the life of a husband, the sole object being to provide a fund for the support of a beneficiary in case of the death of the insured, that such fund will not ordinarily be liable for his debts. Where, however, the money, or a considerable portion of it, is to be repaid in his lifetime, the transaction partakes more of the character of a loan. On principle, the insured might deposit the premiums in a bank on time certificates, drawing interest, and at the end of fifteen years draw the same with an accrued interest. Such funds remain the property of the debtor. So, in case of an endowment policy. The transaction is simply one of contract in which the insurer promises after a certain date to repay the insured the amount agreed upon. Now, suppose the money so invested belongs to the debtor, and which should be applied to the payment of his debts, the mere act of filtering it through the insurance company will not transmute it so that it becomes the property of the beneficiary, free from the claims of creditors. If so, it would afford an easy mode of evading the law, and no stronger illustration is required than the case under consideration. If a debtor's property may be given to his wife in the way proposed, free from the claims of creditors, then our attachment and other laws for the collection of debts are wholly deficient and ineffectual to protect the rights of creditors. But the laws spoken of are not defective, nor is the property in question free from their claims."

The same reasoning is applied in Ellison v. Straw, 119 Wis. 502, 97 N. W. 168, where the accumulated surplus upon a life insurance policy payable absolutely to the insured at the expiration of fifteen years if he survives that period, without the consent of any other person named as beneficiary, is held not to be exempt from the claims of creditors, under a statute exempting life insurance made payable to a married woman or to any trustee for her, although the wife is named as beneficiary in the policy.

So, where the statute exempted from the claims of creditors a policy payable to the wife of the insured, a provision in such a policy that at the expiration of fifteen years, on surrender of the policy, none of its conditions having been violated, the company would pay to the assured himself, his heirs, executors, or assigns, the equitable value of the policy as an endowment in cash, was held to render the policy fraudulent as to creditors. Tompkins v. Levy, 87 Ala. 263, 13 Am. St. Rep. 31, 6 So. 346. In this case, however, it was not attempted to subject the husband's interest to the claims of his creditors during his life, but to subject to such claims the proceeds of the policy after the death of both husband and wife, the contest being between the husband's creditors and the minor children of the insured and his wife.

But, on the other hand, it is held, in Flood v. Libby, 38 Wash. 366, 38 Am. St. Rep. 751, 80 Pac. 533, that an endowment policy payable to the insured or his estate, and which has a present cash surrender value to the holder, is within the protection of a statute providing that the proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt. Here, also,

appellant as plaintiff in the court below, is to subject certain life insurance policies issued upon the lives of debtors of the plaintiff to the payment of a judgment in favor of the plaintiff and against such debtors. The material averments of the bill necessary to consider are to the effect that these policies provided for the payment of certain sums of money to the insured within specified periods, but, in the event of their death before the expiration of such periods, then certain sums would be paid the wife or daughters of each debtor; and that these policies, by virtue of their terms, had certain values which could be obtained from the companies issuing them upon the surrender thereof without the consent of the beneficiaries. To this action the judgment debtors, beneficiaries, and insurance companies were made parties defendant. A general demurrer was interposed to the complaint, which was overruled. Thereafter answers were filed and a trial had on the issues made. The policies were issued, or assignments thereof made, prior to the rendition of plaintiff's judgment. It is claimed on behalf of plaintiff that these policies, either by their express terms, or under the terms of the assignments, vest the insured with full authority to change the beneficiaries without their consent. Judgment was rendered in favor of the defendants, from which the plaintiff appeals.

Messrs. **H. S. Silverstein** and **T. J. O'Donnell** for appellant.

Messrs. **Muller & Summerfield,** for minor appellees:

it was argued that the statute included only such insurance as is payable to a beneficiary other than the insured, and which is manifestly intended for the protection of the family or other beneficiaries, without any present or prospective interest in the insured himself. But the court rejected this argument, saying that it would be difficult to employ language more sweeping and comprehensive than that used in the statute; and that endowment insurance is properly known as life insurance; and that, whatever the terms of payment, yet the conditions of the policy relate, among other things, to the tenure of life of the insured.

The construction of this same statute was involved in Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656, Reversing 51 C. C. A. 97, 113 Fed. 141, where the court said that there could be no doubt that endowment insurance was included within the broad terms of the statute, and was exempt from the claims of creditors.

And in Briggs v. McCullough, 36 Cal. 542, it is held that an endowment policy, whereby an insurance company agreed to pay to the assured or his assigns at the expiration of a certain period, or sooner if he should die, a certain sum of money, together with such dividends as his deposit should earn, in consideration of the deposit with the company of a certain amount, was an "insurance on the life of the debtor," within the protection of a statute exempting such insurance from execution. Here the court said: "The term 'life insurance' is not alone applicable to an insurance for the full term of one's life. On the contrary, it may be for a term of years, or until the assured shall arrive at a certain age. It is simply an undertaking on the part of the insurer that, either at the death of the assured, whenever that event may occur, or on his death, if it shall happen within a specified term, or before attaining a certain age, as the case may be, there shall be paid a stipulated sum. In either form it is, strictly speaking, an insurance on the life of the party. . . . The fact that the company is to pay the agreed sum at the expiration of ten years, even though McCullough [the insured] shall not have died in the meantime, does not devest it of its character of life insurance. It is only a new and additional element in the contract not inconsistent with its other, which is its chief constituent part, to wit: The undertaking to pay on the death of the assured within the specified term."

A policy payable at the expiration of ten years, or at the death of the insured within that time, is held, in Re Sawyer, 2 Hask. 153, Fed. Cas. No. 12,393, to be within the protection of a statute providing that all life policies and money due thereon are exempt from attachment and all claims of creditors during the life of the insured when the annual cash premium does not exceed $150. The court said that this policy was to all intents a life policy, and the fact that, if the party should continue to live the ten years and pay up all his premiums, he would then be entitled to the amount of the insurance, was not sufficient to change the nature of the instrument so as to withdraw it from the exemption; that, if he died before the ten years, the amount was thereby payable, thus depending on the life of the party, so long as the premiums were to be paid, whether the amount was to become payable before the expiration of the ten years or not; that for the ten years it was a life policy, the time of payment being wholly contingent on the death of the insured. But the premiums paid in excess of $150 a year were held to belong to the estate, and to pass to the assignee in bankruptcy of the insured. And it was also held that a paid-up policy payable in five years, the consideration being the surrender of a policy of a larger amount, was not within the protection of the statute, which was held to apply only to policies which called for a premium annually, whereby the estate of the insured was diminished to the extent of the premium only; that the statute was not designed to exempt a policy which was procured by a single payment of a large

A creditor's bill plaintiff must show that the act was done with intent to hinder, cheat, or defraud creditors.

Grimes v. Hill, 15 Colo. 359, 25 Pac. 689; Emery v. Yount, 7 Colo. 107, 1 Pac. 686; Burdsall v. Waggoner, 4 Colo. 256; McCutcheon's Appeal, 99 Pa. 135; King v. Cram, 185 Mass. 103, 69 N. E. 1049; Arnett v. Coffey, 1 Colo. App. 34, 27 Pac. 614; Schmitt v. Dahl, 88 Minn. 506, 67 L.R.A. 590, 93 N. W. 668; Hendrie & B. Mfg. Co. v. Platt, 13 Colo. App. 15, 56 Pac. 209.

The court is asked to elect for the defendants when the election asked for would be against public policy and violative of every principle of right and justice.

Jarboe v. Hey, 122 Mo. 341, 26 S. W. 968; Jones v. Clifton, 101 U. S. 225, 25 L. ed. 908; Johnson v. Alexander, 125 Ind. 580, 9 L.R.A. 660, 25 N. E. 706; Fowler v. Butterly, 12 Jones & S. 148, 78 N. Y. 68, 34 Am. Rep. 507; Briggs v. McCullough, 36 Cal. 542; 2 May, Ins. 4th ed. § 399; Haskell v. Equitable Life Assur. Soc. 181 Mass. 341, 63 N. E. 899; Herrick v. National L. Ins. Co. 5 Ins. L. J. 80.

Mr. M. B. Carpenter, for appellees Appel:

A creditor's bill cannot reach an option held by the debtor.

Sweezy v. Jones, 65 Iowa, 272, 21 N. W. 603; Koehler v. Olsen, 68 Hun, 63, 22 N. Y. Supp. 677; Barclay v. Smith, 107 Ill. 349, 47 Am. Rep. 437; Provident Life & T. Co. v. Mills, 91 Fed. 435; Glanz v. Gloeckler, 104 Ill. 573, 44 Am. Rep. 94; Sheets v. Sheets, 4 Colo. App. 454, 36 Pac. 310.

Messrs. Goudy & Twitchell, D. V. Burns, and Talbot, Denison, & Wadley for other appellees.

Gabbert, Ch. J., delivered the opinion of the court:

Counsel for plaintiff say that this action

amount, thereby making great inroads upon the estate of the insured.

In some cases the effect of exemption statutes is not involved.

Thus, a policy payable to the insured if living at a specified date, otherwise to his estate, is held to be "property," the legal title to which passes to a receiver in supplemental proceedings, appointed before such date. Reynolds v. Ætna L. Ins. Co. 6 App. Div. 254, 39 N. Y. Supp. 885.

So, where a policy is made payable to the insured at the expiration of a certain period if living, or to his children in case he dies during the term, and the term of the policy expires before an assignment for creditors, the right of the assured to have the money paid to him is "property," within the meaning of Mass. Pub. Stat. chap. 157, § 46, from the moment the contract is made, and all the interest of the insured passes to his assignee. Bassett v. Parsons, 140 Mass. 169, 3 N. E. 547.

And an endowment policy payable to the insured on a specified date if living, and to his executors, administrators, or assigns in case of his earlier death, which provides for a paid-up policy after two payments have been made, is subject to attachment after such two payments have been made, where the insured has absconded, as against a claim of the insurance company against the insured, which was not due when the attachment was issued. Tradesmen's Nat. Bank v. Cresson, 10 Pa. Co. Ct. 57.

Where an endowment policy was payable to insured six years after date if living, otherwise to his children, it was held that the insured had a valuable interest in the policy which passed to his assignee in bankruptcy, who was entitled to maintain an action in equity to recover the policy from the company, where the bankrupt had attempted to surrender the same to it. Brigham v. Home L. Ins. Co. 131 Mass. 319.

Under a Code provision that an attachment may be levied on a cause of action arising on contract, whether past due or yet to become due, it is held that the interest of an insured in an endowment policy payable to him ten years after date if then alive, or to his estate on his earlier death, may, when it has a surrender value, be attached by a creditor before the end of the ten years. Kratzenstein v. Lehman, 18 Misc. 590, 42 N. Y. Supp. 237, Reversing 17 Misc. 64, 39 N. Y. Supp. 838.

But the interest of the assured in a twenty-year distribution policy of insurance on his life, which will cease on his failure to pay premiums, is held not to be an estate, within the meaning of a statute making an execution a lien, from the time it is placed in the hands of the officer, on all the personal estate of or to which the judgment debtor is, or may afterwards and before the return day of the writ become, entitled. Boisseau v. Bass (Boisseau v. Penn) 100 Va. 207, 57 L.R.A. 380, 93 Am. St. Rep. 956, 40 S. E. 647.

And where the proceeds of an endowment policy made payable to the wife of the insured, the premiums being paid by the husband, were received by the wife from the insurance company during the solvency of the husband, and invested in real estate by her, after which the husband became insolvent, such real estate is not subject to the claims of his creditors. Studebaker Bros. Mfg. Co. v. Welch, 51 Neb. 228, 70 N. W. 920.

Where a tontine policy, dependent on the insured's surviving a specified date, was made payable to the wife of the insured if living, if not to his children, and if no children to his executors, with four options in the wife at the maturity of the policy, one of which was to take the cash value at the expiration of the tontine period, which option she exercised, but, before the expiration of the tontine period, the insured filed a liquidation petition and obtained his dis-

is in the nature of a creditor's bill. Their theory upon which they claim this action can be maintained is that, where a debtor takes out a policy of life insurance upon his own life, by the terms of which, should he survive a certain definite period, the company undertakes to pay him a certain sum of money, with the contingency that, upon the death of the insured during this period the company will in that event pay certain sums of money to a beneficiary named in the policy or by assignment; and where such policy by its terms has a value which the insured can obtain by surrender of the policy, without the consent of the beneficiary,—such a policy is an asset of the insured, which can be reached by his creditors. In other words, they claim that what he himself may do under such a policy a court of equity will compel him to do for the benefit of his creditors. This suit being in the nature of a creditor's bill, the elements necessary to maintain it must be present. Conceding, but not deciding, that the contention of counsel for plaintiff is correct in the abstract, a case must be made, both in the complaint and by proof, which would entitle a creditor to subject the property of his debtor, not reachable on execution, to the payment of his debts. There is no averment in the complaint to the effect that when these policies were issued, or the assignments thereof made to the beneficiaries, the insured who are now the judgment debtors, were insolvent, or that the indebtedness which forms the basis of the judgment existed at either of these times, or that the insured were indebted to other parties, or that the policies were taken out or assigned to the beneficiaries with a view to the creation of future obligations. In short, there is no averment of fraud

charge, the court held that at the commencement of the proceedings, and at the time of the discharge, there was a mere contingency that any money would become due on the policy; and the trustee therefore was not entitled to any part of it. Ex parte Dever, L. R. 18 Q. B. Div. 660, 56 L. J. Q. B. N. S. 552.

The question has several times arisen whether policies of this kind constitute property or assets which will pass to a trustee in bankruptcy under the bankruptcy act of 1898, § 70a, cl. 5, providing that the trustee shall be vested with all property of the bankrupt which the latter could by any means have transferred, or which might have been levied upon and sold under judicial process against him. And the decisions have been uniformly in favor of the trustee's right to claim such policies. Re Slingluff, 106 Fed. 154; Re Mertens, 131 Fed. 972; Re Boardman, 4 Am. Bankr. Rep. 620; Re Welling, 51 C. C. A. 151, 113 Fed. 189; Van Kirk v. Vermont Slate Co. (D. C. N. D. N. Y.) 140 Fed. 38.

But in these cases the effect on the right of creditors to such policies, of statutes exempting "life insurance," is not considered.

So, in many cases the question has been raised whether an endowment policy having a cash surrender value passed to the assignee in bankruptcy under § 70a of the act, providing that, when any bankrupt shall have any insurance policy having a cash surrender value payable to himself, his estate, or personal representatives, it shall pass to the trustee as assets, unless within thirty days the bankrupt shall pay the surrender value to the trustee, notwithstanding the provision of § 6, that the bankruptcy act shall not affect the allowance to bankrupts of the exemptions prescribed by the state laws. In these cases, also, the question whether or not an endowment policy was life insurance within the protection of the exemption of the state laws does not seem to have been raised, that apparently being taken for granted, and the point argued is whether the provisions of § 70a were a limitation upon the provisions of § 6, and applied to all life insurance having a cash surrender value, or whether § 70a applied only when insurance policies were not exempted by law from the claims of creditors. In favor of the position that this provision applied to all policies having a cash surrender value and payable to the insured, his executors, administrators, or assigns, it was argued by the court in Re Lange (D. C. N. D. Iowa) 91 Fed. 361, that the purpose of the provision was to prevent the debtor from investing in endowment policies money which equitably belongs to his creditors, and reaping the benefit thereof after he has secured protection against the enforcement of debts due from him through a discharge in bankruptcy; that it was not the intent of Congress, in the enactment of this clause, to deprive the family of the debtor of the protection which he may have secured to them in taking out policies for their benefit payable at his death, but to prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies or policies payable to themselves, and holding the same while seeking a discharge from their debts through the bankrupt act.

There has been considerable conflict in the decisions of the courts in regard to the construction of these two provisions; but it is now settled by the decision in Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656, that § 70a is not a limitation on § 6, and applies only to insurance not exempt under the state laws.

For a review of all the authorities on life insurance as assets of bankrupt or insolvent, see note in 50 L.R.A. 33.

whatever on the part of either the insured or the beneficiaries. The fact that the property sought to be subjected to the payment of the debts of the insured is represented by life insurance policies in which beneficiaries have an interest does not change the rules with respect to creditors' suits. They must necessarily be the same, without regard to the character of the property of the debtor which it is sought to reach. Before a court of equity is authorized to cancel a voluntary conveyance or transfer of property on the ground of fraud upon creditors, it must be alleged and proved that debts existed at the time the conveyance or transfer was made, or that the conveyance or transfer was made with a view to the contracting of future obligations. Emery v. Yount, 7 Colo. 107, 1 Pac. 686; Sexton v. Wheaton, 8 Wheat. 229, 5 L. ed. 603; Arnett v. Coffey, 1 Colo. App. 34, 27 Pac. 614.

The beneficiaries obtained their respective interests before the judgment in favor of plaintiff was rendered. Whether these interests be subject to revocation by the insured is immaterial. The beneficiaries cannot be devested of their interests except by the acts of the insured. As the policies now stand, the money which the beneficiaries would receive in the event of the death of the insured would not belong to their respective estates, but to the beneficiaries. Hendrie & B. Mfg. Co. v. Platt, 13 Colo. App. 15, 56 Pac. 209. This assignment was made for their benefit, when, so far as the bill and proofs disclose, the insured had the right to do so. It does not appear that the plaintiff was in any manner prejudiced thereby, or that any property of the insured was applied in order to effect this arrangement, which in equity plaintiff would be entitled to have applied to the payment of its indebtedness, or that any conditions exist which would authorize a court of equity, at the instance of a creditor, to annul a voluntary arrangement on the part of the insured for the benefit of those for whom, by the laws of nature as well as man, it was their duty to make provision. If the latter should be compelled to surrender these policies to the companies issuing them, and accept the value thereof, the rights of the beneficiaries would be destroyed. The insured may have interests in these policies which a court of equity, if their rights only were involved, might have the power to compel them to apply to the payment of their indebtedness; but, however this may be, a court of equity would not be authorized to exercise this power when thereby the vested rights of third persons would be destroyed, unless it should appear that the conditions existed under which a court of equity, at the instance of a creditor, may annul voluntary arrangements entered into between his debtors and third persons.

The judgment of the District Court is affirmed.

Gunter and Maxwell, JJ., concur.

KANSAS SUPREME COURT.

FEDERAL BETTERMENT COMPANY, Plff. in Err., v. JOHN W. REEVES.

(— Kan. —, 84 Pac. 560.)

Foreign corporation—agent to receive service of process.

1. One who has exclusive supervision and control of some department of the corporation's business, the management of which requires of such person the exercise of independent judgment and discretion, and the exercise of such authority that it may be fairly said that service of summons upon him will result in notice to the corporation, is a "managing agent," within the meaning of the statute providing for the service of summons upon a managing agent of a foreign corporation.

Physician—evidence—conclusion from history of case.

2. A physician, while testifying as an expert, is not permitted to testify to his conclusions of the permanency of an in-

Headnotes by GREENE, J.

Case Note.—Who is managing agent of foreign corporation for purposes of service of process.—As a general rule, a managing agent of a foreign corporation, within the contemplation of a statute authorizing service of process on such an officer, is one whose position, rank, and duties make it reasonably certain that the corporation will be apprised of the service made; in other words, one who stands in the shoes of the corporation in relation to the particular business managed by him for the corporation. Doe v. Springfield Boiler & Mfg. Co. 44 C. C. A. 128, 104 Fed. 864; Palmer v. Chicago Evening Post Co. 85 Hun. 403, 32 N. Y. Supp. 992; Beale, Foreign Corp. § 273; Murfree, Foreign Corp. § 215.

The following persons have been held to be managing agents within the contemplation of such statutes: One whose name appears as manager on the letter heads of a foreign manufacturing corporation, and who signs his name as manager to letters dealing with corporate business,—Young & F. Co. v. Welsbach Light Co. 55 App. Div. 16, 66 N. Y. Supp. 1024; one whose name appears on the freight bills of a foreign railroad cor-

jury to his patient, based partially upon the history of the injury detailed to him by the patient or other person, and partially upon his own examination.

Foreign corporation—process—service.

3. The various methods provided by statute for obtaining service of process on foreign corporations are cumulative.

(Porter, J., dissents from proposition 2.)

(February 10, 1906.)

ERROR to the District Court for Neosho County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. J. L. Denison, with Messrs. **Burnham & Dashiell**, for plaintiff in error.

Mr. W. R. Cline, for defendant in error:

Service on the managing agent was proper.

Burlington Ins. Co. v. Mortimer, 52 Kan. 784, 35 Pac. 807; German Ins. Co. v. First Nat. Bank, 58 Kan. 86, 62 Am. St. Rep. 601, 48 Pac. 592.

Greene, J., delivered the opinion of the court:

John W. Reeves recovered judgment for injuries alleged to have been sustained by him through the negligence of the defendant, the Federal Betterment Company, a corporation. The facts alleged in the petition are, substantially: That the plaintiff was working for the Morehead Manufacturing Company in its factory situated at Morehead in Neosho county, Kansas; that the defendant was a corporation engaged in drilling for oil and gas and in the transportation of such products by pipe lines to consumers; that it led a pipe from its main

poration as its general manager, and whose duties consist in contracting for the transportation of freight over the lines of the corporation, and in attending to the transfer of freight to and from connecting roads,—Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co. 32 Ohio St. 116; the general manager of a railroad line located in California, who there solicits and obtains freight and passenger business for a connecting line without the state, which, with the other line, forms a system or route over which the trains of the former are run to points within the state,—Norton v. Atchison, T. & S. F. R. Co. 61 Fed. 618; the manager of an agency established within the state for the purpose of soliciting traffic for a foreign railroad corporation which has no line within the state,—Fremont, E. & M. Valley R. Co. v. New York, C. & St. L. R. Co. (Union State Bank v. Fremont, E. & M. Valley R. Co.) 66 Neb. 159, 59 L.R.A. 939, 92 N. W. 131; a person who has full charge of the business of a foreign corporation dealing in lumber and merchandise at a particular place within the state, and is subject to no authority from any other person or agent within the state, but who corresponds with, accounts to, and receives instructions from, the main office of such foreign corporation in a foreign state, receives and disburses moneys, pays freight, makes contracts with customers as to terms of payment of accounts, issues receipt for money, employs all necessary temporary assistance for and in behalf of the corporation, and, with the knowledge and under the instructions of the corporation, holds himself out and advertises in the newspaper as manager,—Foster v. Charles Betcher Lumber Co. 5 S. D. 57, 23 L.R.A. 490, 49 Am. St. Rep. 859, 58 N. W. 9; an attorney in fact for a nonresident corporation dealing in certain patent rights, who has full power to make contracts under seal or otherwise, with reference to the sale of such rights,—Perrine v. Ransom Gas Mach. Co. 60 App. Div. 32, 69 N. Y. Supp. 698; an attorney for a foreign corporation, who is engaged in winding up the business of the corporation within the state,—Newport News & M. Valley Co. v. McDonald Brick Co. 109 Ky. 408, 59 S. W. 332; the chief agent of a foreign corporation, who represents the corporation for the sale of its goods in a particular locality within the state, maintains an office and storeroom where such goods are kept, and is paid only by commissions on sales,—Toledo Computing Scale Co. v. Computing Scale Co. 142 Fed. 919; a Kentucky correspondent of a foreign commission corporation, who occupies an office having a private telegraph wire installed by the latter, and leased to its correspondent, and who takes orders for stocks, etc., which he forwards to his principal, and deposits all money, including commissions and margins, to the credit of the latter, he being paid by checks,—Boyd Commission Co. v. Coates, 24 Ky. L. Rep. 730, 69 S. W. 1090; one who represents a foreign newspaper corporation, is paid by commission, and occupies a New York office upon which appears the name of the corporation, and is referred to by the latter as its eastern representative, who solicits advertising contracts, the making of which is a substantial part of the business of the corporation, and a part of which only he is obliged to submit to his principal for approval, and conducts all the other corporate business transacted within the state,—Palmer v. Chicago Herald Co. 70 Fed. 886. But a representative of a foreign publishing corporation who merely solicits advertisements at a weekly salary for a number of newspapers, the name of one of which appears on the door of his office, is not a managing agent,—Vitola v. Bee Pub. Co. 66 App. Div. 582, 73 N. Y. Supp. 273; Fontana v. Post Printing & Pub. Co. 87 App. Div. 233, 84 N. Y. Supp. 308; nor is an agent of a foreign newspaper corporation, who is

line into the Morehead Manufacturing Company's place of business for the purpose of supplying that company with natural gas for fuel to operate its factory; that in doing so it attached thereto what is called a "Tobey meter," but negligently failed to place any regulator between the meter and the high pressure in the main line, thus permitting the high pressure in the main line to come into the lateral line in the factory; that, through the negligent acts of the defendant in carelessly, negligently, and unskilfully constructing and maintaining the pipe and meter, and in failing to place a regulator between its main pipe line and the meter in the factory where the plaintiff was working, and in using a meter which was insufficient to restrain the high pressure of the natural gas in the main line, the pressure burst the meter, causing an explosion which hurled plaintiff the distance of a rod, knocking him senseless, or into such a dazed condition that he did not realize what had happened; that the concussion was so great as to injure his ear and hearing on the side next to the explosion and permanently to injure his left side, shoulder, and chest; that, either by reason of the explosion of the gas upon him, or by reason of being struck on the left side of his head by some missile hurled against him by the explosion, he sustained concussion of the brain, which produced acute mania that lasted in a severe form for several weeks, during which time he required the constant care and attention of others. Other allegations of the extent of plaintiff's injuries were alleged. Upon the filing of this petition in the district court of Neosho county, the county in which the accident occurred, a summons was issued, directed, and delivered to the sheriff, upon which he made the following amended return of service: "Received this writ, May 24, 1904, and, as I was unable to find the president, chairman of the board of directors, or trustees, or other chief officer, or the cashier, treasurer, secretary, or clerk, I served the same, as commanded therein, in my county of Neosho and state of Kansas, on the within-named defendant,—the Federal Betterment Company,—a corporation, as follows: On May 21, 1904, by delivering to W. Kinney, managing agent of said the Federal Betterment Company, by delivering to him personally a true and certified copy of the within summons with all the indorsements thereon. I. F. Yockey, Sheriff Neosho Co., Kan., by J. T. Smith, Deputy, who was specially requested to make said service.

The defendant appeared specially, and filed the following motion to quash the summons: "Now comes the Federal Betterment Company, and appearing specially, and for the purpose of this motion only, and moves the court now here to quash, vacate, and set aside the pretended summons and the pretended service thereof in the above-entitled action for the following reasons, to wit: (1) Because there has been no service of summons upon the said the Federal Betterment Company; (2) because there has been no service of summons upon the said the Federal Betterment Company, or any authorized agent of said company; (3) because said action was improperly instituted in Neosho county, Kan.; (4) because said pretended summons was improvidently issued; (5) because said summons and the return thereof are void and of no effect, and the court has not, by the issuance of such summons, obtained any jurisdiction whatever over said the Federal Betterment Company." In support of the motion, defendant introduced a certified copy of its charter, showing that it was

paid a weekly salary and authorized to solicit advertisements, make contracts therefor, receive payment, and carry on the general business of the corporation in an office having the name of the newspaper on its windows, but who has no control over the rates to be charged or the space given,—Union Associated Press v. Times-Star Co. 84 Fed. 419, in effect reversing Brewer v. George Knapp & Co. 82 Fed. 694, in which a contrary decision was rendered; nor is an attorney in fact for a foreign mining corporation empowered to apply for a patent to mining ground claimed by it, and to execute all papers necessary for that purpose,—Mars v. Oro Fino Min. Co. 7 S. D. 605, 65 N. W. 19.

One who has an office in California with the name of a foreign railroad corporation on its windows, and whose name appears on the folders of the company as its general agent, who solicits passenger and freight business to be carried over some line within the state and then over the road he represents, and who issues shipping receipts for goods shipped from points within the state, is a business or managing agent within the meaning of a statute authorizing service on such an officer. Denver & R. G. R. Co. v. Roller, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738. But a California commission broker, who occasionally makes sales of machinery manufactured by an Illinois corporation, delivered on board the cars at the factory, and sent directly to the purchaser at a price which includes a commission to compensate the broker for procuring buyers, and whom the Illinois corporation refused to appoint as its selling agent, is not a managing or business agent. Doe v. Springfield Boiler & Mfg. Co. *supra*.

For earlier cases on the subject of who is a managing agent of a foreign corporation for the purpose of receiving the service of process, see note in 23 L.R.A. 496.

incorporated under the laws of West Virginia, which charter states that the principal place of business shall be located in the city of Topeka, Shawnee county, state of Kansas. Its chief works will be located in the city of Cherryvale, Montgomery county, Kansas, but it is expected and intended by this company to have branches located at other points in the state of Kansas, and also in the state of Missouri, Indian territory, and Oklahoma territory, and at numerous other places. It also caused to be read the affidavit of F. W. Freeman, as follows: "Affiant is the secretary and treasurer of the Federal Betterment Company; that affiant resides in the city of Topeka, county of Shawnee, and state of Kansas; that the said the Federal Betterment Company is a corporation duly organized and existing under and by virtue of the laws of the state of West Virginia; that said corporation now is, and has been for about one year last past, duly authorized to transact business in the state of Kansas; that in said last-named state said corporation has an office in the city of Topeka; that all the chief officers of said corporation are now, and have for a long time been, actual residents of Shawnee county, in the state of Kansas; that said corporation has not now, and never has had, any office or place of business in the county of Neosho, in said state, and that none of its officers reside therein, but that affiant is informed and believes that in the above-entitled action service of summons was attempted to be made in the above-entitled action upon the said the Federal Betterment Company, in Neosho county, Kan., by delivering a pretended copy of an alleged summons to one W. Kinney; but affiant avers that said W. Kinney was not at the time of such pretended service, had never theretofore been, and is not now, an officer or agent of said company, and said W. Kinney is not now, and never has been, the cashier, treasurer, secretary, clerk, or managing agent of said the Federal Betterment Company, and is not now, and never has been, a person in charge of any office of said company." It also filed the certificate of the secretary of state of Kansas showing that the charter board had authorized the Federal Betterment Company to engage in the business of mining and other pursuits, as expressed in the application, in the state of Kansas, until the certificate should be revoked, or the authority canceled. In refutation of the proofs offered on the motion, the plaintiff introduced the affidavit of J. T. Smith, a resident of Morehead, Neosho county, Kansas, which reads "J. T. Smith, of lawful age, being duly sworn, on his oath says: That he resides at Morehead, Neosho County, Kan., and that he is a user of natural gas which he obtained from the Federal Betterment Company. That affiant is one of the proprietors of the Morehead Manufacturing Company, which said factory is located just west of Morehead in Neosho county, Kan. That affiant not only made contracts with said company, or with its foreman and agent, W. Kinney, for the use of gas in his residence, but also for gas for said factory; affiant knows that said Kinney employed all the hands and hired, worked, and discharged all the men that put in the gas lines for said defendant company; that he, said Kinney, paid off all the company's hands; that he, said Kinney, made all contracts with gas users; that he put in all pipe lines and connected the defendant's high-pressure line with the buildings of all gas users; that said Kinney collected the gas rentals due said company each month and receipted for the same in the name of said defendant company by 'W. Kinney,' its agent or managing foreman. That said Kinney did and performed all things for and in behalf of said company in Neosho county; that said Kinney was located a part of the time each month at Morehead, Neosho county Kan., in the discharge of his duties as agent and field manager of said defendant; and that he sold gas at Morehead, and collected same monthly in the name of said defendant the Federal Betterment Company. That affiant has seen as many as 25 receipts given by said Kinney to Neosho county gas users prior to and up to the injury of plaintiff herein, which receipts were signed in the name of the defendant company, by W. Kinney, agent and superintendent for said company. That said company has gas lines in Montgomery, Labette, and Neosho counties, in Kansas, and affiant knows that said W. Kinney has always acted as the managing agent of said defendant company in said counties; and that, save and except said Kinney, there never was any other authorized person to represent said defendant in Neosho county. That said Kinney, the agent and superintendent of said defendant company, is the person who put in the first meter in the shop where Reeves was injured, and that affiant notified him, or some of his workmen, that it would not work, when he came back and said to lead the joints and then turn in the gas, that it would then be ready to use; that after Reeves's injury said Kinney came back to put in a regulator and a new meter and took out the scraps of the one that had been blown to pieces; that said Kinney always appeared as though the gas line was his, or that he had supreme control of its affairs for said defendant the Federal Betterment Company. That affiant

was and is the duly appointed, qualified, and acting deputy sheriff of I. F. Yockey, and that he served the summons in this action upon said Kinney as agent, foreman, and representative of said defendant company, as more fully set forth in the returns on said original summons now on file in this action. That at the time said I. F. Yockey was and is the duly elected, qualified, and acting sheriff of Neosho county, Kan." The motion to quash was overruled, to which the defendant excepted. Thereafter it filed its answer, and the cause was tried by the court and a jury, a verdict was returned, and a judgment rendered thereon for the plaintiff.

The first alleged error of the defendant is the order of the court in overruling its motion to quash the summons. It contends that there is but one way by which service can be had upon a foreign corporation that has been granted permission to do business in Kansas, and that is by having the summons directed and delivered to the secretary of state, as provided in § 1262 of the General Statutes of 1901. This section reads: "Actions against any corporation organized under the laws of any other state, territory, or foreign country, and doing business in this state, may be brought in any county where the cause of action arose or in which the plaintiff may reside. The summons shall be directed to the secretary of state, and shall require the defendant to answer by a certain day, not less than forty days nor more than sixty days from its date. Said summons shall be forthwith forwarded by the clerk of the court to the secretary of state, who shall immediately forward a copy thereof to the secretary of the corporation sued; and thereupon said secretary of state shall make return of said summons to the court whence it issued, showing the date of its receipt by him, the date of forwarding such copy, the name and address of the person to whom he forwarded said copy, and the costs for service and return thereof. Such return shall be under his hand and seal of office, and shall have the same force and effect as a due and sufficient return made by the sheriff on process directed to him." In this contention we do not agree with plaintiff in error. Section 4504 of the General Statutes of 1901 provides: "Where the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent." The defendant was a foreign corporation, and service of process may be had on such persons in any of the ways provided by statute. It might have been had, as contended by the defendant, by delivering the summons to the secretary of state; but this is not the only way. Service might possibly have been made in this particular case by delivering the summons to any of its officers residing in the state, under § 4483 of the General Statutes of 1901. Section 4504 provides an additional way. None of these provisions is exclusive of the others. Where there are several methods for obtaining such service, the plaintiff may select any one. The corporation cannot complain that he did not select some other equally good way. Statutes which provide for service of process on foreign corporations should be liberally construed for the accomplishment of the purpose intended, namely, that of bringing such persons into court. They are permitted to enter the state by comity only, and in the methods of subjecting them to the jurisdiction of the courts they cannot insist upon a technical or strict construction in their favor. If, therefore, the nonresident defendant corporation had a managing agent in the county of Neosho where the action was brought, service could be had on the corporation by serving the summons on such managing agent in that county. The question then is, Was W. Kinney the managing agent of the defendant? This is a question of fact, and it must be determined from the affidavits of Freeman and Smith.

It will be observed that the affidavit of Mr. Freeman on the question of agency is very general in terms. The specific statement is: "But affiant avers that said W. Kinney was not at the time of such pretended services, had never theretofore been, and is not now, an officer or agent of said company." This is but the statement of Mr. Freeman's conclusion. It is not a detailed statement of what Kinney's duties to the corporation were. The court was not given the facts as Mr. Freeman understood them, from which it could have arrived at a conclusion. Instead of doing this the affiant gives his conclusion, and he may have believed that Kinney was not, as he expressed it, "the agent of the company." He may have believed that it required the appointment of the board of directors to constitute Kinney a managing agent of the company, and being secretary he knew this had never been done. The affidavit of Smith was a detailed statement of the acts performed by Kinney for the company, from which the court below concluded that Kinney was the managing agent of the company, within the section of the statute authorizing the service of summons on a managing agent of a foreign corporation, and in this we think the court was correct. Who is a "managing agent" of a foreign corporation, on whom service of summons may be made, must depend in every case upon the kind of business conducted by the corporation, what the gen-

eral duties of the supposed "managing agent" are, and whether it can be fairly said that service on such agent would bring notice to the corporation. Much discussion may be found in the cases upon this question, and it is one upon which there is some disagreement. It may be said, however, that the later decisions are more liberal in interpreting the term "managing agent" than were the earlier ones. While no general rule can be stated which will serve as a test, certain principles may be announced which will serve to assist in determining the matter. Such managing agent must be in charge, and have the management, of some department of the corporation's business, the management of which requires of the agent the exercise of an independent judgment and discretion; not that he shall not be under the general direction of the corporation,—all agents are subject to the general control of their principals,—but in the management of his particular department he shall have authority to manage and conduct it as his discretion and judgment direct. He must be in the exclusive and immediate control and management of that department or of the entire works conducted at the place where he is in charge.

In Porter v. Chicago & N. W. R. Co. 1 Neb. 14, it was stated in the first subdivision of the syllabus: "An agent invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent, within the 75th section of the Code, upon whom a summons may be served. It is immaterial where he resides." In Coler v. Pittsburg Bridge Co. 146 N. Y. 281, 40 N. E. 779, the court said: "It is not necessary that the office of the person to whom the summons is delivered, in a suit against a foreign corporation, should be precisely described as that of 'a managing agent,' because, as we think, from the language of § 432 of the Code of Civil Procedure, it was intended that any person holding some responsible and representative relation to the company, such as the term 'managing agent' would include, might be served with the summons." In American Exp. Co. v. Johnson, 17 Ohio St. 641, the question came up on the alleged insufficiency of the service of the original summons. The court said: "At the time of service the company had a general 'superintendent' for the state, residing at Cleveland, and two or more 'local agents' in the county of Madison, one of whom resided at London, in said county, and kept an office there, where he received and forwarded packages for the company, and did all the business of the company usually transacted in such receiving and forwarding offices. Service was made upon the said agent at London alone; and the question is, whether he was the 'managing agent' of the company, within the meaning of the 68th section of the Code. We think he was such managing agent, and that the service was sufficient." In Brewster v. Michigan C. R. Co. 5 How. Pr. 183, the court said: "The managing agent upon which the summons may be served must be one whose agency extends to all the transactions of the corporation; one who has or is engaged in the management of the corporation, in distinction from the management of a particular branch or department of its business." This language is referred to and criticized in Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co. 31 Fed. 294, 295, as follows: "The language quoted is much broader than that used in the subsequent cases, and was not necessary to the decision of the case; since it appeared that the alleged agent was employed with very limited powers, in connection with a very small part of the defendant's business. . . . The adjudications in the state courts have not gone so far as to hold that no agent is a 'managing agent' who does not participate in the management and control of every part of the corporate business, and of every corporate act. Still less has such a construction of these words been given in any local action like this, where that construction would defeat justice, and enable a corporation systematically to violate the law with impunity. Such a construction, it seems to me, would be unreasonable, and presumably foreign to the intent of the statute, when the words 'managing agent' are equally capable of including a case of the management and control of that department of the company's business out of which the wrongs proceed." This question was before the court in Reddington v. Mariposa Land & Min. Co. 19 Hun, 405, where it was held: "It is quite clear that the legislature attached importance to the term 'managing agent,' and employed it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employee who acted in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of the work, and the manner of executing the same. The distinction thus attempted to be drawn we deem reasonable, and in harmony with the obvious purpose of the statute in regard to the service of process upon a foreign corporation."

A more serious question arises upon the objections to certain testimony of Dr. C. C. Surber, who testified as follows:

(9) Q. Did you learn at that time from Reeves, or his attendants, that he claimed

to have received a violent injury to the left side of his head, about December, 1903, from the explosion of a gas meter?

A. Yes, sir.

(3) Q. Could such an injury as Reeves claimed to have received produce such a condition as you found at that time in his case?

A. Yes, sir.

(6) Q. From the history of the case, as you learned it, and from your diagnosis of the case, taking into consideration Reeves's age and his general condition, do you consider the injury to his left ear and the left side of his head of a permanent or temporary character?

A. I would say a permanent.

The witness was an expert, who, under the rules of evidence, might give his opinion based either on facts testified to by others, or upon hypothetical questions put to him, or upon an examination of the patient; but he could not testify to conclusions arrived at from the history of the case given him by the patient or others. Such testimony would be as completely within the rule against hearsay evidence as if sworn to by one not an expert. Nor can a physician give his opinion based partially upon what he has been told of the case, and partially upon what information he obtained by an examination of the patient. Questions and answers 9, 3, and 6 fall fairly under the objection that the answers were based partially upon a personal examination and partially upon the statements of others. Atchison, T. & S. F. R. Co. v. Frazier, 27 Kan. 463; Heald v. Thing, 45 Me. 392. A physician may testify to the condition of the patient as he found him, whether suffering from pain, and to utterances or exclamations of pain; and he may also give the patient's statement as to the location of the pain causing such exclamations; and this, because it can be said to be a part of his examination.

There are numerous assignments of error. Objections were made in some instances to nearly every question asked of a witness, many of which are frivolous. An examination of all the assignments satisfies us that no error was committed, except as suggested.

For this reason the judgment is reversed, and the cause remanded.

Johnston, Ch. J., and Burch, Mason, Smith, and Graves, JJ., concur.

Porter, J., dissenting:

I dissent from the statement of law in the second paragraph of the syllabus. I think an attending physician is competent to testify, unless the matter is privileged, to his conclusions with reference to the character and extent of a patient's complaint or injury, and to base his opinion upon his examination and treatment, in connection with the "history of the case" obtained from the patient. If the patient relates to him the manner in which he was injured, and even the details of the accident, it is not to be presumed that the physician permits such statements to affect his opinion of the character and extent of the injury. Some part of his professional opinion is necessarily based upon the statements of the patient in answer to his questions. If he is a competent physician, his technical knowledge will prevent the patient from imposing upon his credulity. Block v. Milwaukee Street R. Co. 89 Wis. 371, 27 L.R.A. 365, 46 Am. St. Rep. 849, 61 N. W. 1101; Quaife v. Chicago & N. W. R. Co. 48 Wis. 513, 33 Am. Rep. 821, 4 N. W. 658; Louisville, N. A. & C. R. Co. v. Snyder, 117 Ind. 435, 3 L.R.A. 434, 10 Am. St. Rep. 60, 20 N. E. 284; Barber v. Merriam, 11 Allen, 322, 325. See also Rogers, Expert Testimony, § 47, and cases cited. A different rule obtains where the physician is consulted solely for the purpose of having him become a witness. Stewart v. Evarts, 76 Wis. 35, 20 Am. St. Rep. 17, 44 N. W. 1092. In this case, while the questions asked the physician were somewhat broader than necessary, he was competent to testify as an expert from his examination and treatment, and it does not appear that the error was prejudicial.

GEORGIA SUPREME COURT.

C. H. WILLCOX et al., Plffs. in Err.,
v.
WILLIAM KEHOE.

(124 Ga. 484, 52 S. E. 896.)

Lease—covenant to reimburse cost of repairs.

1. A covenant in a lease, whereby the lessor expressly stipulates that he will not be bound to make repairs, alterations, additions, or improvements upon the leased premises, but agrees that the lessee, at his option, may make such repairs, etc., as shall be necessary, and that he will reim-

Headnotes by CANDLER, J.

Case Note.—Covenant of lessor to pay for repairs or improvements as one running with land.—A lessor's covenant for himself and his assigns, to pay the lessees or their assigns the value of improvements to be erected by them on the demised premises during the term of the lease, runs with the land, and may be enforced by the original lessees against an assignee of the reversion (Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910; Berrie v. Woods, 12 Ont. Rep. 693); or by the assignee of the lessees against the

burse him therefor to an amount named, is a personal obligation on the part of the original lessor, and does not run with the reversion, so as to bind an assignee thereof.

Same—transfer of reversion.

2. One who buys land subject to a lease containing a covenant of the character indicated in the preceding note is not bound for the breach of the purely personal covenant of his predecessor, made prior to the sale of the land to him.

(December 21, 1905.)

ERROR to the City Court of Savannah to review a judgment in favor of plaintiff in an action brought to recover rent alleged to be due and unpaid. Affirmed.

The facts are stated in the opinion.

Messrs. R. R. Richards and Peeples & Jordan for plaintiffs in error.

Messrs. O'Connor, O'Byrne, & Hartridge, for defendant in error:

The covenant was a personal one on the part of plaintiff's predecessors in the lease, and could not bind him.

1 Taylor, Land. & T. 8th ed. § 263, p. 315; 18 Am. & Eng. Enc. Law, 2d ed. p. 644; Gardner v. Samuels, 116 Cal. 84, 58 Am. St. Rep. 135, 47 Pac. 935; Hansen v. Meyer, 81 Ill. 321, 25 Am. Rep. 282; Cicalla v. Miller, 105 Tenn. 255, 58 S. W. 210; Tucker v. McArthur, 103 Ga. 409, 30 S. E. 283; Atlanta Consol. Street R. Co. v. Jackson, 108 Ga. 634, 34 S. E. 184.

Candler, J., delivered the opinion of the court:

The Domestic Coal & Wood Company, a firm composed of Willcox and Salas, leased from Harriet C. Jones and others a wharf lot in the city of Savannah for the term of three years and four months; the date of the lease being May 29, 1901. The plaintiffs in error are a partnership doing business under the name of the Standard Fuel Supply Company, and are successors in busi-

lessor (Stockett v. Howard, 34 Md. 121; Hollywood v. First Parish [Mass.] 78 N. E. 124).

And the lessee is entitled, in equity, to have the amount due him under the covenant declared a lien upon the property. Fowler v. Mutual L. Ins. Co. 28 Hun, 195.

Whether such covenant technically runs with the land or not, in equity it becomes a charge upon the leased property, which can be enforced by the successors in interest of the lessee against the successors in interest of the lessors, who had notice of the covenant, both actual and constructive, and received benefits under the lease. Re Coatsworth, 37 App. Div. 295, 55 N. Y. Supp. 753. This case, however, was reversed on appeal (160 N. Y. 114, 54 N. E. 665) on another ground, and without passing on this point.

But where the covenant to pay for an improvement to be erected does not expressly bind the lessor's grantees or assigns, it does not run with the land. Etowah Min. Co. v. Wills Valley Min. & Mfg. Co. 121 Ala. 672, 25 So. 720; Hansen v. Meyer, 81 Ill. 321, 25 Am. Rep. 282; Gardner v. Watson, 18 Ill. App. 386, Affirmed in 119 Ill. 312, 10 N. E. 192; Grey v. Cuthbertson, 4 Dougl. K. B. 351; McClary v. Jackson, 13 Ont. Rep. 310. Nor is such covenant binding upon the lessor's devisee. Ovington Bros. Co. v. Henshaw, 47 Misc. 167, 93 N. Y. Supp. 380.

Where a statute expressly or by implication provides that assigns, although not mentioned, shall be bound, such covenants without the word "assigns" are held to run with the land, and bind the assignee or grantee of the reversion. Frederick v. Callahan, 40 Iowa, 311; Ecke v. Fetzer, 65 Wis. 55, 26 N. W. 266.

In Conover v. Smith, 17 N. J. Eq. 51, 86 Am. Dec. 247, it was held that where the lease gives to the lessees, without mentioning their assigns, permission to remove machinery and put in other machinery and fixtures, and the covenant to pay their value is to the lessees, but not to their assigns, the covenant, being, not for the erection of new buildings, but for alterations and improvements in existing buildings, may be enforced by the assignee of the lessees.

Where the lessee has not obligated himself to put the improvements on the land, but, under the terms of the lease, it is entirely optional with him, the lessor's covenant to pay for the same does not run with the land. Hite v. Parks, 2 Tenn. Ch. 373; Cicalla v. Miller, 105 Tenn. 255, 58 S. W. 210. And so it was held though the covenant purported to bind the lessor's assigns. Etowah Min. Co. v. Wills Valley Min. & Mfg. Co. *supra;* Gardner v. Samuels, 116 Cal. 84, 58 Am. St. Rep. 135, 47 Pac. 935. But in Hunt v. Danforth, 2 Curt. C. C. 592, Fed. Cas. No. 6,887; Bailey v. Richardson, *supra;* Batchelder v. Dean, 16 N. H. 265; Conover v. Smith, *supra;* Hazelwood v. Pennybacker (Tex. Civ. App.) 50 S. W. 199; and Berrie v. Woods, *supra*,—it does not appear that the lessees obligated themselves to make the improvements.

In Hazelwood v. Pennybacker, *supra*, it was held that the death of the lessor did not revoke his covenant to pay for improvements on the leased property; and the lessee could recover for the same against the lessor's heirs, who collected the rents, and did not object to, but encouraged, the improvements upon the property under the terms of the lease, although the lease did not purport to bind the lessor's heirs or assigns, but provided that the lessee could hold possession until the improvements were paid for.

In Batchelder v. Dean, *supra*, the lessor covenanted to pay the lessee at the expiration of the term for certain improvements to be made, or to allow him to continue to occupy the premises until he should be remunerated from the rents and profits. It

ness to the Domestic Coal & Wood Company. One of the conditions of the lease referred to was as follows: "It is covenanted and agreed by and between the parties of these presents, that the said [lessees] shall take and occupy the said property as it stands at the beginning of this lease, and that the said [lessors] shall not be called upon or be responsible for any additions, alterations, improvements, or repairs upon the said leased property, or any part thereof, or for any dredging or increased depth of the water along said wharf front, and that all such additions, improvements, repairs, or dredging shall be made by the [lessees] at their option and at their own expense. But said [lessors] hereby covenant and agree to reimburse and to pay to the said [lessees] for any necessary repairs, improvements, or dredging made or done by them a sum not to exceed in the aggregate during the term of said lease twelve hundred dollars ($1,200), to be paid to said [lessees] at the time or times when said repairs or dredging is completed and payment for the same becomes due." The instrument contained various other covenants which are not material to this discussion. Only one of the covenants of the lease is expressly made applicable to the successors or assigns of either party, *viz.*, a stipulation that, in the event of default in the payment of rent, the lessors, "their successors or assigns," shall have the right to re-enter and terminate the lease. During the years 1901 and 1902 the original lessees and their successors, the plaintiffs in error, expended for necessary repairs on the leased premises a sum in excess of the $1,200 provided by the clause of the contract which has been quoted. Of this amount $802.30 was reimbursed to the original lessees, presumably at the time the repairs were made. The remainder, $397.70, has never been reimbursed, though demand for same has been made. In April, 1905, Kehoe, the defendant in error, purchased the wharf lot, and after the expiration of the lease brought suit against the lessees for an amount alleged to be due for three months' rent of the premises. The defendants filed a plea, in which they sought to recoup against the plaintiff's claim for rent the difference of $397.70 between the amount that has been paid to them and their predecessors by way of reimbursement for repairs made and the amount of $1,200 provided for by the covenant to reimburse, which has already been set out. On motion of counsel for the plaintiff the plea of recoupment was stricken as insufficient in law, and the defendants excepted. It will be seen that two controlling questions are presented for decision, *viz.:* Was the covenant to reimburse one which ran with the land, or a merely personal obligation on the part of the original lessors; and, if it was not a covenant running with the land, was Kehoe, who bought subject to the lease, bound by its terms to the extent that he will be held liable for the previous breach of the covenant by his predecessor in title?

1. At common law a distinction was drawn between the land—*i. e.*, the right to the possession of leased premises, and the reversion, or the right to the estate after the expiration of the lease; and it seems that "covenants ran with the land, but not with the reversion. Therefore the assignee of the lessee was held to be liable in covenant, and to be entitled to bring covenant, but the assignee of the lessor was

was held that the lessor's grantee could not, at the expiration of the term, devest the lessee of his estate or interest, except by the payment of the balance due for the improvements, although it did not appear that the lease was binding on the lessor's assigns.

In California Annual Conference v. Seitz, 74 Cal. 287, 15 Pac. 839, the land and buildings thereon belonged to different parties, who entered into a contract or lease which provided that the owner of the buildings (lessee) should pay certain rent for a certain period, and at the expiration of the term should have the option to remove the buildings, or require the landowner (lessor) to pay their value. With the consent of the lessor, the lessee assigned the lease, and it was held that the assignee had the right to compel the lessor to purchase the buildings.

Where the covenant to pay relates to an improvement which is merely in contemplation, and the lessee's assigns are not expressly named in the covenant, his assignee cannot enforce it. Thompson v. Rose, 8 Cow. 266; Tallman v. Coffin, 4 N. Y. 134; Coffin v. Talman, 8 N. Y. 465; Johnston v. Bates, 16 Jones & S. 180; Peterson v. Haight, 1 Miles (Pa.) 250.

Spencer's Case, 5 Coke, 16, was cited in support of many of the foregoing cases, but, while in this latter case the court promulgated a number of resolutions, the real question in the case was whether or not a lessee's covenant for himself and his executors (not assigns), that he, his executors, administrators, or assigns would build a wall upon the demised premises, was binding on the lessee's assignee. It was held not, because the existence of the wall was merely in contemplation, and had not yet become a part of the land. However, it was said in this case that the covenant would have been binding upon the assignee, although the wall was not *in esse* when the covenant was made, if the lessee had covenanted for himself and his assigns, because the wall was to be erected upon the land demised, and the assignee would take the benefit of it.

not." See note to Spencer's Case, 1 Smith, Lead. Cas. 9th Am. ed. 180, Citing Thursby v. Plant, 1 Wms. Saund. 300, n. 10 [1 Wms. Saund. 240, note 3], and Butler v. Archer, 12 Ir. C. L. Rep. 104. To remedy this inequality the statute of 32 Henry VIII., chap. 34, was passed, whereby it was enacted, in effect, that assignees of lessors should "have like advantage against the lessees, their executors, administrators, and assigns, by entry, for nonpayment of the rent, or for doing waste or other forfeiture, and by action only, for not performing other conditions, covenants, or agreements, expressed in the indentures of leases, . . . as the said lessors and grantors, their heirs or successors, might have had;" and that "all lessees and grantees of lands, . . . their executors, administrators, or assigns, shall have like action and remedy against all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the King, or of any other person of the reversion of the said land and hereditaments so letten, or any parcel thereof, for any condition or covenant expressed in the indentures of their leases, as the same lessees might have had against the said lessors and grantors, their heirs or successors." From the sweeping language of this statute it would seem that Parliament intended that all covenants in leases should run both with the land and the reversion, or, in other words, that assignees of both lessor and lessee should be entitled to all the benefits and subject to all the burdens of covenants contained in the lease. But in Spencer's Case, 5 Coke, 16, 1 Smith, Lead. Cas. 9th Am. ed. 174, two important limitations were placed upon covenants running with the land. Quoting from the language used in that case, they were: (1) "When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words; but, when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being," and, in order for the assignee to be bound, he must be expressly named in the covenant. (2) "But, although the covenant be for him and his assigns, yet, if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged." The first of these rules was, in the subsequent English case of Minshull v. Oakes, 2 Hurlst. & N. 793, attacked as unreasonable, and the opinion was expressed that Spencer's Case was decided contrary to the rule (note to Spencer's Case, 1 Smith, Lead. Cas. 186); but it has, nevertheless, been followed generally by the courts, both of England and the United States. In the opinion of the writer, the second rule quoted was intended merely to protect the assignee of the lease or of the reversion against whimsical or unreasonable covenants in leases; but it has been given a much more restricted application, and accordingly this court has held that, "to constitute a covenant running with the land, the covenant 'must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed.'" Atlanta Consol. Street R. Co. v. Jackson, 108 Ga. 638, 34 S. E. 184, Citing 1 Ballard, Real Prop. § 491.

Now, as to the application of these rules to the covenant under consideration. The trial judge, in an able opinion delivered when the judgment was rendered striking the plea of recoupment, held that the covenant related to a thing merely *in posse*, and therefore that it could not bind the assignees, in the absence of an express stipulation that they should be bound. He seems to have proceeded upon the idea that, because the lessor was not bound under the lease to make any repairs, but might or might not do so at his option, the subject of the covenant was "floating," or uncertain. His Honor was doubtless for the moment confused with the idea that the covenant was one by which the landlord agreed at the option of the tenant to make repairs, whereas he in fact expressly declined to undertake any such obligation, and agreed, not to repair, but to reimburse. But, assuming the correctness of the premise taken, we cannot agree to the correctness of the conclusion reached. The fact that the tenant might or might not make repairs to the wharf or dredge the channel is, in our opinion, unimportant. The question is, Was the thing to be repaired or dredged in existence at the time the covenant was made? The affirmative of this question is not disputed. And so, had the covenant been that the landlord should repair, it would not have been necessary, in order to bind the assignees of the reversion, that they should be expressly named. But, as we have seen, the covenant was to reimburse for repairs which the lessee was permitted to make, and the pivotal question for us to decide is whether this was a covenant so related to the estate or interest created as to run with the land, whether the word "assigns" was used or not. A case very closely in point, and one which has been very frequently cited by the text-books and the courts of various states, is that of Bream v. Dickerson, 2 Humph. 126. There it ap-

peared that a lease was made for a term of years at a stipulated rental; the lessor covenanting for himself and heirs "to pay and satisfy . . . [the lessees], their heirs and assigns, at the expiration of the lease, the full and fair cash valuation of such improvements as might be standing on the premises at the expiration of the lease, provided it did not exceed the sum of $1,500. This sum, whatever it might be, he reserved to himself the right to pay in one, two, and three years from the expiration of the lease, or to pay the same out of the rents of said improvements, if they would rent for an amount sufficient to pay it." During the term both the lease and the reversion were assigned, and improvements to an amount greater than $1,500 were placed on the land by the lessees and their assignees. At the expiration of the lease the assignees of the reversion refused to pay any amount for the improvements on the land, and the tenants sought to enjoin them from bringing an action of ejectment for the land until they had either paid the value of the improvements or permitted the plaintiffs to receive such value out of the rents and profits. In the opinion the court, speaking through Turley, J., said: "Whether a particular express covenant sufficiently touches and concerns the thing demised as to be capable of running with the land is not unfrequently a question of difficulty, but such as we do not feel it to be in the case now under consideration. There is no covenant on the part of the lessees to improve. They may do so, or not, at their option. The covenant is on the part of the lessor to pay for improvements if they should be made and left standing at the expiration of the lease. A covenant, to run with the land, must touch and concern it; and it is difficult to see how a covenant to pay a pecuniary consideration for a house, if the tenant shall think proper to erect it, can be said to touch and concern the estate." See also Gardner v. Samuels, 116 Cal. 84, 58 Am. St. Rep. 135, 47 Pac. 935; Hansen v. Meyer, 81 Ill. 321, 25 Am. Rep. 282; Etowah Min. Co. v. Wills Valley Min. & Mfg. Co. 121 Ala. 672, 25 So. 720. So, in the present case, we fail to see how a covenant to pay money for purely contingent repairs, to be made at the option of the lessee, can be said to touch or concern the land, or to have relation to the estate or interest conveyed, so as to constitute it a covenant running with the land. The case of Atlanta Consol. Street R. Co. v. Jackson, 108 Ga. 634, 34 S. E. 184, while different as to its facts, contains strong authority *arguendo* for the ruling now made. Whether, had the lessee been bound by the lease to make the repairs, the covenant to reimburse would have been tantamount to a covenant to repair by the lessor, and would have run with the land, *quære*?

2. Having reached the conclusion that the covenant to reimburse did not run with the land, it is easy to decide that the assignee of the reversion, Kehoe, was not bound by its terms by reason of the fact that he took with notice of it and subject to the lease in which it was contained. It is not necessary to decide whether, had the repairs been made subsequently to the purchase by Kehoe, he would have been bound to reimburse by reason of his notice of the covenant in the lease. It appears that there had been a complete breach of this purely personal obligation before Kehoe bought. The only notice with which he was charged was notice that his predecessors in title owed their tenants money for repairs which the latter had made on the property. While it may be argued with force that he bought the property subject to the subsequent obligations imposed by the lease, it cannot seriously be contended that he purchased, along with it, the previously incurred personal debts of his grantors, growing out of their ownership of the property.

Judgment affirmed.

All the Justices concur.

ILLINOIS SUPREME COURT.

CHARLES W. BENNETT, Appt.,
v.
MARY A. BENNETT et al.

(217 Ill. 434, 75 N. E. 339.)

Will—trust—vesting of interest.

1. A bequest to a trustee of a fund to be invested and the income paid to testator's son until he reaches a certain age, when the fund shall become his absolutely, does not

Case Note.—Effect of provision in bequest of personalty that, upon the death of the first taker, the property shall go to his "heirs," to create an absolute title in him.—It needs no argument to demonstrate that a testamentary disposition of property after the death of the first taker will be given effect in the absence of an artificial meaning growing out of some technical rule of construction. Such a rule is that in Shelley's Case, upon the applicability of which to a bequest of personalty the solution of the question under discussion depends. This celebrated rule is stated to be "that where the ancestor [by any gift or conveyance] takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, either in fee or in tail, 'the heirs' are

vest the title in the son until he reaches the prescribed age; and the fact that the fund is at once segregated from the estate and devoted to the particular trust will not defeat the intention of the testator.

Same—personalty—heirs—Shelley's Case.

2. A provision in a will vesting a fund in a trustee with directions to pay the income to testator's son until he attains a certain age, when the fund shall become his absolutely, that in case the son dies before reaching such age "it shall go to his heirs," does not, under the rule in Shelley's Case, vest the title in the son so as to defeat the testator's intention; but the provision will be regarded as one of purchase or substitution.

Trust—renunciation—right of beneficiary.

3. Refusal of a trustee to accept the trust will not vest a legacy in the beneficiary if the entire beneficial interest was not in him according to the terms of the will.

(October 24, 1905.)

APPEAL by complainant from a judgment of the Appellate Court, Second District, affirming a decree of the Circuit Court for De Kalb County dismissing his bill filed to reach a legacy. Affirmed.

Statement by Ricks, J.:

On December 27, 1891, Charles D. Bennett, late of De Kalb county, Illinois, died, leaving a last will and testament, which was duly admitted to probate in said county on

words of limitation of the estate, and not words of purchase." 1 Coke, 94. Its origin has been variously accounted for, some commentators supposing it to have been adopted to prevent abeyance of the inheritance, which would tend to clog the free alienation of property, while others advance the theory that it is grounded in feudal polity, as tending to preserve the superior lord's right to claim relief, as well as the lucrative incidents of wardship and marriage. At first a rule of construction, it later became a rule of law; while the modern tendency, evidenced by both statutes and decisions, is to relegate it to its original place, placing the stress upon the intention of the creator of the estate, provided, however, that such intention is expressed in such language as the law deems appropriate for the purpose.

In its application to testamentary dispositions of property, the tendency was always strong to treat it as a rule of construction, for the reason that, while conveyances are usually made with the aid of counsel, wills frequently are not; wherefore expressions therein are to be given their natural, rather than their technical, meaning. See Ridgeway v. Lanphear, 99 Ind. 251.

The rule itself shows that it has reference only to estates in real property; and its application to gifts of personalty is, as remarked in BENNETT v. BENNETT, only by way of analogy. See also Evans v. Weatherhead, 24 R. I. 502, 53 Atl. 866, and cases cited. And, since an absolute estate in personalty may be created without words of inheritance, as is not the case with realty at common law, the presumption created by the rule yields more readily to the intention of the testator.

The diminished force of the rule, above alluded to, will explain the variations found in the cases which follow.

The rule in Shelley's Case is held applicable to a bequest of personalty in Ewing v. Standefer, 18 Ala. 400, in which a bequest in the following words, "I lend to my daughter, Lydia Standefer, during her natural life, five negroes, . . . these five negroes with all their increase I will to the lawful begotten heirs of Lydia Standefer to be equally divided among them at her death," —was held to give the first taker the absolute property.

In Lloyd v. Rambo, 35 Ala. 709, a similar bequest in the form of a loan to the first taker, going on to provide that "at her death I give the above property to her lawful heirs of her body," was held to give the first taker an absolute estate.

Such was also the conclusion in Parish v. Parish, 37 Ala. 591, where the personalty was given " 'to be her right and property during her lifetime, and her heirs' after her; . . . but, should she die without an heir, then the said property to be equally divided among the rest of my heirs."

In Smith v. McCormick, 46 Ind. 135, it is held that a bequest of a certain sum to testator's daughters "on the express condition and understanding that they are to enjoy and use the $8,000 bequeathed to each of them during their natural lives, and at their death to revert and descend to the heirs of their body," is held to give the daughters such money absolutely.

And in Horne v. Lyeth, 4 Harr. & J. 431, a bequest of a term of years to testator's daughter "during her natural life, and after her decease . . . to the heirs of my said daughter," was held to give the daughter the whole of the unexpired interest in the term.

A bequest of negroes to testator's daughter "during her lifetime or widowhood, and then I give them to her lawful heirs for them and for their heirs forever," was held, by virtue of the rule in Shelley's Case, to pass the absolute interest to the daughter, in Ham v. Ham, 21 N. C. (1 Dev. & B. Eq.) 598.

And in Hodges v. Little, 52 N. C. (7 Jones, L.) 145, a bequest of slaves to a woman and her husband during their natural lives, "and then . . . to the lawful heirs of" the woman, was held to give her the absolute estate.

So, also, in Kiser v. Kiser, 55 N. C. (2 Jones, Eq.) 28, a bequest of slaves to tes-

January 9, 1892. The testator left surviving him the defendants Mary A. Bennett, his widow, and Ernest A. Blake, a grandchild, and the complainant, Charles W. Bennett, his only surviving child. By his said will testator appointed his wife, Mary A. Bennett, and the defendant David A. Syme, executrix and executor thereof; the latter being also named as trustee. David A. Syme refusing to act either as executor or trustee, the defendant Mary A. Bennett was appointed sole executrix, duly qualified, and at the time of filing the bill herein was still acting as such. No trustee, at the time of bringing this suit, had been appointed. By the second clause of his will, the testator gave to his wife, Mary A. Bennett, "for her comfortable support and maintenance, the use, during her natural life, of all my estate, both real and personal, of whatever name or nature, together with the rignt and authority to dispose of the same, or any part thereof, as she may see fit, and to use the interest and so much of the principal of my said estate as may be necessary for her support and maintenance, as aforesaid, charged, however, and subject to, the payment of the sum of $3,000 to my trustee, David A. Syme, as hereinafter provided, for the benefit of my son, Charles W. Bennett, and also to the payment of a legacy of $500 to my grandson, Ernest A. Blake, as hereinafter provided." The third clause of said will, out of which this controversy arises, is as follows: "I give, devise, and bequeath to my trustee, David A. Syme, the sum of $3,000 in trust, to invest the same in notes and mortgages on unencumbered real estate, or other safe investments, as his good judgment may dictate, with interest semiannually, to be collected and paid to my son, Charles W. Bennett, semiannually until he attains the age of forty years, and, if my said wife is then living, to pay to my said son, Charles W. Bennett, at such time, the said sum of $3,000, which shall then become his absolutely; but, if my said wife is not living when my said son becomes forty years of age, then and in that case, said David A. Syme shall retain the said $3,000 and in-

tator's daughter, and at her death and the death of another person "to fall to the heirs of" such daughter, was held to give the daughter an absolute estate.

A testamentary provision stating it to be testator's desire "that part of my estate which shall go to my two daughters . . . shall be held by them during their natural lives and no longer, and then equally divided between their heirs lawfully begotten,"—was held to give the daughters the absolute property, in Moore v. Brooks, 12 Gratt. 135, by virtue of the rule in Shelley's Case, as the expressions used would, if applied to realty, have created an estate tail, and therefore, when applied to personalty, operated to convey an absolute estate.

The foregoing cases go to show the extent to which the courts in earlier days were wont to go in giving effect to the rule as against an evident intention of the testator. In the cases which follow the intention of the testator was given effect over the technical language used.

A bequest of property to testator's daughter, "and to her lawful issue," followed by a limitation over in case of death of such daughter without having lawful issue living at the time of her decease, was held to give a life estate only, in Cleveland v. Havens, 13 N. J. Eq. 101, 78 Am. Dec. 90.

A testamentary provision as follows: "It is my will and desire that the amount so bequeathed to my daughters above named shall be so secured to them that they only receive the benefit on the portion so bequeathed to them. . . . At their decease the property so bequeathed to go to their children or legal heirs,"—will not entitle such daughters to the principal. Akers v. Akers, 23 N. J. Eq. 26.

Where the first taker was given the use of personal estate, the will going on to state, "and after her death I give and bequeath the same to the heirs of her body, to them and their heirs and assigns forever,"—the word "heirs" was held to be a word of purchase, in Lemacks v. Glover, 1 Rich. Eq. 141.

And in M'Lure v. Young, 3 Rich. Eq. 559, a bequest to testator's daughter "and the issue of her body, forever; but, in case of my said daughter's death without issue living at the time of her death, then" to other persons,—was held to give the daughter a life estate with remainder to her issue as purchasers.

A bequest of the use of $1,000, and other property, with permission to the legatee to "invest or use all this property as he may, in his discretion, think best, during his natural life, and at his death to go to the heirs of his body and be used for their education if necessary,"—was held to indicate an intention on the part of the testator to give only a life estate to the first taker, which would override any presumption arising from the rule in Shelley's Case, in Crawford v. Wearn, 115 N. C. 540, 20 S. E. 724.

A bequest of the income of a certain sum during the legatee's natural life, "and at her death the principal sum to her heir or heirs in equal proportions," was held to entitle the first taker to the income only, upon the ground that the rule in Shelley's Case was not applicable to a bequest of personalty, in Gross v. Sheeler, 7 Houst. (Del.) 280, 31 Atl. 812.

Where, as in Bennett v. Bennett, an executory trust is created for the benefit of the first taker, additional reasons may be adduced why the rule in Shelley's Case will not apply. In the first place such a

vest the same, and pay the interest to my said son, Charles W. Bennett, as hereinbefore provided, for ten years thereafter, or until he arrives at the age of fifty years, at which time the said $3,000 shall be paid to my said son and become his absolutely, and in case of his death before the time or times herein fixed for the payment of the $3,000 to him it shall go to his heirs." By the fourth clause of his will the testator devised $500 to Ernest A. Blake, and, in addition thereto, $500 and one-third part of the remainder of his estate upon the death of the wife of the testator; but directed that the estate should be held by the trustee until said Ernest A. Blake should attain the age of twenty-two years. By the sixth clause of the will he devised to his trustee, in trust, the remainder of his estate, to be managed, controlled, and invested for the use and benefit of appellant in the same manner as the $3,000 trust, to be held until appellant should attain the age of forty years, at which time said remainder was to be paid to him.

Complainant filed his amended bill, setting up the foregoing facts, and the further fact that the sum of $3,000 had been separated from the rest of the estate of Charles D. Bennett, deceased, and since February 29, 1892, has been in the hands of Mary A. Bennett as such executrix; that she has invested said sum on May 16, 1892, in a loan to one Samuel Whitney on his note, secured by unencumbered real estate in said county, said note being payable in five years after date, with interest at 6 per cent, payable semiannually; also that said Mary A. Bennett has paid and accounted to complainant for interest on said sum of $3,000 at the rate of 6 per cent per annum, semiannually, since the 29th day of February, 1892, up to and including November 16, 1894. The bill herein, was filed October 8, 1894, Complainant alleges in his amended bill that he is thirty-four years of age, in poor health, and unable to perform manual labor; that he has no trade or profession by which he can earn a living; that his only source of income is the interest on this $3,000, or

provison is a strong indication of testator's intention to give the first taker only an estate for life, and so the courts have generally held.

Thus, in Siceloff v. Redman, 26 Ind. 251, it is held that where there is an executory trust, with a discretionary power vested in the trustee, for the use and benefit of the first taker during her lifetime, then to her heirs and assigns, the rule in Shelley's Case does not apply.

And where a sum of money is given to the executor, "to be by him held in trust and invested, and the interest thereof paid to" a certain person "and his heirs," the appointment of the trustee, with directions to pay interest and keep the principal invested, is regarded as evidence that an absolute legacy to the first taker was not intended. Burtis v. Doughty, 3 Bradf. 287.

Where an active trust is created by a bequest to a legatee of a sum of money to be placed on interest by the executors, the interest thereof to be paid annually to the legatee during his natural life, and with a limitation over in case of his death without legitimate heirs of his own body, there is a clearly expressed intention to give the first taker only the income for life. Eichelberger's Estate, 135 Pa. 160, 19 Atl. 1006, 1014.

And where a testator directs that a share of the residuary estate be reserved, kept, and invested by the executor, the proceeds and so much of the principal as may be necessary to be applied to the proper maintenance of testator's son during his life and at his death to go to his heirs; but provides that such son shall have no control of the property, and that it shall not be liable for his debts,—the son has no heritable estate. Dull's Estate, 137 Pa. 112, 20 Atl. 418.

A bequest of personalty to a trustee, to receive and pay over the income during the natural life of testator's daughter, with a bequest of the principal at her decease, "equally to and amongst all the heirs of her body if she should have any," with limitation over in default of such heirs, gives such daughter only a life estate. Clemens v. Heckscher, 185 Pa. 476, 40 Atl. 80.

A bequest of property in trust to pay the net income to the nephew of testatrix during his life, with powers of management and authority to use the principal for his support if necessary; and providing that, "upon the decease of my said nephew, all the property and estate then holden in trust for his use shall be conveyed to his heirs at law, their heirs and assigns, for their own use,"—sufficiently indicates an intention on the part of the testatrix to give a life interest only to the nephew, so as to prevent the application of the rule in Shelley's Case. Bucklin v. Creighton, 18 R. I. 325, 27 Atl. 221.

But where the trust, instead of being executory, is executed, the words "lawfully begotten heirs" are not words of purchase, but of limitation. Worrell v. Vinson, 50 N. C. (5 Jones, L.) 91.

The other reason why the rule in Shelley's Case does not apply where there is an executory trust is also suggested in the BENNETT CASE, which is that the two estates must be of the same quality. Where the first taker has an equitable estate, the remainder being given in fee to the heirs, the two estates cannot coalesce. Hemphill's Estate, 18 Pa. Co. Ct. 527; Craige v. Craige, 9 Phila. 545; Mercer v. Hopkins, 88 Md. 292, 41 Atl. 156; 2 Jarman, Wills, 6th ed. *1180; Underhill, Wills, § 663.

$180 per year, which he avers is insufficient to support him; that he is now in debt about $800, and has no means of paying it; that a trustee should be appointed, and that there should be decreed to be paid to him out of said sum of $3,000 a sufficient amount to pay all his outstanding obligations, and a further sum sufficient to enable him to enter into some trade or business out of which he could earn money enough to support him; that by the terms of the third clause of the will said sum of $3,000 vested in him is subject to levy and sale upon execution, and he fears that the indebtedness against him may be put into judgment and his interest in the $3,000 sold to satisfy the same, and that he will be put to great cost and expense, unless the said sum of $3,000 is paid to him,—and prays for the appointment of a trustee, and that said Mary A. Bennett be decreed to pay over to such trustee said sum of $3,000, and that the trustee so appointed be ordered by the court to pay over to complainant the said sum of $3,000 and take his receipt therefor, and that thereupon said trustee be discharged, or that the court may order the trustee to pay complainant a sum sufficient to enter into some business sufficient for his support.

The defendant Mary A. Bennett filed a demurrer to the amended bill, coupled with an answer. The answer admits most of the material allegations of the bill, except as to the health of the complainant and his inability to perform manual labor, and as to such portions of the bill it denies the same, and avers complainant is in good health and able to earn a support, if he would, but that he is of idle and spendthrift habits, and that it was because of the knowledge the testator had of the idle and spendthrift habits and disposition of the complainant to indulge in imprudent speculations and investments, and his prior losses by such conduct and mismanagement of business, that he, the said testator, prudently provided by the will that the said complainant should not receive the said $3,000, except under the circumstances set forth in the third clause of the will; that testator did not intend that complainant should receive the $3,000 at all, unless the contingencies mentioned in said third clause should occur that would entitle him thereto; that the present heir presumptive of said complainant is the defendant Ernest A. Blake; that what complainant is able to earn, added to his income from said $3,000, will be quite sufficient to furnish him a comfortable support and maintenance; that it would not be to his advantage or benefit at the present time to engage in any business as the owner and manager thereof; admits that a trustee should be appointed, but denies that otherwise the complainant is entitled to any of the relief prayed. To so much of the bill as claims that said sum of $3,000 is vested in the complainant, and is subject to levy and sale under executions against him, and that he is entitled to have the same paid to him now, the defendant Mary A. Bennett demurs.

On the hearing the complainant in open court withdrew his application for the appointment of a trustee in place of David A. Syme, who declined to act as such, and thereupon the court sustained the demurrer to the amended bill, and dismissed the same so far as demurred to; and, the complainant having waived a hearing on the other matters in said amended bill and filed no replication to the answer thereto, the court dismissed the amended bill at the cost of the complainant, from which action of the court the complainant prosecutes this appeal.

The court below found by its decree that the principal sum of the $3,000 legacy to be put into the hands of David A. Syme, as trustee, and to be loaned by him, as provided in the third clause of the will of Charles D. Bennett, deceased, the interest to be paid to said complainant semiannually, is not vested in said complainant nor liable for the payment of his debts; but his right thereto is dependent on the contingencies of his living to be forty years of age and said Mary A. Bennett living, or, in case she is then deceased, on his living to be fifty years of age; and, in case of his being deceased before he becomes entitled thereto, the said $3,000 is to go to whomsoever may be his heirs, as substituted legatees under said will. The appellate court for the second district affirmed the judgment of the court below. Pending this proceeding, and since the decree below, and since the judgment of the appellate court affirming the same, it is made to appear that one Clarence D. Rogers has been duly appointed trustee of the estate of Charles D. Bennett under the provisions of the will here under consideration; and it also is made to appear to the court that the appellee Mary A. Bennett has, since the submission of the cause, departed this life, and Clarence D. Rogers, the trustee above named, has been substituted as appellee herein.

Mr. W. C. Kellum for appellant.

Messrs. Carnes & Dunton and H. T. Smith, for appellees:

The trust created by this will is an active trust as distinguished from a simple, dry, or passive trust.

Kirkland v. Cox, 94 Ill. 412; Kellogg v. Hale, 108 Ill. 168; Green v. Grant, 143 Ill.

72, 18 L.R.A. 381, 32 N. E. 369; Hart v. Seymour, 147 Ill. 611, 35 N. E. 246; Cooper v. Cooper, 36 N. J. Eq. 121; Force v. Brown, 32 N. J. Eq. 118.

The trust is a spendthrift trust.

23 Am. & Eng. Enc. Law, p. 5; Steib v. Whitehead, 111 Ill. 247; Stambaugh's Estate, 135 Pa. 585, 19 Atl. 1058; Kaufman v. Breckinridge, 117 Ill. 305, 7 N. E. 666; Baker v. Brown, 146 Mass. 369, 15 N. E. 783; Slattery v. Wason, 151 Mass. 266, 7 L.R.A. 393, 21 Am. St. Rep. 448, 23 N. E. 843; Patten v. Herring, 9 Tex. Civ. App. 640, 29 S. W. 388.

The legacy did not vest in appellant, even if held not to be a spendthrift trust.

Blanchard v. Maynard, 103 Ill. 60; Cassem v. Kennedy, 147 Ill. 660, 35 N. E. 738; Spear v. Fogg, 87 Me. 132, 32 Atl. 791; Hunt v. Hall, 37 Me. 363; Richardson v. Wheatland, 7 Met. 171; Putnam v. Gleason, 99 Mass. 454; Smith v. Rice, 130 Mass. 441; Denny v. Kettell 135 Mass. 138; Bates v. Gillett, 132 Ill. 287, 24 N. E. 611; Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 689; Belslay v. Engel, 107 Ill. 186; Beach, Wills, § 287; Wms. Exrs. 7th Eng. 6th Am. ed. 1304; Scofield v. Olcott, 120 Ill. 362, 11 N. E. 351; Jarboe v. Hey, 122 Mo. 341, 26 S. W. 968; McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210; Banta v. Boyd, 118 Ill. 186, 8 N. E. 671; Powers v. Egelhoff, 56 Ill. App. 606; Carper v. Crowl, 149 Ill. 465, 36 N. E. 1040.

The rule in Shelley's Case does not apply.

Gross v. Sheeler, 7 Houst. (Del.) 280, 31 Atl. 812; 2 Redf. Wills, p. 66; Herrick v. Franklin, L. R. 6 Eq. 593; Baker v. Scott, 62 Ill. 102; Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 767; Green v. Green, 23 Wall. 491, 23 L. ed. 77.

Ricks, J., delivered the opinion of the court:

Many questions are raised and urged by appellant which, under the views we entertain of the will in question, seem to be unimportant and not applicable. We regard the trust here created and under consideration as what is known as a "spendthrift trust," created for the purpose of providing for the maintenance of appellant, and at the same time securing it against his improvidence and incapacity for self-protection. Such estates have become recognized, generally, by most of the courts of the United States, and their treatment of the question has gone into the books as the American doctrine upon the subject of and applicable to such trusts. 26 Am. & Eng. Enc. Law, 2d ed. pp. 137 et seq., and authorities there cited; Steib v. Whitehead, 111 Ill. 247. Most of the controversy arising in relation to such trusts has involved questions affecting the rights of creditors to the trust fund or property. No such question is here involved. The sole contention is by the appellant, who is the *cestui que trust*, and who claims that the trust is executed, and, if not, that payment in whole or *pro tanto* should be accelerated, that he might so apply it as to relieve his creditors.

Appellant's first and main contention is that the trust is a dry or passive trust, so far as the provisions of the will are concerned, and that it is executed by the statute of uses, and that the title to the trust property vested in appellant at the death of the testator. It is a cardinal rule of construction of wills that the intention of the testator shall be ascertained from all that is contained within the four corners of the will, and, when ascertained, shall be given effect, unless it contravenes some well-established principle of law. Whether the trust is executed or executory, and whether the estate is vested or contingent, are matters of sound construction, following the correct interpretation of the provisions of the instrument creating the trust. The testator was, at the time of making his will and at the time of his death, seised of a considerable estate. Appellant was his only living child, and was thirty-one years of age. Besides appellant the testator left a grandson, Ernest A. Blake, who was a minor, and also left Mary A. Bennett, the widow of the testator. By clause 3 of the will $3,000 was set apart and placed in trust, and the income was to be paid to appellant until he attained the age of forty years, at which time, by the provisions of the will, the corpus or principal fund should become the absolute property of appellant, provided the wife of the testator was then living; but, if the wife or widow should be dead at the time appellant attained the age of forty years, the trust fund here in controversy should be held by the trustee ten years longer, and at the expiration of the said ten years should become the absolute property of appellant. The reason for the extension of the time at which appellant might become vested with the property is readily comprehended when the other provisions of the will are looked into. The testator by his will directed that $500 should go to his grandson, Ernest A Blake, upon the death of the testator, and $500 and one third of the remainder of his estate upon the death of the wife of the testator, and that appellant, after the payment of these sums, should have two thirds of the remainder of the testator's estate, but that it should be held by the trustee until he should attain the age of forty years, when it should be paid to him. It will thus be seen that, if the

wife of the testator was dead when appellant attained the age of forty years, appellant would come into two thirds of the remainder of the estate of the testator absolutely; and it was the clear purpose of the testator to guard against want or improvidence on the part of appellant by providing that, if the contingency should happen upon which he might, at the age of forty years, receive two thirds of the residuum, there would still be held for him, or for his benefit, the original $3,000, the income of which would be secured to him until he should attain the age of fifty, when the corpus should vest in him.

In the case at bar, owing to the peculiar state of the pleadings, we are not aided by the averments of the answer, but must place our construction of the will solely upon the matters appearing in it and the bill; but we think, from the provisions to which we have adverted, the intention of the testator was clear and manifest that appellant should never be vested with the title to the fund here in question until he should attain the age of forty years, and not then if his mother should be then dead; but that the same, in that case, should be postponed until he should attain the age of fifty years. His grandson, who was a minor, was to have the full benefit of the estate when he attained the age of twenty-two years. Taking these provisions, then, together, it would seem unnecessary to go beyond the will itself to determine the intention of the testator. In determining the character of the trust here created, whether a spendthrift trust or not, we may look to the provisions of the will and the conditions of the parties as disclosed by the bill. Kaufman v. Breckinridge, 117 Ill. 305, 7 N. E. 666. It is usual in such trusts to find a provision against alienation of the trust fund by the voluntary act of the beneficiary, or *in invitum* by his creditors. "It is not necessary that an instrument creating a spendthrift trust should contain an expressed declaration that the interest of the *cestui que trust* in the trust estate shall be beyond the reach of his creditors, provided such appears to be the clear intention of the testator or donor as gathered from all parts of the instrument construed together in the light of the circumstances." 26 Am. & Eng. Enc. Law, 2d ed. p. 141; Stambaugh's Estate, 135 Pa. 585, 19 Atl. 1058; Baker v. Brown, 146 Mass. 369, 15 N. E. 783; Patten v. Herring, 9 Tex. Civ. App. 640, 29 S. W. 388. The fact that a trustee was appointed and vested with the estate, and the beneficiary was given the income only, is a circumstance from which the intention of the testator to create a spendthrift trust may be inferred. Stambaugh's Estate, *supra*.

Appellant contends that there is a present gift to him of the $3,000 legacy, with the payment merely deferred to one of the future periods mentioned in the will, and that where such is the case, and the subject-matter of the bequest is to be at once separated from the estate and vested in the trustee for the benefit of the legatee, the gift vests at once; and this, whether the fund is to be held for accumulation and final payment, or whether the interest is paid to the legatee as it accrues. In support of this contention, appellant cites 29 Am. & Eng. Enc. Law, p. 454. The language there used, and upon which the rule announced is predicated, is: "Where there is a clear gift, distinct from a direction to pay when the legatee attains a certain age, the direction to pay will not postpone the vesting." If there was a clear gift *in præsenti*, the position of appellant would be unassailable. But, as we read this will, there is no present gift to him of the legacy, but the gift is to the trustee, who, as we think, takes the fee, charged with the exercise of a discretion as to its investment, and is directed to pay the income to appellant until the times designated to pay the corpus. The language used by the testator with reference to the two designated times of payment is as to the period of forty years, at which time the said sum of $3,000 "shall then become his absolutely," and, as to the second period of payment, is, "at which time the said $3,000 shall be paid to my son and become his absolutely." So that, if the ordinary and usual meaning be given to the language of the will, it would seem entirely clear that it was the intention of the testator that appellant's right to the corpus should not vest until the period of distribution; and the fact that the fund is segregated at once from the estate and devoted to the particular trust should not, we think, defeat the clearly expressed purpose of the testator. Such fact is one of the tests to be used in doubtful cases in determining whether the legacy is vested or not, and most commonly arises in cases where there is an absence of language that can be construed into a gift, as distinguished from a mere direction to pay; but, when the language is not doubtful, and the intention of the testator, as shown by the language in the will, is clear that the legacy should not vest at the death of the testator, rules of construction used in doubtful cases have no application.

The last expression of the third clause is, "In case of his death before the time or times herein fixed for the payment of the $3,000 to him, it shall go to his heirs." The appellant urges that this provision, that "it shall go to his heirs," brings the bequest within the rule of Shelley's Case, and that

the legacy is vested by operation of law; that, by analogy to said rule, the vesting of the legacy cannot be prevented by the clearly expressed intention of the testator that it shall not be, because, having used the word "heirs" in this manner, the law gives that word controlling effect, and denies to the testator the power to direct his estate in a channel contrary to the course fixed by the law. As applied to a devise of real estate, the position of appellant is sound, for the reason that the policy of the law has been to give stability to titles to such property and hold them vested when it can. As applied to gifts or conveyances of personalty, the word "heirs," strictly speaking, has no application. If, in a devise of the latter class of property, additional words were necessary, the words "executor, administrator, and assigns" would be the proper words to show the extent of the estate to the first taker and indicate absolute property. By analogy, however, the rule in Shelley's Case is applied in gifts of personalty; but in all cases where the word is used in the devise of personalty it is held to yield to the expressed intention of the testator. Taylor v. Lindsay, 14 R. I. 518; Horne v. Lyeth, 4 Harr. & J. 431; Wms. Pers. Prop. 244; Glover v. Condell, 163 Ill. 566, 35 L.R.A. 360, 45 N. E. 173; 22 Am. & Eng. Enc. Law, p. 512; Gross v. Sheeler, 7 Houst. (Del.) 280, 31 Atl. 812; 4 Kent, Com. 218. There being no present grant to the appellant by the will in question, we are disposed to regard the provision as to the heirs taking the property, in the event that the appellant should die before the time fixed for him to take it, as being words of purchase or substitution. Beach, Wills, § 287; Wms. Exrs. 6th Am. ed. 1034. Mr. Freeman, in his note to Carpenter v. Van Olinder, as reported in 11 Am. St. Rep. 106, says: "Hence a devise to A in trust for his heirs as long as he shall live, and after his death to his heirs, their heirs and assigns, vests in A a life estate only, and the fee in his heirs; . . . and, generally, where the use only is given to the first taker, and his heirs, designated as remainder-men, take both the legal and the beneficial estate, the rule in Shelley's Case is inapplicable." The rule also seems to be well established and recognized by this court in Baker v. Scott, 62 Ill. 86, that, where there is an executory trust created, the rule in Shelley's Case has no application. The same rule is also laid down in 27 Am. & Eng. Enc. Law, p. 68.

It is also contended by appellant that the legacy vested by the refusal of the trustee to accept the trust. This result can only follow in cases where the entire beneficial interest is in the *cestui que trust* and the trustee is a mere repository of the title. 27 Am. & Eng. Enc. Law, p. 127. Such is not the case here. In Glover v. Condell, *supra*, a trust very similar to this was held an active, and not a passive, one. It was there said (page 588 of 163 Ill., page 369, 35 L.R.A., and page 180 of 45 N. E.): "But personal property is not within the statute of uses. In the case at bar the trustees were to hold the proceeds of sale—the money or securities representing two thirds of Albert's share—during his life, and invest the same and pay him the interest during his life, so that the trust was an active one, and his estate was equitable." It is quite apparent that the postponement of the time of the payment of this legacy was not on account of, or for the benefit of, the fund or estate of the testator, as there was no charge of any kind against it. It was separated from the other funds or portions of the testator's estate by his direction. The postponement of the time of payment was for reasons personal to the legatee, and, if the intention of the testator that the legacy should not vest in appellant until the period of payment was not clear and certain from the language used, in the absence of a present gift to him, we would hold that the legacy did not vest until the period of distribution or payment. Scofield v. Olcott, 120 Ill. 362, 11 N. E. 351.

We are of the opinion that the chancellor and the Appellate Court placed the proper construction upon the will before us, and the judgment of the Appellate Court is affirmed.

KANSAS SUPREME COURT.

M. A. MOORE, Plff. in Err.,
v.
JOEL GRIFFIN et al.

(— Kan. —, 83 Pac. 395.)

Deed—reservation—oil and gas.

1. A deed to real estate contained the following provision: "Reserving to said parties of the first part all the rights, privileges, and benefits secured . . . under an oil and gas lease executed by said parties of the first part, . . . with full power and right to renew or extend, change or

Headnotes by PORTER, J.

Case Note.—Effect upon remote grantee of reservation or exception of mineral rights.—The question above stated was also a subject of consideration in Marvin v. Brewster Iron Min. Co. 55 N. Y. 538, 14 Am. Rep. 322, in which it was held that where all mineral ores, with right to mine the same, were excepted from the operation of a deed, the fact that the deeds to remote grantees of the same property contained no reser-

modify, said lease . . . as fully and to the same extent as though this conveyance had not been executed. It is intended hereby to reserve all oil and gas privileges in and to said premises." This constitutes an exception, and not a reservation. The title to the oil and gas in said lands remained in the grantors.

Same—remote grantee—cancelation of lease.

2. The owners of lands make a lease of the oil and gas privileges in the lands. Thereafter they convey the lands by warranty deed, excepting and reserving all rights and privileges secured to them by the lease and "all oil and gas privileges in and to said premises." Their grantee conveys by general warranty to another without any reservation or exception. Thereafter the oil and gas lease is canceled by consent of the parties to the lease. All of the conveyances being of record, a subsequent purchaser of the lands purchases with constructive notice, and takes no interest in the oil and gas; and the cancelation of the lease does not extinguish the rights of the original owners, nor vest the right to the oil and gas in the owner of the lands at the time of such cancelation.

(November 11, 1905.)

ERROR to the District Court for Wilson County to review a judgment in favor of defendants in an action brought to quiet title to certain real estate. Affirmed.

Statement by **Porter**, J.:

Plaintiff brought this action to quiet the title to 160 acres of land in Wilson county against Joel Griffin and wife. The case was tried by the court, and defendants had judgment, from which plaintiff appeals. On September 24, 1894, defendants owned the land in fee. On that date they conveyed by general warranty deed to Susan J. Gore, who afterward conveyed to another, and by regular conveyances the title passed to plaintiff, March 5, 1901. The deed made by defendants to Susan J. Gore contained an exception or reservation out of which arises the sole contention in this case. The deed recites a consideration of $6,000 and in the granting clause, following the description of the land, is this provision: "Reserving to said parties of the first part, their heirs and assigns, all the rights, privileges, and benefits secured to the party of the first part under an oil and gas lease executed by said parties of the first part to Guffey and Galey, dated April 9, 1894, with full power and right to renew or extend, change or modify, said lease with the said Guffey and Galey, or their heirs and assigns as fully, and to the same extent, as though this conveyance had not been executed. It is intended hereby to reserve all oil and gas privileges in and to said premises, and to lease and transfer the same." The warranty clause of the deed closes as follows: "Except as above set forth, and the right at all times to enter upon said premises to operate for oil and gas." The oil and gas lease referred to in the deed had been executed to Guffey and Galey by defendants several months prior to their conveyance to Susan Gore, and contained the usual provisions. It was duly recorded in April, 1896, but prior to the purchase of the lands by plaintiff. In March, 1896, defendant Joel Griffin made an extension and what purports to be an assignment of his lease to the Forest Oil Company, and in August, 1897, with the consent of Guffey, and Galey, and the Forest Oil Company, the lease was canceled. These transfers and the release were attached to the original lease, and duly recorded. In none of the conveyances subsequent to the first, from the Griffins to Mrs. Gore, was any reference made to this lease or to any exception or reservation of the oil and gas, and plaintiff claims that he purchased without actual or constructive notice of either.

Mr. T. J. **Hudson**, for plaintiff in error:

When the lease was canceled, the full title vested in plaintiff, as the reservation or exception, whichever it may be called, as to that lease, was not a thing of life.

vations of mineral rights did not affect such rights.

And Baker v. M'Dowell, 3 Watts & S. 358, in holding that a conveyance of property, excepting and reserving to the grantor, his heirs and assigns, the one half of all iron ore found on the premises, the grantor's title thereto being subject to an outstanding title to one half of all iron ore found on the premises, reserves to the grantor himself the half of the ore which is vested in him, also holds that a reservation of the moiety to which the title was outstanding was unnecessary, since, as it lay in the channel of the title the grantee was purchasing, he was bound to take notice of it.

And in Murray v. Allred, 100 Tenn. 100, L.R.A.(N.S.) 39 L.R.A. 249, 66 Am. St. Rep. 740, 43 S. W. 355, it is held that where the grantee of property under a deed reserving all mines, metals, and minerals, conveys by general warranty deed without any reservation, the possession of the land by the remote grantee is not adverse to the owner of minerals therein, when the land is used merely for agricultural purposes, without any denial of the right to the minerals, or any assertion of claim inconsistent therewith.

That the effect of the grant or exception of mineral rights is to create a distinct estate is also held in Stuart v. Com. 94 Ky. 595, 23 S. W. 367; Wardell v. Watson, 93 Mo. 107, 5 S. W. 605; and Virginia Coal & I. Co. v. Kelly, 93 Va. 332, 24 S. E. 1020.

McLaughlin v. Penney, 65 Kan. 530, 70 Pac. 341.

Messrs. Cates & Cates and B. F. Shinn, for defendants in error:

A purchaser of real estate must take notice of the recitals contained in the deeds which make up his chain of title, and is bound thereby.

Claggett v. Crall, 12 Kan. 397; Taylor v. Mitchell, 58 Kan. 194, 48 Pac. 859; Zear v. Boston Safe Deposit & T. Co. 2 Kan. App. 505, 43 Pac. 977; Knowles v. Williams, 58 Kan. 228, 48 Pac. 856.

Severance of the soil from the strata and mining rights beneath it may be created by reservation, exception, or express grant.

Bryan, Petroleum & Natural Gas, 49, § 30; Donahue Petroleum & Gas, 220, § 1, pp. 225, 226; Koen v. Bartlett, 41 W. Va. 559, 31 L.R.A. 128, 56 Am. St. Rep. 884, 23 S. E. 664; Murray v. Allred, 100 Tenn. 100, 39 L.R.A. 253, 66 Am. St. Rep. 740, 43 S. W. 355; Lillibridge v. Lackawanna Coal Co. 143 Pa. 293, 13 L.R.A. 632, 24 Am. St. Rep. 544, 22 Atl. 1035.

Porter J., delivered the opinion of the court:

Plaintiff in error fails to specify in his brief any errors complained of as required by rule 10 of this court (66 Kan. vi., 79 Pac. ix.), and the judgment might be affirmed for this reason. It is a case, however, in which particular specifications are not so material. The main contention is that the judgment is not sustained by sufficient evidence, and is contrary to law. Most of the testimony is in reference to the actual knowledge plaintiff had of the lease and exception referred to in the first deed. The court very properly ruled all of it out of the case. Whether he had actual notice was immaterial. He was bound by the recitals in the former deed. Knowles v. Williams, 58 Kan. 221, 228, 48 Pac. 856. The case turns upon the force and effect of the provision in the deed. Plaintiff argues that it is an exception instead of a reservation. Considerable learning has been expended in refining the distinctions between an exception in a deed and a reservation. Strictly speaking, a reservation is something created or reserved out of the thing granted that was not in existence before, while an exception must be a part of the thing granted. Winston v. Johnson, 42 Minn. 398, 45 N. W. 958. A similar provision in a deed was held to be an exception, and not a reservation, in Barrett v. Kansas & T. Coal Co. 70 Kan. 649, 79 Pac. 150. There the provision was as follows: "This deed is made subject to the following exceptions, reservations, and conditions, to wit: . . . The said party of the first part hereby reserves the coal and other minerals underlying said land."

The deed in that case contained both words, "exceptions" and "reservations;" but otherwise the provision is similar to the one here. The modern tendency of the courts has been to brush aside these fine distinctions, and look to the character and effect of the provision itself. Gould v. Howe, 131 Ill. 490, 23 N. E. 602. While the distinction between an exception and a reservation in a deed is well established, the words are frequently used interchangeably and synonymously. 11 Am. & Eng. Enc. Law, 2d ed. p. 555. In Bainbridge on Mines & Minerals, 34, it is said: "The severance of mines is usually effected by exceptions in deeds of assurance, which transfer the freehold in the surface and reserve the mines. An exception is distinguished from a reservation by its being part of the thing granted and in existence at the time of the grant, while the latter is a right of new creation arising out of the subject of the grant. They are different in legal effect, but in their creation 'there is no magic in words,' and, if the meaning is clear, either of the above expressions will operate for the purpose designated. They are also construed exactly in the same way as actual grants. In either case the law favors their construction by giving them all proper and necessary incidents." "The owner of land may convey a surface estate in fee in it, and reserve to himself an estate in fee in the minerals, or any particular species of them; in which case the vendee holds a distinct and separate estate in the surface or soil, and the vendor holds a distinct and separate estate in the minerals. By this severance each estate is subject to the laws of descent, of devise, of conveyance." Kincaid v. McGowan, 88 Ky. 91, 13 L.R.A. 289, 4 S. W. 802. Another case very much in point is Murray v. Allred, 100 Tenn. 100, 39 L.R.A. 249, 66 Am. St. Rep. 740, 43 S. W. 355. There the owner conveyed the lands, reserving "'all mines, minerals, and metals in and under the land.'" His grantee conveyed by general warranty without any reservation. Allred, who took by regular chain of conveyances, brought an action to determine the ownership of the petroleum oil beneath the lands, claiming that oil is not a mineral, but that, if it should be held to be a mineral, his possession of the surface was adverse to the claim of defendant to the oil. The court, in an exhaustive opinion, held that oil is a mineral, and recognized the doctrine that the exception in the deed separated the estate in the minerals from the estate in the lands, and that the possession of the surface of the land, without any denial of the mineral rights, was not adverse to the claim of the

owner of the minerals. Different estates may be created in the surface and soil of lands and the underlying strata in which minerals, oils, and gas may be found; and this separation of estates may be accomplished by an exception in the deed conveying the lands by which the grantor carves out and retains the right to the minerals in the land. The right retained by the exception is the ownership of the minerals. Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 18 L.R.A. 702, 34 Am. St. Rep. 645, 25 Atl. 597; Koen v. Bartlett, 41 W. Va. 559, 31 L. R.A. 128, 56 Am. St. Rep. 884, 23 S. E. 664.

Plaintiff contends, however, that the cancelation of the Guffey and Galey lease, mentioned in the exception, operated to extinguish the rights of defendants therein, and to cast or vest upon the then owner of the lands all the rights in the oil and gas. Farnum v. Platt, 8 Pick. 339, 19 Am. Dec. 330, is in point. The owner of land, having leased a stone quarry thereon for a term of years, conveyed the land, reserving the use of the quarry until the expiration of the lease. During the continuance of the term, the lease was canceled by consent. It was held that this did not extinguish the reservation, but that would continue until the end of the term. Besides, the rights of defendants in the oil and gas do not depend upon the existence of the lease. The deed excepted and saved to them, not only their rights under the lease, but "all oil and gas privileges in and to said premises." The provision in the deed to Mrs. Gore is an exception as distinguished from a reservation. Its force and effect were to carve out a separate estate in the oil and gas from the estate in the surface soil. The title to the surface and soil of the lands passed to the grantee. The title to and ownership of the oil and gas in the lands remained with the grantors.

The judgment will be affirmed.

All the Justices concur.

OREGON SUPREME COURT.

STATE OF OREGON, Respt.,
v.
C. H. THOMPSON, Appt.

(— Or. —, 84 Pac. 476.)

Ticket brokerage—prohibition.

1. A statute prohibiting the sale of railroad transportation by persons having no certificate of authority, which must be provided by the railroads to their duly authorized agents, prohibits the transaction of ticket brokerage business.

Railroad ticket—property right.

2. The purchaser of a railroad ticket is not deprived of his property by forbidding him to sell it through ticket brokers.

Same—obligation of contract.

3. A statute prohibiting the sale of railroad tickets through brokers does not impair the contract of the holder of a ticket purchased after the law took effect.

Same—special privileges.

4. An unlawful grant of special privileges is not effected by a statute limiting the sale of railroad tickets to railroads and their duly authorized agents.

Same—interstate commerce.

5. Limiting the sale of railroad tickets to railroad companies and their duly authorized agents is not, although applicable to tickets of roads out of, as well as within, the state, an interference with interstate commerce.

Same—prevention of fraud.

6. The legislature may lawfully prohibit the transaction of a railroad-ticket brokerage business for the protection of travelers from fraud.

(February 6, 1906.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County convicting him of violating the anti-scalping act. Affirmed.

Statement by **Hailey, J.:**

This is an appeal from a judgment of conviction for violating what is commonly known as the anti-scalping act, passed at the last session of the legislature, and found on page 422 of the Session Laws of 1905. The act provides, in substance, as follows: Section 1: That it shall be the duty of the owner or owners, or person or persons, operating a railroad, to provide every agent who may be authorized to sell its tickets or other evidence of a right to travel upon any railroad with a certificate setting forth the authority of such agent to make such sale, which certificate must be duly attested and signed. Section 2: That every agent, person, firm, or corporation engaged in selling, issuing, or dealing in railroad passenger transportation in this state must have a fixed place of business, and keep the certificate mentioned in § 1 posted in a conspicuous place therein. Section 3: That it shall be unlawful for any person mentioned in § 2, who is not possessed of and has not

Case Note.—Anti-ticket-scalping law.—The subject of the constitutionality of anti-scalping statutes is considered in a case note in 3 L.R.A.(N.S.) 558, which shows the weight of authority to be in favor of the constitutionality of such statutes. That note. as well as the opinion in STATE v. THOMPSON, includes Illinois among the states

posted the certificate mentioned, to sell, exchange, or transfer, or offer for sale, exchange, or transfer, the whole or any part of a railroad ticket, or pass, or other evidence of a right to travel on any railroad, whether the same is situated within or without the limits of this state. Section 4: That it shall be unlawful for any person named in § 2 to set up, establish, or maintain, conduct, or operate, within the state, any office or other place for the sale, exchange, or transfer of railroad tickets, or any part thereof, or passes, or any other evidence of a right to travel on any railroad within or without the limits of the state, unless such person is possessed of and has posted the certificate above mentioned. Section 5 makes the displaying of any sign bearing certain words, without having posted the certificate as above mentioned, sufficient evidence to establish a prima facie case against the owner, proprietor, employee, or person in charge of said office or place of business. Section 6 provides a penalty for the violation of §§ 1, 2, 3, and 4. Section 7 requires the owner or person operating any railroad in this state, or any railroad doing business therein, to redeem, upon presentation by the lawful holder thereof, the whole or any part of any unused ticket, and how such redemption shall be made, and the time within which it must be presented for redemption. Section 8 provides a penalty for refusal, neglect, or failure to redeem as provided in § 7.

Messrs. **Martin L. Pipes, Henry E. McGinn, and John F. Logan,** for appellant:

The act interferes with the interstate commerce clause.

Black, Const. Law, 170; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161.

It grants special privileges to the certified agents of the railroads and to the railroads.

Allardt v. People, 197 Ill. 501, 64 N. E. 533.

It violates the interstate commerce clause of the Constitution.

Brennan v. Titusville, 153 U. S. 300, 38 L. ed. 722, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; McCall v. California, 136 U. S. 104, 34 L. ed. 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Pom. Const. Law, §

in which such statutes have been sustained, because of the decision in Burdick v. People, 149 Ill. 600, 24 L.R.A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, 952, holding constitutional a statute forbidding the sale of railroad tickets by anyone except the licensed ticket agents of the railroad companies. But since that note was written attention has been called to several Illinois circuit court cases, which repudiate the decision in Burdick v. People, on the ground that that action was fictitious and collusive. The fictitious character of the action is recognized in Re Burdick, 162 Ill. 48, 44 N. E. 413, where the court says that the decision in Burdick v. People is binding and conclusive only as between the parties to that case, but says nothing as to the correctness of the decision. But the constitutionality of the statute was considered by Gibbons, J., in People v. Ullman (circuit court of Cook county) 3 Chicago L. J. 337, and in People ex rel. Marks v. Pease (circuit court of Cook county) 4 Chicago L. J. 75, where the decision in Burdick v. People was held not to be a binding precedent, because of the fictitious character of the action; and the statute was declared unconstitutional.

The question came up again before Dunne, J., in People ex rel. Geis v. Pease (circuit court of Cook county) 3 Chicago L. J. 504, who also repudiated the decision in Burdick v. People, and held the statute invalid, saying: "Until the supreme court of this state, upon a case presented to it by parties who are in fact adversely interested in the outcome, shall declare such law within the police power of the state, this court holds to the view that this law, or any law which declares it a crime for one citizen to sell to another that which is not injurious to the public health, morals, or general welfare, is not only a dangerous and unjustifiable interference with the citizen's personal right and liberty, but a violation of the Constitution of this state."

A like view of the question was taken by Brentano, J., in People ex rel. Frank v. Pease (superior court of Cook county) 4 Chicago L. J. 182, 31 Chicago Legal News. 293, where the decision in Burdick v. People was held not binding, and the statute was declared invalid; the judge saying he could not escape the sound reasoning and convincing logic of the decision in People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006, and that he felt bound to follow it as a guide and authority.

In People v. Ullman, *supra*, the question of the constitutionality of the statute arose on a motion to quash an indictment for violation of the statute, and Judge Gibbons, while holding the statute invalid, refused to quash the indictment, in order that, if a conviction were had thereon, an appeal might be taken to the supreme court so that court might have a chance to explain its former ruling, and, if it saw fit, overrule and annul it. But, so far as we have been able to discover, none of these circuit-court cases has been carried to the higher courts.

378; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238.

The business of selling tickets is regarded as lawful.

People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; Burdick v. People, 149 Ill. 600, 24 L.R.A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, 952; State v. Corbett, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; 1 Tiedeman, State & Federal Control of Persons & Property, 522–524.

The delegation of power to the corporation to decide the conditions under which the law is to operate makes the law unconstitutional.

Jannin v. State, 42 Tex. Crim. Rep. 631, 53 L.R.A. 349, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419; Allardt v. People, *supra*.

Property protected by the 14th Amendment includes every right of enjoyment and disposal of it.

Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Boon v. Moss, 70 N. Y. 465; Dwight v. Hamilton, 113 Mass. 175; Smith v. McCullough, 104 U. S. 25, 26 L. ed. 637.

The power of alienation is a necessary incident to the right of property.

1 Bl. Com. 138; 2 Kent, Com. 326; 1 Tiedeman, State & Federal Control of Persons and Property, 353, 540.

Everyone has a right to pursue a lawful vocation, which is protected by the Constitution.

Ex parte Garland, *supra;* Re Aubrey, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900; Allgeyer v. Louisiana, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427; State v. Brown, 37 Wash. 97, 68 L.R.A. 889, 107 Am. St. Rep. 700, 79 Pac. 635; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.

Messrs. James F. McElroy, Arthur C. Spencer, Dan J. Malarkey, John Manning, and **A. M. Crawford,** Attorney General, for respondent:

Anti-ticket-scalping laws are upheld.

Ex parte Lorenzen, 128 Cal. 431, 50 L.R.A. 55, 79 Am. St. Rep. 47, 61 Pac. 68; Fry v. State, 63 Ind. 552, 30 Am. Rep. 238; Burdick v. People, 149 Ill. 600, 24 L.R.A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, 952; State v. Corbett, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; State v. Bernheim, 19 Mont. 512, 49 Pac. 441; State v. Ray, 109 N. C. 739, 14 L.R.A. 529, 14 S. E. 83; Com. v. Wilson, 14 Phila. 390; Com. v. Keary, 198 Pa. 500, 48 Atl. 472; Jannin v. State, 42 Tex. Crim. Rep. [illegible] S.)

631, 53 L.R.A. 349, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419; Re O'Neill (Wash.) 83 Pac. 104; Allardt v. People, 197 Ill. 508, 64 N. E. 533.

Independent of direct legislation on the subject, ticket scalping has been enjoined by both state and Federal courts.

Kinner v. Lake Shore & M. S. R. Co. 69 Ohio St. 339, 69 N. E. 614; Schubach v. McDonald, 179 Mo. 175, 65 L.R.A. 136, 101 Am. St. Rep. 452, 78 S. W. 1020; Louisville & N. R. Co. v. Bitterman, 128 Fed. 177; Boston & M. R. Co. v. Fogg (Mass.; not reported); Pennsylvania R. Co. v. Beekman, 30 Wash. L. Rep. 715; Illinois C. R. Co. v. Caffrey, 128 Fed. 770; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65.

The ticket-scalping business is a public menace.

Drummond v. Southern P. Co. 7 Utah, 118, 25 Pac. 733; Rahilly v. St. Paul & D. R. Co. 66 Minn. 153, 68 N. W. 853; Frank v. Ingalls, 41 Ohio St. 560; Levinson v. Texas & N. O. R. Co. 17 Tex. Civ. App. 617, 43 S. W. 901 (Tex. Civ. App.) 43 S. W. 1032; Post v. Chicago & N. W. R. Co. 14 Neb. 110, 45 Am. Rep. 100, 15 N. W. 225; Houston & T. C. R. Co. v. Ritter, 16 Tex. Civ. App. 482, 41 S. W. 753; Way v. Chicago, R. I. & P. R. Co. 64 Iowa, 48, 52 Am. Rep. 431, 19 N. W. 828; Comer v. Foley, 98 Ga. 678, 25 S. E. 671.

The legislature may, in order to safeguard the objects within the protection of its police power, pass laws regulating or suppressing a business injurious to public health, morals, comfort, prosperity, etc.

Butler v. Chambers, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308; State v. Aslesen, 50 Minn. 6, 36 Am. St. Rep. 620, 52 N. W. 220; Mugler v. Kansas, 123 U. S. 653, 31 L. ed. 207, 8 Sup. Ct. Rep. 273; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; State ex rel. Beek v. Wagener, 77 Minn. 494, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; Ex parte Mon Luck, 29 Or. 421, 32 L.R.A. 738, 54 Am. St. Rep. 804, 44 Pac. 693; Portland v. Meyer, 32 Or. 368, 67 Am. St. Rep. 538, 52 Pac. 21; State v. Schuman, 36 Or. 16, 47 L.R.A. 153, 78 Am. St. Rep. 754, 58 Pac. 661; Ex parte Northrup, 41 Or. 489, 69 Pac. 445; Burdick v. People, State v. Corbett, Re O'Neill, and Jannin v. State, *supra*.

Railway tickets are not articles of merchandise which are intended to be bought and sold at a profit.

Hibbard v. New York & E. R. Co. 15 N. Y. 455; Jannin v. State and State v. Corbett, *supra;* Ames v. Southern P. Co. 141 Cal. 728, 99 Am. St. Rep. 98, 75 Pac. 310; 4 Elliott, Railroads, § 1593.

Hailey, J., delivered the opinion of the court:

The only question raised on this appeal is the constitutionality of the foregoing act. It is claimed: First. That it violates the following sections of article 1 of the state Constitution: Section 10, which declares that "every man shall have remedy by due course of law for injury done him in person, property, or reputation;" § 20, which declares, "No law shall be passed granting to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens;" and § 21, which declares, "No *ex post facto* law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." Second. That it violates the 14th Amendment to the Constitution of the United States, which provides that no state shall deprive any person of liberty or property without due process of law; and also violates § 8 of article 1 of the Constitution of the United States, which gives to Congress the power to regulate commerce among the several states. In this opinion, for brevity and clearness, we will apply the word "ticket" to all kinds of railroad transportation mentioned in the act, and use the word "railroad" as synonymous with the words in the act, "owner or operator of any railroad." Before discussing the various contentions made by the defendant as above set forth, we deem it necessary to ascertain the effect of this law, and then will consider the question whether or not it violates any of the above provisions of our state and Federal Constitutions.

1. It is contended on the part of counsel for appellant that this act does not prohibit the ticket-brokerage business, but permits it when done by one having the certificate provided for in the act, and only makes it a crime when done by one not holding such certificate. Such a construction of the law gives no force to the relation of principal and agent necessarily created by the appointing certificate. The holder of such certificate is the agent of the railroad issuing the same, and his acts in selling, issuing, and dealing in tickets are the acts of his principal and binding upon such principal, and are not the acts of such agent in his individual capacity, acting upon his own account. Again, such a construction also gives to the agent authority not warranted by the terms of the act, by imputing to him the right to deal generally in all tickets, whether issued by the railroad appointing him its agent, or some other railroad. By the terms of this act the agent is expressly limited in his authority to sell, issue, or deal in tickets issued by the railroad appointing him, and has no authority, by virtue of a certificate from one railroad, to sell or deal in the transportation of another railroad from which he holds no certificate. The agent, as well as the railroad appointing him, is limited to selling, issuing, and dealing in its tickets, and such agent must do so as its agent, and cannot deal in tickets of another railroad for which he is not agent. The right to issue, sell, and deal in railroad transportation is thus limited to the railroad acting through its agents; and it follows that when done by a ticket broker or other person not authorized and acting as agent for the railroad, such transactions are unlawful and punishable under this act, and thus prohibited thereby.

2. The question, then, is: Does this law violate any of the constitutional provisions above mentioned? It is argued by counsel for the defendant that it takes property without due process of law. Defendant contends that the purchaser of a transferable ticket has a right to do with it as he pleases, and that to limit his right to sell or otherwise dispose of it is depriving him of his property therein without due process of law. It does not deprive the purchaser of a ticket of his property. It only limits the manner in which he shall use such property. It is one thing to take away the property of a person, and another to limit his use of such property. In the case of the purchase of a railroad ticket, the railroad sells it to the purchaser for the purpose of transportation over the lines of the seller, and not for barter or trade in the market; and he is not deprived of his property therein so long as he has the right to use it for the purpose for which it was sold to him; and the presumption is that he purchased it for the purpose for which it was sold. In addition to the right to use it for its original purpose, the act in question gives him the additional right to compel the seller to redeem it, in the event the purchaser fails to use it, if presented for redemption within a certain time.

3. It is next contended that the law violates the constitutional provision which prohibits the passing of any law impairing the obligations of contracts. This contention is not tenable, for the reason this constitutional provision only prohibits the passage of laws impairing the obligations of contracts in existence at the time the law took effect, and therefore it has no application to the case at bar, the ticket in controversy having been sold by the railroad after this law went into effect. This law is prospective, and not retrospective, in effect, and is clearly not an *ex post facto* law, as it does not undertake to punish the defendant

for an act done prior to the time it took effect, the doing of which was at that time not a crime.

4. Counsel for defendant argue that the law grants privileges to some persons not granted to others upon the same terms, and therefore violates § 20, art. 1, of the state Constitution, and the 14th Amendment to the Federal Constitution; and cites in support of this contention Re Oberg, 21 Or. 406, 14 L.R.A. 577, 28 Pac. 130, in which it was claimed that an act providing that "no officer or seaman of a sea-going vessel, or ship, shall be arrested or imprisoned for debt; and any officer executing a process of arrest for debt upon such officers or seamen shall, upon conviction, . . . be fined," etc.,—was in violation of the foregoing section of the Constitution; but the act was upheld by this court on the ground that, since there was no discrimination between persons of the class of sailors mentioned, it was not unconstitutional. The court said: "All sailors of a sea-going vessel within the prescribed limits are treated alike, and entitled to enjoy the privileges or immunities granted. The act prescribes the same rule of exemption to all persons placed in the same circumstances. It does not grant to a sailor immunity from arrest for debt, and refuse it to his neighbor, if they be similarly situated. . . . Any person who is a sailor may enjoy the immunity, and any citizen desiring such immunity may have it, in the words of the Constitution, 'upon the same terms,' by becoming a sailor." So in the case at bar the privilege, if such it be deemed, of selling tickets under this act, is granted to railroads only to be done by them directly or through their agents; and all railroads are treated alike and entitled to enjoy the privileges or immunities granted; and anyone desiring to secure like privileges and immunities can do so by becoming one of that class. The difficulty with the argument on the part of the defendant is that it fails to make a distinction between the persons who, as agents of the railroads, act for them, and such persons acting in their individual capacity as third persons. If the law allowed such agents to act in their individual capacity, and not as agents solely when possessed of the certificate provided for in the law, it would doubtless be amenable to the objection raised by the defendant; but such is not the case. Furthermore, defendant has no unqualified right to sell and deal in the tickets of a railroad, and is therefore not deprived of a privilege or immunity guaranteed by the Constitution, as the right claimed is not one of the fundamental rights guaranteed by this clause of the Constitution. It is argued, however, that the defendant cannot bring himself within this class; it being contended that the legislature has delegated to the railroad companies the power to classify the citizens of the state, and authorize some of them to conduct a business, and prohibit all others from engaging in the same business. Here, again, the representative capacity of the agent of the railroad is confounded with his individual capacity. It is the railroads themselves that are classified, and not the individuals who may act as agents for them. Prior to the passage of this act the railroads had a right to sell tickets and appoint agents. That was one of their privileges, and they were not required to furnish them with certificates showing such agency; and the act does not take away either privilege, but adds the requirement of furnishing such agents with a certificate. All railroads dealing in tickets within the state, like "all seamen of sea-going vessels," are treated alike.

5. It is next claimed that the act interferes with the interstate commerce clause of the Federal Constitution, in that it relates to tickets of railroads without, as well as within, the state. We cannot see the force of this contention. Under the law, the railroads can sell as freely as they could before. The one additional requirement is that they furnish their agents with a certificate of authority. It does not attempt to regulate commerce within the meaning of that term as interpreted by the Supreme Court of the United States. It casts no burdens upon commerce, and places no obstacles in its way. Its operation is wholly within the limits of the state and within the police power of the state. As stated in Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28, "such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce."

6. Finally, it is urged that the legislature has no right to prohibit a lawful and harmless calling; and it is urged that the ticket-brokerage business has always been a lawful and proper vocation, and may be honestly conducted. The legislature, however, has seen fit to prohibit the conduct of such business in order to protect travelers from fraud; and the facts alleged in this complaint, if true, apparently uphold the legislature in the wisdom of its act. With this, however, this court has nothing to do. It is within the power of the legislature to prohibit the doing of acts that in themselves have been and are legal, as, for instance, the

catching of salmon during certain seasons of the year may be prohibited, the killing of wild game may be prohibited, and numerous other instances which are found upon our statute books. Consequently, this contention is not tenable. Portland v. Meyer, 32 Or. 368–371, 67 Am. St. Rep. 538, 52 Pac. 21; State v. Schuman, 36 Or. 16–25, 47 L.R.A. 153, 78 Am. St. Rep. 754, 58 Pac. 661.

We deem it unnecessary to discuss further the questions argued upon this appeal, for the reason that legislation similar to the act in question has been adopted in many of our sister states, and its constitutionality has been fully sustained by all of their highest courts, with the single exception of the state of New York, where two dissenting opinions were rendered that agree with the following decisions, which fully discuss all questions raised in the case at bar, and all of which hold it to be within the police power of a state, through its legislature, to enact such a law as the one in question: Fry v. State, 63 Ind. 552, 30 Am. Rep. 238; Burdick v. People, 149 Ill. 600, 24 L.R.A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, 952; State v. Corbett, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; Com. v. Keary, 198 Pa. 500, 48 Atl. 432; Jannin v. State, 42 Tex. Crim. Rep. 631, 53 L.R.A. 349, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419; State v. Bernheim, 19 Mont. 512, 49 Pac. 441; Re O'Neill (1905; Wash.) 83 Pac. 104; State v. Manford (1905; Minn.) 106 N. W. 907. The only courts holding adversely to the above decisions are the courts of New York, which follow the opinion of Chief Justice Parker, of the New York court of appeals, in the case of People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006, in which case the decision is largely based upon two grounds: First, that the New York statute conferred authority upon an agent of one railroad to sell the tickets of any other railroad, which the statute in this state does not do, it expressly limiting his authority to the sale of the tickets of the road appointing him; and, second, on the ground that the act was a violation of the liberty of the citizen, guaranteed him by the Constitution, to engage in ticket brokerage, which the state could not take away by the exercise of its police power. We are, however, unable to agree with the logic or the reasoning of that opinion, but prefer to accept the reasoning and logic of the two dissenting opinions written in the same case, which have been practically adopted by the cases above mentioned.

We therefore hold the act valid, and the judgment of the lower court is affirmed.

4 L.R.A. (N.S.)

NORTH CAROLINA SUPREME COURT.

W. E. DANIEL, Admr., etc., of C. D. Key,
v.
PETERSBURG RAILROAD COMPANY, Appt.

(117 N. C. 592, 23 S. E. 327.)

Agent—scope of employment—shooting customer.

1. Whether a carrier's agent is acting within the line of his employment or not in shooting a person who has used abusive language to him concerning storage charges on baggage is a question for the jury.

Shooting person—burden of defense.

2. The burden of showing extenuating circumstances for shooting a person is upon the defendant.

Same—abusive language.

3. Abusive language to a carrier's agent, by a passenger who is angry at a charge for storage on his baggage, cannot justify or excuse the act of the agent in shooting him when he is going out of the office.

(December 11, 1895.)

Subject Note.—Liability of master for malicious act of servant when master owes special duty to party injured.

I. In general, 485.
II. When malicious act is within scope of employment, 487.
III. When act is beyond scope of employment, 491.
IV. Effect of injured party being the aggressor, 504.
V. Extent of liability, 506.

I. In general.

The decisions present a conflict upon this question. The courts are practically unanimous in going to the extent of holding a master liable to one to whom he owes a special duty which is violated by a malicious act of his servant when the servant is acting within the line of his duty; but just at this point a difference of opinion arises, one class of cases going still farther and holding the master liable notwithstanding the act complained of is not within the line of the servant's duty if it occurs during the continuance of the contract of carriage, or is a violation of the special duty owed by the master toward the injured party by virtue of some contract relationship, express or implied. The other class of cases holds to the doctrine that only when the malicious act is committed while the servant is acting within the scope of his employment can the master be held liable. This conflict of opinion exists not only between different jurisdictions, but within jurisdictions; and the question is therefore one of much confusion and difficulty, partly on this account and also largely by reason of the

APPEAL by defendant from a judgment of the Superior Court for Halifax County in favor of plaintiff in an action brought to recover damages for the killing of plaintiff's intestate by the act of defendant's servant for which it was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. **MacRae & Day** and **Thomas N. Hill**, for appellant:

The act was not done by Lifsey on behalf of defendant, nor in furtherance of its business; and there was no evidence that it was done by authority, direction, or order of defendant, either express or implied.

A master is liable for the act of a servant, done in the course of his employment about his master's business; but he is not liable for an act done outside of his employment, nor for the wanton violation of the law by him.

Wood, Mast. & S. chap. 13, §§ 277 et seq.; Jones v. Glass, 35 N. C. (13 Ired. L.) 305; Wesson v. Seaboard & R. R. Co. 49 N. C. (4 Jones, L.) 379; Hussey v. Norfolk Southern R. Co. 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; White v. Norfolk & S. R. Co. 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191.

The killing of Key by the agent, Lifsey, in any view of the testimony, was entirely personal and separate from his employment.

Pollock, Torts, in Ewell's Essentials of the Law, p. 16.

The test of the master's liability for acts of his servant is not whether it was done during the existence of the servant's employment, but whether it was done in the prosecution of the master's business.

Davis v. Houghtellin, 33 Neb. 582, 14 L. R. A. 741, 50 N. W. 765; Wesson v. Seaboard & R. R. Co. *supra;* Garretzen v. Duenckel, 50 Mo. 110, 11 Am. Rep. 405; Jackson v. St. Louis, I. M. & S. R. Co. 87 Mo. 422, 56 Am. Rep. 460; Central R. Co. v. Peacock, 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709.

The act complained of must not only be done while so employed, but must pertain to the particular duty of that employment.

Stringer v. Missouri P. R. Co. 96 Mo. 302, 9 S. W. 905; Snyder v. Hannibal & St. J. R. Co. 60 Mo. 416; Sherman v. Hannibal & St. J. R. Co. 72 Mo. 63, 37 Am. Rep. 423.

The relation of carrier and passenger be-

lack of clearness and definiteness in many of the opinions. After a review of the decisions, however, it seems justifiable to say that the later and clearer holdings seem to be tending toward the stricter rule of liability, holding the employer liable on the ground that his contract or special duty towards the injured party has been violated, rather than upon the principle of *respondeat superior*. The language of the concurring opinion in DANIEL v. PETERSBURG R. Co. exemplifies this tendency.

There are, however, numerous strong, definite decisions, as well as others not so clear, but which seem to deem it necessary, in order to create any liability upon the master's part, that the malicious act be committed within the scope of the servant's employment; and this, notwithstanding the master owed a special duty to the injured party which was violated by the act committed. This doctrine is clearly illustrated in STRANAHAN BROS. CATERING CO. v. COIT.

There is no question of the application of the principle involved in this note to carriers, it being universally conceded that a special duty always exists on the carrier's part to carry the passenger with safety and courtesy. Besides its application in DANIEL v. PETERSBURG R. Co., it has also been applied where the malicious act was the act of a baggage master, in Georgia R. & Bkg. Co. v. Richmond, 98 Ga. 495, 25 S. E. 565; and when it was that of a freight agent, in Columbus & R. R. Co. v. Christian, 97 Ga. 56, 25 S. E. 411, *infra*, III. But the United States court of appeals, in a lengthy opinion in Bowen v. Illinois C. R. Co. 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306, strongly disapproves of DANIEL v. PETERSBURG R. Co., and declares that the rule applicable to carriers, hotel keepers, and theater proprietors does not apply in the case of a freight agent and one calling at the freight office on a matter of business. The principle has been applied to agricultural associations holding fairs (Oakland City Agri. & Industrial Soc. v. Bingham, 4 Ind. App. 545, 31 N. E. 383, *infra*, II.; Brooks v. Jennings County Agri. Joint-Stock Asso. [Ind. App.] 73 N. E. 951, *infra*, III.); and to express companies (Richberger v. American Exp. Co. 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922, *infra*, III.); and to theater managers (Fowler v. Holmes, 24 N. Y. S. R. 299, 3 N. Y. Supp. 816, *infra*, II.; Dickson v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, *infra*, III.); and to bailor and bailee (Jones v. Glass, 35 N. C. [13 Ired. L.] 305, *infra*, III.). There is, however, some lack of harmony in its application to innkeepers. An *obiter* statement in an early English case (Calye's Case, 8 Coke, 32) was that, "if the guest be beaten in the inn, the innkeeper shall not answer for it." So, liability is denied in Evansville & C. R. Co. v. Baum, 26 Ind. 73, *infra*, III.; but it is admitted, at least to the extent of acts done within the line of duty, in Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148, *infra*, III.; Wade v. Thayer 40 Cal. 578; and perhaps still further in Gile v. Libby, 36 Barb. 70; and in Dickson v. Waldron, *arguendo*, *infra*, III.

As to storekeepers and saloon keepers, there is also considerable conflict among the cases as to whether any special duty exists toward patrons, sufficient to create any liability by reason of the principle in question. The existence of any special duty on the

tween defendant and deceased had long since been terminated.

Hansley v. Jamesville & W. R. Co. 115 N. C. 602, 32 L. R. A. 543, 44 Am. St. Rep. 474, 20 S. E. 528.

If a passenger wantonly offers a servant personal insult, and the servant resents it on the spot in a personal way, without reference to his duties as a servant, it may be, the passenger thus wantonly bringing about the assault cannot complain of the carrier whatever are the results.

Eads v. Metropolitan R. Co. 43 Mo. App. 546.

A passenger, by his misconduct, can forfeit the relation of passenger, and will then occupy the relation of a stranger.

Ibid.; Mali v. Lord, 39 N. Y. 383, 100 Am. Dec. 448; Smith v. Louisville & N. R. Co. 95 Ky. 11, 22 L. R. A. 72, 23 S. W. 652; Evansville & C. R. Co. v. Baum, 26 Ind. 73; Gregory v. Piper, 9 Barn. & C. 591; Croft v. Alison, 4 Barn. & Ald. 590; Harrison v. Fink, 42 Fed. 787.

The law presumes that the master uses care in selecting the servant, and the burden is on the party alleging negligence, to prove it.

Pullman's Palace Car Co. v. Ehrman, 65 Miss. 384, 4 So. 113; Scott v. Central Park, N. & E. River R. Co. 53 Hun, 414, 6 N. Y. Supp. 382.

The passenger, in order to entitle himself to protection, is bound to behave himself in a decent and orderly manner.

Meehan v. Morewood, 52 Hun, 566, 5 N. Y. Supp. 710; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Peavy v. Georgia R. & Bkg. Co. 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70; Candiff v. Louisville, N. O. & T. R. Co. 42 La. Ann. 477, 7 So. 601.

One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported under a contract, and is accepted as a passenger by the company.

Webster v. Fitchburg R. Co. 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 165.

When this relation ceases the party ceases to be a passenger.

Hansley v. Jamesville & W. R. Co. *supra;*

part of a saloon keeper toward his patrons is strongly denied in Peter Anderson & Co. v. Diaz (Ark.) 92 S. W. 861: "The saloon keeper does not hold himself out to the public as the protector of those who may be patrons of his saloon. His business the rather advertises him the other way."

So, any special obligation is expressly not recognized in Bergman v. Hendrickson, 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304, an action against a saloon keeper.

And the application of the principle to mercantile houses generally is denied, *arguendo*, in the following language, in Bowen v. Illinois C. R. Co. *supra*: "Is it possible that the owner of the house shall respond in damages for the injury, the result either of a fit of insanity or personal revenge on the part of the clerk, on the ground, not that it was done within the scope of his employment, but in a place where persons are invited to come and transact business with the house? How is it possible, under such condition, for any business house to conduct its affairs, dependent upon the employment of clerical assistance, if exposed to such liability, after the merchant has exercised due care in the selection of his clerk, who has worked for him six months with no manifestations of insanity or homicidal mania? . . . There would have to be written into the law of master and servant a new rule, making every employer an absolute insurer of the safety of every person who comes upon his premises . . . on any matter of his special business, against any injury inflicted by any employee."

So, one may lawfully enter a store and deal with any clerk with reference to the purchase of goods; but if, on some dispute, the clerk should commit assault and battery upon him, the merchant would not be responsible therefor. Williams v. Pullman Palace Car Co. 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631, *arguendo*.

So, a storekeeper is not liable for any wilful act of an employee, unless expressly or impliedly authorized by him. Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448.

On the other hand, the existence of a special duty as a ground of liability is recognized in a number of instances. Dickson v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, *arguendo;* Mallach v. Ridley, 24 Abb. N. C. 172, 9 N. Y. Supp. 922; Swinarton v. Le Boutillier, 7 Misc. 639, 28 N. Y. Supp. 53, *arguendo;* Collins v. Butler, 83 App. Div. 12, 81 N. Y. Supp. 1074, all *infra*, III.

II. When malicious act is within scope of employment.

There seems to be no doubt that, if a malicious act which violates a duty of the master toward a third person is committed by the servant while he is actively engaged in the performance of his duties, and as a part thereof, however ill advised or unnecessary it may be, the master will be liable to the party thus injured in his contract rights. The courts, by numerous decisions, seem to regard this as settled.

Thus, a carrier is liable for injuries caused by the malicious and outrageous act of one of its conductors in attempting to eject a peaceable passenger from a train by means of a loaded revolver. Gallena v. Hot Springs R. Co. 4 McCrary, 371, 13 Fed. 116.

Where a passenger, while occupying a for-

Buckley v. Old Colony R. Co. 161 Mass. 26, 36 N. E. 583.

Mr. Robert O. Burton, for appellee:

In all cases where the master owes a duty to third persons or the public, he cannot shirk or evade it by committing its performance to another, but is bound absolutely to perform the duty, and is liable for failure so to do, in any respect, whereby injury results to others, whether such failure results from the negligence, or from the wilful, wanton, or criminal conduct of the agent to whom the duty is committed.

3 Wood, Railway Law, 1376.

The company owed a duty to Key, which it failed to perform on account of the agent's conduct. This duty was to deliver the baggage in sound condition, and to protect the owner applying for it from the wrongful acts of the servants of the road.

2 Wood, Railway Law, 1367, 1368; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; Burnell v. New York C. R. Co. 45 N. Y. 184, 6 Am. Rep. 61.

It by no means follows that when the relation of carrier to the baggage ceases, by the delay of the owner to call for and accept it within a reasonable time, the carrier's duty in reference to it ceases, or that his liability is at an end. The change effected by such delay is merely the substitution of a custody in one character for that of another, or rather the continuation of the responsibility in a different character and in a different degree.

Hutchinson, Carr. 2d ed. § 712; Mattison v. New York C. R. Co. 57 N. Y. 552; Wood, Mast. & S. § 321.

The liability for the baggage continues, for its destruction, through negligence or wantonness of the servant, after arrival and storage; why not for the wanton injury of the traveler who calls for his baggage?

The only ground upon which a master can avoid liability for unauthorized and wilful acts of a servant is that they are not done in the course of the servant's employment. When not so done, yet, if they directly cause a failure to perform a duty incumbent upon the master, he is responsible upon that ground.

1 Shearm. & Redf. Neg. §§ 150, 154; Buswell, Personal Injuries, § 36; Mallach v.

bidden part of a vessel, was forcibly ejected therefrom by two of the carrier's servants, with such force as seriously to injure him, the carrier was held liable on the ground that it was bound to protect its passenger against the misconduct of its own servants engaged in executing the contract of carriage, when acting within the general scope of their employment. New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039.

It is declared in Alabama G. S. R. Co. v. Frazier, 93 Ala. 45, 30 Am. St. Rep. 28, 9 So. 303, that, if a brakeman, during an effort to discharge his duty in regard to ejecting passengers, wilfully assaults and beats a passenger, not in self-defense against an assault made or reasonably apprehended, the company is liable.

So, a complaint charging the wrongful, wilful, wanton, and intentional ejection of a passenger from a train by a conductor, thereby causing injury, was held to state a good cause of action, in Louisville & N. R. Co. v. Perkins (Ala.) 39 So. 305.

A street car company is liable for the act of its conductor in wilfully ejecting a passenger from a street car. Converse v. Washington & G. R. Co. 2 MacArth. 504.

A carrier is liable for the act of a freight conductor in ejecting a would-be passenger from his train by means of unusual and unnecessary violence of word and act. Western & A. R. Co. v. Turner, 72 Ga. 292, 53 Am. Rep. 842.

And a street car company was held liable for the unlawful violence of one of its conductors in beating, kicking, and cutting with a knife, a passenger, upon a short delay in paying fare. Savannah Street R. Co. v. Bryan, 86 Ga. 312, 22 Am. St. Rep. 464, 12 S. E. 307.

If a colored woman is denied the privilege of the ladies' car through mere wantonness on the part of the brakeman the company is liable. Chicago & N. W. R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641.

So, if a passenger is injured by the act of the conductor when acting under the general scope of his employment, even though the act is wanton and malicious, the company will be liable. North Chicago City R. Co. v. Gastka, 128 Ill. 613, 4 L.R.A. 481, 21 N. E. 522.

The liability of a railroad company for the act of a brakeman in maliciously ejecting a passenger from a train is upheld in Illinois C. R. Co. v. Davenport, 177 Ill. 110, 52 N. E. 266.

Trainmen are not authorized to inflict unnecessary personal violence in putting an intoxicated man off the train, and the company is liable for their act in so doing. Illinois C. R. Co. v. Sheehan, 29 Ill. App. 90.

For a wrongful act of a conductor in expelling a passenger from a train, done in a spirit of oppressive malice or wantonness, the company was held liable in exemplary damages in Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103. This was upon the principle that a corporation is liable for wilful acts of its agents, committed within the general scope of their employment.

So, in Pittsburgh, C. & St. L. R. Co. v. Theobald, 51 Ind. 246, the carrier was held liable for the wilful and malicious act of a brakeman in ejecting a passenger, when the act was done in the line of employment.

And so, the principle is promulgated in Louisville & N. R. Co. v. Kelly, 92 Ind. 371,

Ridley, 24 Abb. N. C. 172, 9 N. Y. Supp. 922; Williams v. Pullman Palace Car Co. 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631; Keene v. Lizardi, 5 La. 431, 25 Am. Dec. 197; White v. Norfolk & S. R. Co. 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191; Morrissey v. Eastern R. Co. 126 Mass. 377, 30 Am. Rep. 686; Carpenter v. Boston & A. R. Co. 21 Am. & Eng. R. Cas. 336, note, 97 N. Y. 494, 49 Am. Rep. 540.

Where a servant of the company, intrusted by it with the care of supervision over passengers, commits some act toward a passenger in direct violation of his duty to look out for the comfort and safety of passengers, the master is liable.

Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504; Stewart v. Brooklyn & C. T. R. Co. 90 N. Y. 588, 43 Am. Rep. 185; Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33.

A railroad company is under a special duty to persons who come upon its premises for the purpose of doing business with it as a common carrier.

Pierce, Railroads, 275; Hamilton v. Texas & P. R. Co. 64 Tex. 251, 53 Am. Rep. 756; Fick v. Chicago & N. W. R. Co. 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527; Thomp. Carr. Pass. pp. 352 et seq.; Pendleton v. Kinsley, 3 Cliff. 416, Fed. Cas. No. 10,922; Milwaukee & M. R. Co. v. Finney, 10 Wis. 388; Batton v. South & North Ala. R. Co. 77 Ala. 591, 54 Am. Rep. 80; Britton v. Atlanta & C. Air-Line R. Co. 88 N. C. 536; 2 Rorer, Railroads, 957; Baltimore & O. R. Co. v. Schwindling, 8 Am. & Eng. R. Cas. 552, note, 101 Pa. 258, 47 Am. Rep. 706; Gillis v. Pennsylvania R. Co. 59 Pa. 141, 98 Am. Dec. 317; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L. R. A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

There is no question about the duty of protection while the passenger goes into the depot to get his dinner.

Peniston v. Chicago, St. L. & N. O. R. Co. 34 La. Ann. 777, 44 Am. Rep. 444; Dice v. Willamette Transp. & Locks Co. 8 Or. 60, 34 Am. Rep. 575.

Nor after arrival, where the passenger was aiding in taking off his baggage.

Ormond v. Hayes, 60 Tex. 180.

Now what difference in legal principle is there in the liability of the road for an as-

47 Am. Rep. 149, that a carrier is responsible for injuries wilfully inflicted upon a passenger by servants engaged in the performance of duties within the general scope of their employment.

A street car company is liable for a wilful injury inflicted upon a passenger by a servant acting within the scope of his employment. The court says that the liability of the master under such circumstances is too well settled in Indiana to be open to controversy. Citizens' Street R. Co. v. Willoeby, 134 Ind. 563, 33 N. E. 627.

An agricultural society is liable for a malicious injury by a gatekeeper attempting to enforce a rule of the society, according to Oakland City Agri. & Industrial Soc. v. Bingham, 4 Ind. App. 545, 31 N. E. 383.

And so, a railway company is liable for the act of its conductor in wilfully injuring a passenger while expelling him from the train in the line of duty. Baltimore & O. R. Co. v. Norris, 17 Ind. App. 189, 60 Am. St. Rep. 166, 46 N. E. 554.

When a wilful or criminal act is done by a servant in the course of his employment, toward a passenger, the carrier is liable,—the intent with which the act is done does not affect the carrier's liability. McKinley v. Chicago & N. W. R. Co. 44 Iowa, 314, 24 Am. Rep. 748.

So, a carrier is liable for a wanton assault upon a passenger by a servant acting within the line of his employment, where the relation of carrier and passenger exists; no matter what the motive is which causes the servant of the carrier to commit an unlawful act, a carrier is responsible for the act and its natural consequences. Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952.

Where a driver insulted a passenger, and at once pursued him into the street, and there violently assaulted him, the carrier was held liable, the whole series of acts being regarded as done within the scope of the employment. Wise v. Covington & C. Street R. Co. 91 Ky. 537, 16 S. W. 351.

A Pullman car company is liable for the act of a servant in wantonly and maliciously assaulting a passenger, while acting within the scope of his employment. Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 22 So. 53.

A direction, made wantonly and maliciously by a brakeman, to jump from a train on account of danger, in consequence of which a passenger does jump and receives injuries, renders the carrier liable therefor. "If, in the performance of that duty, he wilfully and maliciously terrorizes and injures passengers, the carrier is responsible for his conduct." Ephland v. Missouri P. R. Co. 71 Mo. App. 597.

A carrier is held liable for a malicious and wanton assault by a conductor in ejecting a passenger from a car for accidentally stepping on the trolley cord, and thereby pulling the trolley pole from the wire, in Tanger v. Southwest Missouri Electric R. Co. 85 Mo. App. 28.

A railway conductor, in the exercise of his police powers and disciplinary control over his train, may use such force as is necessary to overcome the resistance of a recusant passenger; yet, if he employs such unnecessary force as to maltreat the resisting intruder in ill-temper or hostility; or if the excessive force used by him is shown to be wanton or malicious,—the railroad company

sault by its servant in the depot five minutes after the arrival of the train, and its liability for an assault by him, in the same place, forty-eight hours after,—the traveler calling for his baggage in each case?

Johnson v. Boston & M. R. Co. 125 Mass. 75.

To show grave misapprehension underlying the contention that the railroad's liability for the misconduct of its agents on its trains rests purely upon the relation of carrier and passenger, I need only call attention to the responsibilities of a sleeping-car company.

Pullman Palace Car Co. v. Smith, 79 Tex. 468, 13 L.R.A. 215, 23 Am. St. Rep. 356, 14 S. W. 993; Pullman Palace Car Co. v. Gavin, 93 Tenn. 53, 21 L.R.A. 298, 42 Am. St. Rep. 902, 23 S. W. 70; Pullman Palace Car Co. v. Matthews, 74 Tex. 654, 15 Am. St. Rep. 873, 12 S. W. 744; Pullman Palace Car Co. v. Pollock, 69 Tex. 120, 5 Am. St. Rep. 31, 5 S. W. 814; Lewis v. New York Sleeping Car Co. 143 Mass. 267, 58 Am. Rep. 135, 9 N. E. 615.

In considering what is reasonable time in which to take away baggage, we are to look at the customs of the country, the manner and facilities for transporting baggage from the station, and all the surrounding circumstances; and what would be a reasonable time in one case might not be so in another.

Mote v. Chicago & N. W. R. Co. 27 Iowa, 22, 1 Am. Rep. 212; Louisville, C. & L. R. Co. v. Mahan, 8 Bush, 184; Roth v. Buffalo & State Line R. Co. 34 N. Y. 548, 90 Am. Dec. 734; Jones v. Norwich & N. Y. Transp. Co. 50 Barb. 193; Jacobs v. Tutt, 33 Fed. 412; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

A railroad company is bound to keep its premises and stations in a reasonably safe and fit condition.

Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. 359; McDonald v. Chicago & N. W. R. Co. 26 Iowa, 124, 96 Am. Dec. 114.

Persons who have business with the company at the stations, such as loading or unloading freight, are entitled to protection, and may recover for an injury occasioned by the unsafe condition of the building, or a failure to light it properly.

Buenemann v. St. Paul, M. & M. R. Co.

is liable. Randell v. Chicago, R. I. & P. R. Co. 102 Mo. App. 342, 76 S. W. 493.

The wanton ejection of a passenger from a car renders the carrier liable, according to Ruebsam v. St. Louis Transit Co. 108 Mo. App. 437, 83 S. W. 984.

A street car company is liable for the act of a conductor in committing an unprovoked assault upon an old man by pushing and kicking him as he is attempting to alight from the car. Flynn v. St. Louis Transit Co. 113 Mo. App. 185, 87 S. W. 560.

Although a conductor, in ejecting a passenger for a refusal to pay fare, acts maliciously, the carrier is responsible. Perkins v. Missouri, K. & T. R. Co. 55 Mo. 201.

A street railway company is liable for the brutal and violent expulsion of a passenger from a car by the conductor. There is no doubt of such liability, according to Haman v. Omaha Horse R. Co. 35 Neb. 74, 52 N. W. 830.

A railroad corporation is liable for the wanton and malicious acts of its agents toward its passengers while engaged in the business of the corporation, although the acts were not directly nor impliedly authorized or ratified by the corporation. Quigley v. Central P. R. Co. 11 Nev. 350, 21 Am. Rep. 757.

A carrier is responsible for the acts of a servant toward a passenger while engaged in the master's work, although done with a wanton or reckless purpose to accomplish it in an unlawful manner. Rowell v. Boston & M. R. Co. 68 N. H. 358, 44 Atl. 488.

If the ejection of a passenger from a train is within the scope of a brakeman's authority, and in so doing the brakeman acts for the company, and not for himself or his own ends, the company is not exonerated, although the servant may act brutally in the performance of the act. Hoffman v. New York C. & H. R. R. Co. 87 N. Y. 31, 41 Am. Rep. 337.

It was contended in Schultz v. Third Ave. R. Co. 89 N. Y. 242, that the act of a conductor in pushing a passenger from a car was so reckless and malicious that the carrier was not responsible for it; but the court held the contention overruled by previous holdings of the New York courts.

Toomey v. Delaware, L. & W. R. Co. 4 Misc. 392, 27 N. Y. Supp. 108, goes on the theory that if, in causing the arrest of passengers on account of alleged failure to pay fare, the conductor did not act maliciously, the carrier would not be liable.

Where a conductor has the power, as servant of a street car company, to expel improper persons from the platform of the car, the carrier is liable for his mistakes committed in the exercise of this authority, even if wilfully done. Lyons v. Broadway & S. A. R. Co. 32 N. Y. S. R. 232, 10 N. Y. Supp. 237.

If an agent employed by a carrier to sell tickets, and empowered to eject improper persons from the premises, did an act which was in fact done towards enforcing this authority, the carrier is responsible for the act and for the particular manner in which it was done, although the defendant selected the manner for a purpose of his own, in passion or wilfulness. McKernan v. Manhattan R. Co. 22 Jones & S. 354.

Evidence that an employee of a theater company was taking up tickets at the time he committed an assault upon a patron, after some words resulting from the latter's

18 Am. & Eng. R. Cas. 156, note, 32 Minn. 390, 20 N. W. 379.

The right of protection extends to all persons "who have rightful occasion to use" the station or platforms.

Tobin v. Portland, S. & P. R. Co. 59 Me. 183, 8 Am. Rep. 415; 1 Wood, Railway Law, pp. 506, 507; State v. Steele, 106 N. C. 767, 8 L.R.A. 516, 19 Am. St. Rep. 573, 11 S. E. 478; Com. v. Power, 7 Met. 600, 41 Am. Dec. 465; Old Colony R. Co. v. Tripp, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89.

The servant, at the time of doing the acts complained of, was on duty for his master, and at or near his proper place; and the assault was committed on appellee while he was properly on the master's ground, and under the charge of the master's servants, and entitled to their protection rather than their abuse.

Indianapolis Union R. Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219; Drew v. Peer, 93 Pa. 234, 28 Am. L. Rev. 127; Bass v. Chicago & N. W. R. Co. 36 Wis. 459, 17 Am. Rep. 495; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; Com. v. Power, 7 Met. 596, 41 Am. Dec. 465; Brazil v. Peterson, 44 Minn. 212, 46 N. W. 331.

No words will justify a killing. The agent had a right to eject Key if he was misbehaving, but had no right to use excessive force.

State v. Steele, *supra*.

So he had a right to shoot in self-defense to prevent death or great bodily harm.

New Orleans & N. E. R. Co. v. Jopes, 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109.

Words of provocation alone will not justify an assault by a street car conductor on a passenger.

Haman v. Omaha Horse R. Co. 35 Neb. 74, 52 N. W. 830; Hanson v. European & N. A. R. Co. 62 Me. 84, 16 Am. Rep. 404; Sanford v. Eighth Ave. R. Co. 23 N. Y. 343, 80 Am. Dec. 286.

An assault by a conductor upon a passenger is not excused, or the liability of a carrier defeated, by the fact that the passenger had used grossly profane and abusive language to the conductor without provocation.

Baltimore & O. R. Co. v. Barger, 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560; New Jersey S. B. Co. v. Brockett,

refusal to get in line, is sufficient to compel a submission to the jury of whether the assault was made while the employee was acting within the scope of his employment. Fowler v. Holmes 24 N. Y. S. R. 299, 3 N. Y. Supp. 816.

A carrier is liable for a wilful assault committed by an employee upon a passenger, although in departure from the authority conferred or implied, if it was in the course of employment. Moritz v. Interurban Street R. Co. 84 N. Y. Supp. 162.

When it plainly appears that the act of a servant was done in the course of his employment, his wilfulness in doing the act will not excuse the master. Passenger R. Co. v. Young, 21 Ohio St. 524, 8 Am. Rep. 78.

A carrier was held liable for the act of its conductor in removing a passenger from a car in such a manner that his death resulted, in Pennsylvania R. Co. v. Vandiver, 42 Pa. 365, 82 Am. Dec. 520.

A carrier was held liable for a malicious assault inflicted by the conductor upon a passenger because the latter pulled a rope registering fares instead of the signal bell. Artherholt v. Erie Electric Motor Co. 27 Pa. Super. Ct. 141.

A carrier is liable for the wilful act of an employee, committed in the course of his employment, although the particular act complained of has been forbidden by the carrier. Redding v. South Carolina R. Co. 3 S. C. N. S. 1, 16 Am. Rep. 681.

The evidence is sufficient to sustain a verdict of exemplary damages against a carrier where its conductor brutally assaulted a passenger in attempting to eject him for alleged failure to pay fare, when the passenger repeatedly and earnestly affirmed that he had paid his fare. Denison & S R. Co. v. Randell, 29 Tex. Civ. App. 460, 69 S. W. 1013.

If a railroad employee, in the discharge of his duty to the company, loses his temper and uses an unreasonable amount of force, that will not acquit the company of responsibility. Texas & N. O. R. Co. v. Taylor, 31 Tex. Civ. App. 617, 73 S. W. 1081, *arguendo*.

So, the carrier was held liable for the violent ejection of a passenger from a car by the conductor upon the passenger's refusal to unfold his transfer upon handing it to the conductor, in El Paso Electric R. Co. v. Alderete, 36 Tex. Civ. App. 146, 81 S. W. 1246.

The conduct of a conductor in ejecting a passenger was declared wanton and malicious in Norfolk & W. R. Co. v. Anderson, 90 Va. 1, 44 Am. St. Rep. 884, 17 S. E. 757; and the carrier was held liable in exemplary damages.

A carrier is liable for the violent and wilful act of an employee toward a passenger when the employee is acting in the course of his employment. Fick v. Chicago & N. W. R. Co. 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527; Stone v. Chicago, St. P. M. & O. R. Co. 88 Wis. 98, 59 N. W. 457, *arguendo*.

III. When act is beyond scope of employment.

To the extent shown by the decisions above, *viz.*, that, for the malicious act of a servant, acting within the scope of his employment, the master is liable when the act violates some special duty of his toward

121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039; Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Coggins v. Chicago & A. R. Co. 18 Ill. App. 620; Willey v. Carpenter, 64 Vt. 212, 15 L.R.A. 853, 23 Atl. 630; Goldsmith v. Joy, 61 Vt. 488, 4 L.R.A. 500, 15 Am. St. Rep. 923, 17 Atl. 1010; Chicago, St. L. & P. R. Co. v. Bills, 104 Ind. 13, 3 N. E. 611.

Railroad corporations are liable for all acts of wantonness, rudeness, or force done or caused to be done by their agents and employees, if done in and about the business or duties assigned to them by the corporation.

Louisville & N. R. Co. v. Whitman, 79 Ala. 328; 2 Morawetz, Priv. Corp. § 730; Illinois C. R. Co. v. King, 69 Miss. 852, 13 So. 824; Rose v. Louisville, N. O. & T. R. Co. 70 Miss. 725, 35 Am. St. Rep. 686, 12 So. 825; Hewett v. Swift, 3 Allen, 420; Moore v. Fitchburg R. Corp. 4 Gray, 465, 64 Am. Dec. 83; Illinois C. R. Co. v. Sheehan, 29 Ill. App. 90; Redding v. South Carolina R. Co. 3 S. C. N. S. 1, 16 Am. Rep. 681; Noblesville & E. Gravel Road Co. v. Gause, 76 Ind. 143, 40 Am. Rep. 224; Palmeri v. Manhattan R. Co. 133 N. Y. 261, 16 L.R.A.136, 28 Am. St. Rep. 632, 30 N. E. 1001; Turner v. Western & A. R. Co. 69 Ga. 827; Peeples v. Brunswick & A. R. Co. 60 Ga. 281; Gasway v. Atlanta & W. P. R. Co. 58 Ga. 216; Savannah Street R. Co. v. Bryan, 86 Ga. 312, 22 Am. St. Rep. 464, 12 S. E. 307; Thomp. Carr. Pass. 369; Indianapolis, P. & C. R. Co. v. Anthony, 43 Ind. 189; Marshall v. Stewart, 33 Eng. L. & Eq. 7.

A railroad company is liable for the wanton act of an engineer in frightening horses by blowing off steam or sounding the whistle.

Toledo, W. & W. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Chicago, B. & Q. R. Co. v. Dickson, 63 Ill. 151, 14 Am. Rep. 114.

The master who puts a servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority.

another, the courts, as first above stated, concede their approval almost unanimously; but just at this point a conflict arises,—one class of cases holding that it is only when the malicious act is within the scope of the employment that the master is liable; the other holding that he is liable for any malicious act committed during the continuance of the obligation owing by him, on the ground that he cannot devolve his bounden duty upon an employee, and then escape liability for a failure to perform it by reason of the latter's malice. Much of the confusion in the decisions exists by reason of difficulty in determining what the courts mean by the phrase "scope of employment." If the same meaning were attached to this phrase by all of the courts using it in deciding the point under discussion, most of the confusion would vanish, and in many instances it would probably appear that decisions apparently conflicting were in reality harmonious, since it is used to describe acts ranging all the way from one clearly within the line of duty to one entirely outside it, but committed during the continuance of the contract relationship between the master and party injured, and in violation thereof. In some instances difficulty exists in determining upon which of the two doctrines first above indicated the decision was based. When, however, the violation of the contract duty owing by the master to the injured party seems uppermost in the court's mind, it is perhaps justifiable to deem the decision based upon the rule of strict or absolute liability for violation of the contract duty, rather than upon the principle of *respondeat superior*. In order to show the existing state of the question in the various jurisdictions, the cases have been taken up by states, and their relative weight thus more clearly shown.

A number of Federal decisions seem to regard the violation of the master's duty as the ground of liability.

Thus, a sleeping car company is responsible for the wilful misconduct of its employees placed in charge of a sleeping car, when the misconduct is of such nature as to interfere with the safe and comfortable use of the car for sleeping-car purposes. Campbell v. Pullman Palace Car Co. 42 Fed. 484.

A steamship company, under its contract to transport passengers safely, is liable for the acts of agents of an independent contractor, hired by it to assist in the transportation, in assaulting, without cause, one of its passengers. Barrow S. S. Co. v. Kane, 31 C. C. A. 452, 59 U. S. App. 574, 88 Fed. 197.

In holding a steamship company liable for the act of an employee in violently assaulting a passenger, the court states as a principle that, where the misconduct of an agent causes a breach of contract of his principal, then the principal is liable in an action to the injured party whether such misconduct be wilful or malicious, or merely negligent. Pendleton v. Kinsley, 3 Cliff. 416, Fed. Cas. No. 10,922.

A judgment against a railroad company for an assault committed by its conductor was affirmed, and the evidence showed that the altercation during which the assault occurred was one provoked by an insult which the conductor himself gave, in Texas & P. R. Co. v. Williams, 10 C. C. A. 463, 23 U. S. App. 379, 62 Fed. 440.

In Alabama the rule of strict liability

and inflicts an unjustifiable injury upon another.

Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129, 21 Am. Rep. 597; Cooley, Torts, 538; Harriss v. Mabry, 23 N. C. (1 Ired. L.) 240; Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14 L. ed. 502; Rogahn v. Moore Mfg. & Foundry Co. 79 Wis. 573, 48 N. W. 669; 2 Wood, Railway Law, 1404; Northwestern R. Co. v. Hack, 66 Ill. 238; Quinn v. Power, 87 N. Y. 535, 41 Am. Rep. 392.

Faircloth, Ch. J., delivered the opinion of the court:

When the plaintiff's intestate purchased his ticket at Petersburg, and had his baggage checked to Garysburg, the contract for their safe delivery at the latter place was complete. The passenger's exit from the train at Bellfield discharged the contract as to him as a passenger, and we have only to consider the duties and liabilities of the parties as to the baggage, consisting of two trunks. The contract as to the baggage, however, continued to the point of delivery, and until the delivery was made.

Common carriers are insurers, subject to a few reasonable exceptions. They are held to exercise the greatest practicable care, the highest degree of prudence, and the utmost human skill and foresight which has been demonstrated by experience to be practicable. They are so held upon the grounds of public policy, reason, and safety to their patrons. The exceptions are the act of God and the public enemy. If these be the proximate cause, and without any neglect on the part of the carrier, then he is not liable in damages. He is, against all perils, bound to do his utmost to protect against loss or damage, and must use efforts proportioned to the emergency to ward it off. If he fails to do so he remains liable, although the act of God may have been the immediate cause of the mischief. Passengers are entitled to protection from the carrier's agents, against assaults or insults from their own employees, from other passengers, or persons on the train, whether such persons are rightfully on the train or not. The reason of the above rigid rules is that the passenger and his baggage, during the transit, are in the possession of, and under the immediate supervision and control of, the carrier's

seems to have been finally adopted after earlier approval of the other rule requiring that the malicious act must be within the scope of employment in order to create liability against the master.

Thus, in an *arguendo* statement in Louisville & N. R. Co. v. Whitman, 79 Ala. 328, the clearly established doctrine is declared to be that railroad corporations are liable for all acts of wantonness done by their employees in and about the duties assigned to them; but that the liability does not extend to any wanton act which an employee might commit in a matter not connected with his service to the carrier.

But later, in Birmingham R. & Electric Co. v. Baird, 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456, in holding a carrier liable for a wanton assault on a passenger by its conductor, the following doctrine is laid down: That the contract of carriage imposes upon the carrier the duty, not only to carry the passenger safely and expeditiously between the termini of the route embraced in the contract, but also to conserve by every reasonable means his convenience, comfort, and peace throughout the journey; and that this same duty is, of course, upon the carrier's agents; that they are under the duty of protecting each passenger from avoidable discomfort and indignities, and the carrier is liable in damages for their failure to do so, and it is of no consequence that the act of the servant, complained of, bears no connection or relation with his duties to the carrier; that the carrier is liable in such cases because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment; and it is manifestly immaterial that the act may have been one of private retribution on the part of the servant, actuated by personal malice toward the passenger. This seems to be the latest utterance of the Alabama courts upon this question, and it is a very clear illustration of the stricter rule of liability.

It is remarked, *arguendo*, in St. Louis, I. M. & S. R. Co. v. Hackett, 58 Ark. 381, 41 Am. St. Rep. 105, 24 S. W. 881, that there has been a difference of opinion in the courts as to whether a master is liable for the wilful and malicious acts of his servant, except where they were in violation of a contract of carriage.

Where a colored person was ejected from a street car by the conductor thereof, the court declared, in Turner v. North Beach & M. R. Co. 34 Cal. 594, that, if the refusal of the conductor to permit the plaintiff to enter the car proceeded purely from his own malice, and was in violation of the express orders of the company, the latter was, nevertheless, liable for the actual damages suffered by reason of such refusal, since, the company being a common carrier of passengers, it was its duty to receive the plaintiff as a passenger, and it cannot escape liability for a failure to do so on the ground that its conductor acted from a malicious motive.

The Georgia court, by a long line of decisions, adopts the view of absolute liability for breach of the special duty.

In holding a railroad company liable for the act of a baggage master in wantonly maltreating a passenger, the court says that it is a duty that these carriers of passen-

agents, such as the conductor and baggage master, and hence the difference in degree of the liability of the defendant as a carrier and as a warehouseman. We have not undertaken to cite the authors and decisions on the above questions. They are numerous, and are collected in 16 Am. & Eng. Enc. Law, on page 387. The contract was to deliver the baggage at the terminal point, and it continues until the delivery is made. The transfer of the baggage from the train to the warehouse did not terminate the contract, but affected only the degree of care required in the two positions. The reason for the strict rule to be observed by the carrier as such, already pointed out, does not, in the nature of the circumstances, apply to him as a warehouseman, as the baggage could not be at all times under his immediate observation. In the latter capacity the defendant was only required to exercise ordinary care while the goods remained in his custody. Example: In Neal v. Wilmington & W. R. Co. 53 N. C. (8 Jones, L.) 482, it was held that keeping goods in an ordinary wooden house at the station, fastened with iron locks and bars, the agent residing 200 yards from the warehouse, was ordinary care, and the railroad was not liable for the loss of the goods by theft. If the passenger does not claim his baggage within a reasonable time after arrival at its destination, the carrier becomes a mere bailee. Under this modified obligation of bailee or warehouseman, he is bound to exercise ordinary care in keeping the baggage until called for or disposed of in some legal way. This modified obligation of the carrier is not an independent one, arising from the accidental circumstance of the baggage being left on his hands, but is imposed by the contract of carriage, and rests upon the carrier with whom the contract was made. It is not suggested, however, that the trunks were not properly cared for in this case. The defendant was not a gratuitous bailee, as he had the right to charge for storage, and did charge and collect it. On application, the plaintiff's intestate had received one trunk, when he was informed of the storage charge (the other trunk not being yet delivered), when he became angry, and, while the agent was writing and delivering the receipt, and receiving the money, he severely abused the

gers owe to the public, to employ reliable and gentlemanly agents to conduct and manage their trains; and, if they do not employ such, they should be made responsible for torts committed by those whom they have employed, and to whom they have given the power to violate their duty, imposed by law, safely to transport the passenger, and decently to treat him on his journey so long as he properly demeans himself. Gasway v. Atlanta & W. P. R. Co. 58 Ga. 216.

Failure to allege that a conductor acted within the scope of his business was held not a vital defect in an action against a carrier for a beating inflicted by the conductor, in Peeples v. Brunswick & A. R. Co. 60 Ga. 281.

A carrier is liable for the act of a conductor in grossly insulting and assaulting a passenger on account of a personal animosity against him. East Tennessee, V. & G. R. Co. v. Fleetwood, 90 Ga. 23, 15 S. E. 778.

The court says, *arguendo*, in Columbus & R. R. Co. v. Christian, 97 Ga. 56, 25 S. E. 411, that, if the freight agent of a railroad company takes advantage of the opportunity, afforded by the presence of a patron at his place of business, to bring about a difficulty with the patron upon the occasion of some previous private quarrel, the company will be liable because of the obligation imposed upon it by law to at least afford its patrons protection against the violence of its agents, when the patron is himself without fault, and is engaged about his business with the company.

So, the court says, in Georgia R. & Bkg. Co. v. Richmond, 98 Ga. 495, 25 S. E. 565, that, if a traveling man went to a baggage office to attend to his baggage, and conducted himself properly, he was entitled to respectful treatment from the agent; and that, if the latter, under these circumstances, unlawfully assaulted and beat him, the company was responsible in damages therefor.

A verdict against a carrier was sustained in Brunswick & W. R. Co. v. Moore, 101 Ga. 684, 28 S. E. 1000, for the act of a conductor in shooting and injuring a passenger just as the latter had alighted from the train. This is on the ground that, by virtue of his contract of passenger carriage, a passenger is entitled to be protected against wanton and wilful acts of the servants of the company.

A carrier is liable for the wanton act of one of its servants in publicly insulting one of its passengers in coarse and brutal language. Cole v. Atlanta & W. P. R. Co. 102 Ga. 474, 31 S. E. 107.

And a carrier is liable for the act of a baggage master in attempting to commit rape upon a female passenger. Savannah, F. & W. R. Co. v. Quo, 103 Ga. 125, 40 L.R.A. 483, 68 Am. St. Rep. 85, 29 S. E. 607.

A railroad company is liable for a wilful assault upon a passenger, made by the procurement of its conductor, and for the subsequent malicious arrest of the passenger. Central R. Co. v. Brown, 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989.

Where a conductor maliciously made remarks calculated to annoy a female passenger a recovery against the railroad company was sustained, in Georgia R. & Electric Co. v. Baker, 120 Ga. 991, 48 S. E. 355.

Some strong decisions in Illinois have also followed this doctrine.

"It is undoubtedly true that, where the

agent in his office, and, receiving his receipt and change, started out of the office, and was at the door, when the agent picked up his gun and shot him in the back of the neck, when he fell out on the doorsteps, and soon died from the shock.

A patron of the defendant, while in his warehouse on business connected with the road, is entitled, from defendant's agent, to protection against assaults or insults from anyone. The language of the deceased to the agent was rude and wrong, for which the agent had a right to expel him from the premises by using such force as was necessary, and no more. The offensive language of the deceased, however, did not justify or excuse the violence of the agent; and, if his violent act was done within the scope of his employment or line of duty, then his employer, the defendant, is liable in damages for the injury complained of, by reason of the original contract, and the act of the agent while so engaged. Was the agent's act in the course of his employment, and while about the master's business? No decisive test can be given; but in all cases the question whether the act was committed by the servant in the service of his employer, or for his own purpose, is one for the jury, in view of all the circumstances. Wood, Mast. & S. 594; Hussey v. Norfolk Southern R. Co. 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923. In this case that question was submitted to the jury in the charge of the court, and by their verdict the fact that the agent was acting within the line of his employer's business is settled in the affirmative.

The full briefs of counsel, and their able argument on each side, assisted the court greatly in the consideration of this case. We do not find it necessary to refer to their numerous citations, but will do so as to some of them. Jones v. Glass, 35 N. C. (13 Ired. L.) 305, relied upon by the defendant, was the case of an overseer engaged in his employer's business. In the exercise of his proper duties, he used excessive force, and seriously injured the slave, and his employer was held liable. The quotation from the opinion on page 308 was that the driver left the track, and ran over a man, and the master was held not liable, because the driver was not doing the business his master

employee goes outside of the line of his employment, and, for purposes of his own, inflicts an injury upon the person of one who has no claim upon the employer arising out of any special relation existing between them, being a stranger to the master, the principle contended for [that the master is not liable for the torts of the servant if maliciously done] is properly applied, and has ever been enforced as a rule of the common law; but it does not appear to us that it should be extended so as to embrace a case where the employee of a common carrier, engaged in operating the train, commits a tort upon a passenger upon such train. In every contract for carriage, the carrier undertakes, not only that the utmost vigilance, care, and skill shall be exercised to safely transport a passenger to his destination, but that during the passenger's transit he shall be treated humanely, and protected from all dangers from whatever source arising, so far as the efforts of the carrier or his servants can be made available for the protection of such passenger." Chicago & E. I. R. Co. v. Flexman, 9 Ill. App. 250, Judgment Affirmed in 103 Ill. 546, 42 Am. Rep. 33. The action was brought for the act of a brakeman in striking a passenger in the face with a lantern because he was under suspicion of having stolen the passenger's watch.

So, a carrier is liable for the act of its motorman in assaulting a passenger, although the altercation arose over a personal matter between the two parties. Hanson v. Urbana & C. Elev. Street R. Co. 75 Ill. App. 474.

And so, in every contract of carriage there is a stipulation implied by law that the passenger shall be humanely treated, and a guaranty that the servants of the carrier, engaged in the performance of their master's contract, shall not unjustifiably assault or beat him, or otherwise maltreat him, while the master sustains such contract relations to him; and the master is liable for any breach of this contract regardless of the motive of the servant in committing the act that violates it. Chicago, R. I. & P. R. Co. v. Barrett, 16 Ill. App. 17.

The liability of a railroad company for the wilful and wanton assault of its conductor upon a passenger is conceded in Wabash, St. L. & P. R. Co. v. Rector, 104 Ill. 296.

The ground of some of the Indiana decisions is rather obscure, but in several the courts clearly adopt the stricter rule of liability.

Stating that those who visit public places in response to invitation, made generally or otherwise, have a right to personal protection while there,—especially so as against assault from agents and servants,—an agricultural association was held liable for the act of a gatekeeper in knocking down and violently assaulting a patron, in Brooks v. Jennings County Agri. Joint-Stock Asso. (Ind. App.) 73 N. E. 951.

The liability of a steamship common carrier for the shooting of a passenger by one of its crew is not affected by the fact that men of a quarrelsome, violent, and fighting nature are usually employed on steamboats. Memphis & C. Packet Co. v. Pikey, 142 Ind. 304, 40 N. E. 527.

A railway company is liable for an injury wantonly inflicted by a brakeman on a passenger traveling on a train upon which he

had put him about. No authority is cited, and, without controverting that statement, it is sufficient to say that, according to the verdict, the agent in the present case was in the line of his duty. Wesson v. Seaboard & R. R. Co. 49 N. C. (4 Jones, L.) 379. Here the defendant had let out the building of the road to contractors, who, while so working, committed a trespass on adjacent lands without the knowledge of the defendant. The court said a master is not liable for the wilful trespass of a servant. He is liable in an action on the case for an injury caused by the negligence or unskilfulness of a servant while doing his business, but not in an action of trespass *vi et armis*. But there is another ground to support that conclusion, to wit, that a contractor is not a servant proper. His is an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. He is not subject to the orders of the other contracting party in respect to the details of the work, but is only bound to do the specific work according to an agreed plan. Baron Rolfe, in Reedie v. London & N. W. R. Co. 20 L. J. Exch. N. S. 65, said: "But neither the principle of the rule [of master and servant], nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned." Hussey v. Norfolk Southern R. Co. *supra*, was an action for slander by defendant's general

is acting as brakeman. This liability is based upon the doctrine that a passenger, while traveling on a train, is under the care and control of the railway company, and is, hence, entitled to be protected against the wilful misconduct of the company's agents. Wabash R. Co. v. Savage, 110 Ind. 156, 9 N. E. 85.

"One of the prime duties resting upon a railroad company is to protect its passengers from assaults and injuries by its servants; nor does the question of its liability for a breach of this duty depend upon whether or not the servant, in the performance of the act, is within the scope of his employment." Indianapolis Union R. Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219.

Recognizing the principle that a carrier undertaking to carry a passenger upon its train is bound to do it safely, it was held in Terre Haute & I. R. Co. v. Jackson, 81 Ind. 19, that the carrier was liable for the wilful act of its servant in throwing a jet from a water tank upon a passenger.

"Common carriers, innkeepers, merchants, managers of theaters, and others who invite the public to become their partons and guests, and thus submit personal safety and comfort to their keeping, owe a special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them." In this case a theater manager was held liable for the unjust removal of a patron by an employee. Dickson v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1.

But in Evansville & C. R. Co. v. Baum, 26 Ind. 73, another view is taken. There, the court does not approve of the doctrine making one having a special duty toward another liable for the malicious act of his servant which violates that obligation. It is said that even the innkeeper whose cook feloniously mingles poison with the food of a guest must then respond in damages for the injury: "nor will sound policy maintain the application of a rule of law to railways or corporations, on this subject, which shall not be alike applied to others, as has been intimated in some quarters. The suggestion is not fit to be made, much less sanctioned, in any tribunal pretending to administer justice impartially." The court regards as the proper rule that, if the act of the servant, complained of, was necessary to be done to accomplish the purpose of the servant's employment,—if it was essential as a means to attain the end directed by the master, and was intended for that purpose,—then it was implied in the employment; and the master is liable, though the servant may have executed it wilfully and maliciously. But when it is unnecessary to the performance of the master's service, and not really intended for that purpose, but is committed by the servant merely to gratify his own malice, though under pretense of executing his employment, it is not done to serve the master, and is not, in fact, within the scope of the employment; and the master is therefore not liable.

The stricter rule of liability seems to have been adopted in Kansas. The court says, *arguendo*, in Missouri, K. & T. R. Co. v. Weaver, 16 Kan. 456, that there is a special duty on the carrier to protect his passengers not only against the violence and insults of strangers and copassengers, but against the violence and insults of its own servants; and that for a breach of that duty he ought to be compelled to make amplest reparation; that the law wisely and justly holds him to a strict and rigorous accountability, upon which depend in no small degree the safety and comfort of passengers; that the carrier selects his own agents, and, unless he finds that violence and abuse on their part meet with swift and sure punishment, he will soon become indifferent to their character and conduct, and rudeness and insult and violence will take the place of politeness, courtesy, and assistance.

So, according to Missouri P. R. Co. v. Divinney, 66 Kan. 776, 71 Pac. 855, a passenger is entitled to protection against wrongful acts of a carrier's servant whether such act occurred in the discharge of his duties to the

superintendent, and came to this court upon demurrer. This court overruled the demurrer, and sent the case back for such action as the defendant might be advised.

The first five prayers for instruction by the defendant were, in substance, that there was no evidence that the agent was acting in the line of his duty to his employer, or that if they believed the evidence they should answer the first issue "No." These prayers assumed the very question which the jury had to consider, and that was properly left to the jury. The last prayer is answered in another part of this opinion.

We think the charge of the court presented the case fully as favorably as the defendant could ask to the jury. The exceptions to the charge were that the court refused to give the prayers to the jury. We think the court gave the defendant's prayers, as far as was proper, to the jury, and the exceptions are overruled. While the abusive language of the deceased would have justified his expulsion by necessary force, it could not extenuate such excessive violence on the part of the agent. The burden of proving and making out a case, at least presumptively, was upon the plaintiff throughout the trial; but, when the killing is admitted, then the burden of showing extenuating circumstances, by a preponderance of evidence, was upon the defendant. That was a material part of his defense, and the jury was so instructed. State v. Willis, 63 N. C. 26; New Orleans & N. E. R. Co. v.

company or not; such acts being a violation of the contract of his company to carry its passengers safely and accord them proper treatment.

It is difficult to determine just where the Kentucky courts stand upon this question.

In Winnegar v. Central Pass. R. Co. 85 Ky. 547, 4 S. W. 237, it is held immaterial, as to the carrier's liability upon his contract to carry a passenger safely, that his servant violated it wilfully.

And that an action will lie in contract or tort against a carrier for the act of its conductor in wantonly assaulting a passenger. Ibid.

But where an attempt was made in Patterson v. Maysville & B. S. R. Co. 25 Ky. L. Rep. 1750, 78 S. W. 870, to hold a carrier liable for the act of its conductor in having a passenger arrested on a charge which proved unfounded, the court held that corporations have never been held liable in Kentucky for the malicious acts of their employees, not committed in the scope of their employment; and sustained a demurrer to the petition.

A new view is taken in Sherley v. Billings, 8 Bush, 147, 8 Am. Rep. 451, at first glance in the nature of a combination of the two doctrines, but which upon further reflection will be seen to tend toward the stricter rule of liability. In this case a steamboat carrier was held liable for a wanton assault committed upon a passenger by a servant. This was upon the theory that all intercourse between officers and passengers, naturally growing out of the relationship existing between them, is within the scope of their employment.

The Louisiana courts rather lean toward the stricter rule.

Carriers are responsible for the misconduct of their servants toward passengers to the same extent as for their misconduct in regard to merchandise committed to their care. Keene v. Lizardi, 5 La. 431, 25 Am. Dec. 197.

Street railway companies are not liable for wilful and tortious acts of their servants, committed outside the scope of their employment, as held in Lafitte v. New Orleans City & Lake R. Co. 43 La. Ann. 34, 12 L. R. A. 337, 8 So. 701. The act in question in this instance was the arrest of a passenger by a driver on the charge of passing counterfeit money. For insulting conduct, however, by the driver toward the passenger while the latter was in the car before being arrested, the company was held liable.

A carrier is liable for a malicious assault by an employee upon a passenger. Williams v. Pullman Palace Car Co. 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85.

A shipowner is liable for the tortious act of the master toward a passenger. Block v. Bannerman, 10 La. Ann. 1.

Probably the leading case upholding the rule of stricter liability comes from Maine.

In this case, Goddard v. Grand Trunk R. Co. 57 Me. 202, 2 Am. Rep. 39, the court states that the fallacy of the argument that the master is not responsible as a trespasser, unless by direct or implied authority to the servant he consents to the unlawful act, when applied to a common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger, and the duty which he owes to a stranger; that it may be true that, if the carrier's servant wilfully and maliciously assaults a stranger, the master will not be liable; but that the law is otherwise when he assaults one of his master's passengers. "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and, if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and copassengers, but *a fortiori*

Jopes, 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109.

After mature consideration of this case, by reason of its importance, we are unable to see any error in the trial below.

Affirmed.

Avery, J., concurring:

The correctness of the ruling in the court below depends, not upon the general principles governing the liability of the master for the torts of his servant, but upon the nature, extent, and duration of the duty of protection which is implied in contracts for the carriage of passengers. Stewart v. Brooklyn & C. T. R. Co. 90 N. Y. 588, 594, 43 Am. Rep. 185. It is important, therefore, to define the duty particularly and clearly, and to determine when it arises, and when it ceases to exist. From the inception of the relation between them, until it ends, the law imposes upon the carrier the duty of protecting his passenger absolutely against his own servants, and qualifiedly against all other persons. Though the conduct of the employee or officer in doing violence to the passenger may be wholly unauthorized, beyond the scope of his authority, and even wilful and malicious, the obligation to respond in damages for any injury done still rests upon the principal just as fully as it would had the master commanded or encouraged the commission of the act. Hutchinson, Carr. §§ 595–597; Goddard v. Grand Trunk R. Co. 57 Me. 202, 2 Am. Rep. 39; Sherley v. Billings, 8 Bush, 147, 8 Am. Rep.

against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the wilful misconduct of the carrier's servant, the carrier is necessarily responsible."

Following Goddard v. Grand Trunk R. Co. *supra*, the carrier was held liable for a brutal assault upon a passenger without sufficient justification, in Hanson v. European & N. A. R. Co. 62 Me. 84, 16 Am. Rep. 404.

Where a passenger, on a steamer, upon making a perfectly proper remark in defense of a relative who was also a passenger, was set upon by the waiters of the steamer and violently beaten, the carrier was held liable by virtue of its contract to carry safely. Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311.

In an *arguendo* statement in Great Western R. Co. v. Miller, 19 Mich. 305, the court says that for the wanton and malicious acts of a conductor the employer is not on the same footing with him in regard to liability.

But in a late case the doctrine of stricter liability is adopted. Thus, it was held that the rule relieving a master from liability for a malicious injury inflicted by his servant when not acting within the scope of his employment does not apply between a common carrier of passengers and a passenger; it being the duty of the carrier to protect its passengers against injury from the wilful misconduct of its servants while performing the contract to carry. Johnson v. Detroit, Y. & A. A. R. Co. 130 Mich. 453, 90 N. W. 274.

A carrier is liable for the act of its brakeman in violently pushing a passenger from the rear of a car when the train was going at a speed that rendered it dangerous,—such an act was a violation of the carrier's duty to carry the passenger safely. Cain v. Minneapolis & St. L. R. Co. 39 Minn. 297, 39 N. W. 635.

In an action for breach of contract to carry safely, the carrier was held liable for the act of a brakeman in suddenly and without warning striking a passenger a violent blow in the face, upon evidence sufficiently proving that the brakeman was in fact occupying that position. Conger v. St. Paul, M. & M. R. Co. 45 Minn. 207, 47 N. W. 788.

It was contended that the rule holding a carrier liable for the malicious act of a servant was not applicable to an express company whose agent had maliciously assaulted a patron; but the court said: "Doubtless there is a difference in the extent of the application of the principle, as between carriers of passengers and express companies, measured exactly by the difference in the things done by them in the discharge of their duties respectively. But the principle applies to both. An express company does not transport passengers, and cannot be made liable as a carrier of passengers might for wilful torts committed by its agents on passengers in their transportation; but it keeps offices for the transaction of its proper business, . . . and in its dealings with its customers, in its offices, in its business, it is bound, in Judge Story's language, 'for respectful treatment and decency of demeanor.'" Richberger v. American Exp. Co. 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922.

An early Missouri decision had advanced the following very exceptional view (the fact of any special duty toward a passenger seems not to have been considered): That, if the conduct of a street-car driver toward the passenger was wilful and malicious, the company was not liable therefor; that it was answerable only for the driver's negligence, incapacity, or unskilfulness. McKeon v. Citizens' R. Co. 42 Mo. 83.

But later a strong decision comes from that state upholding the stricter rule of liability. Thus, the carrier is responsible for the malicious and wanton acts of the servant to a passenger, whether done in the line of his employment or not, if done during the course of the discharge of his duty to the master which relates to the passenger; thus, if a carrier furnishes a servant, who, instead of protecting, insults or assaults, a passenger, it has directly failed in its duty to the passenger. Eads v. Metropolitan R. Co. 43 Mo. App. 536.

451; Peoples v. Brunswick & A. R. Co. 60 Ga. 282; Stewart v. Brooklyn & C. T. R. Co. *supra;* Terre Haute & I. R. Co. v. Jackson, 81 Ind. 19; Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Western & A. R. Co. v. Turner, 72 Ga. 292, 53 Am. Rep. 842; Illinois C. R. Co. v. Sheehan, 29 Ill. App. 90; Dwinelle v. New York, C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. Rep. 611, 24 N. E. 319; International & G. N. R. Co. v. Kentle (Tex.) 13 Am. & Eng. R. Cas. 337; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311. In the case of the female passengers, the weight of authority goes further, and extends the obligation to them so far as to impose the legal duty upon the carrier of protecting them, not only against indecent assaults, but against insulting proposals or insolent abuse, obscene or offensive words. Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504; Bryan v. Chicago, R. I. & P. R. Co. 63 Iowa, 464, 19 N. W. 295; Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. 530; Campbell v. Pullman Palace Car Co. 42 Fed. 484. A railroad company is bound, also, to use reasonable vigilance to protect a passenger against violence at the hands of fellow passengers, or of intruders, or of any person permitted by it to come on its premises; and where it appears that its conductor knew, or had reasonable ground to apprehend, that the safety of a passenger or passengers was endangered by any threatened force from within or outside of the train, and failed to use every available

Also, in an earlier decision a carrier was held liable for a wanton and malicious assault by its conductor upon a passenger, upon the ground of the contract obligation of the carrier to carry safely. Randolph v. Hannibal & St. J. R. Co. 18 Mo. App. 609.

The rule relieving a master from liability for a malicious injury inflicted by his servant when not acting in the scope of his employment does not apply as between a common carrier of passengers and a passenger on account of the contract obligation of the carrier safely and securely to carry its passengers. Haver v. Central R. Co. 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 648, 41 Atl. 916.

In New York the question has been considered many times, and a variety of opinions exists. A number of decisions regard as absolutely necessary to the creation of liability, that the malicious act be committed by the employee in the line of his duty.

Thus, the court says, in Parker v. Erie R. Co. 5 Hun, 57, that it would be unjust to hold a carrier liable for insulting words used, or wrongful acts done, by employees unless done while performing duties incident to the business in which they are employed; and holds acts complained of not done in the course of the servant's employment, although from the facts it appears that they were committed during the continuance of the relation of carrier and passenger.

So, where a passenger on a regular train was injured in a collision with a wild-cat engine, the court held that the jury should have been instructed that, if the engine was maliciously started by one of the carrier's employees, the carrier was not liable, since such an act would have been outside the scope of his employment. Mars v. Delaware & H. Canal Co. 54 Hun, 625, 28 N. Y. S. R. 228, 8 N. Y. Supp. 107.

And so, upon the ground that a principal is liable for the wilful acts of a servant within the scope of the employment, but not for such as are committed clearly outside of such employment and authority, a refusal to charge that, if a conductor acted wilfully and for personal motives in committing an assault upon a passenger, the verdict must be for the carrier, was held error in Murphy v. Central Park, N. & E. River R. Co. 16 Jones & S. 96.

The courts, in a few instances went so far as to apply the principle of Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507, to the relation of carrier and passenger.

Thus, it was held in Hibbard v. New York & E. R. Co. 15 N. Y. 455, that for the wilful acts of the servant the master is not responsible, because such wilful acts are a departure from the master's business. So, in removing from the car a passenger who refuses to exhibit his ticket, if the conductor exceeds the force necessary, he, and not the company, is responsible; citing Wright v. Wilcox, *supra.*

So, in Jackson v. Second Ave. R. Co. 47 N. Y. 274, 7 Am. Rep. 448, the court concedes the law to be clear that a carrier would not be liable for the act of its conductor toward a passenger if it was wilful and malicious.

And so, in another instance the court says: "But if the conductor, although acting within the scope of his employment and authority, but without regard to his service to his employer, and not for the purpose of performing any duty that he, as agent or representative of his employer, is bound to perform, but from malice and in order to effect some purpose of his own, foreign to the employment, wantonly commits an assault upon or causes damage to another,—in that case the act is not the act of the master, but the act of the servant only; and the master is not liable for it." Flynn v. Central Park R. Co. 17 Jones & S. 81.

And so, in Isaacs v. Third Ave. R. Co. 47 N. Y. 122, 7 Am. Rep. 418, the court failed to take into consideration any contract obligation of a carrier toward its passenger, and held, relying upon the principle of Wright v. Wilcox, *supra,* that the carrier was not liable for a wanton, and wilful, and unauthorized trespass committed by its conductor upon a passenger. But this line of cases was expressly overruled in Stewart v. Brooklyn & C. T. R. Co. 90 N. Y. 588, 43 Am.

means to avert the threatened wrong, the company is liable to respond in damages for any assault that ensued. Hutchinson, Carr. § 553a; Britton v. Atlanta & C. Air-Line R. Co. 88 N. C. 536, 43 Am. Rep. 749; Spohn v. Missouri P. R. Co. 87 Mo. 74, 101 Mo. 417, 14 S. W. 880; New Orleans, St. L. & C. R. Co. v Burke, 53 Miss. 200, 24 Am. Rep. 689; Pittsburg & C. R. Co. v. Pillow, 76 Pa. 510, 18 Am. Rep. 424; Pittsburgh, Ft. W. & C. R. Co. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224; Flint v. Norwich & N. Y. Transp. Co. 34 Conn. 554, Fed. Cas. No. 4,873; Chicago & E. R. Co. v. Flexman, *supra;* Angell, Carr. § 521, note a, p. 462; Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568. Where the servant of the railway company is actually assaulted, he has the same right as other persons to repel force by resistance; but, having overcome it, he becomes liable himself, and renders the carrier answerable, if he further pursue and punish the wrongdoer. Hanson v. European & N. A. R. Co. 62 Me. 84, 16 Am. Rep. 404.

Insulting language is never deemed, in law, provocation sufficient to justify an assault, or to warrant the use of excessive force in the expulsion of intruders. But the servant of a company that owes the duty of pertection to one on its premises by its invitation, or to transact business with it, stands in a relation to such person somewhat analogus to that which a peace officer sustains to a prisoner in his custody. It is therefore clear that the defendant was liable to answer in damages for the killing of the

Rep. 185, where the court says, in regard to Isaacs v. Third Ave. R. Co. *supra:* "That case was discussed by counsel and determined by this court upon the assumption that the rule of the master's liability for the assault of a servant, committed upon a person to whom the master owed no duty, was applicable to that case. The mind of the court was not called to the fact that the rule applicable to such a case does not apply to the case of an assault committed upon a passenger by a servant intrusted with the execution of a contract of a common carrier." In this case the carrier was held liable for the act of a car driver in unjustifiably attacking and beating a passenger. The court says that, had the person assaulted been one to whom the carrier owed no duty, the dismissal of plaintiff's complaint would probably have been correct; but that the rule which applies in such a case has no application as between a common carrier and his passenger, since, by the carrier's contract with the passenger, it undertakes to carry him safely and to treat him respectfully, and, while it does not undertake to insure him against every possible danger, it does undertake to protect him against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. The court says that this rule rests upon sound reason, and is abundantly supported by authority.

Two earlier decisions were in harmony with this holding.

Thus, a carrier is liable for the detention of a train, producing damage to a passenger, although the detention was the wilful act of the conductor. This was upon the ground that the detention of the train was a violation of the contract obligation of the carrier to perform the contract of carriage with reasonable diligence. Weed v. Panama R. Co. 17 N. Y. 362, 72 Am. Dec. 474.

So, where a carrier, by its servant, was guilty of a personal and intentional assault, the court declared that the carrier was without a legal defense. Sanford v. Eighth Ave. R. Co. 23 N. Y. 343, 80 Am. Dec. 286.

The reasoning shown in Stewart v. Brooklyn & C. T. R. Co. *supra*, has been subsequently adopted in the numerous decisions, and must be conceded to be settled law in this state.

According to Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319, no matter what the motive is which incites the servant of the carrier to commit an unlawful or improper act toward the passenger during the existence of the relation of carrier and passenger, the carrier is liable for the act and its natural and legitimate consequences; and so, where a violent blow was given to a passenger by a porter while the carrier was performing its contract to carry safely, it was held a question for the jury whether the porter was at the time employed in the performance of his duties as the carrier's servant.

The law is declared well settled that where a railroad company would be liable for the careless act of its employee, it would also be liable for his wilful or malicious act, because of injury to a passenger whom it is bound to convey safely. Mulligan v. New York & R. B. R. Co. 129 N. Y. 506, 14 L. R. A. 791, 26 Am. St. Rep. 539, 29 N. E. 952 (dissenting opinion).

Once the relation of carrier and passenger is entered upon, the carrier is answerable for all consequences to the passenger of the wilful misconduct or negligence of the persons employed by it, in the execution of the contract which it has undertaken towards the passenger. The carrier was held liable for insulting and slanderous language by a servant to a passenger, in this instance, while the servant was acting within the scope of the employment. Palmeri v. Manhattan R. Co. 133 N. Y. 261, 16 L.R.A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001; Hart v. Metropolitan Street R. Co. 65 App. Div. 493, 72 N. Y. Supp. 797, *obiter*.

The true rule is declared to be that, if a conductor makes an assault while in the management of a car, even if maliciously done, the carrier is responsible. in Schwartzman v. Brooklyn Heights R. Co. 84 App. Div. 608, 82 N. Y. Supp. 890.

plaintiff's intestate, who was at the time, in contemplation of law, under its protection; and, as will appear from the authorities already cited, the liability is in no wise dependent upon the question whether the agent was acting within the scope of his authority. Pittsburgh, Ft. W. & C. R. Co. v. Hinds, *supra*. The fact that the intestate was on the premises and under the protection of the company, if such was his status, gave him the right to claim absolute immunity from injury at the hands of any of its servants. The duty of insuring his safety against injury by intruders might possibly depend upon the question whether a servant was at the time on duty at the place of the threatened injury. But for any injury sustained at the hands of its servant, whether on or off duty, a person on its premises by its invitation may hold a railroad company unconditionally responsible. The contract of carriage begins not later than the time when a person enters upon the premises of a carrier for the purpose of securing passage; but, where carriages are furnished by it to transport passengers to a station, a person entering such vehicle, or even halting one for the purpose of boarding it, with the same object in view, and under the implied invitation of the carrier, is entitled to the same right of protection as after the purchase of a ticket. Hutchinson, Carr. §§ 556–561; Dwinelle v. New York C. & H. R. R. Co. *supra;* Brien v. Bennett, 8 Carr. & P. 724; Hansley v. Jamesville & W. R. Co. 115 N. C. 602, 32 L.R.A. 543, 44 Am. St.

The rule is sufficiently broad to protect a passenger on an ocean steamer from the violent seizure of his personal baggage by one of the steamer's officers, and the flinging of such baggage into the sea. De Felice v. Compagnie Française de Navigation, 83 App. Div. 73, 82 N. Y. Supp. 555.

The rule relieving the master from liability for an injury caused by his servant, when not acting within the scope of his employment, does not apply, even though it is maliciously inflicted, as between a common carrier of passengers and a passenger. A carrier is bound to protect a passenger absolutely against the misconduct of its own servants. McLeod v. New York, C. & St. L. R. Co. 72 App. Div. 116, 76 N. Y. Supp. 347, *arguendo*.

So by its contract of carriage, the carrier assumes an absolute obligation to protect a passenger as well against the wilful as the negligent acts of its servants; and for an unjustified and outrageous ejection of a passenger by an employee the carrier is liable. Smith v. Manhattan R. Co. 45 N. Y. S. R. 865, 18 N. Y. Supp. 759.

It was long held by the courts that a common carrier was not responsible for a wilful assault by one of its employees upon a passenger. This rule, however, has been abrogated upon the theory that the common carrier invites the passenger to subject himself to the protection and care of the employees of the corporation, and, under these circumstances the common carrier should be responsible for all the acts of the subordinates towards the passenger while under his custody and control. In like manner, the storekeeper invites the public to enter his premises, and to subject themselves to the custody and control of his subordinates, and by parity of reasoning he should be held responsible for the brutalities of such subordinates, even where they are not committed within the strict line of his employment. Mallach v. Ridley, 24 Abb. N. C. 172, 9 N. Y. Supp. 922.

So, a merchant, having invited patrons into his store for his benefit, and having authorized and induce them to confide in the good conduct of his servants to whom, in the transaction of business, he commits them, thereby assumes the duty, by the exercise of reasonable care, of protecting them from injury by the misconduct of such servants. Swinarton v. Le Boutillier, 7 Misc. 639, 28 N. Y. Supp. 53, *arguendo*.

In deciding that a merchant was, as a matter of law, liable for the act of a clerk in unjustifiably kicking a customer out of the store, the court uses the following language: "At the present day, too, by many arts, every effort is made to induce prospective customers to enter mercantile establishments, examine wares there offered for sale, and transact other lawful business. The time has come when the law, always elastic to mete out justice as the growing needs of mankind's progress require, should hold the master liable for the wrongful acts of servants toward those lawfully upon the scene of his place of business." Collins v. Butler, 83 App. Div. 12, 81 N. Y. Supp. 1074.

Since the decision in DANIEL v. PETERSBURG R. Co. the North Carolina court has declared, in affirming a judgment against a carrier for an assault by one of its employees upon a passenger, that where the relation of carrier and passenger exists the conduct of an employee of the carrier in inflicting violence upon the passenger, though the act is outside of the scope of his authority, or even wilful and malicious, subjects the carrier to liability in damages just as fully as if the carrier had encouraged the commission of the act. This proposition, however, was dissented from by one judge as not having been yet adopted by the North Carolina courts, and as having been in fact rejected in DANIEL v. PETERSBURG R. Co., and because the facts in the case did not call for such an expression. Williams v. Gill, 122 N. C. 967, 29 S. E. 879.

In a slightly earlier decision the court had adopted the following doctrine: That it is among the implied provisions of the contract between a passenger and a railway company that the latter has employed suitable servants to run its trains, and that passengers will receive proper treatment

Rep. 474, 20 S. E. 528; Keokuk Northern Line Packet Co. v. True, 88 Ill. 608; Thomp. Carr. Pass. p. 42, note. The contract for the carriage of the person with implied right of protection ceases ordinarily when the passenger is safely landed at his point of destination, and has left, or had reasonable time to leave, the premises of the carrier. Johnson v. Boston & M. R. Co. 125 Mass. 75; Patterson, Railway Accident Law, §§ 221, 320; Imhoff v. Chicago & M. R. Co. 20 Wis. 344; Pittsburgh, C. & St. L. R. Co. v. Krouse, 30 Ohio St. 222. But, even when only so much of the implied contract is in question as imposes the duty of carrying to its destination the person of the passenger, the law looks to his safety, by requiring of the carrier the exercise of ordinary care in keeping in good condition every part of the usual way which is to be traveled by him in getting off the premises. Hutchinson, Carr. p. 593, §§ 516, 519; Dodge v. Boston & B. S. S. Co. 148 Mass. 207, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373.

It was held by some of the courts, formerly, that the proprietors of public conveyances which carried passengers were not responsible for their baggage unless a distinct price was paid for its carriage. "But the law is now settled otherwise, and when the carrier contracts for the carriage of the passenger, either expressly, or by receiving him upon its conveyance, the carriage of his reasonable and ordinary baggage is regarded as being also undertaken, as incidental to the principal contract, and as equally obliga-

from them; and that a violation of this implied contract is actionable in favor of the passenger injured by its breach, although the act of the servant was wilful and malicious, and whether it was within the line of employment or not. White v. Norfolk & S. R. Co. 115 N. C. 631, 44 Am. St. Rep. 480, 20 S. E. 191.

The early case of Jones v. Glass, 35 N. C. (13 Ired. L.) 305, is consistent with these holdings which favor the stricter rule, although upon a slightly different principle. It was there held that one who had borrowed a slave from another was liable for an act of his overseer in permanently impairing the health of the slave by a violent and passionate blow with a block of wood. This was upon the principle of the relation between a bailor and a bailee; that the bailee is bound to take such care of the thing bailed as persons of ordinary prudence do of their own; and that he is equally liable for any act of his servant in derogation of this duty, as he would be for an act of his own.

It must be conceded, notwithstanding the decision in DANIEL v. PETERSBURG R. CO. does not entirely get away from the other doctrine, that the North Carolina courts, in other holdings, show a decided tendency toward the adoption of the stricter rule, urged in the concurring opinion therein.

So far as discovered, the question has not been squarely up in Ohio previously to STRANAHAN BROS. CATERING CO. v. COIT, and this decision therefore keeps Ohio in line for the present with the fewer states adopting a similar doctrine.

The following conflicting decisions appear in Pennsylvania:

A carrier is not liable for the act of its conductor in wilfully striking a boy passenger a blow with an iron bar, it not being within the scope of his authority; since no company would ever confer the authority to beat even trespassers on their cars. Pittsburg, A. & M. Pass. R. Co. v. Donahue, 70 Pa. 119.

So, if a conductor was at the time acting in the line of his duty and within the scope of his employment in ejecting a passenger, the carrier is liable for unnecessary injury; but for a conductor's malicious trespass the carrier is not liable. Pennsylvania Co. v. Toomey, 91 Pa. 256.

But, according to Smith v. Railroad Co. 41 Phila. Leg. Int. 15, while ordinarily an employer is not liable for the wilful, tortious acts of an employee, that rule does not hold between a carrier and a passenger, for the company is bound to protect the passenger, and the conductor is placed, for that purpose, in charge of a car, so that the company is liable for an assault upon a passenger by him while in the discharge of his other duties *qua* conductor.

The Tennessee decisions have consistently held in harmony with the stricter doctrine.

Thus, if a mate, while in charge of a vessel, commits an unwarrantable assault upon a passenger, the carrier will be liable. R. R. Springer Transp. Co. v. Smith, 16 Lea, 498, 1 S. W. 280.

So, it is the duty of a sleeping car company to maintain a careful and continuous watch over the interior of the car while the berths are occupied by sleepers; and, if a servant of the company, charged with the duty of watching and protecting the property of the guest, purloins it himself, the company is responsible. Pullman Palace Car Co. v. Gavin, 93 Tenn. 53, 21 L.R.A. 298, 42 Am. St. Rep. 902, 23 S. W. 70.

The carrier is liable in exemplary damages for grossly insulting behavior of a drunken motorman toward a passenger. Knoxville Traction Co. v. Lane, 103 Tenn. 376, 46 L. R.A. 549, 53 S. W. 557.

Texas strongly adopts the stricter rule of liability. One decision, however, seems to be out of line.

Thus, if a railroad employee engaged in a private brawl assaults a licensee of the company, the company is not liable. Texas & N. O. R. Co. v. Taylor, 31 Tex. Civ. App. 617, 73 S. W. 1081.

A number of other strong decisions, however, adopt the contrary view.

In holding the carrier liable for a brutal and atrocious assault committed upon a passenger by a conductor, the court says: "A

tory upon the carrier." Hutchinson, Carr. § 678. But, though the legal obligation to transport the ordinary baggage is incidental to the agreement to carry the person, the liability of the carrier for its safety until a reasonable time after the passenger reaches his destination extends, not simply to responsibility for want of ordinary care, as in the case of the passenger himself, but is the same as that of the carrier of goods. Hutchinson, Carr. § 678. Every obligation growing out of the contract continues so long as the contract continues. Dwinelle v. New York C. & H. R. R. Co. *supra*. After a reasonable time, if the baggage is not called for or removed from the station, the liability as insurer ceases, and the law substitutes for it that of warehouseman. Hoeger v. Chicago, M. & St. P. R. Co. 63 Wis. 100, 53 Am. Rep, 271, 23 N. W. 435.

When the relation of carrier, with the obligation of an insurer, ceases, that of warehouseman takes its place, not under any new agreement, but under the original contract of carriage, which still binds the carrier to as high a degree of diligence in caring for it as it was at any time bound to exercise for the safety of the passenger while on its carriage or premises. Hutchinson, Carr. § 712. "The fair construction of such a contract [says Hutchinson, § 713] is said to be that the carrier agrees, for a consideration, to transport the passenger and his baggage to his destination, and deliver the latter to him on its arrival, if called for, and, if not called for, that it shall

common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants employed in executing the contract of transportation. Its liability rests upon the principle that it had engaged the performance of certain duties, and has selected its own servants for the performance of those duties, and hence an assault by an employee is a breach of the duty of the carrier to its passenger. Either the company or the passengers must take the risk of infirmity of temper, maliciousness, or misconduct of the employee whom the company has placed upon the train, and to whom it has committed the power to discharge its duties and to look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is therefore but just to make the company, rather than the passengers, take the risk, and to hold it responsible." St. Louis Southwestern R. Co. v. Johnson, 29 Tex. Civ. App. 184, 68 S. W. 58.

The rule that a master is not liable for an injury resulting from the wilful and malicious acts of his agent, not done in the course of his employment, cannot be applied in a case in which the master, by contract, express or implied, is under obligation to protect the injured person from the servant's wrongful act as well as his own. When the duty is thus imposed on the master, the servant employed to discharge it is a representative of the master, for whose acts, whether of omission or commission, resulting in injury to the person entitled to have the duty performed, the master must be held as fully responsible and liable to make at least actual compensation as though the act were his own personal act. The master's obligation cannot be avoided; and whether the servant's act, violative of the master's duty, be wilful or malicious, is a matter of no importance in determining the liability and obligation of the master to make actual compensation to the person injured. In this case a conductor, some time after an altercation with a passenger, returned, and, approaching him from the rear, brutally assaulted him. Under these facts, it was held that the carrier was liable for the injuries resulting from the wilful and malicious acts of the conductor. Dillingham v. Anthony, 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139.

It is declared to be settled law that unwarrantable assaults upon passengers by a carrier's servants are breaches of the contract of carriage, and as such impose liability upon the carrier. The principles of law applicable to the relation of master and servant do not fully define the rights, duties, and obligations between carriers and passengers. International & G. N. R. Co. v. Kentle (Tex.) 16 Am. & Eng. R. Cas. 337.

It was contended in one case that a master is not liable for the wrongful act of his servant, not done in the scope of his employment; but, while conceding the soundness of the principle, the court held it inapplicable between passenger and carrier, declaring that the latter is liable for an injury inflicted upon a passenger by its servant in whatever capacity the servant may be employed. St. Louis S. W. R. Co. v. Franklin (Tex. Civ. App.) 44 S. W. 701.

The carrier was held liable for the injury resulting to a passenger from a negro woman employed at a station, by reason of the latter's excessive rage at a trifling accident. The court says that in cases like this the carrier is absolutely liable for injuries unlawfully and wrongfully inflicted by his servant upon a passenger. Gulf, C. & S. F. R. Co. v. Luther (Tex. Civ. App.) 90 S. W. 44.

Where a carrier's employee assaulted a passenger and inflicted serious bodily injury upon him, it cannot invoke the rule that the master is not liable for an injury resulting from the wilful and malicious acts of his agent, not done in the course of his employment. That rule does not apply when the injury is inflicted upon a passenger by a carrier's servant. Houston & T. C. R. Co. v. Washington (Tex. Civ. App.) 30 S. W. 719.

So, West Virginia follows the stricter doctrine.

Carriers are liable for the wilful, wanton, malicious, or illegal conduct of an employee

be properly stored, and reasonable care shall be exercised to prevent injury or loss until it is called for, or is lawfully disposed of." The plaintiff's intestate went upon the premises of the company, as he had a right to do, in order to surrender his checks and receive the baggage still held under the original contract of carriage. He paid his fare to that station, and acquired the incidental right to have it transported. A passenger does not lose his character as such by alighting at a station before reaching his destination. Parsons v. New York C. & H. R. R. Co. 113 N. Y. 356, 3 L.R.A. 683, 10 Am. St. Rep. 450, 21 N. E. 145. And he may get off and stop over at any intermediate point, and still, in his egress from and ingress to the station, he is under the protection of the carrier while on its premises. While declaring explicitly that the rule governing the master's liability for the torts of his servant does not apply "to the case of an assault committed upon a passenger by a servant intrusted with the execution of a contract of a common carrier," the court of appeals of New York, in Stewart v. Brooklyn & C. T. R. Co. 90 N. Y. 588, 594, 43 Am. Rep. 185, state the rule to be that the "carrier undertakes to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger." Whether the doctrine might not have been extended even further, it is not necessary for the decision of this case to determine. The station agent was discharging a duty which the defendant owed to the plaintiff's intestate, in receiving the checks and delivering the baggage. Before that duty was fully performed, and while the intestate was on the premises under the original contract of carriage to receive his trunks stored in its warehouse, its agent made a deadly assault upon him, with no pretense or other ground of excuse or justification than the use of insulting language, which in law is no provocation at all. This appeal presents a grave question, which has received mature consideration. While in this particular instance

towards passengers on their trains when such conduct is a breach of the duty owed to persons intrusting themselves to their care, at their solicitation, for compensation. Smith v. Norfolk & W. R. Co. 48 W. Va. 69, 35 S. E. 834.

And so, it makes no difference what was the conductor's motive for doing the injurious act,—how exclusively personal it may have been or how foreign to the master's business then in the nature of transporting the passenger,—if it was in violation of the master's duty to the passenger, which it was the conductor's duty to discharge as the master's servant and in the master's place. Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

A strong decision along this line comes from Wisconsin. The reasoning of the court is that, if a principal owes a duty to a third person, and delegates it to an agent, and the agent fails to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. In such cases malice is negligence. The violation of the contract of carriage in this instance was the act of a conductor in making an insulting approach to a female passenger. Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504.

In an earlier Wisconsin decision it was held that where the misconduct of the agent causes a breach of the obligation or contract of the principal, then the principal will be liable in an action, whether such misconduct is wilful, or malicious, or merely negligent. The action, though undeniably in tort, is treated virtually as an action *ex contractu*, and governed by the same rule as to damages. Milwaukee & M. R. Co. v. Finney, 10 Wis. 388.

Where a struggle in a station yard between a passenger and the carrier's servant was brought on by a wanton and aggressive act of the servant, not apparently acting in the execution of any duty for the company; and the arrest of the passenger, which the servant afterward caused to be made, was after the struggle was over and the passenger was quietly walking away,—these acts on the part of the servant were declared beyond the scope of his employment, and therefore acts for which the carrier was not liable. Walker v. South Eastern R. Co. L. R. 5 C. P. 640.

IV. Effect of injured party being the aggressor.

The courts are not agreed as to the effect, upon the master's liability for his servant's malicious acts, of the person's whose special rights were thereby violated having been the aggressor. A number of decisions go on the theory that the master is not thereby saved from liability, as held in DANIEL v. PETERSBURG R. CO.

Thus, sneers and contemptuous gestures on a passenger's part are no excuse for insulting treatment on the part of a conductor toward him. East Tennessee, V. & G. R. Co. v. Fleetwood, 90 Ga. 23, 15 S. E. 778.

So, the fact that a passenger's negligence furnishes the opportunity to a sleeping car company's servants to take his money does not release the company from its obligation to protect him against them. Pullman Palace Car Co. v. Matthews, 74 Tex. 664, 15 Am. St. Rep. 873, 12 S. W. 744.

Nor is an assault by a conductor upon a passenger excused, or the liability of a carrier defeated, by the fact that the passen-

it may impose a burden upon the carrier to answer for the wilful act of its agent, it is not probable that, with a full understanding of the law, such wilful conduct will be heard of again in the next half century. The law must hold the carriers to the duty of so managing their own servants as to insure the safety of the lives and limbs of persons under their protection. The carriers may provide for their own protection by care in the selection of servants, and the use of wholesome discipline where the employees fail in the discharge of their duty. The other questions are unimportant.

The fact that the plaintiff's intestate had come upon the premises by invitation of the company gave him a right to the protection of the company through its officers and servants. The contract of carriage, and the fact that he was receiving the baggage that had been transported under it, being admitted, the company was, nothing further appearing, liable for an injury to him by its servant. I think there was no error in instructing the jury that, under the admitted facts, the burden of proof was shifted upon the defendant to show that he was justified in making the deadly assault upon the plaintiff's intestate. While I concur with the majority of the court in the conclusion reached, I do not agree to the opinion of the chief justice in so far as it seems to make the liability of the defendant dependent at all upon the question whether the servant was acting within the scope of his authority. The liability for acts of servants is absolute, as to injuries inflicted by them on persons under their protection. I wish to emphasize the view that the principle governing this case affects the relation of master and servant only when the former is a common carrier; and, while the opinion of the court has been modified, it is still open to objection upon this point. The body of the foregoing opinion, submitted as a tentative one, was rejected by the court; but I still think that it places our conclusion upon the only impregnable ground.

Rehearing denied.

ger had used grossly profane and abusive language to the conductor without provocation. Baltimore & O. R. Co. v. Barger, 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560. This was upon the ground that the conductor was bound to see that passengers were properly treated and carried to their destinations, unless persisting in misbehavior, when they might be ejected from the car.

If an excessive battery is wantonly and maliciously inflicted by a servant upon a passenger, the carrier is liable notwithstanding the passenger acts in a provoking manner. Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442.

So, an assault made upon a passenger by a conductor renders the company liable, and mere words or epithets, however opprobrious, used by the person assaulted to his assailant, will not justify the assault. Coggins v. Chicago & A. R. Co. 18 Ill. App. 620.

A carrier is liable for a violent assault committed upon a passenger by a conductor some time after an altercation in which the passenger had been the aggressor; and the latter's provoking conduct was no justification for the act of the conductor. Galveston, H. & S. A. R. Co. v. La Prelle, 27 Tex. Civ. App. 496, 65 S. W. 488.

The conductor cannot rightfully assault the passenger merely because the passenger has insulted him, or otherwise provoked him by mere words; and if he does assault the passenger by reason of such provocation only, unaccompanied by any threats or acts of personal violence, the railroad company will be liable for the consequences of the assault, under the well-established rule which protects passengers against the misconduct of a common carrier's servants. Weber v. Brooklyn, Q. C. & Surburban R. Co. 47 App. Div. 306, 62 N. Y. Supp. 1.

A few decisions take an opposite view, and hold that offensive conduct on the injured party's part in effect dissolves the contract relation, and therefore frees the employer from responsibility.

Thus, a carrier is not liable for the great and unnecessary violence on the part of a conductor toward a passenger when the conductor was goaded into a state of excitement and passion by the passenger's grossly improper conduct. City Electric R. Co. v. Shropshire, 101 Ga. 33, 28 S. E. 508.

So, a passenger may recover against a carrier for injuries from an assault by a conductor, unless he was the aggressor, or the conductor acted in self-defense. Wise v. South Covington & C. R. Co. 17 Ky. L. Rep. 1359, 34 S. W. 894.

And so, where a passenger, by his own misbehavior, provokes an assault from a servant of a carrier, the carrier is not liable. Scott v. Central Park, N. & E. River R. Co. 53 Hun, 414, 6 N. Y. Supp. 382.

If, while a railroad employee is acting in the discharge of his duty, a licensee of the company, by insulting words, brings about an assault, the company is not liable, even if the assault occurs in an effort on the part of the employee to eject the licensee from the platform as a person not authorized to be there. Texas & N. O. R. Co. v. Taylor, 31 Tex. Civ. App. 617, 73 S. W. 1081.

Where a passenger, by his importunate conduct and abusive language towards a baggage man, provoked the latter, and an assault was the result of a quarrel, the blow being inflicted by the servant as an act of personal resentment, his act in so doing cannot be regarded as having been done in the execution of the service for which he was engaged, so as to render the carrier liable

OHIO SUPREME COURT.

STRANAHAN BROTHERS CATERING COMPANY, Plff. in Err.,
v.
FRANK R. COIT.

(55 Ohio St. 398, 45 N. E. 634.)

Master—malicious acts of servant.

1. A master is liable for the malicious acts of his servant, whereby others are injured, if the acts are done within the scope of the employment, and in the execution of the service for which he was engaged by the master.

Same—duty to patron.

2. Where a master owes to a third person the performance of some duty, to do or not to do a particular act, and commits the performance of the duty to a servant, the master cannot escape responsibility if the servant fails to perform it, whether such failure be accidental or wilful, or whether it be the result of negligence or malice. Nor is the case altered if it appear that the malice was directed to the master.

Same—adulteration of milk.

3. Where a master is under contract to deliver to the proprietor of a cheese and butter factory pure milk, and has knowledge that the milk so delivered is to be mixed with the milk of other patrons, and intrusts the delivery to a servant, who, in the course of such employment, delivers adulterated milk, the master is liable for damages necessarily and directly resulting by reason of such delivery; and it is not a defense to show that the servant, without authority, and purposely, and to gratify his malice towards his employer, and with intent to injure him, adulterated the milk so delivered by mixing with it water, and that the master had no knowledge of such adulteration. In such case the rule of damages is compensation for the injury.

(Bradbury, J., dissents.)

(December 8, 1896.)

Headnotes by the COURT.

ERROR to the Circuit Court for Portage County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendant in an action brought to recover damages for the delivery of adulterated milk under a contract for the sale of pure milk. Reversed.

Statement by **Spear, J.**:

The plaintiff's action was brought upon a

therefor. This case, however, was expressly not tried or considered on the theory of the contract of carriage between the carrier and passenger and the carrier's duty to vouch for the good conduct of his servants. Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373.

In a few instances such conduct on the part of the person injured has been held subject to consideration by the jury in mitigation of damages.

The jury should consider, in determining the damages, whether a wilful assault by a conductor upon a passenger just after the passenger alighted from the train was committed under the immediate influence of passion engendered by insulting words of the passenger, or was the outcome of cool deliberation. Houston & S. C. R. Co. v. Batchler, 32 Tex. Civ. App. 14, 73 S. W. 981.

It is error to charge that, if the conduct of a plaintiff was such as to aggravate a conductor into an assault, the jury were not entitled to take that conduct into consideration to mitigate compensatory damages; that such mitigation for that reason could only be had where punitive damages were sought. Freedman v. Metropolitan Street R. Co. 89 App. Div. 486, 85 N. Y. Supp. 986.

Provoking conduct on the part of a passenger may be received in evidence in mitigation of exemplary damages. Galveston, H. & S. A. R. Co. v. La Prelle, 27 Tex. Civ. App. 496, 65 S. W. 488.

V. Extent of liability.

The decisions again present a conflict upon the question as to whether punitive or compensatory damages may be awarded against the employer. The following decisions favor the award of punitive damages: Chicago & N. W. R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641; Louisville, N. A. & C. R. Co. v. Goben, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890; Louisville, N. A. & C. R. Co. v. Wolfe, 128 Ind. 347, 25 Am. St. Rep. 436, 27 N. E. 606; Southern Kansas R. Co. v. Rice, 38 Kan. 398, 5 Am. St. Rep. 766, 16 Pac. 817; Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. 530; Dawson v. Louisville & N. R. Co. 6 Ky. L. Rep. 668; Memphis & C. Packet Co. v. Nagel, 16 Ky. L. Rep. 748, 29 S. W. 743; Baltimore & O. R. Co. v. Blocher, 27 Md. 277; Yazoo & M. Valley R. Co. v. Williams (Miss.) 39 So. 489; Norfolk & W. R. Co. v. Anderson, 90 Va. 1, 44 Am. St. Rep. 884, 17 S. E. 757; Ickenroth v. St. Louis Transit Co. 102 Mo. App. 597, 77 S. W. 162; Sommerfield v. St. Louis Transit Co. 108 Mo. App. 718, 84 S. W. 172; Ammons v. Southern R. Co. 140 N. C. 196, 52 S. E. 731, *arguendo;* Parrott v. Atlantic & N. C. R. Co. 140 N. C. 546, 53 S. E. 432; Pittsburgh, Ft. W. & C. R. Co. v. Slusser, 19 Ohio St. 157; Artherholt v. Erie Electric Motor Co. 27 Pa. Super. Ct. 141; Spellman v. Richmond & D. R. Co. 35 S. C. 475, 28 Am. St. Rep. 858, 14 S. E. 947; Dagnall v. Southern R. Co. 69 S. C. 110, 48 S. E. 97; Quinn v. South Carolina R. Co. 29 S. C. 381, 1 L.R.A. 682, 7 S. E. 614; Lemon v. Pullman Palace Car Co. 52 Fed. 262.

A charge that, whenever the element of malice enters into an act performed by a conductor against a passenger, when the act is done in the strict line of the duty of the

petition of which the following is a copy: "Plaintiff is a corporation, duly organized and doing business, with its principal office in Cleveland, Ohio. That said plaintiff is engaged in the business of bakers and general caterers in the city of Cleveland, Ohio, and also in the manufacture of butter, cheese, and candies, and other confectionery. That in said business, and each of its branches, it requires, needs, and uses large quantities of pure milk and cream, butter and cheese, and ships large quantities of butter and cheese into the general market. That as a part of its said business, it runs a butter and cheese factory at Mantua, Ohio, where it purchases from its patrons, and receives, a large amount of milk, to be in part manufactured into butter and cheese, and in part shipped to its principal places of business, and in part skimmed and the cream therefrom sent to it at its said place of business in Cleveland, to be used in its said business as aforesaid. That defendant, Frank R. Coit, was one of plaintiff's patrons, and furnished large quantities of milk, delivered at its factory at Mantua, Ohio. That said defendant promised and agreed, at the time of bringing, first, his milk to plaintiff's said factory, to bring nothing but milk of first class or superior quality. That he brought milk to said factory from December 14, 1891, to November 21, 1892, and in all about 120,000 pounds, and received therefor the price of a superior quality of milk, to wit, about $1,150; but that said defendant, Coit, instead of bringing first-class milk, or milk of a superior quality, during all of said time furnished plaintiff, at its said factory, milk adulterated with water, only about two thirds of which was milk and one third water, and made foul by stale, filthy, and impure water, well knowing, at said time, it was to be placed with and mixed with the other milk of said factory, and knowing it was to be used in plaintiff's business as aforesaid. That the entire amount of milk received and used at said factory, as said defendant well knew, amounted to about 7,000 pounds daily upon the average. By reason of said adulterated milk furnished by said defendant, the product of said factory was greatly lessened and damaged. That the butter and cheese manufactured therefrom, and the milk with which said adulterated milk furnished by defendant was mixed, were poor, and of an

conductor, but under a state of facts not justifying the act done, exemplary damages may be rendered, is not erroneous. Choctaw, O. & G. R. Co. v. Hill, 110 Tenn. 396, 75 S. W. 963.

So, the damages assessed will be regulated by the presence or absence of personal malice. Carsten v. Northern P. R. Co. 44 Minn. 454, 9 L.R.A. 688, 20 Am. St. Rep. 589, 47 N. W. 49.

If a conductor acts wilfully or maliciously in ejecting a passenger from a street car, the jury may award exemplary as well as compensatory damages. Kiley v. Chicago City R. Co. 90 Ill. App. 275.

Where the act of a railway employee is shown to have been wanton or malicious, the jury, in their discretion, may award to the plaintiff, in addition to his compensatory damages, such further reasonable sum as exemplary damages as they may deem just; but the injured party is not entitled to them as a matter of legal right. Berg v. St. Paul City R. Co. (Minn.) 105 N. W. 191.

The following decisions support STRANAHAN BROS. CATERING CO. v. COIT in holding that the rule of damages is compensation for the injury: International & G. N. R. Co. v. Kentle (Tex.) 16 Am. & Eng. R. Cas. 337; McGehee v. McCarley, 33 C. C. A. 629, 63 U. S. App. 422, 91 Fed. 462; Trabing v. California Nav. & Improv. Co. 121 Cal. 137, 53 Pac. 644; Foley v. Metropolitan Street R. Co. 80 App. Div. 262, 80 N. Y. Supp. 249.

A carrier is not liable to exemplary damages on account of wanton acts of its conductors towards passengers. It is enough that the carrier be made responsible for actual consequences. Pittsburgh, C. C. & St. L. R. Co. v. Russ, 6 C. C. A. 597, 18 U. S. App. 279, 57 Fed. 822.

If any wantonness or mischief on the part of a conductor in ejecting a passenger from a train adds to the injuries of the latter, the carrier must make compensation for the whole injury suffered. Lucas v. Michigan C. R. Co. 98 Mich. 1, 39 Am. St. Rep. 517, 56 N. W. 1039.

In the following cases compensatory damages only are held allowable, unless the employer directly or indirectly participated in or ratified the act complained of, when punitive damages may be awarded: Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261; Randolph v. Hannibal & St. J. R. Co. 18 Mo. App. 609; Peterson v. Middlesex & S. Traction Co. 71 N. J. L. 296, 59 Atl. 456; Haver v. Central R. Co. 64 N. J. L. 312, 45 Atl. 593; Fisher v. Metropolitan Elev. R. Co. 34 Hun, 433; Dillingham v. Anthony, 73 Tex. 52, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139; Milwaukee & M. R. Co. v. Finney, 10 Wis. 388; Bass v. Chicago & N. W. R. Co. 42 Wis. 654, 24 Am. Rep. 437; Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504; International & G. N. R. Co. v. Miller, 9 Tex. Civ. App. 106, 28 S. W. 233; Galveston, H. & S. A. R. Co. v. Donahoe, 56 Tex. 162; Ricketts v. Chesapeake & O. R. Co. 33 W. Va. 433, 7 L.R.A. 354, 25 Am. St. Rep. 901, 10 S. E. 801.

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inferior quality, and soon became unfit for use, or for the trade, except as second or third class, or very inferior quality, and many times became wholly worthless. That large quantities of cream from said factory, which otherwise would have remained good, sweet, and wholesome, became thereby sour, tainted, and unfit for use, and entirely worthless, and the business of plaintiff greatly injured thereby; the said defendant well knowing the uses to which the milk and cream from said factory would be put, and that plaintiff's business, in a great measure, depended thereon; and defendant knew that plaintiff's said business depended upon the absolute purity of the milk from said factory. Yet defendant continued to thus send impure, unwholesome, foul and adulterated milk to said factory, knowing the same to be adulterated, and palming off upon plaintiff, for pure milk, milk that had been watered and adulterated, and to the damage of plaintiff as set forth herein, in the sum and to the amount of ($4,000) four thousand dollars. Wherefore plaintiff prays judgment against said defendant for said sum of $4,000, with interest thereon from November 21, 1892."

Defendant, by answer, admitted the corporate character of plaintiff, and that it was doing business at Cleveland, and denied all other averments. By cross petition he alleged "that, on the 21st day of November, 1892, the said plaintiff was indebted to him for milk before that time furnished it, in the sum of $219, that the same is now due and not paid;" and prayed judgment for that sum and interest.

At the trial, as appears by the bill of exceptions, "the plaintiff, to maintain the issues on its part, introduced evidence tending to sustain the allegations of the petition; and the defendant offered evidence tending to show that he, said defendant, did not water the milk, or know that it had been or was watered, and that he had in his employ one Ed. Miller, who assisted in milking the cows, and part of the time delivered the milk to the factory of plaintiff, and that the said Miller, without his (defendant's) knowledge, for the purpose of injuring the defendant, maliciously watered the milk which was delivered to plaintiff's factory by defendant or his employee, but without any knowledge or suspicion on defendant's part that it had been watered; that, while said milk may have been watered by said Miller during the period he (said Miller) was in the employ of defendant, yet it was no part of his duty, nor was he in any way authorized, to water said milk, and that in doing it said Miller acted, not for defendant, but to injure defendant; but it was the duty of said Miller to milk the cows of defendant in his absence, and to assist defendant when at home, and in his (defendant's) absence to deliver the milk to plaintiff's factory, and that other times he was to deliver milk at the factory of plaintiff as a part of his employment a part of the time at least, but that it was no part of his duty, nor was he directed or in any way authorized, to water the milk, and that, in so doing, he was not acting for defendant, but solely out of malice, and for the purpose of injuring defendant, and to gratify a feeling of ill will towards defendant, of which defendant at the time was entirely ignorant. The plaintiff, upon this question, requested the court to charge the jury as follows: 'If the jury shall find that the milk of defendant was delivered at its factory watered, then the defendant would be liable for the damages that necessarily and directly resulted therefrom, even though the defendant did not water such milk, or authorize it to be done, or know the same was or had been watered, if the jury shall find it was watered by one Ed. Miller, the employee of defendant.' But the court refused to charge the jury as requested, but did charge the jury upon this question as follows: 'If it appear to you that the milk was adulterated by Miller maliciously, to injure Coit, and was, without Coit's knowledge, so delivered to the factory adulterated, then Mr. Coit is not liable to plaintiff for any damage resulting to it from such adulterated milk. Mr. Coit, however, would remain liable for the amount of water delivered, but only because it was not milk.' No other or further charge upon this subject was given to the jury, nor was the above charge in any way modified, changed, or withdrawn, but was, without change or modification, given by the court to the jury as the law by which they were to be governed in arriving at a verdict in the case."

Exceptions to the refusal to charge as requested, and to the charge as given, were duly entered by plaintiff. Verdict for $185, for defendant and against plaintiff, was rendered, and a judgment thereon, and for costs, entered, which was affirmed by the circuit court. The plaintiff asks reversal of these judgments.

Mr. I. T. Siddall, for plaintiff in error:

The defendant delivered adulterated milk unfit for use to the plaintiff (whether he did it in person or by his employee being immaterial), and the statute forbidding such delivery, whether by himself or by his agent, made him, as against an innocent party, liable for the injury resulting therefrom.

By common law dealers in food for man

were held to know the quality of what they sold, and, if not wholesome, an action on the case would lie.

3 Bl. Com. 165; Divine v. McCormick, 50 Barb. 116; Burnby v. Bollett, 16 Mees. & W. 644; Jones v. George, 61 Tex. 345, 48 Am. Rep. 280; Ryder v. Neitge, 21 Minn. 70; Hoover v. Peters, 18 Mich. 51.

By the common law the rule was limited to those who sold for direct consumption, and probably the liability rested upon an implied warranty; but after the enactment of statutes making it penal to sell unwholesome or adulterated food, the liability rested upon the fact of its being unlawful.

Burnby v. Bollett, *supra.*

The rule of the common law, by these statutes, has been extended so as to include the defendant and all those who produce for sale, or sell, milk.

Rev. Stat. 7090, 9, 10, 7458, 12.

It is true these statutes are penal, but they forbid certain acts, one of which is the delivery of adulterated milk. Knowledge is not a condition, but the act, whether done innocently or criminally, is forbidden; and it is a well-recognized rule of law that when a duty thrown upon one is neglected, resulting in injury, the one upon whom this duty rests is liable in the absence of all wrong on the part of the one injured.

Meek v. Pennsylvania Co. 38 Ohio St. 632.

A civil right exists by force of a penal statute.

Jetter v. New York & H. R. Co. 2 Keyes, 154; Correll v. Burlington, C. R. & M. River R Co. 38 Iowa, 120, 18 Am. Rep. 22; Guenther v. Dewein, 11 Iowa, 133; Vining v. Bricker, 14 Ohio St. 334; Baltimore & O. R. Co. v. State, 29 Md. 252; Dill. Mun. Corp. 4th ed. § 308, p. 387, note 1; Burton v. McClellan, 3 Ill. 434; Laflin & R. Powder Co. v. Tearney, 131 Ill. 322, 7 L.R.A. 262, 19 Am. St. Rep. 34, 23 N. E. 389; Somerville v. Marks, 58 Ill. 371; Sangamon Distilling Co. v. Young, 77 Ill. 197.

When an act is prohibited it throws upon all persons the duty of knowing that in their transactions with others such act shall work no injury. The fact that a penalty is attached does not limit the liability.

Bell v. McGinness, 40 Ohio St. 204, 48 Am. Rep. 673; Pittsburgh, C. & St. L. R. Co. v. Smith, 38 Ohio St. 410; Hourigan v. Nowell, 110 Mass. 470; Correll v. Burlington, C. R. & M. River R. Co. *supra;* Shearm. & Redf. Neg. § 484, note 2; Ferguson v. Gies, 82 Mich. 358, 9 L.R.A. 589, 21 Am. St. Rep. 576, 46 N. W. 718.

Mr. J. H. Nichols for defendant in error.

Spear, J., delivered the opinion of the court:

The questions arising on the record are: (1.) Whether or not Coit is liable for the acts of Miller which produced the injury; (2) whether or not the plaintiff's damages, in case the jury found it sustained damages, could embrace all the injury arising from the adulterated character of the milk delivered; (3) if not, whether, in any view, the true rule is that, in case the jury found that the milk was adulterated by Miller maliciously, to injure Coit, and was, without Coit's knowledge, so delivered to the factory adulterated, plaintiff was entitled to a rebate for the water, so that Coit would be liable only for the amount of the water delivered, because it was not milk. The inquiry involves, primarily, a consideration of the liability of the master, although, reduced to its last analysis, it is an inquiry as to the proper rule of damages. Upon the face of things, it is apparent that the question regarded as the controlling one is whether or not Coit is in any way responsible for the acts of Miller.

Let us first consider what result would follow if the case made is the same as though the claimed injury had arisen from Coit's own negligent act. What, under such circumstances, would be the proper rule? The petition alleged a contract. It was in the nature of a proposal and acceptance, Coit proposing and agreeing to deliver at the factory milk which should be milk of first quality, meaning, at the very least, milk not adulterated, and the company assenting, and, in consideration of the offer, impliedly, if not expressly, agreeing to receive and pay, for such milk as should be delivered, the price of first-quality milk. The acceptance of milk so delivered was a sufficient consideration for Coit's promise. It may be that, so far as the agreement was executory, it was unilateral, and that, had Coit failed to deliver any milk, the company could not have recovered damages for such failure; but we need not be concerned with that consideration, for milk was delivered, and nothing can be clearer than that, when Coit delivered, he was bound by the terms of his accepted proposal. Benjamin, Sales, 51; Great Northern R. Co. v. Witham, L. R. 9 C. P. 16. Inasmuch, therefore, as the evidence of plaintiff tended to sustain the allegations of the petition, the jury was justified in finding this contract,—that is, a contract by which Coit agreed to deliver milk of first-class or superior quality (*i. e.*, pure milk),—and to further find that Coit had knowledge that the milk he delivered would be mixed with milk of other patrons, for the manufacture of butter and cheese in part, and in part skimmed for the cream, the product of which would be used by plaintiff in its business as caterers, etc.,

and in part sold in the market, and that the milk delivered was under this contract. Such a contract carries with it a warranty that the goods shall be, and are, what they are agreed to be; for no particular form of words is required to constitute a warranty. As held in Pasley v. Freeman, 3 T. R. 57: "An affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended." To which may be added, upon equally good authority, that "a positive affirmation of a material fact, . . . intended to be relied on as such, and which is so relied upon, constitutes in law a warranty, whether the vendor mentally intended to warrant or not; and that his intention is immaterial." American note to Benjamin, Sales, 6th ed. 625; Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595; Reed v. Hastings, 61 Ill. 266; Kenner v. Harding, 85 Ill. 264, 28 Am. Rep. 615. It is clearly sufficient if the declarations and agreement are so understood and acted upon by the parties; and, if made at the time of the sale, and as part of, or inducement to, the sale, as in this case, no other consideration is necessary, the price to be paid being a sufficient consideration. American note to Benjamin, Sales, 6th ed. 622.

The liability of Coit was as broad under a breach of this contract as though there had been an express warranty by him of every lot of milk as it was delivered. Moore v. King, 57 Hun, 224, 10 N. Y. Supp. 651. The proper rule of damages for a breach in such a case would be such damages as may fairly and reasonably be considered, either as arising naturally from a breach, or what the parties might reasonably be supposed to have foreseen—to have had in contemplation—when they entered into the contract. The rule is that, if special circumstances under which a contract is actually made are known to both parties, the damages resulting from the breach, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of such a contract under the special circumstances. Hadley v. Baxendale, 9 Exch. 341. Plaintiff and defendant were both handling milk extensively, and it is but fair to assume that each knew the effect of mixing impure milk with that which was pure, and the consequent result to the product. So they may be reasonably held to have had such damage in contemplation when they contracted, in case of breach. Probably, also, an implied warranty would be presumed, in view of the knowledge of the purpose, that the milk should be reasonably fit for that purpose; but this is not essential, nor is it important to pursue it at length, inasmuch as there was a contract. Under breach of such a contract, it is manifest that the vendee's damage should be at least compensation; and, if the mixture of the impure milk with that which was pure, and its use in the factory, resulted in impairing the value of the product, it is equally manifest that compensation could not be awarded without taking that fact into the account.

Cases illustrative of the point are numerous. Wilcox v. McCoy, 21 Ohio St. 655, was based upon a claim for damages arising from a sale of sheep represented to be sound, but which were affected by a disease known as the "foot rot," whereby other sheep of the plaintiff were infected and injured. The claim was sustained. A number of similar cases are digested by Mr. Sedgwick in his work on Damages (§§ 765, 766, 768, 769), as follows: Where animals sold are warranted free of disease, loss through communication of disease to other animals of the purchaser may be recovered. Mullett v. Mason, L. R. 1 C. P. 559, and other cases. It is not necessary to the recovery of damages to show that the vendor knew that the diseased animal was to be placed with others belonging to plaintiff. Packard v. Slack, 32 Vt. 9. The defendant is presumed to anticipate that the animals he sells will be placed with others as a natural consequence of his act. Sherrod v. Langdon, 21 Iowa, 518. The expense of nursing and curing other animals, which contract disease from those sold, may also be recovered. Long v. Clapp, 15 Neb. 427, 19 N. W. 467. In Randall v. Newson, L. R. 2 Q. B. Div. 102, the plaintiff had bought of defendant a pole for his carriage. In driving, the horses swerved, and the pole broke short off at the carriage, and the horses were injured. The court held that the question should have been left with the jury whether the injury to the horses was or not a natural consequence of the defect in the pole. Where coloring matter, purchased for the purpose of coloring ice cream by a manufacturer of that article, proved to be poisonous, the purchaser was allowed to recover the value of the ice cream lost through the use of the poisonous coloring matter, and also compensation for injury to business. Swain v. Schieffelin, 34 N. Y. S. R. 888, 12 N. Y. Supp. 155. See Jones v. George, 61 Tex. 345, 48 Am. Rep. 280; also, Sutherland, Damages, §§ 662–675, where the subject is discussed at length, and pertinent authorities cited. There is no reason to doubt that the law is entirely settled; and it is clear that, if the master be found liable, that liability covers all damages necessarily and directly resulting from the injurious acts.

It is also well settled that, where the injury results from the default of the con-

tracting party himself, the motive which induces the act or the omission, unless the circumstances raise a claim for exemplary damages, is of no consequence. In such case, evidence of the defaulting party's motives, or of anything which affects only the moral character of the transaction, can have no weight, and is therefore inadmissible. Unless the intention belongs directly to the issue, it is not an element in the case. Compensation for breach of contract in relation to the payment of money or in relation to property ordinarily does not involve motive, for in the first case the failure to pay as agreed is measured absolutely by the sum and interest, no matter what vicious purpose induced the failure: and, in the second, compensation—that is, to be placed in the same position he would have been in had the other party performed his contract—is the injured party's right, no matter how earnest the unavailing efforts to perform may have been, nor how free from intent to injure the motive of the defaulting party. 3 Parsons, Contr. 167, and authorities cited. Was Colt liable for the consequences of Miller's malicious acts? In pursuing this inquiry, it is important that we keep constantly in mind two controlling facts,—one that the relations of the plaintiff and defendant were contract relations, and those between the defendant and Miller were those of master and servant. The general rule undoubtedly is, although subject to notable exceptions, that the master is not liable for his servant's malicious acts, as shown in Wright v. Wilcox, 19 Wend. 345, 32 Am. Dec. 507, where it was sought to recover against a father for the act of his son, who, while driving the father's horses and wagon and when about his father's business, intentionally whipped up the horses, and ran over one of a number of boys who were trying to get into the wagon. The driver, at the time, saw the boy was between the wheels, and thus likely to be injured. Cowen, J., in deciding the case, remarked that it was impossible to sustain the verdict against the father because the act of the son was done with the wilful intention to throw the boy off; that, while the son was in other respects in the service of his father, he was not in this, which was a plain trespass, for which the master (the father) was no more liable than if his servant had committed any other assault and battery. A case not dissimilar in principle is that of Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373, where the plaintiff, after purchasing a ticket as a passenger, applied to one who had the duty of checking baggage to have his baggage checked, and, by his importunate conduct and abusive language towards the servant, provoked a quarrel, in which the servant, to gratify his personal resentment, struck the plaintiff with a hatchet. It was held "that the wrongful act of the servant in striking the plaintiff cannot be regarded as authorized by the master, nor as an act done in the execution of the service for which he was engaged by the master. And the fact that the blow was inflicted with a hatchet furnished by the master, to be used for a wholly different purpose in connection with the servant's business, is immaterial as respects the liability of the master." It was shown by the evidence that the assault was not committed in endeavoring to eject the plaintiff from the place where the baggageman had special control, but outside of it, and at a place where he had no charge, and so was not a case of the use of excess of force, nor was it calculated to facilitate or promote the business for which the servant was employed. Other cases are to be found which go much further than these in exonerating the master. They are mostly old cases, and some of them have not been followed in the later decisions. Thus, in Middleton v. Fowler, 1 Salk. 282, where, in an action against the master of a stage-coach, to recover for the value of a trunk of a passenger, lost by the driver, into whose possession the trunk had been placed by the traveler it was held by Holt, Ch. J., that the master was not liable. The language of the judge, that "no master is chargeable with the acts of his servant but when he acts in the execution of the authority given by his master," has been given too wide an interpretation; and, indeed, the law of the case would hardly be regarded as good law at the present day. See Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504, where the true distinction is clearly given. This case (as indeed is the larger portion of the reported cases involving the principle) was against a railroad company, the action being based on its common-law liability as a common carrier, and affords an instance of strict application of the rule of *respondeat superior*. But courts are supposed to enforce rules of law, where applicable, without respect to the personnel of the parties; and it is presumed that, where liability is found to attach to a master for the act of a servant, the rule of damages would be the same whether the master were an individual or a corporation.

The modern rule, and we believe it to be well established, is stated by Mr. Mechem in his work on Agency (§ 740) thus: "The tendency of modern cases, however, is to attach less importance to the intention of the agent, and more to the question whether the act was done within the scope of the agent's employment; and it is believed that the true rule may be said to be that the

principal is responsible for the wilful or malicious acts of his agent if they are done in the course of his employment and within the scope of his authority, but that the principal is not liable for such acts, unless previously expressly authorized or subsequently ratified when they are done outside of the course of the agent's employment, and beyond the scope of his authority, as where the agent steps aside from his employment to gratify some personal animosity, or to give vent to some private feeling of his own. The question of what acts are within the scope of the employment is no less difficult of determination here than in those cases where the principal's liability for the agent's negligence is involved; but the principles are the same. Indeed, the determination of whether the principal would have been liable had the same injury resulted from the agent's negligence or unskilfulness will often be of aid; for, if the act in the latter case would be within the scope of the employment, it is none the less so where the intention was wilful. Where the principal owes to third persons the performance of some duty, as to do or not to do a certain act, and he commits the performance of this duty to an agent, the principal cannot escape the responsibility *civiliter* if the agent fails to perform it, whether such failure be accidental or wilful, or whether it be the result of negligence or of malice." Continuing, the author says: "What is meant is that, if the agent, while engaged in doing something which he is authorized to do, and while acting in the execution of his authority, inflicts an injury upon third persons, though wilfully or maliciously, the principal is liable; but if, on the other hand, the agent steps aside from his employment to do some act having no connection with the principal's business, and to which he is inspired by pure personal and private malice or ill will, the principal is not liable." [§ 741.] Mr. Justice Story, in his work on Agency (§ 452), gives the rule in these words: "It is a general doctrine of law that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in those acts or misdeeds, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or participate in, or, indeed, know of, such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies, *respondeat superior;* and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."

It is important to observe a distinction between liability for the malicious acts of an agent with respect to one with whom the principal holds contractual relations,—acts affecting the performance of the contract,—and with respect to others who may have suffered injury by reason of the agent's torts, as a failure to observe this distinction has resulted in apparent confusion of terms both in text-books and decisions. The distinction referred to is made apparent in an old English case. A traveler employed a liveryman stable keeper to drive him safely to his destination. The driver purposely and needlessly, to gratify his own personal malice, went out of his way to collide with another carriage, by which one riding therein was injured. The collision also injured the traveler. The action by the former against the master was predicated wholly on the claim that he was liable for the malicious act of his servant, committed without authority, and not in the line of his service. Any action of the traveler would have rested on the failure of the liveryman to perform his contract. And, as to the latter proposition, Prof. Wharton, in his work on Agency and Agents (§ 487), gives this terse rule: "Principal who contracts to do a particular thing is liable for agent's torts which prevent the performance of the contract." One principle seems to be well settled by the later authorities, *viz.*: That if the act of the servant which has occasioned the mischief is within the scope of the employment, the fact that it was maliciously done does not affect the question of the master's liability under a proper rule of damages.

Coming now, to the case at bar, Were the acts of Miller, which caused the injury, in law the acts of his employer? That is, were they within the scope of his duties, or were they outside and beyond? And here we must not mistake the acts which caused the damage. At first blush it might seem that these acts were the watering of the milk, and those were not within any authority of the master. But not so. The putting of the water in the milk would have been quite innocuous, so far as plaintiff is concerned, had the compound not been delivered to the factory. It was the delivery there which produced the harm. In those acts of delivery Miller stood for and represented his

master. Clearly, those deliveries were done in the course of his employment, "in the execution of the service for which he was engaged by the master." Under such conditions, why should the master not be liable? He had contracted to deliver pure milk, and, in trusting that duty to his servant, why had he not, applying the principle announced by Judge Story, held out that servant as fit to be trusted, and warranted his fidelity and good conduct in all matters connected with the performance of that contract? Why, in reason, should the loss occasioned by the rascality of the defendant's servant be thrown on the plaintiff? The latter had no voice in his selection; no control over his conduct. Does the servant's motive change the nature of the damages? Does it make the failure of the defendant to perform his contract any the less obvious, or any the less serious in results? As remarked by White, J., in Passenger R. Co. v. Young, 21 Ohio St. 524, 8 Am. Rep. 78: "Where a person is injured by the act of a servant, done in the course of his employment, we see no good reason why the motive or intention of the servant should operate to discharge the master from liability. If the nature of the injurious act is such as to make the master liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the master." And would any intelligent legal mind suppose for a moment that, the alleged contract being found, if the delivery of the objectionable compound at the factory had been through the mere negligence of the servant, the defendant would not be liable? Surely not. Nor does the enforcement of the rule of damages hereinbefore indicated involve punishment of one for the malicious act of another. If it were proposed to inflict punitive damages on the master where he is innocent of wrong intent, then that inequitable result would follow. But so long as compensation, and compensation only, is the rule, the motive of the servant not entering into the case one way or the other, the master is not held for the motive; he is held only for the act. So, in this case, if the testimony of the plaintiff tended to prove that Coit knew of the condition of the milk at the time of the delivery, as the record would imply, then proof to the contrary was competent, but for the purpose only of excluding a right to recover punitive damages.

This contract involved reciprocal duties, and gave corresponding legal rights. The defendant was to deliver pure milk; the plaintiff was to pay good money. Now, suppose, instead, of this action, there were a suit of the defendant against the plaintiff for his season's milk, $1,150, and the company had pleaded payment. At the trial it appeared that on the day the account was due the company had given the money to one of its employees, with directions to go to the vendor and pay for the milk, and he had gone to the residence of the vendor and counted out, as the vendor supposed, $1,150, and taken a receipt to the company. The next day, when a deposit in bank was attempted, it was found that a portion of the money was counterfeit. Suppose the testimony to further show that the employee, out of malice towards the company and greed in his own interest, had substituted counterfeit money and paid that. Would the company have a defense? The bills paid looked like good currency, as the milk delivered looked like pure milk. In fact both were tainted. Is there any real difference in the two cases? Is it not a failure to perform a contract in both? True, the method of making proof of damages is different; it is simple in one case, and much less so in the other. But, when arrived at, the result is precisely the same. It is compensation in both cases,—the making of the injured party whole. Our case is essentially dissimilar from that of Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373, where the defendant was exonerated. If Miller had got into a quarrel with the manager of the factory, about the delivery of milk, for instance, and, to gratify his own personal resentment, had lashed the other with the defendant's whip, which had been furnished him to drive the horses with, we would have had a case parallel with the one above cited.

If, on the other hand, the baggage man in the case last cited, impelled by the same malicious motive which induced the assault on the passenger, had, with the hatchet, smashed the passenger's trunk, the question involved would have resembled the case at bar. The view here indicated finds support in the broad principle that where one of two innocent persons must suffer he must be the sufferer who puts it in the power of the wrongdoer to cause the loss. "He, certainly, who trusts most, must suffer most." He through whose agency the loss occurred must sustain it. It is a principle founded on the highest considerations of justice and expediency. The rule is elucidated in the opinion by Minshall, J., in the recent case of Schurtz v. Colvin, 55 Ohio St. 274, 45 N. E. 527, and special reference is here made to that opinion for argument and illustrations. See also Quick v. Milligan, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. 392; Blight v. Schenck, 10 Pa. 293, 51 Am. Dec. 478; Le Neve v. Le Neve, 3 Atk. 646. If the foregoing conclusions are correct, it follows that the instructions given the jury did not cover the case before them. The case made was the

case which, within the allegations of the petition, the evidence tended to prove. The vital points were the agreement to deliver pure milk, the delivery under it, the character of the milk delivered, and the resulting damage; and the questions the jury needed instructions upon, in case they found for the plaintiff on these propositions, were, the liability or nonliability of Coit, and the measure of damages in case he was to be held. The instruction given was, if the adulteration was done by Miller maliciously, to injure Coit, and the delivery of the adulterated article was without Coit's knowledge, he was not liable for any damage; which, if we are right in the principles of law applicable to the case, was erroneous. The court also added that Coit would remain liable for the amount of water delivered, because it was not milk. This means, we suppose, that on Coit's cross petition, he would not be allowed to recover pay for water. Of course he could not, but this instruction ignores any duty to deliver milk not adulterated, and would be proper in a case where the quantity delivered was the only question involved. But here was involved the question of damages for the impaired character of the article delivered; and it is difficult to see how, upon the view most favorable to Coit, the rule would not have been the ordinary commercial rule, *viz.*, the difference between the value of the milk delivered and what its value would have been had no water been mixed with it. Swan's Treatise, 14th ed. 784; American note to Benjamin, Sales, 6th ed. 906.

There is another ground which would appear to defeat the attempted defense. The sale and delivery of adulterated milk is an offense against one of the pure-food statutes. The act of April 10, 1889, entitled "An Act to Regulate the Sale of Milk" (86 Ohio Laws, 229) provides "that whoever, by himself or by his servant or agent, . . . sells, exchanges, or delivers . . . adulterated milk, or milk to which water or any foreign substance has been added . . . shall be punished," etc. In the case of State v. Kelly, 54 Ohio St. 166, 43 N. E. 163, it is held that in a prosecution under the act of March 20, 1884, "to provide against the adulteration of foods and drugs, . . . it is not a defense that the accused is ignorant of the adulteration of the article which he sells or offers for sale." These statutes have a like purpose. They are founded on the policy of protection to the public,—the same policy which is recognized in numberless cases where, on a sale by victualers of articles of food for domestic consumption, the law implies a warranty that they are fit for such purpose,—and the seller will not be heard to say that he did not know they were not, nor to plead good faith in their sale. The rule of construction applied to the act last cited applies equally to the act to regulate the sale of milk; and it is the theory of the decision cited that it is the duty of the party, who, by himself or agent, sells such articles, to know their quality,—they must know, or take the consequences. An opposite construction, it is declared by the court, would defeat the humane purpose of the acts. The principle of Rose v. King, 49 Ohio St. 213, 15 L.R.A. 160, 30 N. E. 267, rules this case with respect to the civil remedy. Where a defendant is liable under the criminal statute, he is liable to a person directly injured, civilly, unless the language of the criminal statute indicates an opposite purpose, which is not the case here.

These conclusions require a reversal of both judgments, and a new trial.

Reversed.

Bradbury, J., dissenting:

This decision seems to me to rest upon the unsound principle that one person may be held to respond in damages to another on account of injuries sustained by the malicious acts of a third person. Unfortunately, the case was argued in this court upon one side only. The circuit court rendering the judgment is composed of men of experience, learning, and ability, and the views of that court upon the question were in harmony with those of the court of common pleas: but we have not had the benefit of that experience, learning, and ability, or of the research of counsel in support of their judgment. Their decision, I think, is correct, but I feel the embarrassment incident to an attempt to justify it without some intimation of the grounds upon which they placed it, or of the views of counsel for the party who prevailed in that court. The action did not sound in contract, the plaintiff was under no obligation to receive milk, and the defendant was under no obligation to deliver it, nor was any price fixed for that which might be delivered and received. The only averment of the petition relating to a promise is this: "Said defendant promised and agreed at the time of bringing, first, his milk to plaintiff's said factory to bring nothing but milk of first class or superior quality." No consideration is stated for this supposed promise; and an analysis of the petition shows that the promise was one implied from the fact that milk was to be delivered, and arose out of the circumstances surrounding the parties. The use to which the milk, according to the averments of the petition, was to be devoted, was simply matter of inducement, showing what damages the defendant might be held to contemplate as the result of his wanton act. The gist

of the action is that the defendant knowingly delivered foul and unwholesome milk. The averment being that the "defendant continued to thus send impure, unwholesome, foul, and adulterated milk, . . . knowing the same to be adulterated. . . . The defendant denied this, and the case was tried. The evidence was not set forth in full, the bill of exceptions showing merely that evidence was given tending to support the petition, and that evidence was also given tending to show that the milk was maliciously watered by an employee of defendant for the purpose, not of damaging the plaintiff, to whom the milk was delivered, but of injuring his employer, the defendant; that it was not his duty to water the milk and in doing so he was not acting for defendant, but solely out of malice towards the defendant, and that defendant was entirely ignorant of his actions. In this view of the evidence, the following instructions were asked by the plaintiff, and were refused: "If the jury shall find that the milk of defendant was delivered at its factory watered, then the defendant would be liable for the damages that necessarily and directly resulted therefrom, even though the defendant did not water such milk or authorize it to be done, or know the same was or had been watered, if the jury shall find it was watered by one Ed. Miller, the employee of defendant." And the court did charge the jury as follows: "If it appear to you that the milk was adulterated by Miller maliciously, to injure Coit, and was, without Coit's knowledge, so delivered to the factory adulterated, then Mr. Coit is not liable to plaintiff for any damage resulting to it from such adulterated milk. Mr. Coit, however, would remain liable for the amount of water delivered, but only because it was not milk." The instructions given by the court of common pleas were directly applicable to the facts, and were sound, unless one man is to be mulcted in damages for the malicious act of another. Employers are liable for that negligence of their servants which occurs in the course of the employment. And under certain peculiar circumstances, where the master owes a special duty to the party injured, he is held liable for malicious acts directed against the person to whom the master owes such special duty. This principle is generally, if not exclusively, confined to common carriers of passengers. I know of no principle, however, by which a master is held liable for a malicious act of a servant, not committed in the scope of his employment, directed against another; or where, as in this case, the malicious act was directed against the master himself, was not done in the course of the master's service, and incidentally injured another. Where a malicious act is done to the injury of another, the right of the latter to redress is against the party who caused the injury. If the person committing the act cannot respond in damages, the party injured can obtain no practical relief. This result often occurs, but is unavoidable. The person doing the mischief is, in such cases, amenable to the public, if the act has been made a crime; otherwise he is answerable only at the bar of public opinion. In driving the vehicle in which this milk was carried to market, the servant had no duty to perform in respect to its quality. His authority was in all respects similar to that of the boy who drives a delivery wagon for a retail grocer. It is the duty of the boy to deliver the parcels as they may be wrapped up in the shop. It was the duty of this hired man of the defendant to deliver this milk in the condition it was when it left the defendant's farm. As well charge the grocer with civil liability for the death of a customer, because the boy maliciously stops at a drug store, procures arsenic, opens and distributes it through a package of sugar, as to charge the defendant in this case with liability because his hired man stopped at a wayside pool of stagnant water, maliciously dipped a bucket into it, and discharged its contents into the cans of milk committed to his charge. In each case the fact of employment gave the opportunity for the act, but the act was not in the line of the employment of either. The statutes in relation to adulterated food and milk are no more applicable in the one case than in the other. If they bear on the question at all the penalties they denounce should be directed against the wrongdoers, and not one of the victims of the wrongful act. No authorities have been cited in support of these views. None are needed, if the analysis of the petition upon which they are founded is correct.

A copy of the petition and answer is appended, from which the character of the action and of the issues joined between the parties can be readily perceived.

KANSAS SUPREME COURT.

SCHWARZSCHILD & SULZBERGER COMPANY, Plff. in Err.,
v.
CYRUS V. WEEKS.

(— Kan. —, 83 Pac. 406.)

Master's duty—injury through violation of.

1. In an action by a servant against the master for negligence. Where the negligent

Headnotes by PORTER, J.

act is in violation of a positive duty which the master owes to the servant, that becomes the controlling fact in determining the master's liability; and, where the negligence of the master is the proximate cause of the injury, the master will be held liable, notwithstanding the negligence of the master may have been set in operation by the act of one who otherwise might be held to be a fellow servant.

Same—protection of servant.

2. The master owes to the servant the duty to take reasonable precautions to protect the servant from injury.

Negligence—proximate cause.

3. Negligence is the proximate cause of an injury when it appears that "the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

(November 11, 1905.)

ERROR to the District Court for Wyandotte County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Porter, J.:

Defendant in error sued to recover for personal injuries occasioned by the operation of a friction hoist used in raising and lowering beeves in a packing house. This case was here once before, and was reversed for error in the instructions. Schwarzschild & S. Co. v. Weeks, 66 Kan. 800, 72 Pac. 274. At the close of plaintiff's testimony upon the second trial, he asked leave to amend his petition to conform to the facts proved. Defendant company objected, and the court overruled the objections. The amendment was dictated to the court reporter, but was not written out or attached to the petition until the time of the settlement of the case made, when, by order of the judge, it was written out and attached to the original petition before the case made was settled. The original petition alleged that in the process of slaughtering beeves, after the cattle were killed, they were shackled by the hind feet, and hoisted to an overhead track, and thus conveyed to the skinning beds. A beef was dropped on each bed, where men skinned the legs, and washed the shanks; then a heavy iron spreader was attached to the hind legs and it was again hoisted, and, as work progressed upon it, conveyed along the overhead track. After the carcass of a beef had been hoisted the second time "fell beaters" removed the hide, "gutters" opened the paunch, and "paunch pullers" removed the paunches. It was the duty of the man following the shank

Case Note.—Negligence of fellow servant concurring with failure of the master to establish or enforce proper rules or regulations for conduct of business.—The court, in the above case, regarded the failure of the employer to establish and enforce proper rules or methods to govern the operation of the appliance in question as the proximate cause of the plaintiff's injury, and the act of the coservant as a mere condition of the injury. The result, however, would doubtless have been the same if the court had regarded the employer's failure to establish such rules and the negligence of the coservant as concurring causes of the injury, since it is well established that a servant's action is not barred by the defense of common employment where a breach of duty on the master's part contributed as a proximate cause to the injury. 2 Labatt, Mast. & S. § 814. This general principle is applied by a large number of cases to various specific breaches of personal duty on the part of the master, such as the failure to provide a proper place to work, or proper material, or competent employees, and the like. It has also been specifically applied in a number of cases where, as in Schwarzschild & S. Co. v. Weeks, the breach of personal duty on the part of the master consisted in its failure to establish or enforce proper rules or regulations for the conduct of the business. Thus, the want of the adoption of a proper system, or proper rules, for the protection of car repairers, has been held to render the railroad company liable for injuries to such a repairer, although the negligence of a coservant concurred with the company's neglect in causing the accident. Fordyce v. Briney, 58 Ark. 206, 24 S. W. 250; Pool v. Southern P. Co. 20 Utah, 210, 58 Pac. 326; Luebke v. Chicago, M. & St. P. R Co. 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870.

So, in Cheeney v. Ocean S. S. Co. 92 Ga. 726, 44 Am. St. Rep. 113, 19 S. E. 33, it was held that the negligence of a fellow servant in throwing a bale of cotton into the hold of a vessel without warning, in consequence of which the plaintiff was injured, would not relieve the owners of the vessel from liability if they failed to station a hatch tender at the hatchway in question; though, if a hatch tender were duly stationed, but afterwards absented himself without the knowledge of the foreman, his absence would be the negligence of a fellow servant, and not that of the company, and the company would, therefore, not be liable.

In Hartvig v. N. P. Lumber Co. 19 Or. 522, 25 Pac. 358, the court held that the failure of the defendant to establish any rule or regulation requiring warning to be given to the men working at the bottom of a chute before timber was thrown into the same, or requiring the men at the top of the chute to give warning, except of their own choice, precluded it from availing itself of the rule of nonresponsibility to a servant for an injury caused by a fellow servant, where an employee working at the bottom of the chute

washer to hoist the carcass to the proper elevation for completing the work. The hoisting was done by means of an appliance called a friction hoist, operated by a rope. The operator was called the hoister. Next following him were the fell beaters, who with cleavers beat away the skin from the shanks. To operate the friction hoist required skill and experience. If the rope was unskilfully handled the beef would fall to the floor and endanger the lives of the workmen. Plaintiff was employed as hoister in charge of the hoisting apparatus. It became his duty, in case a workman in front of him left the line for any purpose, to step forward and take the place of that workman; and it then became the duty of one of the fell beaters immediately behind him to take his place and operate the hoist, the fell beaters being experienced and skilled in the operation thereof. At the time of the injury to plaintiff one of the workmen ahead of him was called away. Plaintiff took his place and was engaged in washing shanks when one of the paunch pullers, without the knowledge of plaintiff or of the fell beaters, seized the rope and attempted to raise a beef, immediately behind plaintiff, and, by reason of his unskilfulness and inexperience in the operation of the hoist, the beef dropped upon plaintiff, and injured him. It was further alleged that defendant company, without the knowledge of plaintiff, had allowed and permitted other employees who were inexperienced and unskilled in its operation, including this particular one, to operate the hoist, and that defendant was negligent in so doing. The amendment alleged that it was an established rule that no one but the hoister and the two fell beaters behind him should operate the hoist, and that, without plaintiff's knowledge, the rule became relaxed; that the man Shortridge, who attempted to operate it, was not informed of the rule, or instructed in the use of the hoist. The answer, in addition to a general denial, set up that plaintiff had assumed the risk of the injury; also that the injury was the result of negligence of fellow servants. Defendant below offered no evidence, but elected to stand upon its demurrer to the evidence of plaintiff. The jury found for plaintiff. The court overruled the motion for a new trial, and defendant brings the case here for review, alleging numerous errors.

Messrs. Frank P. Sebree, Angevine & Cubbison, and J. D. Wendorff, for plaintiff in error:

Before plaintiff can recover under his petition in this case, he must prove, (1) that defendant allowed Shortridge to operate the hoist, or that Shortridge operated it under

was injured by a piece of timber thrown into the chute by a coemployee without any warning.

In Ford v. Lake Shore & M. S. R. Co. 124 N. Y. 493, 12 L.R.A. 454, 26 N. E. 1101, it was held that a railroad company which failed to establish proper rules, or a proper method, for the loading of cars, was liable for injuries to an employee from the improper loading of the car, although it was the work of a fellow servant. The court said: "There was no rule, and the only method or system was such as the foreman in each particular case should deem the safe and proper one to pursue. Under such a state of facts, the employer must be deemed constructively present during the loading of the cars, and the acts of his agents are in law deemed to be his acts. The improper and negligent loading of the cars is thus traced directly to the defendant, and its negligence established."

So, the habitual neglect of a railroad company properly to enforce rules or regulations adopted for the protection of car repairers will render it liable for injuries to such a repairer, notwithstanding that the negligence of a fellow servant was a concurring cause of the injury. Texas & P. R. Co. v. Eberhart (Tex. Civ. App.) 40 S. W. 1060, Affirmed in 91 Tex. 321, 43 S. W. 510.

The last case is to be distinguished from the case of the mere failure of a coemployee, in an individual instance, to observe a rule established by the master for the performance of duties which are properly delegable by him. It is clear that in such a case the negligence of the coemployee is the sole, proximate cause of the injury, and the master is exonerated from liability therefor under the fellow servant rule. But, of course, the failure, even in a single instance, to observe a rule or regulation established by the master, which concurs with the negligence of a fellow servant in causing an accident, will render the master liable, if the rule or regulation in question relates to a nondelegable duty, so that the person charged with its observance is *pro hac vice* the representative of the master, and not a fellow servant. The latter class of cases, which does not properly come within the scope of this note and is mentioned merely by way of distinction, is illustrated by cases holding railroad companies liable for injuries caused by the concurring negligence of a train despatcher (a representative of the company), and of an engineer, or other fellow servant of the person injured. Louisville, N. A. & C. R. Co. v. Heck, 151 Ind. 292, 50 N. E. 988; Baltimore & O. R. Co. v. Camp, 44 C. C. A. 451, 105 Fed. 212; Felton v. Harbeson, 44 C. C. A. 188, 104 Fed. 737; Cincinnati, N. O. & T. P. R. Co. v. Clark, 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125; Hunn v. Michigan C. R. Co. 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502; Mexican C. R. Co. v. Glover, 46 C. C. A. 334, 107 Fed. 360.

such circumstances as to charge defendant with knowledge of that fact; and (2) that defendant knew, or by the exercise of ordinary care would have known, that Shortridge was incompetent to operate said hoist.

Schwarzschild & S. Co. v. Weeks, 66 Kan. 800, 72 Pac. 274; Southern Kansas R. Co. v. Griffith, 54 Kan. 428, 38 Pac. 478; Telle v. Leavenworth Rapid Transit R. Co. 50 Kan. 455, 31 Pac. 1076; Atchison, T. & S. F. R. Co. v. Ledbetter, 34 Kan. 326, 8 Pac. 411; Union P. R. Co. v. Buck, 3 Kan. App. 671, 44 Pac. 904.

The principle of law requiring a master to promulgate rules for the conduct of a complex and dangerous business requires the master, (1) to promulgate only such rules as are necessary for the government of the servant while acting within the scope of his employment, and does not extend to the promulgation of rules to meet every conceivable act that a servant might do outside of his employment; and, (2) he is required to establish only such rules as, under the circumstances, are reasonable.

Labatt, Mast. & S. § 211, pp. 465, 467, 469; 20 Am. & Eng. Enc. Law, 2d ed. pp. 101, 102.

The decision in this case is in conflict with the recent decision of this court in the case of Chicago, R. I. & P. R. Co. v. Wheeler, 70 Kan. 755, 79 Pac. 673, 83 Pac. 27.

Messrs. William B. Sutton and H. E. Dean, for defendant in error:

It was the duty of the employer to prescribe rules governing the operation of the hoist, and to enforce such rules.

Reagan v. St. Louis, K. & N. W. R. Co. 93 Mo. 348, 3 Am. St. Rep. 542, 6 S. W. 371; Moore Lime Co. v. Richardson, 95 Va. 326, 64 Am. St. Rep. 785, 28 S. E. 334; Whittaker v. Delaware & H. Canal Co. 126 N. Y. 544, 27 N. E. 1042; Bailey, Personal Injuries Relating to Mast. & S. § 3288; Lake Shore & M. S. R. Co. v. Murphy, 50 Ohio St. 135, 33 N. E. 403; Donnegan v. Erhardt, 119 N. Y. 468, 7 L.R.A. 527, 23 N. E. 1051; Ford v. Lake Shore & M. S. R. Co. 124 N. Y. 493, 12 L.R.A. 454, 26 N. E. 1101; Coppins v. New York C. & H. R. R. Co. 122 N. Y. 557, 19 Am. St. Rep. 523, 25 N. E. 915; Konold v. Rio Grande Western R. Co. 21 Utah, 379, 81 Am. St. Rep. 693, 60 Pac. 1021; Shearm. & Redf. Neg. 5th ed. § 202; Southwestern Teleph. Co. v. Woughter, 56 Ark. 206, 19 S. W. 575; Schroeder v. Chicago & A. R. Co. 108 Mo. 322, 18 L.R.A. 827, 18 S. W. 1094; Swinarton v. Le Boutillier, 148 N. Y. 752, 43 N. E. 990.

The neglect to enforce a necessary rule once adopted is as much negligence as to fail to establish one in the first place.

Whittaker v. Delaware & H. Canal Co. *supra;* Stock v. Le Boutillier, 19 Misc. 112, 43 N. Y. Supp. 248; Silver Cord Combination Min. Co. v. McDonald, 14 Colo. 191, 23 Pac. 346; Louisville & N. R. Co. v. Reagan, 96 Tenn. 128, 33 S. W. 1050.

The real cause of the injury was the neglect, by the master, of an absolute duty.

Lane v. Atlantic Works, 111 Mass. 136; Lake Shore & M. S. R. Co. v. Wilson, 11 Ind. App. 488, 38 N. E. 343; Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362; Thomp. Neg. 2d ed. §§ 49, 55–57, 59, 62, 68.

Porter, J., delivered the opinion of the court:

Counsel for plaintiff in error devote a considerable part of their brief to the contention that it was error to allow the amendment because there was no evidence in support of it, and, what there was, if any, was admitted over their objections; that the amendment was not made, in fact, until months after the trial, at the time fixed for the settling and signing of the case made, and introduced a new cause of action, which was barred by the statute of limitations. The case made shows that permission to make the amendment was asked and granted at the close of plaintiff's testimony; that, prior to the settling and signing of the case made, it was written out from the notes of the court reporter by order of the judge, attached to the original petition and incorporated in the case made: so that the question whether it was made at the time it purports is immaterial. We are bound by the recitals of the case made.

It is urged that, there being no allegations in the original petition in reference to an established rule, it was error to permit evidence of such a rule. At the same time it is contended that the evidence introduced failed to prove the existence of any established rule. In the latter contention we agree with counsel. The most that can be said for the evidence is that it tended to prove that a sort of method prevailed in the operation of the killing beds, and that certain workmen had certain duties in connection with the operation of the friction hoist. So far as the evidence of which complaint is made tended to prove these things, it was not a departure from the general scope of the original petition. Plaintiff in error was not prejudiced by the attempt to prove the establishment of a fixed rule, since the attempt failed. The allegation in the amendment of the existence of a rule stands as though made in the original petition and not proved. The whole contention about the amendment to the petition, however, becomes immaterial. It appears from an examination of the instructions that the trial court ignored the amendment entirely, and instructed as if it

had not been made. This practically takes the amendment out of the case, and with it goes one of the main contentions.

Plaintiff in error argues that the court should have sustained the demurrer to the evidence, and raises several points, the chief of which are: (1) That defendant was not guilty of any negligence; and (2) that the injury was caused by the act of a fellow servant. We shall consider these points together. The doctrine of fellow servant is not involved in the case as we view it. The master owes certain duties to the servant, among them the duty to take reasonable precautions to prevent an injury to the servant while at work. In Coffeyville Vitrified Brick & Tile Co. v. Shanks, 69 Kan. 306, 76 Pac. 856, it was held that whenever the negligent act violates a duty which the master himself owes to the servant that becomes the controlling fact in determining the master's liability, notwithstanding the negligence of the master was set in operation by one who otherwise might have been designated a fellow servant. In some of the controlling principles that case is similar to this, though the facts there were different, and there was involved the question of the duty of a pit boss to warn the employees of certain dangers; but the duty of the master to conduct his business "in a manner affording reasonable protection to his employees" is recognized. In Daniel v. Chesapeake & O. R. Co. 36 W. Va. 397, 16 L.R.A. 383, 32 Am. St. Rep. 870, 15 S. E. 162, the court, in enumerating the personal nonassignable duties "which the master owes his servant, no matter by whom performed," and quoting from Madden v. Chesapeake & O. R. Co. 28 W. Va. 617, 57 Am. Rep. 695, says: "The duties of the master or employer may be summed up as follows: (1) To provide safe and suitable machinery and appliances for the business [including a safe place to work]. This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in repair and making proper inspections and tests; . . . (2) to exercise like care in providing and retaining sufficient and suitable servants for the business . . . [and instructing those who, from newness or age, evidently need it]; (3) to establish proper rules and regulations for the service, and, having adopted such, to conform to them." In Bishop on Non-Contract Law, § 691, the author says: "The leading principle, around which the others cluster, is, that the master should exercise, in the carrying on of his business, all the watchfulness over his servants, and employ all the safeguards, which a reasonable and considerate prudence may dictate. For any violation of this duty, resulting in an injury to a servant, he [the master] is answerable to him."

Upon the general proposition that the duty rests upon the master not to expose the servant, in the discharge of his duty, to perils and dangers against which the master may guard by the exercise of reasonable care, see Pullman Palace Car Co. v. Laack 143 Ill. 242, 18 L.R.A. 215, 32 N. E. 285; Cayzer v. Taylor, 10 Gray, 274, 69 Am. Dec. 317; Gilman v. Eastern R. Co. 10 Allen, 238, 87 Am. Dec. 635; Wood, Mast. & S. § 326; Beach, Contrib. Neg. 353; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612. In order that the master may claim exemption from liability for injuries to a servant on the ground that the negligent act was that of a fellow servant, the master must have exercised reasonable care to prevent the injury. The risk that the master may neglect to do this is not one which the servant assumes. Pullman Palace Car Co. v. Laack, *supra;* Coppins v. New York C. & H. R. R. Co. 122 N. Y. 557, 19 Am. St. Rep. 523, 25 N. E. 915; Keast v. Santa Ysabel Gold Min. Co. 136 Cal. 256, 68 Pac. 771. The case here is analogous to that of the sudden and unexpected starting of dangerous machinery where the starting is due to the negligence of the master or someone for whose negligence the master is responsible. In such cases the master is held liable. Thomp. Neg. § 5422; Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149; Donahue v. Drown, 154 Mass. 21, 27 N. E. 675. A duty like that requiring the master to establish rules for the conduct of his business for the safety of his servants is the one which requires him, in "carrying on a dangerous or complicated business, to reduce it to such a system, and to conduct it in such a manner, as will best promote the safety of his servants; and he is consequently liable to a servant for an injury occasioned by a defective system of using his machinery or conducting his business, as well as for injuries occasioned by defects in such machinery." Thomp. Neg. § 4175. See also Hunn v. Michigan C. R. Co. 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502.

Here was a dangerous appliance, not in the sense that the persons using it might be injured, but dangerous to others. Operated by a skilful and experienced person, there was danger to no one. Operated by an inexperienced and unskilled person, a heavy beef with the added weight of iron spreader, itself weighing hundreds of pounds, would fall upon and among other workmen while their attention must be given to their own work, and their lives become en-

dangered. There is some evidence in the record, which fairly tends to prove that there had been a method of procedure in the operation of the work on the killing beds as set out in plaintiff's petition; that there were among the workmen usually about 10 common laborers, including the paunch pullers, without any experience in the operation of the hoist; and witnesses testified that frequently these common laborers pulled the rope which operated the hoist, and did this in the presence of the foreman. Plaintiff testified that he had no knowledge of this, and the master offered no testimony to dispute it. All the witnesses familiar with the operation of the hoist agree that it required experience and skill to operate it safely and properly. The rope had to be pulled just right, just far enough, or the beef would be dropped suddenly upon the workmen. The workman, Shortridge, did what was natural and might have been expected of any of the common laborers on the beds unless instructed to the contrary. There was a rope to be pulled; someone said, "Pull the rope," and, wishing to be useful, he pulled it. He knew nothing about how to do it properly, and the result was the injury to the plaintiff. The duty of the master to use ordinary care to prevent injury to plaintiff by establishing and enforcing a rule, or by some other reasonable method, so far as the evidence shows, was ignored. The master did nothing to protect the servant. It is not claimed that Shortridge was negligent in the ordinary sense of a servant, who knows how to do a thing properly, and carelessly does it wrong. He acted ignorantly. He had no duty to perform, except not to act, and he never had been instructed not to act. As previously stated, it was natural for him or any of the other common laborers, in the absence of any rule or instruction, to attempt to do what he did. His act became possible from the negligence of the master. The proximate cause of the injury was not the act of Shortridge, but the neglect of the master to take reasonable precautions to see that such a thing did not occur. It is held generally that negligence is the proximate cause of an injury when it appears that "the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256. See also Atchison, T. & S. F. R. Co. v. Parry, 67 Kan. 515, 73 Pac. 105. The petition, it is true, does not allege that it was the duty of defendant to adopt rules or methods in the operation of the killing beds to provide for the safety of plaintiff. It recites the facts, the usual method employed, and the departure from the usual method. It is shown in evidence that no care was taken in fact to prevent these common laborers from doing what it was clearly natural and probable that they might do, and which it appears one of them did do. The law defines the duty of the master, however; and, while it is not necessary here to decide what would have been reasonable precautions for the master to have taken to prevent injury to the servant, it is sufficient that, as the case stood at the close of plaintiff's testimony, there was some evidence that no precautions of any kind had been taken, and that the failure to take reasonable precautions was the proximate cause of the injury to plaintiff. There was no error in overruling the demurrer.

Error is also claimed in the instructions. The twelfth instruction of which complaint is made relates to the law of a fellow servant; and, while it might be open to some criticism, plaintiff in error was not prejudiced because the negligence of a fellow servant is not available as a defense in this action. Instruction number 13 fairly states the law governing the facts in evidence. The words, "were liable," are qualified by the phrase, "under the method of operating defendant's killing beds." The complaint is that there was no evidence to warrant the instruction; but, as we have said, there is some evidence that common laborers, without experience, and in the presence of the foreman, frequently attempted to operate the hoist. "The employer is chargeable with knowledge of whatever it is his duty to find out and know." Thomp. Neg. § 5404.

Error is specified in overruling defendant's challenge for cause to a juror, and also on account of some remarks of counsel for plaintiff below in his opening statement. These matters cannot be considered, for the reason that they do not appear in the record except in the form of an affidavit, and the record shows this affidavit was filed the day after the motion for a new trial was overruled. The record does not disclose that the court's attention to these alleged irregularities was challenged by the motion for a new trial. We find no error in the instructions, and, in our view of the law of the case, there was sufficient evidence to submit to the jury upon the allegations in the petition and to support the verdict.

The judgment will be affirmed.

All the Justices concur.

Petition for rehearing denied.

CALIFORNIA SUPREME COURT.

JOHN KOCH, Appt.,
v.
SOUTHERN CALIFORNIA RAILWAY COMPANY, Respt.

(— Cal. —, 84 Pac. 176.)

Railroads—safety gates—reliance upon.

That safety gates where a railroad crosses a highway are open is not such an absolute assurance of safety that a traveler on the highway can proceed to cross the tracks without any precaution as to the possible approach of trains.

(Beatty, Ch. J., dissents.)

(February 10, 1906.)

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Edward F. Wehrle and Anderson & Anderson** for appellant.

Messrs. **C. N. Sterry, T. J. Norton, and Paul Burks,** for respondent:

Standing gates are not an invitation to the traveler which allows him to shut his eyes and ears.

Thomp. Neg. § 1614; Greenwood v. Philadelphia, W. & B. R. Co. 124 Pa. 572, 10 Am. St. Rep. 614, 17 Atl. 188; Rangeley v. Southern R. Co. 95 Va. 715, 30 S. E. 386;

Case Note.—Duty of traveler going upon railroad crossing when gates are open.—In addition to the cases cited on this question in the prevailing and dissenting opinions in KOCH v. SOUTHERN CALIFORNIA R. Co., the following are in point:

The doctrine of the Pennsylvania case cited in that opinion, that plaintiff has no right to omit the ordinary precautions of stopping, looking, and listening when approaching a railroad crossing merely because he finds the gate up, was reaffirmed in Lake Shore & M. S. R. Co. v. Frantz, 127 Pa. 297, 4 L.R.A. 389, 18 Atl. 22.

It is frequently stated that the fact that the gates are open is an implied invitation to cross, and an assurance of safety from the danger of any passing train. Blount v. Grand Trunk R. Co. 9 C. C. A. 526, 22 U. S. App. 129, 61 Fed. 375; Central Trust Co. v. Wabash, St. L. & P. R. Co. 27 Fed. 159; Indianapolis Union R. Co. v. Neubacher, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669; Glushing v. Sharp, 96 N. Y. 676; Palmer v. New York C. & H. R. R. Co. 112 N. Y. 234, 19 N. E. 678; Scaggs v. Delaware & H. Canal Co. 145 N. Y. 201, 39 N. E. 716; Fitzgerald v. Long Island R. Co. 10 N. Y. S. R. 433; Wilson v. New York, N. H. & H. R. Co. 18 R. I. 491, 29 Atl. 258; Stapley v. London, B. & S. C. R. Co. L. R. 1 Exch. 21; Wanless v. North Eastern R. Co. L. R. 6 Q. B. 481.

But the weight to be given to such implied invitation depends on the circumstances. Blount v. Grand Trunk R. Co. *supra.*

Where one approaching a crossing is misled by the gates being open, the law will not hold him to the same vigilance to look and listen as when he approaches a crossing not guarded by gates. Indianapolis Union R. Co. v. Neubacher, *supra;* Kane v. New York, N. H. & H. R. Co. 132 N. Y. 160, 30 N. E. 256; Bond v. New York C. & H. R. R. Co. 69 Hun, 476, 23 N. Y. Supp. 450.

The failure to lower the gates modifies the otherwise imperative duty of travelers to look and listen when they reach a railway crossing. Blount v. Grand Trunk R. Co. *supra.*

The fact that the gates are open is not such an assurance of safety as to obviate the necessity of looking and listening. Sights v. Louisville & N. R. Co. 117 Ky. 436, 78 S. W. 172; Pennsylvania R. Co. v. Pfuelb, 60 N. J. L. 278, 37 Atl. 1100; Palmer v. New York C. & H. R. R. Co. 26 N. Y. Week. Dig. 26, 5 N. Y. S. R. 436.

But in Dick v. Louisville & N. R. Co. 23 Ky. L. Rep. 1068, 64 S. W. 725, it was said: "As to whether there is negligence in failing to look for a train when the gates are up, is a question that cannot be said, as a matter of law, to be entirely settled in the affirmative."

One about to drive over a crossing may properly take into consideration the existence of open gates, on the question of how far he shall look and to what extent he shall look; but he is not excused from looking. Merrigan v. Boston & A. R. Co. 154 Mass. 189, 28 N. E. 149.

Where the injured party is thus led to believe that he may cross the track in safety, his attempt to do so, and his lack of that vigilance which, under other circumstances, might be required, cannot be regarded as constituting negligence. Palmer v. New York C. & H. R. R. Co. 112 N. Y. 234, 19 N. E. 678.

If the deceased knew that the gates were never operated during that particular time of day, when he attempted to cross, he had no right to rely upon any protection from the gates. Rainey v. New York C. & H. R. R. Co. 68 Hun, 495, 23 N. Y. Supp. 80; Weed v. New York C. & H. R. R. Co. 91 Hun, 293, 36 N. Y. Supp. 98.

And if he had just witnessed a train passing while the gates were up, and therefore knew that the gateman had neglected his duty, it was all the more imperative that he should be on his guard against danger. Pennsylvania R. Co. v. Pfuelb, *supra.*

In Whelan v. New York, L. E. & W. R. Co. 38 Fed. 15, it was held that a street-car driver was guilty of no carelessness in passing through the open gate towards the crossing of a railroad without stopping at the gate to look or listen for a passing engine.

Romeo v. Boston & M. R. Co. 87 Me. 540, 33 Atl. 24; Pennsylvania R. Co. v. Pfuelb, 60 N. J. L. 278, 37 Atl. 1100, 61 N. J. L. 287, 41 Atl. 1116; Conkling v. Erie R. Co. 63 N. J. L. 338, 43 Atl. 666; Dawe v. Flint & P. M. R. Co. 102 Mich. 307, 60 N. W. 838; Martin v. Baltimore & P. R. Co. 2 Marv. (Del.) 123, 42 Atl. 442; Ellis v. Boston & M. R. Co. 169 Mass. 600, 48 N. E. 839; Swanson v. Central R. Co. 63 N. J. L. 605, 44 Atl. 852; Brown v. Chicago & N. W. R. Co. 109 Wis. 384, 85 N. W. 271.

Where the view is obstructed, the traveler, before going upon the rails, should stop so as to aid to the utmost his faculty of hearing.

Pepper v. Southern P. Co. 105 Cal. 389, 38 Pac. 974.

Mr. E. E. Millikin also for respondent.

Henshaw, J., delivered the opinion of the court:

Plaintiff sued to recover damages for personal injuries occasioned him by reason of the alleged negligence of the defendant in so operating its trains that plaintiff was struck by one of them at the crossing of a street in the city of Pasadena. The negligence charged was the omission upon the part of the defendant company to sound the bell and to close the gates maintained at the crossing at the time of the approach of the train. Upon the taking of all the testimony, the court instructed the jury to find a verdict for defendant, which the jury did, and the court's ruling in this regard is the subject of this appeal.

The consideration of the question necessitates the presentation of the evidence, which is here given, as favorably to the plaintiff as the facts warrant. Plaintiff, about 10 o'clock at night, was driving two horses attached to a light spring wagon toward the railroad track at a gait which he describes as "a pretty fair trot," and which others describe as a "brisk trot." Colorado street, upon which he was driving, is 75 feet wide with an electric railroad track running along it a little south of the middle of the street. The sidewalk on the south side of the street is 11 feet wide. An alley 30 feet wide crosses Colorado street at right angles, and defendant's railroad track also crosses the street in the center of that alley. The train which struck plaintiff's spring wagon consisted of a locomotive, 13 loaded freight cars, and a caboose. It came from the south through this alley up a steep grade at a speed of about 4 miles an hour, and having come almost to a standstill at a station just beyond, the engine was laboring heavily to get under way on the up grade, and "was puffing very hard with a loud exhaust." There was evidence tending to show that the engine bell and the whistle were silent, and it will be assumed that they were. There were gates across the street on each side of the railroad track, and these gates were not closed as the train crossed the street. Colorado street was

The fact that the railroad company maintains gates at the crossing is held to be more important where the traveler is driving a horse and vehicle than where he is walking, because in the former case his attention is necessarily divided between the control of the horse and observation of the track, and his reliance upon the gates must, in the nature of things, be greater than in the case of a pedestrian. Blount v. Grand Trunk R. Co. *supra;* Romeo v. Boston & M. R. Co. 87 Me. 540, 33 Atl. 24.

In Scaggs v. Delaware & H. Canal Co. *supra*, deceased started to walk diagonally over the crossing after the gates were raised, and was killed by a horse and wagon driven by a third party. It was held that the fact that the gates had been raised did not dispense with the necessity of deceased's being as vigilant when upon the crossing in the railroad inclosure as upon the ordinary highway.

In Callaghan v. Delaware, L. & W. R. Co. 52 Hun, 276, 5 N. Y. Supp. 285, it was held that, whether plaintiff relied upon the gate tender, and therefore was justified in making a less vigilant use of his eyes than he would otherwise have done to discover whether a train was coming before driving upon the tracks, were questions of fact for the jury.

The extent to which the traveler may rely upon the fact that the gates are open, and omit the ordinary precautions of looking and listening, is a question for the jury. Blount v. Grand Trunk R. Co. *supra*.

Whether the railroad company was guilty of negligence in allowing the gate to be open so that the traveler could drive upon the track while a train was approaching, is a question for the jury. Haywood v. New York C. & H. R. R. Co. 35 N. Y. S. R. 748, 13 N. Y. Supp. 177.

It is proper for the jury to consider the probable effect of the open gate upon the action of the traveler as he approached the crossing. Baltimore & P. R. Co. v. Carrington, 3 App. D. C. 101.

And whether the traveler exercised the care necessary under the circumstances is for the jury (Indianapolis Union R. Co. v. Neubacher, *supra;* Palmer v. New York C. & H. R. R. Co. 112 N. Y. 234, 19 N. E. 678; Kane v. New York, N. H. & H. R. Co., and Haywood v. New York C. & H. R. R. Co. *supra;* Oldenburg v. New York C. & H. R. R. Co. 29 N. Y. S. R. 836, 9 N. Y. Supp. 419, Affirmed in 33 N. Y. S. R. 663, 11 N. Y. Supp. 689, Affirmed in 124 N. Y. 414, 26 N. E. 1021; Wilson v. New York, N. H. & H. R. Co. *supra*); unless the evidence conclusively shows that he rashly stepped in front of the moving train (Blount v. Grand Trunk R. Co. *supra*).

paved with asphalt, and plaintiff's horses were newly shod with smooth shoes. He approached the track of defendant without checking the speed of his horses, and "looking straight ahead." He says he could not see or hear the train, and first saw it when the noses of his horses were about on the railroad track. According to the map or plat of the locality found in the record, as well as according to the undisputed evidence of witnesses, the buildings in the vicinity were so disposed that, if the plaintiff had been on the alert and driving with reasonable caution, he might have caught sight of the approaching train in ample time to have avoided the accident. Plaintiff was, and had been for six years, familiar with the crossing, but he took no precautions whatever before driving upon it. He did not stop. He did not slow up. He did not look. He did not listen. The clattering of his horses' feet and the noise of his wagon would certainly have interfered with his hearing the approaching train. He was moving faster than the train, and failed to take any precautions by slowing up to listen; but, had he been on the alert, he could have heard and seen the train in time to have avoided the accident. It is difficult to understand, then, how he could have come into collision with this slow-moving locomotive, excepting that he either absent-mindedly or recklessly approached and drove on the track. Indeed, from his own testimony, it is plain that he approached the crossing with a total disregard of its dangers. In substantiation of this is his statement to one of the witnesses, which is not denied, that "my main idea was to get home. I was not paying any attention to anything." Under the facts, then, the plaintiff, after accepting the invitation to proceed, extended to him by the open gates, used no precaution whatsoever, did absolutely nothing for his own protection and safety. He did not lessen the speed of his horses; he did not listen for the approach of the train, which was made audible to others some time before he drew near the crossing; he did not look for the train, as he, himself, testifies he kept his eyes straight ahead; and the first intimation he had of its approach was when his horses shied away from the engine.

The case thus presented is not one as to the degree or amount of care which should be exercised by one about to cross a railroad under the invitation to proceed, given by the open gates, but whether, under such circumstances, a man may fail or decline to exercise any care whatsoever, treating the open gates as a positive assurance of safety. Of course, in any case such as this, where it is shown that a plaintiff has exercised some care, the question whether or not the care actually exercised was due and sufficient will always be a matter for determination by the jury. But where, as here, the unconflicting evidence shows that he exercised no care whatsoever, it becomes a question of law to say whether or not such a plaintiff's case shall be submitted to the jury. If it is so submitted, it can only be upon the theory that the open gates were an absolute warranty of safety, justifying the plaintiff in proceeding without any heed or caution. It is for this proposition that appellant contends. But such we do not understand to be the law. A railway crossing is, itself, a place of danger, and is an effectual warning of danger,—a warning which must always be heeded; and the exercise of ordinary care in traveling over such a place is not excused by the negligent omission of the railway company, itself, to exercise reasonable care. Green v. Southern California R. Co. 138 Cal. 1, 70 Pac. 926; Herbert v. Southern P. Co. 121 Cal. 227, 53 Pac. 651; Lambert v. Southern P. R. Co. 146 Cal. 231, 79 Pac. 873. Nor is it the law that when a railroad company adopts safety gates or any other appliance for the protection of the public, the public is thereby absolved from all duty of taking care of itself. A person is still required to exercise due and ordinary care, and, while the quantum of care which will be reasonable may be less where the gates are provided and are relied upon by the traveler, still the gates, themselves, are not an assurance and a warranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions, as did the plaintiff in this instance. Greenwood v. Philadelphia, W. & B. R. Co. 124 Pa. 572, 3 L.R.A. 44, 10 Am. St. Rep. 614, 17 Atl. 188; Rangeley v. Southern R. Co. 95 Va. 715, 30 S. E. 386; Pennsylvania R. Co. v. Pfuelb, 60 N. J. L. 278, 37 Atl. 1100; Dawe v. Flint & P. M. R. Co. 102 Mich. 307, 60 N. W. 838; Romeo v. Boston & M. R. Co. 87 Me. 540, 33 Atl. 24; Thomp. Neg. § 1614.

The case of Ellis v. Boston & M. R. Co. 169 Mass. 600, 48 N. E. 839, contains a critical review of the matter, and it is said: "The raising of the gates was, no doubt, a circumstance which justified the plaintiff in starting to cross the railroad when he did, and he had a right to expect that, if any engine or train was approaching the crossing on the inbound track, a whistle would be sounded or a bell be rung. But, in attempting to cross the railroad, he was bound, in the exercise of ordinary care, himself to exercise his own powers of observation, and to take thought for his own safety; and he was not entitled to have his

case go to the jury unless there was evidence from which it could be inferred that he did this. No such inference can be drawn either from his own testimony or that of the other witnesses. The general rule that one who attempts to cross a railroad track must, in a reasonable way, use his own powers of observation to assure himself that there is no danger from approaching trains, is clear. Chase v. Maine C. R. Co. 167 Mass. 383, 45 N. E. 911, and cases cited. And the rule applies to one from whom a train approaching upon a second track is hidden by a train which has just passed. Bancroft v. Boston & W. R. Corp. 97 Mass. 275; Winslow v. Boston & M. R. Co. 165 Mass. 264, 42 N. E. 1133. While the raising of the gates justified the plaintiff in attempting to cross when he did, and while that fact and the facts that no whistle was sounded and no bell was rung are to be taken into consideration on the question of how much he must himself look and observe as he makes his way across, these circumstances do not excuse him from looking and listening and taking thought for his own safety. He cannot rely wholly upon them, and cannot recover without showing more, as to his own conduct, than that he so relied. Butterfield v. Western R. Corp. 10 Allen, 532, 87 Am. Dec. 678; Merrigan v. Boston & A. R. Co. 154 Mass. 189, 28 N. E. 149; Tyler v. Old Colony R. Co. 157 Mass. 336, 32 N. E. 227. We are of opinion that, as matter of law, there was no evidence from which it could be found that the plaintiff himself exercised due care, and the verdict for the defendant was rightly ordered. Exceptions overruled."

Excepting for the presence of gates, this case is parallel in its facts with Hager v. Southern P. Co. 98 Cal. 309, 33 Pac. 119; but, as has been said, the presence of gates does not justify the total indifference and disregard to danger which was evinced by plaintiff in this case.

The judgment appealed from is therefore affirmed.

We concur: **McFarland, J.**; **Lorigan, J.**; **Angellotti, J.**; **Shaw, J.**

Beatty, Ch. J., dissenting:

I dissent. When the superior court instructs a jury to find for defendant, this court, in reviewing the judgment, must not only assume the entire truth of plaintiff's evidence, but must give him the advantage of every inference which can be fairly drawn from it. Conflicting evidence, and inferences from it, must be wholly disregarded. This proposition seems to be conceded by the court, and certainly it is fully supported by the first decision cited in its opinion on the principal question of law presented by the case. Greenwood v. Philadelphia, W. & B. R. Co. 124 Pa. 576, 3 L.R.A. 44, 10 Am. St. Rep. 614, 17 Atl. 188. I think, however, that in stating the case this rule has not been strictly observed with respect to important particulars. The statement that the plaintiff was moving faster than the train is based entirely upon the opinion of the defendant's witnesses—the engineer and fireman—that they were going about 4 miles an hour; but this evidence was weakened by the admission that the average speed of the train between Los Angeles and San Bernardino was 15 miles an hour, and that the grade they were ascending at the place of the accident was but a minute fraction over 1 per cent (1.06). It was also in conflict with equally definite evidence on the part of the plaintiff, from which the jury would have been warranted in finding that the speed of the train was at least 50 per cent in excess of plaintiff's speed. Two entirely disinterested witnesses, Holloway and Simons, crossed the track going west just before the accident. They were in a buggy, proceeding at a slow trot. Holloway testified that they met plaintiff about one fourth of the length of the block from defendant's track (about 50 feet), and Simons, testifying as a witness for defendant, stated that when they came in sight of the train at the crossing, it (meaning, I suppose, the headlight) was about midway between Green and Colorado streets, a distance of more than 200 feet from the point of collision. Conceding that this character of evidence is somewhat indefinite, it is no more indefinite than the estimate of defendant's witnesses that the train was moving about 4 miles an hour, and, accepting it as approximately correct, it proves that, while the buggy, proceeding at a slow trot, moved 50 feet from the track to the point where it met plaintiff's wagon, and while plaintiff, moving at a brisk trot, proceeded another 50 feet to the point of collision, the train had moved twice as far, necessarily at a rate of speed twice the average speed of the two vehicles, and probably at a rate much faster than that of the plaintiff. This fact has an important bearing upon another fact which is highly material, in view of the rule as to contributory negligence to be considered hereafter. For, if plaintiff was moving 6 miles an hour (I assume this rate because in the discussion here it has been agreed that a brisk trot is equivalent to at least 6 miles an hour), the train was moving 9 miles an hour, and it is susceptible of mathematical demonstration from other *data* supplied by the uncontradicted evidence of actual measurements that plaintiff could not have

seen the headlight of the train until the heads of his horses were within 12 feet of the track (*i. e.*, less than a second and a half of time). These *data* are: A solid row of brick buildings extending from a line 15¼ feet west of the center of the track a distance of 150 feet,—the entire length of the block. It was dark. The first part of the train that plaintiff could have seen was the headlight, which was moving north on a line 15¼ feet east of the brick building adjoining the alley. Plaintiff was moving east on a line about 21 feet north of the same building. His rate of progress was 6 miles an hour, equivalent to 8⅘ feet a second. The train, moving at the rate of 9 miles an hour, would cover 13½ feet a second. Plaintiff sat 14 feet back of his horses' heads. The hind wheels of his wagon extended 4 feet farther to the rear. The collision was with his hind wheel as he was clearing the track at the east rail.

It will be seen in the ensuing discussion, as it appears from the opinion of the court, that in cases of this kind it is always a material question whether the plaintiff, after discovering his danger, was able to avoid it; and one of the questions here is whether this court can hold, as matter of law, that the plaintiff, within the brief space of a second and a half, could have reined in his horses, or done anything more prudent, after seeing the locomotive, than to try to cross ahead of it. It will be seen that, in the opinion of the court, the conduct of the plaintiff and his whole case takes its color from the assumed slow motion of the train and his own reckless speed. If it be true that upon this point there is, as I have attempted to show, evidence warranting the inference that the speed of the train was 50 per cent in excess of the plaintiff's speed, we must, for the purposes of this appeal, take that as a fact proved, and we are not then forced to conclude that it was the mere recklessness or absence of mind of the plaintiff which placed him in front of the locomotive. For he tells us plainly what he was doing and why he did it. He knew the crossing, and he knew that the defendant guarded the crossing by gates which, from his observation, were always lowered when trains were passing. He knew he was approaching the crossing, and he "kept his eyes straight ahead in order to see if anything was in the way." His idea was—as is probably the belief of a majority of men —that where the state of traffic calls for the erection of crossing gates, the duty and the practice of the railway company is to employ men to attend them and to close them on the approach of a train, and not alone in the daytime, but at all times at which trains may be expected to pass. So believing, and seeing the gates open and motionless, he took it as an assurance of safety and an invitation to proceed. A fair construction of his testimony shows that he was acting consciously upon this view of the situation, and not with a mind solely intent upon getting home, and oblivious to everything else. It is true he did not go upon the stand and formally deny the statement of one of the defendant's witnesses, which is quoted in the opinion of the court, to the effect that he was not paying attention to anything, but that evidence was contradicted in advance by the whole tenor of his testimony in chief, and the expression, itself, admitting it to have been reported with literal fidelity, was used within twelve hours after the accident, very shortly after he recovered consciousness, and while he was acutely suffering from concussion of the brain. Considering that of the three agents of defendant who were sent to the hospital to obtain plaintiff's statement, one, its "special inspector," did not testify; that another, a surgeon, testified to a statement not at all at variance with plaintiff's testimony at the trial; and that only one, the operator at the Pasadena station, testified to the expression quoted,—I do not think we can assume as a fact that the plaintiff, in approaching the crossing, was not paying attention to anything. On the contrary, the case, as the plaintiff might reasonably have asked the jury to view it, and as we, therefore, are bound to view it in considering the instruction to find for the defendant, was simply this: The plaintiff, perfectly aware that he was approaching a city crossing, guarded by gates which, according to his experience, were always lowered on the approach of a train, drove forward without slackening the brisk pace of his horses because he saw the gates standing open, and because he regarded the open gates as an assurance of safety and an invitation to pass. He looked straight ahead to see if there was anything in the way, and was entirely excused from looking in the direction of the approaching train, because his view in that direction was cut off by a solid row of brick buildings which prevented him from seeing the locomotive until it was too late to have avoided the accident. He might, however, have heard the sound (the loud exhaust of the engine) made by the train, if he had stopped to listen. Or, if he had so slackened his pace as to leave him in perfect control of his team, he would have seen the locomotive in time to have pulled up while the train was passing. The question is whether it was his duty, under the circumstances, to stop for the purpose of listening, or to approach the gates so cautiously that

he could rein in his horses instantly on the sudden appearance of the train emerging from behind the building which obstructed his view. The question, in other words, is whether the rule that the failure on the part of a traveler to stop and look and listen is negligence in law (negligence *per se*, as it it sometimes designated) applies to a grade crossing of a city street, which, in compliance with municipal regulations, or by the voluntary act of the railroad company, is guarded by gates arranged to be lowered while trains are passing, or by flagmen habitually stationed there for the purpose of signaling that the way is clear.

Upon this question the cases and the text writers are by no means agreed. There are decisions both ways, and the text writers have inclined to one side or the other, according to their respective views of public policy. The opinion of the court cites only § 1614 of Thompson on Negligence, and the cases referred to in illustration of the text. But § 1614 of Dr. Thompson's work does not state his view of the question. It states the view to which he is evidently opposed, as will be seen by reference to the preceding section (1613), where he says: "Many decisions . . . concede that the traveler approaching a railway crossing has the right to rely upon the fact that the gate is open, or that the flagman is absent from his post, and to assume from these indications that no train is approaching, and that he may safely proceed to cross; and so where the gates are up and a flag flying, indicating that a train will stop before reaching the crossing; and so where the traveler, having waited several minutes, starts to cross on the gates being raised. While, as we shall soon see" (referring to § 1614, cited by the court), "some courts condone the fault of the railroad company in luring the traveler to his death or injury by deceptive appearances, and visit all the blame on the traveler, yet, even these courts concede that a traveler approaching a crossing guarded by gates is not required to exercise the same vigilance in looking and listening as when he approaches one not so guarded," etc.

With the sole exception of the Pennsylvania case, the decisions cited in the opinion of the court will be found on examination to furnish a very slender support to its conclusion. In Greenwood v. Philadelphia, W. & B. R. Co. 124 Pa. 572, 3 L.R.A. 44, 10 Am. St. Rep. 614, 17 Atl. 188, the doctrine contended for by defendant is, indeed, carried to its extreme limit. There a hose cart, responding to an alarm of fire (a false alarm as the event proved), was driven rapidly upon a gate crossing and one of the firemen injured by a passing train. An instruction to find for the defendant was affirmed because it appeared that the driver of the cart, relying on the open gates, did not stop to listen as he approached the crossing. Outside of Pennsylvania, I think, it would be difficult to find a case going to this extent. In every other case cited the person injured was a pedestrian, and in every case the decision turned upon the fact that the plaintiff, after passing the gates, could have seen the approaching train in ample time to have avoided the accident if he had used his eyes. This was the whole point of the decision; and in each case, except the New Jersey case, previous decisions of the same court, in which it had been held that travelers had a right in approaching a grade crossing to rely upon open gates as an assurance of safety, were distinguished upon the ground mentioned.

Take the Virginia case,—Rangeley v. Southern R. Co. 95 Va. 715, 30 S. E. 386. The facts of that case are stated at page 720 of 95 Va., and page 387 of 30 S. E., as follows: "The record considered as on a demurrer to the evidence shows that the deceased, on the night of the accident, with his companion, left a restaurant, the porch of which extended to within 8 or 10 feet of the railroad track; that he went to a point on or near the track, and was standing there talking when struck by the defendant's train; that the night was dark, but that the locality was well lighted by electric lamps; that the track was straight in the direction from which the train came, with nothing to obstruct the view in that direction after leaving the restaurant porch; that the train was backing about as fast as a man could walk, not over 5 miles an hour, up grade, using steam, and that the bell was ringing from the time it commenced to back until after the unfortunate man was run over." The court, discussing the refusal of an instruction which, "in effect, informed the jury that a person approaching a railroad crossing where gates are required to be kept and lowered on the approach of trains has the right, when he sees that the gates are not lowered, to presume that no train is approaching, and that he is under no obligation to use his senses to ascertain whether a train is approaching," referred to another case, reported in the same volume, for the correct rule in such cases. Kimball v. Friend, 95 Va. 125, 27 S. E. 901. The facts of that case were that the plaintiff rode a bicycle on the track at about the speed of a trotting horse. The sides of a cut prevented him from seeing the approaching locomotive until he was too close to avoid the collision, and he was killed. He did not stop to listen, and he did not approach the crossing at such a moderate rate of speed as would

enable him to control his movements. There was no direct evidence, of course, that he did or did not listen. Upon a very full discussion of the evidence and the rulings giving and refusing instructions, the court holds that a traveler is not required to exercise the same vigilance in approaching gate crossings as he must exercise at crossings not so guarded, and that in such cases the question of contributory negligence is peculiarly one for the consideration of the jury. The judgment for the plaintiff (defendant in error) was affirmed.

Next in order is the New Jersey case, Pennsylvania R. Co. v. Pfuelb, 60 N. J. L. 278, 37 Atl. 1100. That was another case of a pedestrian walking upon a gate crossing and being killed by a train which he could have seen approaching for a long distance before he stepped on the track; and a circumstance to which much weight was attached was the fact that, when he was approaching the track, he saw the gate standing open while another train was passing, which was notice that the open gates were not an invitation to cross.

Dawe v. Flint & P. M. R. Co. 102 Mich. 307, 60 N. W. 838, was another case of a pedestrian injured by a train which she could have seen approaching, after passing the gates, long before it struck her. The case is distinguished from Richmond v. Chicago & W. M. R. Co. 87 Mich. 374, 49 N. W. 621, and Evans v. Lake Shore & M. S. R. Co. 88 Mich. 442, 14 L.R.A. 223, 50 N. W. 386. The rule established by those cases, and not questioned by the Dawe Case, is, that "a party approaching a railroad track has a right to rely upon the absence of such warnings of danger, as it is shown to be the custom of the railroad company to give." See point 2, syllabus, p. 442, 88 Mich. "When gates are provided by railroad companies at street crossings, the public have a right, the gates being open, to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duties, and are not negligent in acting upon the presumption that they are not exposed to a danger which could only arise from a disregard of such duties." And see Van Auken v. Chicago & W. M. R. Co. 96 Mich. 307, 22 L.R.A. 33, 55 N. W. 971.

A Maine case is next cited by the court, Romeo v. Boston & M. R. Co. 87 Me. 540, 33 Atl. 24. This was another case of injury to a pedestrian who, for a distance of 80 feet from the track, had a plain view of the approaching train, if she had raised her eyes to look. The case was distinguished, for this reason, from State v. Boston & M. R. Co. 80 Me. 430, 15 Atl. 36, and Hooper v. Boston & M. R. Co. 81 Me. 260, 17 Atl. 64. In the first of these cases the gates had been erected voluntarily by the railroad company, and they did not operate them at night; but, nevertheless, it was held to be a question for the jury, whether the deceased was guilty of contributory negligence in driving on the track without stopping. The second case is to the same effect.

Coming to Massachusetts, an extensive quotation is made from the opinion in Ellis v. Boston & M. R. Co. 169 Mass. 600, 48 N. E. 839. I think it can hardly be said that the opinion in that case contains a critical review of the matter. The plaintiff walked through the gates and stepped on the track in front of a train that he could have seen if he had looked. It is expressly stated that the raising of the gates was a circumstance which justified him in starting across the track; but his failure to use his eyes when he was in perfect control of his own movements, and in a place of safety, was held to be negligence. It is an error, I think, to regard this case, or any of the cases in which a man or woman on foot was injured by a train they could have seen approaching if they had looked along the track, as authority in this case. With the single exception of the New Jersey case, they were all decided by courts that hold to the doctrine that open gates are an assurance of safety which justify the traveler to enter the crossing without stopping to listen: and all that is said in any of the decisions in regard to the obligation of the traveler to make use of his senses has reference to the ability of a pedestrian to avoid the danger after passing the gates by simply stopping when the train has come into his view. In this case the plaintiff could have done nothing to save himself after the train came in view. The views of the supreme court of Massachusetts, regarding a case such as this, are stated in Clark v. Boston & M. R. Co. 164 Mass. 434, 41 N. E. 666. There, the plaintiff, hauling a load of hay with a team of two horses, drove at a trot down a grade to a gate crossing without attempting to stop, and was injured. Exceptions to a verdict in his favor were overruled by the supreme court upon the ground that "there is no absolute rule of law that a traveler approaching the crossing at grade of a highway by a railroad must, under all circumstances, stop to look and listen for a train before entering upon the railroad." (First point of syllabus.) See also Conaty v. New York, N. H. & H. R. Co. 164 Mass. 572, 42 N. E. 103, and § 1613 of Thompson on Negligence, and the cases cited under that section; particularly the opinion of Judge Elliott in the case of Pennsylvania Co. v. Stegemeier, 118 Ind. 306, 10 Am.

St. Rep. 136, 20 N. E. 843, and the opinion of Judge Williams in Cleveland, C. C. & I. R. Co. v. Schneider, 45 Ohio St. 688, 17 N. E. 321. Both of these cases were very elaborately argued and considered, and the conclusions of the courts were widely at variance with the doctrine to which we are committing this court in the first case we have had to consider involving the question of negligence in approaching a gate crossing. It is, in my opinion, very important, on the first presentation of this question, that this court should adopt that rule which is dictated, not only by considerations of public convenience, but of humanity. If we lay down the rule that open gates at street crossings are an assurance of safety to all persons, and an invitation to pass without stopping to listen when the view is obstructed, I feel assured that the railroad companies will see that their gates are kept in order and tended by careful and competent keepers. There will be no accidents of this kind, and both life and property will be rendered more secure without any impediment to the great and increasing railroad traffic. Their trains will be able to move with the same or greater celerity than now, and without danger of encountering obstacles at the points where gates are established. But the traffic conducted by rail is not the only thing to be considered. The multifarious traffic of large cities upon their public streets is to be considered, and promoted, as far as it can be done, without injury to more important interests; and, since the careful operation of crossing gates would be no interruption to the passage of trains, while it would leave the use of the streets free at all times when the gates were open, the rule which I advocate would conserve all interests at no cost except for the erection and repair of the gates, and the wages of keepers,—a cost which in most cases would be trifling in comparison with the privilege of crossing the city streets at grade.

There is, perhaps, less difference between me and the court upon the question of law involved in this case than there is with respect to the facts. It is, at all events, recognized in the opinion of the court, that there is a distinction to be observed between cases of accidents at gate crossings and those at crossings not so guarded. This distinction was repudiated in a majority opinion of the district court of appeal, and, as the judge who presided at the trial was one of the two justices who concurred in that opinion, I am satisfied, not only from that circumstance, but from the argument of counsel for respondent here, that the case was taken from the jury upon the assumption that it was governed entirely by the strict rule applied to accidents at unguarded crossings in such cases as Green v. Southern California R. Co. 138 Cal. 1, 70 Pac. 926, and Herbert v. Southern P. Co. 121 Cal. 232, 53 Pac. 651, and not upon the theory of this decision that the plaintiff could have avoided the accident after the train came within range of his vision.

INDIANA SUPREME COURT.

STATE OF INDIANA, Appt.,
v.
WILLIAM H. LOWRY.

JOHN M. LEWIS, Appt.,
v.
STATE OF INDIANA.

(— Ind. —, 77 N. E. 728.)

Interstate commerce—cigarettes.

1. A state cannot deny to a proper person the right to hold in the original packages cigarettes which he has imported from another state.

Statute—prohibiting owning cigarettes.

2. A statute making it unlawful to keep or own cigarettes does not apply to the act of smoking cigarettes, or of having them in possession for the sole purpose of smoking them,—at least where the title states that the act is to regulate, and, in certain cases, prohibit, the use of cigarettes; and the words "keep" and "own" are preceded by

Case Note.—Right of state to confiscate cigarettes imported for personal use.—A search has failed to reveal any other authority on this exact question. The cases nearest in point are the intoxicating liquor cases referred to in the opinion, which are there so carefully considered in their relation to the question under discussion that the opinion leaves nothing further to be said. As the court expressly limits its decision to the right to hold cigarettes in the original packages in which they are imported, and expressly refrains from determining whether a person importing such cigarettes for his own use could successfully rely on the interstate commerce law for protection against state control after he had broken the original package in which the cigarettes were imported, the decision adds nothing new in principle to the law of interstate commerce as it stood before the case was decided. By construing the statute involved as not applying to the act of smoking cigarettes or having them in possession for the sole purpose of smoking them, the court has avoided the necessity of deciding the more interesting question of the right of a state, under its police power, to regulate or prohibit the use of articles imported from another state for personal use only, after the original package is broken.

those governing the manufacture, sale, and giving away of such articles.

(Montgomery, J., dissents in part.)

(April 26, 1906.)

APPEAL by the State from a judgment of the Criminal Court for Marion County in favor of defendant in a prosecution charging him with violation of a statute against owning cigarettes. Affirmed.

APPEAL by defendant from a judgment of the Circuit Court for Madison County convicting him of violating the statute against owning cigarettes. Reversed.

The facts are stated in the opinion.

Messrs. **William C. Geake, C. C. Hadley,** and **L. G. Rothschild,** with Mr. **Charles W. Miller,** Attorney General, for the State in first case:

The point of time when an article of interstate commerce ceases to be such, and the power of the state over it begins, is when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the state or country.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132.

In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens.

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; 17 Am. & Eng. Enc. Law, p. 74.

Mr. **Charles P. Benedict** also for the State.

Messrs. **Taylor, Woods, & Wilson** for appellee.

Messrs. **Leslie Kinnard, B. R. Call,** and **Taylor & Woods** for appellant in second case.

Messrs, **C. W. Miller, W. C. Geake, C. C. Hadley,** and **L. G. Rothschild** for the State.

Gillett, Ch. J., delivered the opinion of the court:

The defendants below, Lowry and Lewis, were respectively charged with violating an act of the general assembly, approved February 28, 1905, known as the "anti-cigarette law." Acts 1905, chap. 52, p. 82. Although the cases are wholly unrelated in their facts, the law questions involved are such that the appeals may advantageously be considered together.

In the first of said cases it appears that Lowry caused 1,000 cigarettes to be shipped to him, for his personal use, by a dealer in Louisville, Kentucky. The shipment was made by the Adams Express Company, a common carrier of goods for hire by express. The cigarettes were packed 20 in a box, each box had a United States revenue stamp thereon, and in lots of 25 these boxes were inclosed in packages or cartons, and the latter, in turn, were wrapped together in a strong paper and securely tied. This package was opened by Lowry upon its receipt, and from time to time, between May 8, 1905, and the institution of the prosecution, he smoked such cigarettes. It further appeared that Lowry, at the time in question, was forty years of age, in no wise engaged in the purchase, sale, or distribution of cigarettes, and that the cigarettes he shipped into the state were not intended for sale, or to be given away, to any person or persons. As to the prosecution against Lewis, it merely appears that at the time of his arrest he was smoking a cigarette, and that he had at that time upon his person a box containing five cigarettes. There is no contention that he was a dealer, that he had such cigarettes in his possession for the purpose of sale or gift, that he acquired them unlawfully, or that he was a minor. The case may therefore be assumed to have been that of a man smoking a cigarette, and having a few cigarettes in his possession intended for his own consumption.

The title and body of the enactment under which said prosecutions were had are as follows:

"An Act to Regulate and in Certain Cases to Prohibit the Manufacture, Sale, Keeping, Keeping for Sale, Owning, or Giving Away, of Cigarettes, Cigarette Paper, Cigarette Wrappers, and Other Substitute for the Same, Providing Penalties for the Violation Thereof, and Repealing all Laws in Conflict Therewith.

"Be it enacted by the general assembly of the state of Indiana, that it shall be unlawful for any person, by himself, clerk, servant, employee, or agent, directly or indirectly, upon any pretense or by any device, to manufacture, sell, exchange, barter, dispose of or give away, or keep for sale any cigarettes, cigarette paper, or cigarette wrappers, or any paper made or prepared for the purpose of being filled with tobacco for smoking; or keep or own, or be in any way concerned, engaged, or employed in owning or keeping, any such cigarettes, cigarette paper,

or wrappers; and any person for violation of the same shall be guilty of a misdemeanor, and, upon conviction, shall, for the first offense pay a fine of not less than $25 nor more than $50 and cost of prosecution, and stand committed to the county jail until such costs are paid; and for the second and each subsequent offense he shall pay, upon conviction thereof, a fine of not less than $100 nor more than $500 and the cost of prosecution, or be imprisoned in the county jail not to exceed six months: Provided that the provisions hereof shall not apply to the sales of jobbers doing an interstate business with customers outside the state."

Taking up the Lowry appeal first, the question arises whether a keeping or owning of cigarettes, in an unopened, original package (as that term is used in the law), is in violation of the statute. This question must be determined for two reasons: (1) Because the lawfulness of Lowry's act up to that point is involved; and (2) because a determination of that question in his favor would raise a presumption that the words "keep" and "own" were not used in the sense contended for by the attorney general. The question as to the lawfulness of interstate commerce in cigarettes was taken out of the pale of controversy by the decision in Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132. It was there said: "Whatever product has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of Federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce although it may to a certain extent be within the police power of the states. Of this class of cases is tobacco. From the first settlement of the colony of Virginia to the present day tobacco has been one of the most profitable and important products of agriculture and commerce, and, while its effect may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of opinion that it cannot be classed with diseased cattle or meats, decayed fruit, or other articles, the use of which is a menace to the health of the entire community. Congress, too, has recognized tobacco in its various forms as a legitimate article of commerce by requiring licenses to be taken for its manufacture and sale, imposing a revenue tax upon each package of cigarettes put upon the market, and by making express regulations for their manufacture and sale, their exportation, and importation. Cigarettes are but one of the numerous manufactures of tobacco, and we cannot take judicial notice of the fact that it is more noxious in this form than in any other. Whatever might be our individual views as to its deleterious tendencies, we cannot hold that any article which Congress recognizes in so many ways is not a legitimate article of commerce." It was said in Lyng v. Michigan, 135 U. S. 161, 166, 34 L. ed. 150, 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725, 727: "The power cannot be conceded to a state to exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, to regulate such commerce, without congressional permission. The same rule that applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products, natural or manufactured, of any state, applies to all commodities in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts, and the usages of the commercial world. It devolves on Congress to indicate such exceptions as, in its judgment, a wise discretion may demand under particular circumstances." It has been well said that commerce among the states is a unit, and in respect of that commerce this is one country, and we are one people. Some of the statements of the court in Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, wherein the right was recognized to ship intoxicating liquor into a prohibition state and to sell such liquor therein, in original packages, led to the enactment by Congress of what is known as the "Wilson act," wherein it is provided that all fermented, distilled, or other intoxicating liquors transported into any state or territory, or remaining therein, for use, consumption, sale, or storage, shall, upon arrival, be subject to the operation and effect of laws enacted by the state or territory in the exercise of its police powers to the same extent as if said liquors had been produced in such state or territory. Act Aug. 8, 1890, 26 Stat. at L. 313, chap. 728 (U. S. Comp. Stat. 1901, p. 3177). We refer to this enactment as explanatory of some of the cases which we shall hereafter consider.

The states are not prohibited from enacting reasonable laws, under the police powers, relative to interstate commerce, provided that such laws are local in their character and only incidentally affect such commerce: but, as the regulation of the transportation of goods from one state into another is a matter which is national in its character, the silence of Congress is equivalent to a declaration that such commerce shall be free. Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Leisy v. Hardin, *supra;* Western U. Teleg. Co. v. James, 162 U. S. 650,

40 L. ed. 1105, 16 Sup. Ct. Rep. 934. These two classes of powers, the authority of the nation over interstate commerce and the control of the state over persons and things within its borders often clash, and in no way can this commerce be kept free from burdensome restrictions, except by the enforcement of the national authority to the extent that it is necessary to protect it. It was said by Mr. Justice Catron, in the License Cases, 5 How. 504, 600, 12 L. ed. 256, 299, relative to the effect of according to the states a power to regulate such commerce while within their borders: "Upon this theory, a power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the state and its courts could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing." As has been frequently pointed out, that which does not belong to interstate commerce is within the jurisdiction of the police powers of the state, and that which does belong to such commerce is within the jurisdiction of the United States. Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, *supra*; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265. The courts cannot permit a conflict to continue between these powers; to the extent that the acts of a state legislature impinge upon national authority, they must go down. The question which is to be determined in each case is whether the state enactment amounts to a regulation of, or discrimination against, such commerce.

It is clear that the grant of national authority over interstate commerce would be in no wise satisfied by the holding that an original package was only exempt from the authority of the state until it reached the hands of the consignee. As far back as Brown v. Maryland, *supra*, in which the taxing power of the state and the right of importation from a foreign country were brought into conflict, Chief Justice Marshall observed: "There is no difference in effect between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported, if none could be sold. . . . The object of importation is sale. . . . It is inconceivable that the power to authorize this traffic when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value." These considerations were productive of the holding in Leisy v. Hardin, *supra*, that there was a right to sell in original packages intoxicating liquors which had been shipped in from another state. In the case of Bowman v. Chicago & N. W. R. Co. *supra*, which clearly foreshadowed the ruling in Leisy v. Hardin, *supra*, Mr. Justice Matthews, speaking for the court, stated that—"the very purpose or motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists of the sale and exchange of the commodities transported" (page 499 of 125 U. S., page 712 of 31 L. ed., and page 706 of 8 Sup. Ct. Rep.). Of course, national authority must end somewhere in the matter of interstate commerce, or the rights of the states to regulate their own domestic affairs would be entirely subordinated; but it is clear that once it is determined that an indispensable concomitant of the right of making interstate shipments under national protection or regulation is some further right which can alone make the privilege in any degree efficacious, and it must indubitably follow, as within the principle of the above authorities, that such further right exists.

The declarations of law which have been made as to when the police power of the state attaches where the purpose of the importation is sale cannot with any degree of propriety be applied to cases where the purpose of the importation is not sale, but personal consumption. It cannot be supposed that this great and growing class of commerce between the states was not regarded as a matter of national concern in the establishment of a Constitution which was adopted "in order to form a more perfect Union." "Commerce undoubtedly is traffic," said Chief Justice Marshall, in the celebrated case of Gibbons v. Ogden, 9 Wheat. 189, 6 L. ed. 68, "but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts

of nations, . . . and is regulated by prescribing rules for carrying on that intercourse." See also Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321. If commerce for consumption, carried on between states, is recognized as a matter of national importance, limitations cannot be placed about it by the police powers of the state which would render the right but a dry and technical one. As was said by Mr. Justice Field, in his concurring opinion in Bowman v. Chicago & N. W. R. Co. *supra:* "To assert that, under the Constitution of the United States, the importation of an article of commerce cannot be prohibited by the states, and yet to hold that when imported its use and sale can be prohibited, is to declare that the right which the Constitution gives is a barren one, to be used only so far as the burden of transportation is concerned, and to be denied so far as any benefits from such transportation are sought. The framers of the Constitution never intended that a right given should not be fully enjoyed."

Commerce does not include everything which precedes or which follows after transportation, and we are not to be understood as intimating that in the matter of goods shipped in for consumption the powers of the state can in no wise act upon them, where the effect is only incidental, secondary, or remote. It is not necessary for us to determine in this case whether a person who has imported cigarettes in an original package for the purpose of consumption can successfully rely on the Federal law as a protection against state control after he breaks bulk and thus commingles his goods with those of the state. The Supreme Court of the United States has never gone further in the matter of recognizing the right to retain possession of goods shipped into the state than to hold that there existed a right to sell the goods in an original package after it had reached its destination; and it may be that that court would regard the opportunity of evading state laws as too great to warrant the protection of an interstate shipment after it had lost its distinctive character as an original package; but once the right of importation for consumption is recognized, notwithstanding hostile state laws, and it must indubitably follow that the shipment will be protected down to the last moment that the goods continue in the hands of the importer in the original package.

There seems to be no case which presents itself precisely as this does, for the reason, doubtless, that legislation relative to such subjects has not, so far as we have observed, taken the form of a prohibition upon the use, but has, instead, been directed against the manufacture or sale of the article. We have found three cases, however, which in principle rule the question which is before us, namely, Donald v. Scott, 76 Fed. 554, Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265, and Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. All of these cases arose in South Carolina, and they grew out of efforts to enforce what is known as the "dispensary law," under which the state, for police purposes, took over the liquor traffic. The situation in those cases as respects legislation is somewhat different from that with which we have to deal, but nevertheless the cases are in point. In South Carolina the state was recognizing the consumption of intoxicating liquors as lawful, but, assuming to act under the authority of the Wilson law, had attempted to extend its powers over the importation of such liquors, while here, as respects cigarettes, the contention of the state is that even their use is under the ban, but at the same time the fact must be recognized that Congress has not given its consent to the regulation of interstate traffic in cigarettes, so that the absence of congressional regulation must be regarded as equivalent to a declaration that commerce therein as between the states shall be free.

The opinions in Donald v. Scott and Scott v. Donald, *supra*, are based on the same case. The suit was instituted to restrain the seizure of intoxicating liquors under the state law, while in the possession of a common carrier, the petitioner having imported such liquors for his personal use. It is true that they were in the possession of the carrier at the time, but the point in said opinions lies in the fact that importation for private use was protected. The circuit judge, in the course of his opinion, said: "The petitioner purchased this package of liquor in North Carolina. He imported it into this state through a common carrier. He purchased and imported it solely for his own use and consumption. He is not, and never was, engaged in the liquor traffic. His well-known position as a leading editor in Columbia forbids such an idea. The package was plainly marked in his name, disclosed the fact of its purchase, importation, and personal use. Labels on the package, showing all these, could not have escaped observation. Under ordinary circumstances, he has established his right to the protection of the order of this court. The right to import under the interstate commerce law would be idle, indeed, if the subject-matter imported were not protected when it reached its destination. As it is protected in its importation solely because it is imported for personal use only, it will be protected as

long as this personal use continues." On the appeal of said case to the Supreme Court of the United States, it was stated in argument by the attorney general of the state that "the sole question is whether so much of the dispensary law of South Carolina as prohibits the importation of alcoholic liquors from other states for personal use was enacted in the legitimate exercise of the police power of the state." The court affirmed the decree of the United States circuit court enjoining the seizure, and held that the sections of the statute which were involved were void, both as a hindrance to interstate commerce and as creating an unjust preference in favor of the products of the enacting state. After the decision of said case, the legislature of South Carolina repealed the sections of the law which had been condemned, and substituted therefor requirements intended to pass muster as an inspection law. The statute, as thus amended, came under the review of the Supreme Court of the United States in Vance v. W. A. Vandercook Co. *supra*, the suit being by a California corporation, engaged in the production and sale of wines, to enjoin the seizure of original packages of wine which it had shipped into the state to fill orders which it had taken of private customers, and also to enjoin the seizure of packages which it was about to ship into the state to await sale. The court held that the requirements of the so-called inspection law were such that its provisions did not amount to a means reasonably suited to the end, and that petitioner was entitled to make said shipments for private consumption, but it upheld the provisions of the South Carolina law prohibiting the making of sales after the liquor had reached its destination. In the course of the opinion of the court this language was used: "The right of persons in one state to ship liquor into another state to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of the state law." In a subsequent portion of the opinion the court said: "On the face of these regulations (referring to the provisions for inspection), it is clear that they subject the constitutional right of the nonresident to ship into the state and of the resident . . . to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges." Certain members of the court dissented from the conclusion that the law was valid as to the original packages shipped into the state to await sale, and a statement made in the minority opinion, in referring to the proposition upon which the members of the court were united, gives point to the first of the above excerpts from the majority opinion. We refer to the statement that "the court concedes that it is not within the power of the state, even when reinforced by the act of Congress of August, 1890 [(the Wilson act) Act Aug. 8, 1890, chap. 728, 26 Stat. at L. 313 (U. S. Comp. Stat. 1901, p. 3177)], to deprive a resident of one state of the right to ship liquor into another state, to a resident for his own use, 'because such right is derived from the Constitution of the United States and does not rest on the grant of the state law.' "

But we are not without further explanation on the part of the Federal Supreme Court as to the effect of this ruling in the Vance Case. The court made the following comments upon said case in Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 25, 49 L. ed. 925, 928, 25 Sup. Ct. Rep. 552, 554: "Considering the Wilson act and the previous decisions applying it, it was decided that the South Carolina law, in so far as it took charge in behalf of the state of the sale of liquor within the state, and made such sale a source of revenue, was not an interference with interstate commerce. In so far, however, as the state law imposed burdens on the right to ship liquor from another state to a resident of South Carolina intended for his own use, and not for sale within the state, the law was held to be repugnant to the Constitution, because the Wilson act, whilst it delegated to the state plenary power to regulate the sale of liquors in South Carolina shipped into the state from other states, did not recognize the right of a state to prevent an individual from ordering liquors from outside of the state of his residence for his own consumption, and not for sale." In the dissenting opinion in the Pabst Brewing Co. Case, written by Mr. Justice Brown, and concurred in by three of the other justices, this explanation is given of the operation of the Vance Case: "The case turned upon the power of the consignee of liquors to receive them for his own use within the state of South Carolina, as well as the power to sell them in the original, unbroken packages as imported to citizens of South Carolina. It was held, in substance, that the consignee had the constitutional right to receive them for his own use without regard to the state laws, but that, under the Wilson act, he could no longer assert a right to sell them in original packages in defiance of the state laws." In American Exp. Co. v. Iowa, 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182, 184, the court, after referring to certain of its decisions, used this language: "The doctrine of the foregoing cases was applied in Vance v. W. A. Vandercook Co. 170 U. S. 438, 442, 42 L. ed. 1100, 1102, 18 Sup. Ct. Rep. 674, to the right of a citizen of South Carolina

to order from another state, for his own use, merchandise, consisting of intoxicating liquors, to be delivered in the state of South Carolina. . . . Those cases rested upon the broad principle . . . of a citizen of one state to freely contract to receive merchandise from another state, and of the equal right of the citizen of a state to contract to send merchandise into other states."

If the above cases mean anything and principle is to control, it must be held that it is incompetent for a state to deny to a proper person the right to hold in an original package an article like tobacco which he has shipped into the state. After he has borne the burden of importation, and has enjoyed the protection of the Federal law from the initial negotiation until the package is at rest, it cannot be that the state can treat a possession thus acquired as contraband. So long as a right to import for personal consumption is recognized, we affirm with all confidence that the right to hold the package is protected. If it is not protected beyond that point, it is not because the commerce in the article is recognized by the United States as being in any wise unlawful, but only because the Federal Supreme Court may conclude that a protection of consumption, as distinguished from a protection of that which distinctively belongs to commerce, would too far disturb the autonomy of the states.

As before stated, this case does not require us to go further in the consideration of the Federal law than to hold that the manner in which Lowry acquired the possession of the cigarettes was not unlawful. Beyond that point we may affirm, as applied to both cases, that after a painstaking study of the statute in question the conviction has been forced upon us that said enactment does not apply to the act of smoking cigarettes or of having them in possession for the sole purpose of smoking. Several reasons lead us to this conclusion.

I. If it had been the purpose of the legislature to prohibit smoking cigarettes, it can scarcely be supposed that the intention so to do would not have found direct expression. That being within the intent, the smoking of cigarettes would naturally have been the major denouncement. That this is a pertinent consideration is shown by the following statement of an English writer: "Sometimes, if the meaning of an enactment is not plain, light may be thrown upon it by observing that certain words which we might reasonably have expected to have been found in the enactment, have obviously been omitted from it by design." Hardcastle, Constr. & Effect of Stat. Law, 43. Within six days after the enactment of the statute in question, the legislature defined as a delinquent child any boy or girl (within certain age limits) "who smokes cigarettes." Acts 1905, chap. 145, p. 440. In §§ 569 and 570 of an act concerning public offenses, which was adopted within ten days of the date of the enactment we are considering, the legislature mentioned, in terms, the subject of smoking by children no less than four times. Acts 1905, chap. 164, p. 719. In the light of these cognate enactments, it seems incredible that the legislature should have indulged in so much of circumlocution to express prohibition that, as the ultimate object, would naturally have had the first place in the act. Of course, we know that the smoking of cigarettes, at least in some circumstances, was the evil with which the lawmaking power sought to deal, but, as we have no means of knowing whether the end was to suppress the smoking of cigarettes entirely, or to limit their use, by making them difficult to obtain, particularly by boys, we are unable to say that the legislative purpose could only attain its consummation by a holding that the cigarette was intended to be contraband in all circumstances. Indeed, if we may judge by contemporaneous legislation, we may assume that, because the cigarette was a recognized menace to the boys of the state, it was deemed advisable to take cigarettes out of commerce, by prohibiting the manufacture, sale, gift, or other transfer of them.

2. Another consideration which shows that the statute cannot have the broad construction which the state contends for is that the title of the act states that it is "an Act to Regulate and in Certain Cases to Prohibit," etc. Now the primary meaning of the word "regulate" is "to lay down the rule by which a thing shall be done." Anderson's Law Dict. This must be the meaning of the statute in question, for the word is used, as the title shows, in contradistinction to the word "prohibit." We find in the act a limitation in favor of jobbers, in certain cases, but the statute will be searched in vain for anything which amounts to a regulation if the act is construed in accordance with the contention of the state. More might be said upon this subject, but the proposition is virile enough to maintain itself. We may, however, call attention to the fact that the conspicuous difference between the act in question and the Iowa anti-cigarette law (Iowa Laws 1896, chap. 96, p. 96) lies in the fact that the title of the Iowa act solely purports to be an act to prohibit.

3. As shown by the opinion relative to the defendant Lowry, the act would be unconstitutional in part, if it were held to apply to his act of shipping cigarettes into the state for his own use. Even in a case where the only question involved is as to the effect

of an enactment, a construction is to be preferred, where it is reasonable, which will prevent the act from being unconstitutional in any circumstances.

4. The only words in the statute which would be broad enough to cover the cases in hand are "keep" and "own," and yet we find that they are preceded by the words "manufacture, sell, exchange, barter, dispose of, give away, or keep for sale." As to the last-mentioned words, it will be perceived by what precedes them that the prohibition is not alone directed against what a person by himself may do, but that he is also subjected to the penalty for doing the same acts by his "clerk, servant, employee, or agent," thus in a degree indicating that the prohibited acts may be done for him by others. Besides, the words "keep or own" have immediately following them a prohibition against being "in any way concerned, engaged, or employed in owning or keeping any such cigarettes," thus suggesting that this keeping or owning which is prohibited perhaps applies to a kind of keeping or owning in which others may be in some way concerned. Even the word "keep" is said to be derived from the Anglo-Saxon word "cepan," another form of "cypan," meaning to traffic, sell, store up, and the like. Enc. Dict. One of the meanings of the word "keep," according to the Century Dictionary, is "to have habitually in stock or for sale." It is also to be noted that it is the keeping or owning of "cigarettes," the plural number, which is prohibited, a fact that has a degree of significance in view of what precedes. Moreover, it would be but little short of ridiculous to say that a person smoking a cigarette kept or owned it, and even the possession by a smoker of a quantity of cigarettes, designed for mediate or immediate consumption, would, in ordinary parlance, be more likely to be characterized as a having of them in his possession than as an owning or keeping of them. The latter words have in them more of the idea of permanency. This has been recognized by the courts as to the word "keep." Easley v. Pegg, 63 S. C. 98, 41 S. E. 18; Williams v. Firemen's Fund Ins. Co. 54 N. Y. 569, 13 Am. Rep. 620; Mears v. Humboldt Ins. Co. 92 Pa. 15, 37 Am. Rep. 647; First Cong. Church v. Holyoke Mut. F. Ins. Co. 158 Mass. 475, 19 L.R.A. 587, 35 Am. St. Rep. 508, 33 N. E. 572. As to the word "own," the Century Dictionary, in referring to the synonyms of "possess," states: "Have is the most general of these words; it may apply to a temporary or to a permanent possession of a thing. . . . To own is to have a good and legal title to." It thus appears that neither of the words upon which the state relies are so distinct as not to be open to construction. This fact and the other considerations to which we have referred, both within and without the words of the enactment, make it clear, either that the meaning of the words "keep" and "own" may be said from their intrinsic meaning not to cover such a case as this, or, at least, that, when read in connection with what precedes and follows, they are insufficient to bring the cases within the statute.

While it is proper to consider the force of particular words in determining whether a statute stands in need of construction, yet it is to be remembered that, that conclusion arrived at, the method changes, and the intent should be sought by a consideration of the entire enactment. As stated by Dwarris, "The framers of laws do not weigh only the force of single words, as philologists and critics, but of whole clauses and designated objects." Potter's Dwarr. Stat. 196. It is by accommodating our mental vision to this evident truth that we avoid a wooden interpretation of the words and become able to apprehend the spirit of the statute. "It is not the words of the law," says the ancient Plowden, "but the internal sense of it, that makes the law; . . . the letter of the law is the body of the law; the sense and reason of the law is the soul." Eyston v. Studd, 2 Plowd. 459. One of the maxims of the law which there is frequently occasion to employ in the constructure of statutes is that of *Noscitur a sociis*. It is known from its associates or associations. As stated by Maxwell, "When two or more words, susceptible of analogous meaning, are coupled together, *Noscuntur a sociis;* they are understood to be used in their cognate sense. They take, as it were, their color from each other; that is, the more general is restricted to a sense analogous to the less general." Interpretation of Statutes, 461. Another writer says: "Not only are words and provisions modified to harmonize with the leading and controlling purpose or intention of an act, but also by comparison of one subordinate part with another; that is to say, the sense of particular words or phrases may be greatly influenced by the context, or their association with other words and clauses. The principle is embodied in the maxim, *Noscitur a sociis*, and is applicable to the construction of all written instruments." 2 Lewis's Sutherland, Stat. Constr. § 414. In the discussion of the maxim, *Noscitur a sociis*, Mr. Broom states: "It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu*,— the coupling of words together shows that they are to be understood in the same sense."

5. The act in question passed the Senate, where it originated under the title, "An Act to Regulate the *Manufacture, Sale*, and

Giving Away of Cigarettes, Cigarette Paper, and Other Substitutes for the Same, and Repealing Laws in Conflict" (our italics). When the bill passed the House on third reading it retained said title, but the title was afterwards amended in said body by adding a penalty clause. This carried the bill back to the Senate; that body refused to concur in the amendment, and, as a result, a conference committee was appointed, which reported in favor of the adoption of the present title, and the recommendation was concurred in by both Houses. A legislative history of this kind is too significant to be overlooked. As pointed out in United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, the attempt to determine the legislative purpose from the speeches of individual members of the assembly is open to the objection that each speaks for himself; but here we have both Houses approving a title which states that the act relates to the "manufacture, sale, and giving away of cigarettes and cigarette paper." The change which was subsequently proposed by the conference committee can readily be understood when it is considered that the act was really prohibitory in most particulars, and that it was only an act to regulate in the sense that it was designed to keep the traffic in leash. It is true that a motion failed in the House to amend the act so as to declare that nothing therein should apply to adults having cigarettes or cigarette papers in their possession. It can only be assumed, however, bearing in mind the nature of the title which was adopted by the House after said motion had been acted on, that the amendment was regarded as unnecessary.

6. The fact must be remembered that the statute we are called on to construe is a criminal statute, and that the rule applicable to such statutes is that of strict construction; that is, the case must be within the spirit, as well as within the letter, of the statute. "This rule," said Chief Justice Marshall, in United States v. Wiltberger, 5 Wheat. 95, 5 L. ed. 41, "is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial, department [for] it is the legislature, not the court, which is to define a crime and ordain its punishment." Mr. Endlich states that the rule of strict construction "requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. To determine that a case is within the intention of a statute, its language must authorize the court to say so; but it is not admissible to carry the principle that a case which is within the mischief of a statute is within its provisions, so far as to punish a crime not specified in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. In this characteristic the difference between liberal and strict constructions is clearly presented. Whilst the letter of a remedial statute may be extended to cases clearly within the same reason and within the mischief the act was designed to cure, unless such construction does violence to the language, a consideration of the old law, the mischief and the remedy, though proper in the construction of criminal as well as other statutes, is not in itself enough to bring a case within the operation of the former class of statutes; their language, properly given its full meaning, must, at least by that meaning, expressly include the case; and in ascertaining that meaning the court cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied in them." Interpretation of Statutes, § 329.

7. Another fact to be considered is that the statute, which, as a penal enactment, cannot receive an equitable construction, is subject to be limited, so far as the meaning of its words are in doubt, by the fact that it is in derogation of the common law. "The general rule in exposition . . . is this, —that in all doubtful matters, and where the expression is in general terms, they [the words], are to receive such a construction as may be agreeable to the rules of common law in cases of that nature, for statutes are not presumed to make any alteration in the common law further or otherwise than the act does expressly declare." Arthur v. Bokenham, 11 Mod. 150.

There can be no doubt that the legislation in question proceeded from the postulate that an evil had grown out of the readiness with which cigarettes could be procured, but, looking at the words relied on, colored as they are by that which is specific, we are unwilling to conclude that it was the intention of the general assembly to invade the private life of the adult further than to the extent that he must necessarily be subject to those requirements of the statute which do not admit of doubt. We quote, as considerably in point, the following language from Church of Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511: "It is a familiar rule that a thing may be within the letter of the statute and yet not . . . within its spirit, nor within the intention of its makers, . . . for frequently, words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consider-

ation of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. . . . It is a case where there was presented a definite evil, in view of which the legislature use a general term with the purpose of reaching all phases of that evil; and, thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute." Here, however, it must always be borne in mind that the case is really not within the letter. It would be impossible to find a reason for the holding that the defendants were guilty of violating the statute, except as the enactment was approached in the spirit of wringing everything out of it which its words did not necessarily withhold.

We may assume that the general assembly did not intend to put upon the statute books an act which would in no wise affect the evil against which it legislated; but, as respects a criminal enactment, there can be but one result where we cannot determine whether the legislative authority bids us to go with it a mile or to go with it twain. Indeed, it is never safe in the construction of a statute to give weight to views as to its policy, where such views are themselves open to doubt and controversy. Relative to considerations of policy and convenience, Judge Story is credited with the statement that "men on such subjects complexionally differ from each other; the same men differ from themselves at different times." Potter's Dwarr. Stat. p. 215, Sedgwick, Constr. of Stat. & Const. Law, 2d ed. 308. While such considerations are not without force in some circumstances, especially where used to show that the letter of the law is an expression of its spirit, yet we can in no wise sanction the view that a court is at liberty, where doubt remains as to the intent of a penal enactment after testing it by the recognized canons of construction, to venture among warring opinions in the legislative domain in search of what it conceives to be public policy. Such a practice must not infrequently result in judicial legislation. "The idea that the judges in administering the written law can mold it and warp it according to their own notions, not of what the legislator said, not even of what he meant, but of what, in their judgment, he ought to have meant,—in other words, according to their own ideas of policy, wisdom, or expediency,—is so obviously untenable that it is quite apparent that it never could have taken rise, except at a time when the division lines between the great powers of government were but feebly drawn, and their importance very inperfectly understood." Sedgwick, Constr. of Stat. & Const. Law, 2d ed. 265.

The necessity of considering separately the various propositions on which we base our conclusions that the defendants were not shown to be guilty apparently leaves each proposition to make its own impact on the construction contended for by the state; but it must not be forgotten that whatever of dynamics these propositions involve, they must be regarded as having a cumulative operation. When so considered, we do not perceive how it could be contended that the defendants were guilty. There still remains of the act, as we have construed it, all and more of prohibition relative to cigarettes than is found in the Tennessee statute, and we have not been able to find that it has even been contended under the Iowa law that there was a liability under such facts as exist in the cases before us.

The appeal in State v. Lowry is not sustained. The judgment of conviction in Lewis v. State is reversed, with a direction to grant a new trial.

Montgomery, J., concurs in result in 20,719, but dissents in 20,646.

Montgomery, J., dissenting:

The state may not, in the proper exercise of its police power, so far interfere with Federal control of interstate commerce as to prohibit the importation of cigarettes in packages of customary sizes in such commerce. The right of importation carries with it the right to resell in original packages, and the right by the importer to own and keep such cigarettes for personal use. Donald v. Scott, 76 Fed. 554; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062. These principles induce me to concur in the result reached in the Lowry Case.

In the Lewis Case, however, I cannot give assent to the construction of the statute under consideration, adopted by the majority of the court. The prevailing opinion legalizes ownership and possession of cigar-

ettes for personal use, without regard to the source from which they were obtained. This holding denounces as a criminal the man who sells or gives away a cigarette, but shields the one who procures the unlawful act to be done. It is difficult to conceive that a possession can be lawful which is wholly founded upon an unlawful transaction. Courts have nothing to say concerning the mere policy of legislation. It is for the legislature to determine what regulations are needed to protect the public health, morals, and safety; and, if the measures adopted are intended, convenient, and appropriate to these ends, the exercise of its discretion is not subject to review by the courts. But when the legislature, in the exercise of the police power of the state, has passed an act, it is the duty of the court to give it the greatest effect reasonably possible towards accomplishing the objects intended. It is a familiar principle that where the meaning is doubtful, in seeking the intent of the legislature, it is proper for the court not only to consider the letter of the act, but also the circumstances under which it was enacted, prior legislation upon the same subject, the mischief to be remedied, and other like matters. State Tax Comrs. v. Holliday, 150 Ind. 216, 233, 42 L.R.A. 826, 49 N. E. 14; Hunt v. Lake Shore & M. S. R. Co. 112 Ind. 69, 75, 13 N. E. 263; Middleton v. Greeson, 106 Ind. 18, 5 N. E. 755, and cases cited. In 1893 the legislature passed an act making it unlawful to give, barter, or sell, either directly or indirectly, to any child under sixteen years of age, tobacco or preparations of tobacco to be chewed or smoked by said child, or to persuade, advise, counsel, or compel any such child to chew or smoke tobacco. Laws 1893, chap. 20, p. 19. In 1897 it was made unlawful to sell, barter, furnish, or give away, directly or indirectly, to any minor, any cigarette, cigarette wrapper, or any substitute for either or to procure for, or to persuade, advise, counsel, or compel, any minor to smoke any cigarette. Laws 1897, chap. 135, p. 205. The general assembly of 1905, in revising the Criminal Code, re-enacted these statutes, and, in addition, passed the act now under consideration.

It is manifest that the last enactment is not the result of an emotional impulse, but is the product of mature thought and of gradual growth, and was intended to meet an existing necessity. Construing these statutes together, as we must, it is evident that the primary consideration of the legislature was to provide some effectual means of protecting the youth of the state from the pernicious effects of cigarette smoking. It is conceded by all that the use of cigarettes by the young is injurious to a serious degree, and it is a matter of common knowledge that prior laws had proved inadequate to prevent the evil. Keeping in mind the history of legislation upon this subject, the inefficiency of prior statutes, the existing evil, and the ends to be attained, what is the fair and reasonable interpretation of the language of the act? Is the possession of these contraband articles denied only to dealers and warehousemen having in view a sale or some species of disposition to others, or is such possession forbidden to all persons, and for any purpose, except when within the protection of the interstate commerce clause of the Constitution of the United States? The statute under consideration was manifestly patterned from § 5006, Iowa Code 1897, which reads as follows: "No one, by himself, clerk, servant, employee, or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in the consideration of the purchase of any property, or any service or in evasion hereof, or keep for sale, any cigarettes, or cigarette paper, or cigarette wrappers, or any paper made or prepared for the purpose of making cigarettes, or for the purpose of being filled with tobacco for smoking; or own, or keep, or be in any way concerned, engaged, or employed in owning or keeping, any such cigarettes, or cigarette paper or wrappers, *with intent to violate any provision of this section;* or authorize the same to be done, etc." The omission of the italicized words from the Iowa statute, requiring an unlawful intent to sell or dispose of the prohibited articles in connection with the owning and keeping of the same, is very significant. The language of the Indiana act is that it shall be unlawful for any person to keep or own any cigarette, cigarette paper or wrapper, without any qualification as to whether the same is for sale or use. The obvious meaning of the words "keep" and "own" as here used, it seems to me, is that no one shall "keep," or hold a mere naked possession for the use of another,—and "own," or hold by virtue of his own title, these prohibited articles. A more limited and obscure meaning might be ascribed to these words, but this interpretation appears so patent as to make the learning of a philologist unnecessary. This construction makes the administration of this statutory police regulation easy and effectual, but, if the application of the act is to be limited as held in the principal opinion, its fair enforcement becomes impossible, and the evil against which it was directed will be but slightly mitigated. We cannot ex-

pect satisfactory enforcement of a law which makes guilt or innocence depend upon the secret intent of the accused person.

The characteristics distinguishing dealers and consumers who own articles suitable for use as well as sale are too capricious for practical purposes. The construction adopted in the majority opinion will no doubt close established places of business and banish reputable dealers in this species of goods; but it may turn loose upon the community a horde of irresponsible peripatetic agents, carrying a stock ostensibly for their own use, seeking purchasers in privacy, and preying upon the artificial appetite created by their acquired habits. I do not think the application of the law was intended to be so limited. This view is supported and confirmed by reference to the legislative journals containing the proceedings relating to the passage of this act. Such journals are not only proper, but often most valuable aids to the court in determining the legislative intention, where the language used is of doubtful meaning. Edger v. Randolph County, 70 Ind. 331; Walter A. Wood Mowing & R. Mach. Co. v. Caldwell, 54 Ind. 270, 23 Am. Rep. 641; 26 Am. & Eng. Enc. Law, p. 639. It appears from the Journal of the House (page 1221) that when the bill was pending upon second reading, and was under consideration as a special order, among other amendments proposed was the following: "Sec. 2. It shall be unlawful for any person under the age of twenty-one years to smoke, use, keep, or own, or be in any way connected, engaged, or employed in smoking, using, owning, or keeping, any cigarette, cigarette paper or wrappers. Any person violating," etc. This proposed amendment was rejected by the friends of the bill. Immediately before taking the vote upon the final passage of the bill an amendment was proposed to § 1 embodying, in substance, the conclusion of the majority in the following language: "Provided further, that nothing in this section shall prevent persons over twenty-one years of age from having in their possession to be used, cigarettes, cigarette paper, and tobacco." This proposed amendment was rejected. House Journal, p. 1398. It is my opinion that it was and is the intent of this statute, as finally passed, to make the possession of cigarettes, and the constitutent parts thereof mentioned, by any person within this state unlawful, except where such possession is within the protection of the interstate commerce clause of the Constitution of the United States.

A discussion of the constitutional question argued in this connection is unnecessary, and the judgment against appellant Lewis ought to be affirmed.

4 L.R.A. (N.S.)

IOWA SUPREME COURT.

STATE OF IOWA
v.
JOHN SMITH, Appt.

(— Iowa, —, 106 N. W. 187.)

Former conviction—indictment.

1. Referring in the indictment to former convictions of one accused of crime as former judgments will not exclude evidence thereof, although the statute provides for the pleading and proof of former convictions to enhance punishment.

Same—order of proof.

2. Permitting proof of former convictions on the trial of one accused of crime before identifying the person convicted with the accused is not error, since the order of proof is within the discretion of the court.

Same—proof—identity.

3. To warrant the application of a statute authorizing additional punishment of one convicted of crime upon proof of former convictions, the identity of accused and the one against whom the former judgments were entered must be established by affirmative evidence; mere proof of identity of names not being sufficient.

Same—failure of proof.

4. Failure of proof of identity of accused and those convicted in former prosecutions prevents the court from applying the statute authorizing additional punishment in case of successive convictions, but in case of a finding of guilt it can impose only the

Case Note.—Identity of name as evidence of identity of person in criminal cases.—The general rule, as stated in Lawson on Presumptive Evidence, p. 307, is that identity of name raises a presumption of identity of person where there is similarity of residence, trade, circumstances, or where the name is an unusual one; but it is otherwise where the name is a common one, and there are several persons known of the same name and of the same place.

Some of the qualifications of this general rule with reference to criminal cases seem to have been applied in Garrett v. State, 76 Ala. 18, in which it was held that, where the name of one on trial charged with murder is the same as that of the person who had an altercation with the deceased in the morning of the day of the murder, it is presumptive evidence that they are one and the same person, in the absence of proof that the name is borne by two or more persons in the same community.

And in People v. Cline, 44 Mich. 290, 6 N. W. 671, it was held that, on the trial of one charged with obtaining property by means of a forged mortgage, which he represented had been executed by a mortgagor who lived in a particular section of the state, evidence that a person of the same name had lived in another part of the state, but was dead, was insufficient to prove that the mortgage was fabricated, and that the two persons

punishment provided for the offense for which accused is on trial.

Instructions—not supported by evidence.

5. Giving an instruction which has no basis in the evidence is reversible error.

(Deemer, J., dissents in part.)

(February 15, 1906.)

APPEAL by defendant from a judgment of the District Court for Linn County convicting him of larceny and imposing sentence under the statute authorizing additional punishment in case of successive convictions. Reversed.

The facts are stated in the opinion.

Messrs. **Barnes & Chamberlain** and **Tom H. Milner**, for appellant:

To bring an indictment within the folds of the statute, it is necessary to allege the conviction.

Judgment and conviction are not synonymous.

3 Bl. Com. 395; Pearson v. Lovejoy, 53

were really one and the same person. The court said: "Some names are very common; and, where the residence is fixed in a city or old settled portion of the country without any distinct place of residence being pointed out, or some other means of identification, the proof would be too uncertain where the liberty of a citizen was at stake."

In other criminal cases the presumption of identity of persons from identity of names seems to have been indulged, without reference to the qualifications stated by Mr. Lawson.

Thus, for the purpose of affecting the credibility of a defendant as a witness in his own behalf on the trial of a criminal charge, the record of the former conviction of a person of the same name may properly be received in evidence without further proof that they are one and the same person, as identity of name is prima facie proof of identity of person; and it rests with the accused, in such a case, to show they are not the same. State v. McGuire, 87 Mo. 642.

And, for the purpose of impeaching the evidence of one Frank H. Rolfe, who is on trial for robbery, a record of the conviction, on the charge of assault, of a person by the name of Frank Rollins, and evidence given by an officer of the state prison that the accused was once an inmate of the prison, and was known by the name of Frank Rollins among the officers, as well as upon the records of that institution, are prima facie sufficient to establish the identity of the accused with Frank Rollins. People v. Rolfe, 61 Cal. 540.

For the same purpose, the state may, on the trial of an indictment for burglary and larceny, against Charles Kelsoe alias McCarthy, read in evidence the former conviction of Charles Kelsoe alias McCarty, of grand larceny, as the name with the alias under which the defendant was indicted was the same as that in the record of conviction, and identity of such a name is sufficient to raise a presumption of identity of person. State v. Kelsoe, 76 Mo. 505.

To impeach the credibility of a witness for the state, it is competent to introduce an authenticated record showing a conviction of a felony of one of the same name as the witness, without any further proof that such person was the same who testified as witness, as identity of name is prima facie evidence of identity of person. Bayha v. Mumford, 58 Kan. 445, 49 Pac. 601.

And to discredit the testimony of a witness for the state by the name of William Baker, the accused, who is on trial for conspiracy, may introduce a properly certified record of conviction of one William S. Baker of a felony in another state, inasmuch as the defendant is required by statute to prove a prior conviction by the record, and since the evidence sought to be introduced makes out a prima facie showing for the admission of the record. State v. Loser (Iowa) 104 N. W. 337.

Where it is contended that one on trial for robbery is not the same person mentioned in a deposition taken on a preliminary examination, it is not error to charge the jury that identity of person is presumed from identity of name, in absence of any evidence to rebut the presumption. People v. Riley, 75 Cal. 98, 16 Pac. 544.

While recognizing the general rule that identity of name is prima facie evidence of identity of person, yet the court, in Shuler v. State (Ga.) 54 S. E. 689, held that the mere identity of name, appearing from the signature of the attesting officer and that of the person who signed the accusation charging the illegal sale of intoxicating liquors as prosecuting attorney, will not warrant the assumption, as matter of law, that the same individual acted not only as a notary public, but also as prosecutor.

But the fact that two men on a jury impaneled to try one charged with malfeasance in office had the same names as two men who served on the grand jury which indicted the accused does not prove that they are the same persons, or justify a court in granting a new trial,—especially when the defendant did not raise the objection before trial. Wickersham v. People, 2 Ill. 128.

After a prima facie case has been made out by showing identity of names, it then becomes a question for the jury to determine from all the evidence whether or not the parties are the same. State v. Loser, *supra*.

The identity of one charged with being a common seller of intoxicating liquors with a person of the same name who is mentioned in the record of a prior conviction of selling intoxicating liquors is a question of fact for the jury; and the identity is not sufficiently conclusive to authorize the court to take it from the jury and treat it as a question of law. State v. Lashus, 79 Me. 504, 11 Atl. 180.

Barb. 408; Re Road, 103 Pa. 253; Com. v. Lockwood, 109 Mass. 325, 12 Am. Rep. 699.

It is error to give an instruction containing a correct legal proposition, which is not applicable to any issue in the case.

Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; Wood v. Chicago, M. & St. P. R. Co. 68 Iowa, 491, 56 Am. Rep. 861, 27 N. W. 473; State v. Brainard, 25 Iowa, 572; State v. Kyne, 86 Iowa, 616, 53 N. W. 420.

Messrs. **Charles W. Mullan**, Attorney General, and **Lawrence De Graff** for the State.

Bishop, J., delivered the opinion of the court:

With the manifest purpose of bringing the case within the operation of the provisions of chapter 109, p. 58, Acts 27th Gen. Assem., it was alleged in the indictment, in addition to charging the facts of the instant crime, that on the 19th day of November, 1887, a judgment was rendered against the defendant, John Smith, under the name of John A. Smith, in the district court of Linn county, this state, for the crime of burglary; that on the 19th day of October, 1901, another judgment was rendered against the defendant, John Smith, in the district court of Linn county, for the crime of breaking and entering a dwelling house in the daytime. Section 1 of said chapter reads as follows: "Whenever any person has been twice convicted of either of the crimes of burglary, . . . larceny where the value of the property stolen exceeded $20, or of breaking and entering with intent; . . . or has been convicted of two or more of said crimes, and shall thereafter be convicted of any one of such crimes, committed after such second conviction,—he shall be imprisoned in the penitentiary for any term not less than fifteen years, provided such former judgments shall be referred to in the indictment stating the court, date, and place of rendition." Section 3 provides that an authenticated copy of the record of a former judgment shall be prima facie evidence of such conviction, and may be used in evidence against the defendant. Section 4 requires that the jury, if it finds the defendant guilty, "must also find and determine specially whether the defendant had previously been convicted of either of the crimes referred to in the indictment, and the number of times so convicted."

Upon the instant trial, the state offered in evidence, and, over the objection of defendant, there was admitted, the criminal record of the district court of Linn county, this state, as of date November 19, 1887, which recited that in the case of the state of Iowa against John A. Smith, then pending in said court, the defendant so named having been indicted and convicted of the crime of burglary, it was ordered and adjudged that he be confined in the penitentiary for the period of three years. In the same way there was admitted in evidence the criminal record of said district court as of date October 19, 1901, which recited that in the case of the state of Iowa against John Smith, pending in said court, the defendant so named having been indicted for the crime of larceny, and having pleaded guilty, it was ordered and adjudged that he be confined in the penitentiary for the period of three years. It is contended that the admission in evidence of such records was error. The objection presented to the court below was based upon several grounds, but we need notice only those that are insisted upon in argument in this court. In the first place, it is said that the evidence was improper because of a variance between the language of the statute and that used in the indictment; that is, that the statute speaks of former convictions, whereas the indictment refers to former judgments. The point is devoid of merit. We need not stop to inquire whether, by strict rule, a different meaning is to be attached to the words "conviction" and "judgment." It is certain that in common parlance the words are used interchangeably; and this is done in the statute in question. Thus, while in the language thereof former convictions are made the basis for an extended term of imprisonment, it is provided that "such former judgments shall be referred to in the indictment." Secondly, it is urged that the court erred in permitting the records of the former judgments to be read because there was no evidence tending to identify the defendant on trial as the person against whom such judgments were made and entered. As we think, the objection on that ground went only to the order of proof, and was not well taken. Questions as to the order of proof are addressed to the sound discretion of the court, and it was not error, as counsel seem to think, to admit the records, competent in themselves, because, looking backward over the record after the state had rested its case, it became apparent that no proof of identity had been attempted. If counsel for defendant desired to save the point, it was for them to invoke a further ruling of the court by appropriate motion, and, having failed to do so, defendant is not in a position to complain.

2. No attempt was made by the state to identify the defendant on trial as the defendant in the former judgments referred to in the indictment and in the records introduced. The county attorney seems to have pinned his faith to the idea that, if he could point out to the court that at some other time, and in the same or some other court, a man by the name of Smith had been the

subject of a judgment in a criminal prosecution, the identity of the defendant on trial as the person named defendant in such former judgment, was sufficiently established; and, there being two or more of such judgments, an application of the statute in question was fully warranted. It is manifest, to our minds, on reason and authority, that such conclusion cannot be sustained. It does not require a second reading of the statute to make clear its purpose, and we need not stop to enlarge upon that. And similar statutes are in force in nearly, if not quite, all the states in the Union, as well as in England and elsewhere. By the uniform current of authority, the fact of the prior convictions is to be taken as part of the offense instantly charged, at least to the extent of aggravating it and authorizing an increased punishment. 12 Cyc. Law & Proc. p. 950, and note. Among other cases cited in the note are these: Evans v. State, 150 Ind. 651, 50 N. E. 820; Com. v. Harrington, 130 Mass. 35; People v. Sickles, 156 N. Y. 541, 51 N. E. 288; Wood v. People, 53 N. Y. 511; Gibson v. People, 5 Hun, 542; Bandy v. Hehn, 10 Wyo. 167, 67 Pac. 979. Now, as it will be observed, the statute requires that the fact of former convictions shall be set forth in the indictment. And this but conforms to the general rule governing criminal procedure. 10 Enc. Pl. & Pr. p. 489; Maguire v. State, 47 Md. 485. And it is former convictions of the instant defendant that is required to be alleged; not merely that a man passing under the name to which he answers has been the subject of convictions. The plea of not guilty puts in issue, not only all matters of fact essential to the instant crime, but the fact of the alleged former convictions of the defendant. 12 Cyc. Law & Proc. p. 951, and cases in note; Hughes, Crim. Law & Proc. § 2831. Moreover, as we have seen, the statute requires a special finding at the hands of the jury as to the fact of such former convictions and the number thereof. It ought not to require the citation of authority to make it clear that a finding of fact, thus made imperative, could only be had upon evidence tending to proof. And it is not conceivable, as matter of criminal law, that, to avoid an adverse finding, a defendant can be held to take the initiative and bring forward the evidence tending to his exculpation in respect of any fact alleged in the indictment and material to his conviction or punishment. It is well enough, and for obvious reasons, that an accused who places his reliance for acquittal, as against a prima facie case made out against him, upon affirmative matter of defense, or who seeks to bring himself within an excepted class, should be held to bring forward the requisite proof; but there is no theory upon which the principle there involved can be given application here. In addition to a conviction for the crime instantly charged, the state is seeking to have an unusual punishment inflicted because of former convictions of similar offenses. As the plea of the defendant is given effect to traverse every allegation of the indictment, the state must carry the burden to make good the charge in its every essential particular. 12 Cyc. Law & Proc. p. 951, and note.

The statute provides for the introduction of authenticated copies of the judgments alleged in proof prima facie thereof. But the state may not stop there. The identity of the defendant as the person who suffered such former convictions remains to be proved. We grant that the identity of names may be some evidence of the identity of persons; but, standing alone, it is not enough. Every fact essential to the infliction of legal punishment upon a human being must be proved beyond a reasonable doubt. And it would amount to a travesty to say that a prima facie case for an increased term of punishment could be made out against John Smith, being tried in Linn county, by showing the isolated facts that a man passing under that name had at some time or other been convicted in the courts of Lee county, likewise in Lyon county. And the almost unbroken voice of authority is against such a conclusion. The matter for the jury to determine is the historical fact involved in the charge, and this they must determine as any other fact in the case. Our conclusion finds warrant in the following authorities: Hines v. State, 26 Ga. 614; State v. Lashus, 79 Me. 504, 11 Atl. 180; State v. Adams, 64 N. H. 440, 13 Atl. 785; People v. Price (Sess.) 2 N. Y. Supp. 414, Affirmed in 119 N. Y. 650, 23 N. E. 1149; Hughes, Crim. Law & Proc. § 3146; Bishop, Crim. Law, § 963. See also the following: Bandy v. Hehn, *supra*; State v. Haynes, 35 Vt. 570; People v. King, 64 Cal. 338, 30 Pac. 1028; Johnson v. People, 55 N. Y. 512; Com. v. Briggs, 7 Pick. 177; People v. Sickles and Evans v. State, *supra*. That there may be cases where identity of names will be accepted as prima facie evidence of identity of persons, we readily concede. But our attention has been called to no reported case where a court of respectability has been bold enough to go so far as to hold that the identity of a person upon whom it was sought to inflict a penalty prescribed by criminal law was sufficiently established by naked proof of identity of names. What has been said foregoing is not necessary to our disposition of this appeal; but, as the case must go back for a new trial, it is intended

to govern the course of proceedings upon such trial.

3. In view of the state of the record before the trial court, it must be manifest that there could be no propriety in submitting to the jury any question respecting the alleged former convictions of the defendant. If anything, the court, on its own motion, should have directed the jury to put the subject entirely out of consideration, and this notwithstanding counsel for defendant had not seen fit to move therefor on behalf of their client. Instead of so doing, the court, in charging the jury, stated the issues by quoting the language of the indictment, including the reference to the former judgments, and reciting the plea of the defendant. This was followed by the insertion of the provisions of § 1 of the act of the general assembly, hereinbefore referred to and quoted, as a whole in the body of the charge. No other definition or description of the offense for the commission of which defendant was on trial, and respecting which the jury was called upon to make a finding of his guilt or innocence, appears in the charge. Only a general verdict was required and found, and the judgment rendered thereon provided for imprisonment for a term of fifteen years, being five years in excess of the maximum allowed under the statute making breaking and entering a house in the nighttime and with felonious intent a crime. Apparently the court misconceived the purpose and effect of the act of the twenty-seventh general assembly. In fact, the proceedings against the defendant were primarily based—as they must have been—upon the general statute declaring for and defining the crime of breaking and entering, and prescribing the punishment therefor. The later legislative act was invoked only to secure an increase of punishment in case of conviction by reason of the former judgments predicated on the commission of kindred offenses. The function of the latter act begins and ends with serving such purpose. And if, in this case, proof of the former convictions had been made, the requirement would have been to have called for a general verdict as to the instant offense, having reference to the general statute, and a special verdict as to former convictions, having reference to the provisions of the later act. But, as we have seen, proof as to former convictions of the instant defendant failed for want of identification. It then became the simple duty of the court to submit for a general verdict the question of guilt or innocence as to the offense of breaking, etc., set forth in the indictment. And a verdict of guilt being found, the defendant should have been sentenced to imprisonment for a period not exceeding ten years. If the excessive punishment imposed upon this defendant were all, we should not feel called upon, in view of the statute, to grant a new trial. Such error could be corrected by reducing the sentence to a term that would be in compliance with the statute.

4. The court gave to the jury an instruction, as follows: "Defendant cannot be convicted upon his confession alone, unless made in open court, unless accompanied with other proof that the offense was committed." There is not a scintilla of evidence in the record even tending to prove that a confession was ever made by the defendant. The nearest approach thereto is found in the testimony of one of the state's witnesses, a police officer, who says that, in respect of a pair of spectacles,—a part of the stolen property,—defendant made the statement, in substance, that he had got them from another man and could account for his possession of the same. It is wholly unnecessary that we cite authorities in support of the rule that the giving of an instruction which has no basis in the evidence is reversible error.

Other matters of error argued need not be discussed. They are either without merit, or are not likely to arise upon a new trial.

The judgment is reversed, and the case is remanded for a new trial.

Deemer, J., dissenting:

I am constrained to dissent from the second division of the majority opinion. What is a name but a word used to designate a particular person or thing? Indeed, a man's name is the designation by which he is distinctly known in the community (Laflin & R. Powder Co. v. Steytler, 146 Pa. 434, 14 L.R.A. 690, 23 Atl. 215), and as a general rule his middle name or initial is unimportant. Primarily, then, we identify a person by his name, and not by any physical description. From this follows the general rule that identity of names is prima facie evidence of identity of persons. See cases cited in 15 Am. & Eng. Enc. Law, 2d ed. p. 918. We have applied this rule in all manner of cases. State v. Loser (Iowa) 104 N. W. 337; State v. Prins, 113 Iowa, 74, 75, 84 N. W. 980; Gilman v. Sheets, 78 Iowa, 502, 43 N. W. 299. See also State v. McGuire, 87 Mo. 642; Kimball v. Davis, 19 Wend. 442; Campbell v. Wallace, 46 Mich. 320, 9 N. W. 432; State v. Kelsoe, 76 Mo. 505, 11 Mo. App. 91; Flournoy v. Warden, 17 Mo. 435; Cuddy v. Brown, 78 Ill. 415; Aultman, M. & Co. v. Timm, 93 Ind. 158; Bayha v. Mumford, 58 Kan. 445, 49 Pac. 601; Green v. Heritage, 63 N. J. L. 455, 43 Atl. 698. It is true that some cases seem to hold with the majority. See Com. v. Briggs, 5 Pick. 429, Com. v. Norcross, 9 Mass. 492, and Bogue v.

Bigelow, 29 Vt. 179. But it should be remembered that the Massachusetts court is out of harmony with the current of authority on this question of names. In State v. Robinson, 39 Me. 150, which was very like the instant one, the question of identity was left to the jury, as I think it should have been in this case. State v. Lashus, *supra*. It should be remembered in this connection that John Smith was, prior to this trial, convicted in the same county, and in the same court, as the one in which he was being tried upon the present indictment. The indictment was sufficient to bring it within the provisions of chapter 109, p. 58, Acts 27th Gen. Assem., in that it alleges the prior judgments of conviction of the defendant Smith. I should hardly know how to charge him with having theretofore been convicted, except to state that a judgment had been rendered against him (Smith). Surely the state was not required to describe his physical characteristics and those things which differentiated him from other human beings. His name was his lawful designation, and sufficient for all purposes of criminal pleading. I think there was enough to take the case to a jury on this proposition.

IOWA SUPREME COURT.

A. G. BEATTY
v.
ELZY WARDELL, Admr., etc., of Jane Wardell, Deceased, et al., Appts.

(— Iowa, —, 105 N. W. 357.)

Homestead—exemption to heirs.

The heirs do not take the homestead of their ancestor free from his debts contracted prior to its acquisition, under a statute providing that the homestead of every pensioner, whether the head of a family or not, purchased with pension money, shall be exempt, and such exemption shall apply to debts contracted prior to its purchase, where, under the statutes, such exemption would not aply to homesteads in general.

(November 18, 1905.)

APPEAL by defendants from a judgment of the District Court for Buchanan County subjecting an alleged homestead to the debts of the homestead claimant. Affirmed.

Statement by **Deemer, J.**:

Suit in equity to subject certain property to the payment of a judgment held by plaintiff against one Jane Wardell, now deceased. The defendants are her administrator and heirs at law, and as such they pleaded that the property was the homestead of the said Jane Wardell at the time of her death, having been purchased with pension money received by her from the United States government. There was a trial to the court, resulting in a decree for plaintiff, and defendants appeal.

Messrs. **Cook & Cook** and **R. E. Leach**, for appellants:

A homestead purchased with United States pension money is exempt to the heirs of the pensioner, free from her debts contracted previous to its acquisition, under §§ 4010 and 2985 of the Code.

Minneapolis & St. L. R. Co. v. Cedar Rapids, G. & N. W. R. Co. 114 Iowa, 502, 87 N. W. 410; Eastwood v. Crane, 125 Iowa, 707, 101 N. W. 481; Cummings v. Everett, 82 Me. 260, 19 Atl. 456; Lewis's Sutherland, Stat. Constr. 1904, 2d ed. § 451, p. 857; Moninger v. Ramsey, 48 Iowa, 368; Kite v. Kite, 79 Iowa, 491, 44 N. W. 716; Ellsworth v. Ellsworth, 33 Iowa, 164; Cook v. Allee, 119 Iowa, 226, 93 N. E. 93; Mitchell v. Witt, 98 Va. 459, 36 S. E. 528; Linton's Appeal, 104 Pa. 228; United States v. Freeman, 3 How. 556, 11 L. ed. 724; Converse v. United States, 21 How. 463, 16 L. ed. 192; Manuel v. Manuel, 13 Ohio St. 458; Storm v. Cotzhausen, 38 Wis. 139; Hughes v. Farrar, 45 Me. 72; French v. Oxford County, 64 Me.

Case Note.—Right of heirs to exemption of homestead from ancestor's debts contracted prior to its acquisition by him.—There appear to be very few cases in which the above question has been discussed.

In Vermont the statute reads: "If any head of a family shall decease, leaving a widow, his homestead, of the value of $500, shall wholly pass to his widow and children, if any there be, in due course of descent, without being subject to the payment of the debts of the deceased, unless made specially chargeable thereon;" and in Simonds v. Powers, 28 Vt. 354, it was held that the homestead of the deceased, in the hands of the widow and heirs, was subject to all the debts which the deceased owed at the time he acquired the homestead. This decision was adhered to in Perrin v. Sargeant, 33 Vt. 84.

In Missouri, where the statute expressly provides that "such homestead shall be subject to attachment and levies of execution upon all causes of action existing at the time of the acquiring such homestead," it was held in Rogers v. Marsh, 73 Mo. 64; Kelsay v. Frazier, 78 Mo. 111; and Daudt v. Harmon, 16 Mo. App. 203,—that the burden of showing that an administrator's sale of the deceased's homestead was for the payment of debts contracted before the homestead right attached, was upon him

583; Martin v. Oskaloosa, 126 Iowa, 680, 102 N. W. 529.

Mr. E. B. Abbott, for appellee:

The exemption of pension money is for the benefit of the pensioner, and not permitted to inure to the benefit of any other person.

Yates County Nat. Bank v. Carpenter, 119 N. Y. 550, 7 L.R.A. 557, 16 Am. St. Rep. 855, 23 N. E. 1108; Spelman v. Aldrich, 126 Mass. 113.

Land bought by the sons of a pensioner with his pension money is not exempt from seizure for his debts.

Sims v. Walsham, 9 Ky. L. Rep. 912, 7 S. W. 557; Whinery v. McLeod, 127 Iowa, 11, 102 N. W. 132; Friend v. Garcelon, 77 Me. 25, 52 Am. Rep. 740; Robion v. Walker, 82 Ky. 60, 56 Am. Rep. 878; Re Liddle, 35 Misc. 173, 71 N. Y. Supp. 474; Beecher v. Barber, 6 Dem. 129.

Deemer, J., delivered the opinion of the court:

The property in controversy, being a lot in the city of Independence, was owned by Jane Wardell at the time of her death. It had been purchased with pension money obtained by her from the general government. Immediately after her purchase of the property she moved into the same, and has occupied it as a homestead down to her death. One of her minor children lived with her upon the property until about four months just preceding her death. Jane Wardell left surviving five children, who were all of age, save one. This one was twenty years of age. After he left his mother's home there was no one residing with her upon the property. Plaintiff holds a judgment against Jane Wardell upon debts contracted some time prior to the receipt of the pension money, and before the acquisition of the homestead. The deceased left no children under the age of sixteen years, nor were or are any of her children dependent upon her. Defendants contend that the property is exempt to them from the debts of their mother, for the reason that it was her homestead purchased with pension money; while, on the other side, it is contended that the property is not exempt, and that, while it may have been exempt so long as Jane Wardell lived, it did not pass to the heirs freed from the mother's debts contracted prior to the acquisition thereof. The creation of homesteads and exemptions is the work of the legislature, and to its acts we must look in determining such controversies as this. In the Code, under the title "Homesteads," we find the following provisions: "The homestead of every family . . . is exempt from judicial sale, where there is no special declaration of statute to the contrary." § 2972. "The homestead may be sold on execution for debts contracted prior to its acquisition." § 2976. "Upon the death of . . . the wife, . . . if there be no survivor the homestead descends to [her] issue . . . according to the rules of descent, . . . and is to be held by such issue exempt from any antecedent debts of their parents, or their own, except those of the owner thereof, contracted prior to its acquisition." § 2985. Under these statutes it will be observed that the homestead, while used and occupied by the family, is exempt; and that it is also exempt to the heirs, except for the antecedent debts of the ancestor, contracted prior to its acquisition. Defendants, who are the administrator and heirs at law of Jane Wardell, cannot hold the property in question as exempt under these statutes, for two reasons: First, because at the time of the widow's death she had ceased to be the head of a family; and, second, because the judgment which plaintiff is seeking to enforce was for debts contracted by the deceased owner prior to the time she acquired the property.

But they rely upon another provision of law, found in the Code under the title "Executions," which reads as follows: "The homestead of every such pensioner, whether the head of a family or not, purchased and paid for with any such pension money or the proceeds or accumulations thereof, shall also be exempt; and such exemption shall apply to debts of such pensioner contracted prior to the purchase of the homestead." Code, § 4010. Under this section, the prop-

who claimed under the administrator's deed, as against the widow and heirs. The court drifted from this ruling in Murphy v. De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861, and placed the burden of showing that the property was exempt as claimed upon the heirs. But in Anthony v. Rice, 110 Mo. 223, 19 S. W. 423, it returned to the original position, and expressly overruled Murphy v. De France.

In Furniss's Succession, 34 La. Ann. 1013, it was held that where the Constitution requires that the homestead shall be "set apart and registered" before it is exempt; and the deceased had not registered his homestead at his death,—his widow and children could not exempt it to the prejudice of his creditors.

And so it was held in Reinhardt v. Reinhardt, 21 W. Va. 76, where the declaration of intention to claim the property as a homestead was not recorded as required by statute until after the death of the husband, when it was filed by the widow on her behalf and on behalf of the children.

This note does not cover the cases dealing with the right of the person by whom the homestead was originally acquired to hold it exempt from his previously contracted debts.

erty in question was exempt to the pensioner during her life, although she was not the head of a family, even from debts contracted by the owner thereof prior to its acquisition. So that, so long as Jane Wardell lived, plaintiff could not have enforced his judgment against the property, although she lived upon it alone, and notwithstanding the debts for which it was rendered were contracted prior to its acquisition by her.

But the question here is, Did the heirs take the homestead, free from the antecedent debts of their ancestor? There is nothing in any of these statutes which expressly so declares; and, if there be any such exemption, it must be bottomed on the thought that, as the property could not have been taken by the judgment creditor during the life of his debtor, the exemption so stamped upon it passed to the heirs or successors in interest, and freed it from the antecedent debts of their mother. It is true that § 4010 provides that the homestead of every pensioner, purchased and paid for with pension money, shall be exempt, no matter if he be living alone, and that it shall be exempt even from debts contracted prior to its acquisition; but this evidently has reference to an exemption during the life of the owner. The manifest purpose of the act was to save the homestead to a pensioner who might be living upon it alone, and to secure it to him free from antecedent debts. There may also have been the thought of preserving the property to the pensioner, even though he had invested his pension in other ways and in other things before it finally reached the homestead.

Appellants' contention, broadly speaking, is that § 4010 creates a new homestead, which is exempt in the hands of heirs, free from the antecedent debts of the ancestor. But this is evidently unsound. True this homestead is relieved of certain rules which apply to homesteads in general; but for the rules applicable to homesteads in general we must look to the statutes and decisions relating thereto. Under the general homestead statutes, which we have quoted, this property, although homestead in character, and exempt during the life of the pensioner, did not pass to her heirs, free from her antecedent debts. Code, § 2985. This is the only section of the Code relating to homestead exemptions after the death of the owner; and, if that is to control, the property is subject, in the hands of the heirs, to the antecedent debts of the owner. Conceding, then, that the property in question was a homestead, and exempt in the hands of the purchaser, there is nothing in the statute which declares that it shall be exempt in the hands of the heirs. If we turn to the statute with reference to the descent of homesteads, there is nothing to indicate that it shall pass free from antecedent debts, although purchased with pension money or the avails thereof. This was a homestead during the pensioner's life, although she had no family living with her, and could not have been taken for antecedent debts; but, in order to determine the rule to be applied after her death, we must look to the general statutes as to the descent of homesteads. Turning to that, we discover that it is not exempt in the hands of the heirs from the antecedent debts of their ancestor. As a general rule a homestead exemption is for the benefit of the occupant; and upon his death, in the absence of statute, it descends to the heirs as other property of the deceased. If there be any other rule, it is in virtue of some statute so declaring. So that the mere exemption of property as a homestead does not free it from the debts of the owner in the hands of his heirs after death. If there be any such exemption, it is by reason of some statute so stating. There is no statute which exempts any kind of homestead in the hands of heirs free from the antecedent debts of the owner contracted prior to its acquisition. Indeed, the very opposite rule is stated in the statute quoted. As the homestead exemption is in derogation of common right, it does not, in the absence of statute, descend to heirs at law, and may be subjected to the payment of the ancestor's debts. Re Liddle, 35 Misc. 173, 71 N. Y. Supp. 474; Briant v. Lyons, 29 La. Ann. 64. In Perkins v. Hinckley, 71 Iowa, 499, 32 N. W. 469, we had a question quite analogous to the one here involved. There the widow of one Perkins, who was a pensioner, sought to have certain pension money of her deceased husband set aside to her because it was exempt from execution. The administrator resisted her claim, and was successful in the district court. Upon appeal it was held that, although the pension money was exempt in the hands of the pensioner, the widow was not entitled to have it set off to her as exempt property, under a statute providing that property exempt to one as the head of a family should be exempt in the hands of the widow. If, by reason of its exemption while in the hands of the deceased owner, it passed to his widow or heirs with the same freedom from execution after his death as before, the decision must of necessity have been the other way.

Appellants rely upon a line of cases relating to exemptions of personal property to the widow under a section of the statute which says, in effect, that personal property exempt to one deceased as the head of a family shall pass to his widow, exempt in her hands as in the hands of the deceased. But it is evident that these are not in point, and nothing said therein gives us any help

in the solution of the problem now before us. Of such cases is Ellsworth v. Ellsworth, 33 Iowa, 164. The other cases cited by appellants, such as Moninger v. Ramsey, 48 Iowa, 368, and Kite v. Kite, 79 Iowa, 492, 44 N. W. 716, decide nothing contrary to the rule here announced. Some things said in those opinions by way of argument are relied upon by appellants, and may give some color to their present claim, but the actual decisions in no manner govern this case. No reliance is placed upon the fact that the property in question is pension money or the avails thereof; it being practically conceded that, but for its homestead character, defendants would have no claim to it. Appellee's motion to strike appellants' amendment to abstract, etc., is overruled.

We are clearly of opinion that the property is subject to plaintiff's judgment, and the decree is affirmed.

Petition for rehearing denied May 19, 1906.

KANSAS SUPREME COURT.

M. J. HARRINGTON, Plff. in Err.,
v.
E. J. LOWE et al.

(— Kan. —, 84 Pac. 570.)

Married woman's contract.

In Kansas, coverture affords no ground for declaring invalid a married woman's contract, even although she possesses no separate estate or separate trade or business.

(February 10, 1906.)

ERROR to the District Court for Phillips County, prosecuted by plaintiff and defendant Mason to review a judgment adjudicating the title to certain real estate. Reversed.

Statement by Burch, J.:

The plaintiff in error commenced the action from which this proceeding in error arises for the purpose of foreclosing a real-estate mortgage executed by James and Malinda Suggs. B. A. Mason answered that he is the owner of the mortgaged premises, and traced his title from James and Malinda Suggs through their deed to the First National Bank of Orleans, Nebraska, the deed of a receiver for that institution to W. A. Green, and the deed of the latter to him. C. E. Nelson answered, claiming that C. V. Rand is the owner of the land, and asked for the foreclosure of a mortgage given by Rand to one E. J. Lowe and by the latter transferred to him. E. J. Lowe answered that, having obtained title by means of quitclaim deeds from the heirs of James Suggs, who was then deceased, and by means of a conveyance from the holder of a tax deed to the land he had conveyed it to C. V. Rand. C. V. Rand answered, admitting the conveyance to him, but, being doubtful in respect to the soundness of his title and its freedom from encumbrance, he asked for relief against the Nelson mortgage and against Lowe as his warrantor in the event that a right superior to his should be established. The Selbys claimed a fractional interest in the land as heirs of James Suggs, deceased. The statute of limitations was pleaded as a bar to any kind of relief upon the plaintiff's mortgage. The case was submitted upon an agreed statement of facts, which reads as follows:

"(1) It is stipulated between the parties hereto for the purpose of this hearing that the following are the facts in the case:

"(2) That James Suggs received a patent to the land in controversy from the United States, dated March 25, 1886, and on the same day the said James Suggs, together with Malinda Suggs, his wife, then residents of Phillips county, Kansas, borrowed of one Edward E. Parker the sum of $500, which sum they agreed to repay on the 1st day of March, 1891, all of which was evidenced by a note of that date which is hereto attached and marked exhibit A, and that on the same day, as a part of the same transaction, and for the better securing of said note and interest as the same matured, the said James Suggs and Malinda Suggs executed to the said Edward E. Parker their certain mortgage deed conveying to the said Edward E. Parker the land in controversy, which mortgage is attached, marked exhibit B, and that said mortgage was duly filed for record on the 27th day of March, 1886.

"(3) That on the 1st day of January, 1886, the First National Bank of Orleans, Nebraska, was a going concern, duly organ-

Headnote by BURCH, J.

Case Note.—Ownership of separate estate, trade, or business as a condition of married woman's right to contract.—The view put forth in the case in hand, that a married woman may be regarded as wholly freed from her common law disability to contract, though legislation on the subject only goes so far as to authorize her to contract freely with reference to her real and personal property, and to carry on any trade or business, or to perform services, on her sole and separate account, seems to be without parallel

ized under the national banking act, and continued to be a going concern until the 1st day of May, 1897, upon which date it became and was insolvent, and was so declared by the Comptroller of the Currency, and one P. O. Hedlund was duly appointed receiver thereof, and that thereafter and upon the resignation of said P. O. Hedlund one John W. McDonald was duly appointed receiver, and continued to act as such until the affairs of said bank were wound up, which date was about the 1st day of January, 1903. That from the 1st day of January, 1886, up to the 1st day of May, 1897, and during all the time said bank was a going concern, George W. Burton was the president thereof. That on the 30th day of November, 1888, James Suggs and Malinda Suggs, his wife, executed a deed to the premises in controversy in which the name of the grantee was blank, and delivered the same to George W. Burton, as president of said bank, such deed being a warranty with full covenants, and was made expressly subject to the mortgage hereinbefore recited. That thereafter the premises in controversy were shown in the reports of the bank as an asset thereof, and continued to be so shown until the year 1894, when the same was, by order of the Comptroller of the Currency, ordered to be, and was, charged off the books of said bank under the limitation imposed in the banking act itself. That during all the time said premises were listed as an asset of the bank drafts were issued by said bank and remitted by George W. Burton to the assignee of said mortgage and note in payment of interest. That after said assets were charged off the books of said bank said George W. Burton remitted, on March 25, 1895, the interest due on March 1st of that year. On October 10, 1895, he remitted the interest due on September 1, 1895. On April 5, 1896, he remitted the interest due on March 1, 1897.

in any other jurisdiction. The question is generally regarded as one of statutory construction; and, as the variance between the statutory provisions renders the cases of little comparative value, only a few of the later ones are here presented.

It may also be remarked that where, as is sometimes the case, statutes abolish all disability on the part of married women to contract, with certain exceptions, the ownership of a separate estate, trade, or business will not be an element of the right to contract; while, where they impose such disability, with certain exceptions, such ownership will be a circumstance bearing only on the subordinate question, hereinafter discussed, whether the prior ownership of separate property, trade, or business is a condition precedent to the right to contract with respect thereto, where conferred by such an exception.

The weight of authority seems to favor the view that statutes conferring the right on married women to contract with respect to their separate estates, or to carry on trade or business on their own account, are not to be construed as conferring the right to contract generally.

Thus, in First Nat. Bank v. Hirschkowitz, 46 Fla. 588, 35 So. 22, it is held that a promissory note of a married woman is void unless she shall have been made a free trader, although her separate statutory property may be subjected, in equity, to a debt contracted in respect of it.

In Frazee v. Frazee, 79 Md. 27, 28 Atl. 1105, it is held that, except in regard to the separate estate of a *feme covert*, or where she is empowered by statutory authority to act as a *feme sole*, all her covenants, contracts, and agreements in courts of law, as well as of equity, are absolutely null and void; so that, where a statute prescribes the joint deed of herself and husband, or a power of attorney executed jointly with her husband, as the mode by which her statutory or real estate may be conveyed, her agreement to sell real estate cannot be specifically enforced.

In Kenton Ins. Co. v. McClellan, 43 Mich. 564, 6 N. W. 88, it is held that a maried woman's power to contract is not general, but statutory, and cannot be extended beyond the constitutional and statutory limits; so that she cannot be held liable on a promissory note if not given with respect to her separate estate.

In Linderman v. Farquharson, 101 N. Y. 434, 5 N. E. 67, it is held that statutory power to contract with respect to her separate estate, or to carry on business on her own account, only enabled a married woman to contract to that extent.

In Citizens' State Bank v. Smout, 62 Neb. 223, 86 N. W. 1068, it is held that, where a statute only confers upon a married woman the right to contract with reference to her separate property, trade, or business, or upon the faith or credit thereof, and with the intent thereby to charge her separate estate, she is not liable upon promissory notes signed by her as surety, her common-law disability being in force except as abrogated by statute.

In Buning v. Berteling, 5 Ohio N. P. 167, it is held that a married woman cannot be held liable on her promissory note, where it does not appear that she has separate property to be charged therewith.

In American Mortg. Co. v. Owens, 18 C. C. A. 513, 25 U. S. App. 659, 72 Fed. 219, it is held that the constitutional and statutory provisions of South Carolina, reserving to a married woman her separate property, and authorizing her to contract and be contracted with, as to it, in the same manner as if she were unmarried, do not empower her to make a contract not intended to benefit her separate property or having reference thereto; so that her mortgage, given to

"(4) That on or about the 22d day of May, 1889, the said James Suggs departed this life, leaving surviving him his widow, Malinda Suggs, and the following children and heirs at law, to wit: Eliza Suggs, Katie Suggs, Sarah E. Thompson, Sarah M. Selby, and Mary Selby, daughters, and Alexander Corbett and Sarah E. Corbett, children of a deceased daughter and grandchildren of the said James Suggs. The said Alexander Corbett was also known as Harry Corbett. That on the 29th day of August, 1901, Malinda Suggs, the widow, and Eliza Suggs, single, Katie Suggs, single, Sarah E. Thompson and husband, and Alexander Harry Corbett and Sarah E. Corbett, conveyed to E. J. Lowe, by quitclaim deed, the premises in controversy, which deed was duly filed for record September 2, 1901. That on the 4th day of September, 1899, the county of Phillips in the state of Kansas, acting by and through its officers, duly authorized thereunto, executed to one Eliza Rundle a tax deed to the premises in controversy, which deed was duly recorded on September 14, 1899, and on the 6th day of September, 1901, the said Eliza Rundle, single, conveyed the premises in controversy to the said E. J. Lowe, by quitclaim deed, which deed was duly recorded on September 14, 1901.

"(5) That afterwards, and on the 20th of September, 1901, the said E. J. Lowe and husband conveyed to one C. V. Rand, by warranty deed, with full covenants, the premises in controversy, which deed was duly recorded on the 23d day of September, 1901. That said C. V. Rand purchased the said premises in controversy from E. J. Lowe in reliance upon the records, and without any notice of outstanding equities further than the record disclosed, and that he paid a full consideration to the said E. J. Lowe in good faith and in reliance upon the warranty of said E. J. Lowe, to wit, the sum of $300 in cash and a mortgage of

secure a loan for her husband's benefit, is invalid.

In Hirth v. Hirth, 98 Va. 121, 34 S. E. 964, involving the validity of a wife's undertaking to assume her husband's debt, it is held that, although a statute empowers a married woman to make contracts as if sole, in respect to her trade, business, labor, services, and separate estate, or upon the faith or credit thereof, she is incapable of making a contract, unless she owns a separate estate, at the time the contract is made.

In Wisconsin, a statute conferring similar powers was held not to authorize the making of a contract by a married woman to pay for her board while living with her husband and engaged in no business. Chickering-Chase Bros. Co. v. White (Wis.) 106 N. W. 797.

As to whether a married woman authorized by statute to hold, acquire, and contract with reference to her separate estate may enter into a valid contract with respect to the acquisition of property, where she previously had no separate estate or business, there is some difference of opinion, the preponderance of authority, however, being in favor of such right.

In Hays v. Jordan, 85 Ga. 741, 9 L.R.A. 373, 11 S. E. 833, it is held that a statute providing that all property acquired by the wife during coverture shall vest in and belong to her authorizes a married woman to make a binding contract for the purpose of acquisition of property, whether she has a separate estate or not. The court says: "The law having thus given her the power to hold in her own right property given to or inherited by her, free from her husband and without the intervention of a trustee, it gave her necessarily the power to contract and be contracted with. . . . If the law deals thus generously with wives who were so fortunate as to own property at the time of marriage, or who have received or inherited property since, why will it not so deal with all wives? . . . We can see no good reason to hold that the same rights were not conferred upon the wife who had nothing at her marriage, and has acquired nothing by gift or inheritance since. The legislature, in our opinion, intended to put all wives upon the same footing in regard to contracts and acquiring property, and intended to allow them to make contracts, whether they have separate estates or not, and to make these contracts binding whether executed or executory."

Campe v. Horne, 158 Pa. 508, 27 Atl. 1106, is to the same effect.

A married woman, authorized to contract in respect to her separate estate and to engage in business, may purchase property on credit, and bind herself by an executory contract to pay the consideration money, although she has no antecedent estate to be benefited, and though the purchase is not made for the purposes of trade or business. Cashman v. Henry, 75 N. Y. 103, 31 Am. Rep. 437; Minners v. Smith, 40 Misc. 648, 83 N. Y. Supp. 117.

In Kriz v. Peege, 119 Wis. 105, 95 N. W. 108, it is held that the possession, by a married woman, of a separate estate or business, or a contemplation by her to engage in business, is not essential to her statutory right to contract as regards the acquirement of property; that, while the separate estate is essential to the making of the contract by her, merely to charge her separate estate binding in equity, it is not, to make a contract authorized by the statute.

On the other hand, it is held in Harrison v. Mansur-Tibbetts Implement Co. 16 Tex. Civ. App. 632, 41 S. W. 842, that a wife authorized to acquire separate property cannot do so by purchase wholly on a credit.

$350 executed as a part of the consideration of said purchase, dated September 20, 1901, payable to the order of E. J. Lowe. That on the 21st day of November, 1901, the said C. V. Rand duly filed in the office of the register of deeds of Phillips county, Kansas, an acknowledged *caveat* to the effect that said $350 mortgage was given as part consideration of the purchase of said premises; that the title to said premises was defective, and that the consideration for said mortgage had in whole or in part failed; and that afterwards, on the 7th day of December, 1901, said note and mortgage was duly assigned to one John C. Bullard for a valuable consideration as collateral security for a loan, and that he subsequently, upon payment of the debt, delivered the same to the said E. J. Lowe. That the said E. J. Lowe, on March 28, 1902, duly sold and indorsed said note and assigned said mortgage before its maturity to the said defendant, C. E. Nelson, who still owns the same, hereto attached as exhibits C and D and E and F. That said Nelson was informed at the time of said purchase that such *caveat* was on file.

"(6) That upon the appointment of the said P. O. Hedlund as receiver of said First National Bank of Orleans, Nebraska, he found among the books, papers, and assets in the vault of said bank the deed executed by the said James Suggs and wife, as hereinbefore recited, and took possession of the same, and delivered the same, with the books and papers of said bank, to his successor, John W. McDonald. That said deed was in all respects in the same condition as when it was delivered to the said George W. Burton, as president of said the First National Bank of Orleans, Nebraska.

"(7) That on the 8th day of January, 1902, John W. McDonald, as receiver of said the First National Bank of Orleans, having previously applied to the circuit court of the United States for the district of Nebraska for authority to sell the premises in controversy or the interest of the bank therein, did on said date execute to one W. A. Green a deed to said premises executed by him, the said John W. McDonald, as such receiver, in accordance with and under the direction of said circuit court, which deed was duly filed of record on the 1st day of April, 1902. That on March 28, 1902, said W. A. Green and wife executed and delivered to one B. A. Mason their quitclaim deed to the premises in controversy, which deed was duly recorded on the 1st day of April, 1902. That the deed made by James Suggs and wife, in blank, was, on the 1st day of April, 1902, filed for record in the office of the register of deeds of Phillips county, Kansas, and at the time of the filing thereof it had written or printed therein as the name of the grantee, 'First National Bank of Orleans, Neb.'

"(8) It is further stipulated that the remittances of interest made by George W. Burton were sent to one and directed to William A. Porter, Marshall, Michigan, and were written upon the letter heads of the bank of which said Burton was president, and were signed 'Geo. W. Burton.'

"(9) That shortly after the execution of the bond the said Edward E. Parker indorsed the same as appears thereon, and for value sold and delivered it, together with the accompanying mortgage, to one Bethia L. Humphrey, and at the same time he placed the assignment on the said mortgage which appears thereon; but said assignment was unacknowledged and was never recorded. That afterward, and on the 29th day of January, 1902, E. E. Parker executed in writing an assignment of said mortgage to said Bethia L. Humphrey, duly acknowledged the execution of the same, which assignment was duly recorded on the 2d day of April, 1902. That on the 21st day of March, 1902, said Bethia L. Humphrey executed an assignment of said mortgage to one M. J. Harrington, which assignment was duly filed for record on the 2d day of April, 1902.

"(10) That on or about the year 1890 the said James Suggs and Malinda Suggs removed from Phillips county, Kansas, and continued at all times thereafter until the death of said James Suggs to reside in or near Orleans, in the state of Nebraska, and said Malinda Suggs thereafter continued to be a resident of Nebraska.

"(11) That after said James Suggs and family removed to the state of Nebraska said premises were unoccupied until about the year 1899, when the same was taken possession of by Eliza Rundle, under her tax deed. The only possession, if any, prior thereto, after the removal of said Suggs, being the constructive possession which the law would imply from ownership under said warranty deed from Suggs and wife, delivered, as aforesaid, to the said George W. Burton, as president of said First National Bank of Orleans, Nebraska.

"(12) It is further stipulated that neither the said defendants Selbys, interveners herein, defendants Lowe and wife and Rand and wife, had any notice or knowledge of the assignment of said Suggs's note and mortgage until said assignments were placed of record in April, 1902.

"(13) It is further agreed that said defendants named in the last paragraph would testify that they had no notice of the payments of instalments of interest on said

note so made by said George W. Burton, president of said First National Bank of Orleans, Nebraska.

"(14) That the consideration for which said tax deed was issued to Eliza Rundle was $71.96, at the date of the issuance of said deed on September 4, 1899.

"(15) That immediately upon the conveyance of the said land to the defendant C. V. Rand, as aforesaid, said Rand entered into the possession thereof, and immediately and before the commencement of this suit, made lasting and valuable improvements thereon, but the value of such improvements and the value of the rents and profits of said land are not agreed to at this time, but are reserved until the final determination of this action.

"(16) It is further agreed that all the foregoing facts are also agreed to upon behalf of and for the interveners, Sarah M. Selby, Lewis Selby, Solomon Selby, and Mary Selby, and the defendant C. E. Nelson.

"(17) It is further stipulated in the above case that at the time the patent issued to said James Suggs to the premises in controversy, to wit, March 25, 1886, he, the said James Suggs, took a fee-simple title to the premises in controversy. That Malinda Suggs, his wife, had, at the date of the execution of said note and mortgage, no separate property or estate; and that her only right of property at that time was the marital right of expectancy in the said premises owned by and patented to the said James Suggs, and covered by the note and mortgage in controversy, and that, on the death of the said James Suggs, she, the said Malinda Suggs, his widow, took a fee-simple title by inheritance, under the laws of the state of Kansas, to the undivided half interest of whatever interest, if any, the said James Suggs may have had at the time of his death in the said mortgaged premises in controversy. That at the time said note and mortgage were given the said premises were used and occupied as the homestead of James and Malinda Suggs."

The court held that action upon the note secured by the plaintiff's mortgage is barred by the statute of limitations; that Mason's title is invalid; that the Selbys have no interest in the land; that Rand is the owner of it; and that the Nelson mortgage, which, pending the hearing, had been assigned to Lowe, was a valid lien, and should be enforced. Judgment was rendered accordingly, and the plaintiff, Harrington, and the defendant Mason, prosecute error.

Messrs. **C. A. Lewis** and **Burnham & Dashiell**, for plaintiff in error:

The statute of limitations did not run.

Gen. Stat. § 4449; Lane v. National Bank, 6 Kan. 74; Bonifant v. Doniphan, 3 Kan. 26; Hoggett v. Emerson, 8 Kan. 262; Morrell v. Ingle, 23 Kan. 32; Conlon v. Lanphear, 37 Kan. 431, 15 Pac. 600; Ament v. Lowenthall, 52 Kan. 706, 35 Pac. 804; Williams v. Metropolitan Street R. Co. 68 Kan. 17, 64 L.R.A. 794, 104 Am. St. Rep. 377, 74 Pac. 600.

We could ignore the one joint maker entirely, and rely solely upon the other signer.

Newhall v. Field (N. M.) 79 Pac. 711; Moore v. Gray, 26 Ohio St. 525; Camp. v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Missouri Sav. & L. Co. v. Rice, 28 C. C. A. 305, 55 U. S. App. 205, 84 Fed. 131; 19 Am. & Eng. Enc. Law, 2d ed. p. 512; Linn v. Ziegler, 68 Kan. 528, 75 Pac. 489.

Whenever anyone gives a mortgage to secure the payment of a note, that mortgage can be foreclosed so long as the note is alive as to either of the payors.

Perry v. Horack, 63 Kan. 88, 88 Am. St. Rep. 225, 64 Pac. 990; Jackson v. Longwell, 63 Kan. 93, 64 Pac. 991; Fuller v. McMahan, 64 Kan. 441, 67 Pac. 828; Cooper v. Haythorn, 66 Kan. 91, 71 Pac. 277.

A married woman, who has no separate estate, may borrow money, and, by her contract to repay the same, become personally liable therefor.

Kriz v. Peege, 119 Wis. 105, 95 N. W. 108; Tillman v. Shackleton, 15 Mich. 446, 93 Am. Dec. 198; Faddis v. Woollomes, 10 Kan. 56; Furrow v. Chapin, 13 Kan. 107; Building & Loan Asso. v. Jones, 32 S. C. 313, 10 S. E. 1079; Hibernian Sav. Inst. v. Luhn, 34 S. C. 175, 13 S. E. 357; Sidway v. Nichol, 62 Ark. 146, 34 S. W. 529; Wilder v. Richie, 117 Mass. 382; Miner v. Pearson, 16 Kan. 27.

Messrs. **Flansburg & Williams**, for defendant in error:

The disability of nonresidence is removed in case of death, and the remedy is thereby immediately revived, and the statute of limitations begins to run anew.

Hanson v. Towle, 19 Kan. 273; Atchison, T. & S. F. R. Co. v. Burlingame Twp. 36 Kan. 628, 59 Am. Rep. 578, 14 Pac. 271; Rork v. Douglas County, 46 Kan. 175, 26 Pac. 391; Bauserman v. Charlott, 46 Kan. 480, 26 Pac. 1051; Kulp v. Kulp, 51 Kan. 341, 21 L. R. A. 550, 32 Pac. 1118; Palmer v. Palmer, 36 Mich. 487, 24 Am. Rep. 605; Savage v. Scott, 45 Iowa, 130; Bauserman v. Blunt, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466.

A married woman in the state of Kansas is under the common-law disability of coverture, except where that disability is removed by statute.

Tallman v. Jones, 13 Kan. 438; Comegys v. Vasse, 1 Pet. 193, 7 L. ed. 108; 2 Fearne, Contingent Remainders, Smith's ed. 23; 1

Fearne, Contingent Remainders, Smith's ed. 551.

The contract of a married woman, made without reference to her separate estate, and when in fact she possesses no separate estate, is absolutely void and unenforceable.

Deering v. Boyle, 8 Kan. 525, 12 Am. Rep. 480; Knaggs v. Mastin, 9 Kan. 532; Miner v. Pearson, 16 Kan. 27.

Where the debt itself is barred, the mortgage ceases to have any valid existence.

Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765.

Burch, J., delivered the opinion of the court:

If the note in suit be a valid obligation, enforceable against Mrs. Suggs, her absence from the state tolls the statute, and the plaintiff's mortgage may be foreclosed. If not, his action is barred. It is claimed that Mrs. Suggs is not bound because she had no separate estate when the note was given, and it does not appear to be a contract made in connection with any trade or business conducted on her sole and separate account; that the so-called married woman's act permits contracts only in reference to these matters, and that, except as they are removed by statute, all the common-law disabilities of married women persist. The question for determination, therefore, is the measure of capacity to enter into contracts which a married woman possesses under the laws of Kansas. The legislative act referred to took effect October 31, 1868, and reads as follows:

"Sec. 1. The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property which shall come to her by descent, devise, or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts.

"Sec. 2. A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.

"Sec. 3. A woman may, while married, sue and be sued, in the same manner as if she were unmarried.

"Sec. 4. Any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name."

Gen. Stat. 1901, chap. 62.

Much stress is placed upon the words of the 2d section, "enter into any contract with reference to the same;" that is, with reference to her real and personal property. In the case of Deering v. Boyle, 8 Kan. 525, 12 Am. Rep. 480, decided at the July, 1871, term, suit had been brought on a promissory note given by a married woman. She answered that when the note was given she was a married woman; that the note was given to the payee in satisfaction of her husband's sole, separate, and individual debt, and that it was given without any benefit or consideration whatever moving to her. The district court sustained a demurrer to this defense, and this court affirmed the judgment. In the facts of the case there can be found no intimation that the woman had ever possessed any property, trade, or business. There is no presumption of law that she had done so, and, if such had been the case, the allegations of the answer show that her contract could not have had any possible connection with them or with her services or earnings. The note concerned a matter entirely outside of the statute, and yet it was held that she had capacity to make it, and that judgment might be rendered upon it.

In the case of Wicks v. Mitchell, 9 Kan. 80, decided at the January, 1872, term, suit was brought on a promissory note executed by a married woman with others, one of whom was her husband. She answered that the note was given in liquidation of the debt of the other makers, and that she signed as surety only. Her answer also contained the following allegations: "That said note was not given to the plaintiff for the benefit of this defendant, nor for the use and benefit of her sole and separate property, nor with reference to the same, nor for anything which might or could inure to its or her benefit; that this defendant did not, nor has she, charged her sole or separate property with the payment of said note, but at the time of its execution refused to in any manner so charge her sole and separate property, or any part thereof." A demurrer was sustained to the answer, and judgment given for the plaintiff. This answer went beyond the one made in Deering v. Boyle, *supra*, in that it pleaded the woman's refusal to charge her separate property with the satisfaction of the contract. If the possession of a separate estate which may be bound is necessary in order to confer capacity to contract, the exclusion of such estate from benefit from the transac-

tion and from liability for the satisfaction of the contract ought, it would seem, to be equivalent to the possession of no estate, so far as that contract is concerned. Nevertheless, it was held by this court that Mrs. Wicks had capacity to make the contract; that the answer stated no defense, and that the judgment upon it against her was authorized by law.

In the case of Larimer v. Kelley, 10 Kan. 298, decided at the July, 1872, term, it appeared that in 1864 Mrs. Larimer and Mrs. Kelley were captured by the Sioux Indians. They both escaped, and afterwards entered into an agreement with each other to write and publish a book describing their experiences during captivity. The expenses of the work were to be borne by Mrs. Larimer, and the profits were to be divided equally. The petition of Mrs. Kelley alleged that when the manuscript was nearly completed Mrs. Larimer took possession of it, carried it to Philadelphia, and had it published in her own name, thereby depriving Mrs. Kelley of the credit and reputation of the authorship of the book, and of her share of the profits of its publication. The answer alleged that at the time the agreement was made the defendant was a married woman and had no trade, business, or property on her own account, had no earnings from any such trade or business or from the performance of any labor or services, was incapable of making the contract sued upon, was not authorized to do so by her husband, and that the plaintiff was also a married woman when the contract was made, and therefore incapacitated to enter into a binding agreement. A demurrer was sustained to this answer, and judgment was rendered accordingly. The contract pleaded was made while the married woman's act of 1859 was still in force. Comp. Laws 1862, chap. 141; Acts 1859, chap. 94, p. 564. Under that act, as under the act of 1868 which supplanted it, the only express grant of power to make contracts is that contained in § 2, which relates exclusively to property. The points of the argument made in support of Mrs. Larimer's answer are identical with those made in opposition to the liability of Mrs. Suggs: Disability at common law to contract at all; capacity to contract now only to the extent to which the common-law disability has been removed; the letter of the married woman's act which allows contracts only "in reference to the same,"—that is, in reference to property. This court, speaking by Mr. Justice Brewer, made short work of this argument, and announced a capacity to contract which does not relate to real or personal property, and which is not described in the statute. In connection with a citation of the statute, he said: "The third and fourth defenses are that a *feme covert* cannot make a contract such as is set forth in the petition. That contract is one for labor. Each is to furnish her skill and knowledge, her time and labor, in the production of a book. . . . If she can perform labor and services on her separate account, she can contract for them. If she performs them, she can recover for them. The coverture of the parties did not, therefore, avoid their contract, and the demurrer to the third and fourth defenses was properly sustained." Larimer v. Kelley, *supra*.

In the case of Tallman v. Jones, 13 Kan. 438, decided in 1874, a strict and literal interpretation of the statute was rejected, and it was held that a married woman without any separate estate might purchase property on credit for the purpose of engaging in business, and that her note given for such property was a valid obligation.

In the case of Miner v. Pearson, 16 Kan. 27, the action was brought to recover upon the note of Louisa B. Pearson and Walter C. Pearson, and to foreclose a mortgage securing it. The district court refused to render a judgment against Louisa B. Pearson on the ground, as counsel stated, that she was a *feme covert*. There is nothing in the case to show that she owned the land or had any separate estate when the note and mortgage were given, or that they were given with reference to any trade or business. This court ordered judgment against her, saying: "A married woman may, in this state, bind herself by her contracts to the extent of her separate property. And a personal judgment may be rendered against her which will reach any or all of her separate property not exempt from execution under the exemption laws."

In the case of Bolinger v. Brake, 4 Kan. App. 180, 45 Pac. 950, a married woman had joined in the covenants of a warranty deed of her husband's land. Her capacity to bind herself by such a contract was denied, but both the trial court and the court of appeals held her liable, and the judgment was affirmed by this court. 57 Kan. 663, 47 Pac. 537; 58 Kan. 818, 51 Pac. 290. Other significant decisions might be adverted to.

This court has been organized some forty-four years, but counsel have cited no decision it has ever made in which any defense based on the common-law doctrine of coverture has been allowed to prevail against a married woman's contract. It is true that in Deering v. Boyle and Wicks v. Mitchell it is said a married woman does not bind herself personally as a man does, and that her contracts bind her separate estate or not at all. These statements, however, did not control the decisions rendered, and were soon

recognized to be of no special significance. In each case capacity to make a contract which was not and could not be connected with the maker's separate property, trade, business earnings, or services was recognized and the contract enforced, and in Deering v. Boyle the possession of a separate estate as an element of capacity was utterly ignored. In Deering v. Boyle, Mr. Justice Valentine undertook to show that the contract involved did relate to property in a sense sufficient to afford technical authority for it as a strictly statutory affair. He argued that a man contracts with reference to his property without mentioning it. The man makes his contract. The law says what shall be done with his property if he fails to perform. He contracts in view of the law, and thereby relates the contract to his property and binds it. Under the statute a married woman may do as a married man may do, and hence her promissory note given to pay the debt of her husband may be said to refer to her property in its obligation. A man's contract, however, does not refer merely to property in present possession or ownership. Future acquisitions are within its obligation, and the reference of a man's contract to his property may be to such future acquisitions. His contract is that if he do not pay his creditors may sue him, obtain a judgment against him, cause execution to be issued and levied on his property, and cause such property to be sold to satisfy the execution. But he need not have the smallest item or article of property, real or personal, to make the contract, or to make it refer to his property, or to support a judgment upon it. The opinion concludes: "This is a married man's contract with reference to his property. A married woman may, under said § 2 of the married woman's act, contract 'in the same manner, to the same extent, and with like effect,' with reference to her property." Deering v. Boyle, 8 Kan. 525, 537, 12 Am. Rep. 480.

From the context it is plain that the expression used in that opinion, to the effect that, unless a married woman's contract bind her separate estate, it is a nullity, referred to the source of satisfaction, and not to capacity to contract. The argument is this: A married woman does not bind herself personally,—that is, her body cannot be taken on a capias ad satisfaciendum; her husband is no longer liable for her debts, and he is not bound; therefore, unless she bind her own property, the obligation comes to naught. The same expression is repeated in Wicks v. Mitchell, but the context there also shows that the ineffectiveness referred to does not arise from a lack of capacity altogether prohibiting any kind of an engagement, but that it results from the want of a fund to apply to the satisfaction of a contract entered into by one at all times competent to make it. "A party is held obligated to do that which is the legal effect of the instrument he executes. The rule is as fixed and clear for married women as for any other persons. When they sign promises to pay, the law holds that they act in good faith, and that they intend to do what they have promised. It considers that instrument a valid instrument, and, as it can be held valid only because enforceable against her separate estate, it enforces it against such estate." Wicks v. Mitchell, 9 Kan. 80, 89. But the potentiality of property which, as the statute contemplates, may come to her by gift, descent, devise, or bequest, or which she may acquire through her own means, or in connection with her own trade or business, is sufficient to authorize the formation of the contractual relation.

From the foregoing it will be observed that there are no restrictions upon the authority of married women to contract generally. Whatever contract her husband can make she can make. The court availed itself of the first opportunity presented to make this decision, and that the legislative intention was properly grasped is certain from the fact that the married woman's act of 1868 has remained unchanged to this day. The statement in Deering v. Boyle and Wicks v. Mitchell, that a married woman does not bind herself personally, was merely a somewhat automatic enunciation of the old law found in all the unregenerated texts. Thus, in Reeve, The Law of Baron and Femme, it is said: "It is a general rule that a wife cannot so contract as to bind herself; her contracts are said to be void in law. The principles on which this doctrine is founded are two: (1) The right of the husband to the person of his wife. This is a right guarded by the law with the utmost solicitude; if she could bind herself by her contract, she would be liable to be arrested, taken in execution, and confined in a prison; and then the husband would be deprived of the company of his wife; which the law will not suffer. (2) The law considers the wife to be in the power of the husband; it would not, therefore, be reasonable that she should be bound by any contract which she makes during the coverture, as it might be the effect of coercion. On the first ground she is privileged for the sake of her husband; on the last, for her own sake." Chapter 8, p. 98. "No action at law can be maintained against her. For the judgment in that case would subject her person to imprisonment; and thus the husband's right to the person of

his wife would be infringed, which the law will not permit in any case of a civil concern." Chapter 13, p. 171. When the statements noted were written, imprisonment for debt except in cases of fraud already had been abolished, and, by virtue of the very statute the court was considering, the power of the husband over the wife in the matter of contracts and property had been destroyed. Therefore, as suggested in 2 Cord on Married Women, § 1045, the reasons assigned for the incapacity of the wife and for her exemption from personal judgments are destitute of force under our altered and amended law. In recognition of this fact, no doubt, the tone of judicial utterance soon changed, and in State v. Hendricks, 32 Kan. 559, 564, 4 Pac. 1050, the justice who wrote the opinion in Deering v. Boyle said: "In Kansas, women have all the rights and privileges that men have, except merely that they cannot vote at general elections. A married woman may sue and be sued, contract and be contracted with, buy, sell, barter, trade, and carry on business in the same manner, to the same extent, with like effect, and as freely as any other person may. And all this she may do in her own name, and in the same manner as others not in her condition." For all those who feel that the reasoning of Deering v. Boyle is artificial, attenuated, and against the overwhelming weight of judicial opinion elsewhere, there is secure ground upon which to declare that the final conclusion reached was sound. The words *feme covert* no longer have for us anything more than a historical interest. The species is extinct in this state. This fact can best be brought into appreciation by standing for a moment with hand on mouth peering into the hole of the pit from whence we were digged.

The common law relating to the rights and powers of married women was based upon a belief in the complete union of the married pair, which would be destroyed by allowing any opportunity for a divided will. It was assumed that conjugal affection would lead the husband to deal justly with his wife, and, if that motive were not sufficiently potent, that a realization of the fact that his wife's interests were identical with his, fear of family discord, pride of appearance, and other promptings would move him to eschew all arbitrariness. But it was believed that occasional lapses into despotism might better be suffered than to compromise the indivisibility and indissolubility of the matrimonial union. Hence, to the numerous and respectable audience present at his lectures, Blackstone said: "By marriage, the husband and wife are one person in law,—that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs everything; and is therefore called, in our law-French, a *feme-covert, fœmina viro co-operta;* is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquire by the marriage." Commentaries, bk. 1, chap. 15, p. 442. In fact, the woman acquired nothing but a right to support. She was despoiled of all her goods, chattels, and money, which the husband might dispose of as absolutely as if they had always belonged to him, and which he might will away from her at his death. He was entitled to the possession and profits of her land during the marriage; and, if he survived her and a child had been born, the right continued until his death. If she acquired property, she could not hold it. It went to him. She could not make a contract or a testamentary disposition of her property, because she had no independent will of her own. The making of a contract with her husband was inconceivable. He was the guardian of her children, and was entitled to her earnings and her services. Whatever she did was presumed to be under his coercion. He could restrain her person and could visit corporal punishment upon her for the purpose of restoring that concord and harmony which marital unity required. If the baron killed his *feme*, it was an ordinary kind of homicide. If the *feme* killed her baron, it was a species of treason, because she rebelled against the authority and supremacy of her lord, and she was disemboweled and burnt alive.

All this followed naturally, logically, and inevitably from the ideal nature of the perfect union, with headship in the husband, which the sacramental ceremony of marriage at the common law established; but it stifled the free growth and expression of that individuality which the laws of nature entitled a woman to display, and it resulted in unconscionable tyranny. Misfortune frequently overtook the matrimonial venture. Wives were reduced to poverty by the conduct of vacuous and profligate husbands. Rapacious creditors knew no distinction between property produced by the impecunious, but domineering, husband, and that which the wife had surrendered when she passed *in manu viri*, and because she was a legal and economic nonentity she was obliged to suffer and submit in abject helplessness. Courts of equity

interposed their cumbersome makeshifts of trusteeship, uses, settlements, and equitable separate estates; but equity follows the law, and unaided it could not overthrow the harsh and stern legal doctrines by which the degradation of married women was accomplished. Finally, remedial legislation put in its tardy appearance. In Kansas a beginning was made with the territorial act of 1859, already cited. When the state Constitution was framed it commanded the legislature to provide for the protection of the rights of married women in acquiring and possessing property, real, personal, and mixed, separate and apart from their husbands and for their equal rights in the possession of their children, and created the homestead, which it exempts from forced sale for the payment of debts and which it prohibits the husband from encumbering or alienating without the joint consent of his wife. Const. art. 15, §§ 6 and 9. These constitutional provisions themselves irretrievably broke down the common-law theory of marital unity, destroyed the notion of feminine subjection to baronial authority, threw off the restraints of coverture, and installed the modern doctrine of the equality of man and wife before the law. Legislative acts based upon the same principles speedily followed, until not only does a married woman have the right to acquire, possess, and dispose of her own property in her own way, free from her husband's dictation and domination, possess the homestead equally with him and defeat its alienation, if such be her will, make and fulfil contracts for her services, keep her own earnings, conduct her own business and retain the profits, buy from her husband and sell to him as if he were a stranger, sue and be sued, make a will, educate and control her children equally with her spouse, and govern her own conduct free from his interference or restraint, but she is authorized to attend political caucuses and conventions, nominate candidates, vote at municipal and school elections according to her own independent judgment and inclination, and to hold public offices of profit, trust, and honor. What there is left of subjugation by her husband or subjection to him to incapacitate her to make any kind of contract she please is difficult to perceive.

All the legislation affecting the status of married women must be considered in order that the full virtue of each separate act may be appreciated; and it is noteworthy, indeed, that on the same day the married women's act of 1868 became operative the following statute went into effect: "The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the general statutes of this state; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this state; but all such statutes shall be literally construed to promote their object." Gen. Stat. 1868, chap. 119, § 3. The court, therefore, is not obliged to bend its efforts toward the preservation of the swollen autocracy of the baron over the *feme*, but it is at liberty to interpret acts of the legislature from the standpoint of the legislature itself and according to the remedial purpose it had in view. This purpose clearly appears to involve a recognition of the fact that the exercise of rights which formerly attended marriage by capture is no longer to be tolerated; that in the family, as elsewhere in society, the finer relations of adult individuals are not fixed by statutes, but flow from uncoerced consent and mutual agreement; that the wants, the interests, the capacities, the activities, and the aspirations of a married woman cannot be incorporated and consolidated into those of her husband so that she performs everything under his wing and cover, as Blackstone would have; that the kernel of her life is herself, which conjugal love no more obscures in her than in a man; and that she is entitled to the same untrammeled opportunity for the development and display of her womanhood that he possesses for the development and display of his manhood. "The tendency in Kansas has always been toward an exact equality among the sexes under the law. The tendency has been to place all adult persons, male and female, upon the same legal plane so far as such a thing can be accomplished." Mr. Justice Valentine, in Miller v. Morrison, 43 Kan. 446, 449, 23 Pac. 612. "In Kansas a woman is in nearly all matters accorded civil and political equality with man; she is not his servant nor his slave. Here, the sexes may harmonize in opinion and co-operate in effort; here woman is no longer subordinate to man, but the two are co-ordinate together; here, the burden of a common prejudice and a common ignorance against woman has been wholly removed; here, the tyranny which degrades and crushes the wives and mothers in other countries no longer exists; here, the coveted rewards of life forever forbidden them in some of the states are within their reach; here, a fair field for their genius and industry is open, and womanhood, with the approbation of all, may assert its divinely chartered rights, and fulfil its noblest duties." Chief Justice Horton, in State v. Walker, 36 Kan. 297, 311, 59 Am. Rep. 556, 13 Pac. 279.

Therefore the one-person idea of the marriage relation as expounded by the common-law authorities can no longer be made the touchstone of a married woman's rights or capacities in this state. Her powers and responsibilities do not depend upon the principle of unity, but upon the principle of diversity. True, some adumbrations of the doctrine are shown by our law, and, so far as they have become fixed and settled rules, must be respected. But coverture is an obsolete relation. It flourished originally in the atmosphere of caste and privilege, and it has gone the way of the *patria potestas* and chattel slavery. "In this state a husband and wife are two independent persons; and the husband has no more immediate interest or control over the property of the wife than any other person. Our system of marriage literally implies the equality of the husband and wife, the integrity and individuality of each, the mutual obligation in which love and duty find no bondage, the division of labor, and the multiplication and sharing of happiness." Baker v. Stewart, 40 Kan. 442, 459, 2 L.R.A. 434, 10 Am. St. Rep. 213, 19 Pac. 904. There is no longer any reason for the common-law doctrine relating to the contracts of married women, and with the death of the reason for it every legal doctrine dies. Reeves applies this test to the case of married women's contracts: "The true criterion, by which we determine whether she is liable or not upon her contracts, is whenever the aforesaid marital right [of the husband] can be affected, and whenever we can presume a possibility of coercion, her contracts are utterly void; but if we can find a case when no marital right can be affected, and every presumption of any possible coercion is removed out of the way, the wife is bound. The words of that distinguished character, Lord Hardwicke, in 1 Ves. Sr. 305, are these: The disability arising from coverture is not for want of discretion, but because she is under the power of the husband; this position I take to be correct, and the consequence is clear, that when she ceases to be under his power, there is no solid objection to her managing her own estate as she chooses, if no marital right is affected by it." Reeve, The Law of Baron and Femme, chap. 8, pp. 98, 99.

This court has had occasion to act upon the same principle: "The laws of Kansas do not presume that a wife who unites with her husband in the commission of a crime acts under his coercion. On the contrary, the laws of Kansas presume that all persons of mature age and sound mind act upon their own volition, and are responsible for their acts. . . . But, giving this presumption its fullest scope,—supposing that it has operation at common law in murder cases, as well as in many others,—still we do not think it can have any operation in Kansas; and this on account of the changed condition of our society and institutions. The presumption was probably right, when first adopted, for the state of society which then existed. But it cannot be right now under our present condition of society, and it is not the law. There was once a reason for the presumption; but that reason has long ago ceased to exist in Kansas; and when the reason for the presumption has ceased to exist, the presumption itself must also cease to exist." State v. Hendricks, 32 Kan. 559, 564, 4 Pac. 1050. "Under the provisions of our statute, the reasons assigned for the liability of the husband for the torts of his wife no longer hold good, and therefore, in our opinion, under the changes made by the statutes, the liability no longer exists. It is a part of the common law that where the reason of the rule fails, the rule fails with it. . . . Again, in this state, the common-law power of correction of the wife by the husband is no longer tolerated. Under the common law, the married woman's legal existence was almost entirely ignored. She was sunk into almost absolute nonentity, and rested in almost total disability; but all of this has been changed by the statute, and to-day, in our state, 'her brain and hands and tongue are her own, and she should alone be responsible for slanders uttered by herself.' . . . Our conclusion is that the provisions of our statute change the common-law rule, and thereby discharge the husband from liability for the torts of the wife committed when he is not present and with which he has no connection. In this state the wife stands upon an equality, in all respects, with the husband. She is alone responsible for her contracts, and should be alone responsible for her words and her acts." Norris v. Corkill, 32 Kan. 409, 410, 412, 49 Am. Rep. 489, 4 Pac. 862. The conclusion must be that in Kansas coverture affords no ground for declaring invalid a married woman's contract, even although she possess no separate estate or separate trade or business. This being true, the Suggs mortgage is a valid lien upon the real estate in controversy, and the plaintiff is entitled to have it foreclosed.

E. J. Lowe stands upon the proposition that Suggs and wife did not execute or deliver the instrument through which Mason claims title, and she verifies her pleading to this effect. But she alleges that if she should be mistaken the instrument is no more than a mortgage upon which action is barred, and hence that the receiver's deed to Green is a nullity as a conveyance of land. Besides, she denies under oath the authority of the receiver to execute and deliver that deed. She is, therefore,

thoroughly committed to the position that the title to the land passed to the Suggs heirs upon the death of James Suggs, and she cannot be allowed to assume antagonistic attitudes upon the record. The Suggs heirs could not have taken a valid tax title to their own land. It was their duty to pay their taxes, and a purchase by them from the holder of a tax deed would have amounted to no more than a redemption. The same is true of their grantee, and Lowe acquired nothing by virtue of her acquisition of the Rundle tax title after she had bought out the Suggs heirs. The district court finds that the First National Bank deed was executed and delivered, and does not find that it was a mortgage. It was made subject to the plaintiff's mortgage. The copy in the record shows a consideration of $1,000. Soon after its execution and delivery Suggs and wife left the land, and the deed drew to the bank constructive possession. The bank made public claim to the land in its reports to the Comptroller of the Currency, paid the taxes upon it, and paid the interest upon the plaintiff's mortgage. Finally it sold the land as its own to one not shown to have possessed any knowledge of the claimed defect, who, in turn, sold it to the defendant Mason. Under these circumstances, James and Malinda Suggs would be estopped to deny, as against the present claimant under that deed, that it was effectual as a conveyance. The Suggs heirs would be estopped in the same manner, and their grantee, Lowe, possesses no right to dispute it superior to theirs.

The defendant Rand makes no claim that he acquired a good title to the land, or that he was an innocent purchaser. He claims no higher right than those which Lowe possessed and could convey. Lowe cannot plead for him that he purchased innocently, for he holds Lowe's covenants that the title is good in fact. Lowe acquired title by a quit-claim deed reciting only a nominal consideration. Inquiry at the treasurer's office—one of the public record offices of the county—would have disclosed the fact that the bank had paid the taxes on the land for a series of years. An inquiry at the bank, or of its receiver, would have discovered the bank's title. Hence Lowe was not an innocent purchaser, and Rand's title obtained through her altogether fails. The purchase-money mortgage given by Rand likewise fails for want of consideration.

The judgment of the District Court is reversed, and the cause is remanded, with instruction to render judgment on the findings of fact in accordance with the views expressed in the foregoing opinion.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

MARY E. BENNETT, Appt.,
v.
LOUISVILLE RAILWAY COMPANY.

(— Ky. —, 90 S. W. 1052.)

Appeal—verdict against evidence.

1. That a verdict is against the weight of the evidence is no ground for reversal.

Street car—starting before passenger seated.

2. It is not negligence to start a street car before an incoming passenger has reached a seat, where there is nothing in his appearance to indicate that he needs unusual care and precaution for his protection.

(February 20, 1906.)

APPEAL by plaintiff from a judgment of the Common Pleas Branch, Second Division, of the Circuit Court for Jefferson County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **R. C. Davis** and **J. J. Davis** for appellant.

Messrs. **Fairleigh, Straus, & Fairleigh,** for appellee:

It is not negligence for a street car to start while a passenger is in the act of passing from the platform into the car.

Sharp v. New Orleans City R. Co. 111 La. 395, 100 Am. St. Rep. 488, 35 So. 614; Herbich v. North Jersey Street R. Co. 65 N. J. L. 381, 47 Atl. 427; Aiken v. Southern P. Co. 104 La. 163, 29 So. 1; Gretzner v. New Orleans & C. R. Co. 105 La. 270, 29 So. 496; Black v. Third Ave. R. Co. 2 App. Div. 387, 37 N. Y. Supp. 831.

Messrs. **Kohn, Baird, & Spindle** and **Greene & Van Winkle** also for appellee.

Case Note.—Starting street car before passenger is seated.—This note is intended to include only those cases in which injury is caused by starting the car after the passenger has obtained a footing upon it, but before he has reached a seat. For earlier cases see exhaustive note in 42 L.R.A. 294.

It is the duty of a street car company, when its cars are standing for the reception of passengers, to use the highest degree of care to see that all passengers lawfully entering them reach a place of safety before they are started. Normile v. Wheeling Traction Co. 57 W. Va. 132, 68 L.R.A. 901, 49 S. E. 1030; Norfolk & A. Terminal Co. v. Morris, 101 Va. 422, 44 S. E. 719.

A street car company is negligent in starting its car before a passenger has landed securely upon the platform. Lehner v.

Nunn, J., delivered the opinion of the court:

Appellant instituted this action against the appellee to recover damages for injuries received upon one of its street cars, as she alleged, by the negligent management and operation thereof by the motorman. On the trial the jury returned a verdict in favor of the appellee, and she has appealed.

She alleged in her petition, in substance, that the motorman stopped the car for her, and as she entered the door of the car, and was in the act of taking her seat, the motorman negligently turned on the current, and started the car, she alleged, with a sudden and unusual jerk, by which she was thrown with great force and violence against the end or edge of the seat, by reason of which she received painful injuries to her body and spinal column; that she was made sick and sore, and confined to her bed for a long time, suffering great pain, and was compelled to undergo a serious and painful operation, in the removal of the lower end of her spinal column; that her loss of time and medical expense amounted to $500; and was otherwise injured and damaged to the extent of $5,000. The appellant asked for a reversal, for the reason that the verdict was against and contrary to the evidence. That the court erred in giving to the jury instructions 2 and 3.

The appellant and one witness sustained her allegation that the jerk in starting the

Metropolitan Street R. Co. 110 Mo. App. 215, 85 S. W. 110.

The law requires a street car conductor to stand in a position where he can see that a passenger is safely on board, before he gives the signal for the car to proceed. Normile v. Wheeling Traction Co. *supra.*

The degree of care which a street car company owes its passengers is not shown by the act of a conductor of an electric car, who stood within the car, where he could not see whether an intending passenger was safely on board, but gave the signal to start after the passenger, a woman who carried a package in one hand and a basket in the other, had stepped upon one of the steps with her right foot, and while she was in the act of stepping up with her left foot, which she had raised from the ground, and was thrown against the rear rail by the premature starting of the car. Ibid.

It was an act of negligence for a conductor to start an open car which the passenger believed had stopped in response to her signal, before such passenger had an opportunity to step from the running board into the body of the car; and the negligent character of the act is not affected by the fact that the passenger attempted to board the car by stepping on the inside running board, or the one toward the other tracks, a habit of the public well known to the company, and one which the conductor should have heeded; and the fact that the conductor was on the opposite side of the car made it more important for him to view the other side before giving the signal to start. Austrian v. United Traction Co. 19 Pa. Super. Ct. 329.

A street car company is liable for injuries to a passenger, a man about seventy years of age, caused by being thrown from the car, on which no conductor was seen by him, and which started with a jerk just after he had caught the hand rail of the rear platform, and had placed one foot on the first step, and was about to place the other foot on the next step. Devoy v. St. Louis Transit Co. 192 Mo. 197, 91 S. W. 140.

And a street car company is liable to a passenger who is injured by being thrown against the rear end of the car by a sudden lurch of the car, which is set in motion while the passenger is going up the rear steps of the platform and before she has an opportunity to reach a place of safety. Lehner v. Metropolitan Street R. Co. *supra;* Stoddard v. St. Louis & M. River R. Co. 105 Mo. App. 512, 80 S. W. 33.

But a street car company owes no duty to a woman passenger, who is apparently strong and healthy, to wait, after she has entered the body of the car, until she is seated, before giving the signal to start, or to notify her that he is about to give such signal. Weeks v. Boston Elev. R. Co. (Mass.) 77 N. E. 654.

It is not an act of negligence for the conductor, who is standing on the rear platform with the passenger in plain view, to signal the car to go ahead after the passenger, who is a strong and healthy woman between fifty-eight and sixty years of age, and who shows no signs of physical or mental infirmity, has proceeded 5 or 6 feet up the passageway toward the front of the car, although there are seats near the rear which she might take. Ibid.

Nor is it an act of negligence to start an electric street car around a wide, easy curve while a passenger, a man about seventy years of age and weighing about 220 pounds, is passing from the platform to a seat in the car. Sharp v. New Orleans City R. Co. 111 La. 395, 100 Am. St. Rep. 488, 35 So. 614.

In Herbich v. North Jersey Street R. Co. 65 N. J. L. 381, 47 Atl. 427, which was an action against a street car company, brought by a young child for injuries alleged to have been caused by being thrown from the car after she and her mother had entered it and before they had reached a seat, it was held error to refuse to charge the jury that the starting of a car before a passenger is seated is not negligence.

It is a question for the jury whether a street car company was negligent in starting, with a sudden jerk, a summer car, on the running board of which a man, who was about fifty-eight years of age, had stepped before the car had quite stopped, and was thrown off before he could leave the running board and enter the body of the car. Powelson v. United Traction Co. 204 Pa. 474, 54 Atl. 282.

car by the motorman was a sudden and unusual one, and that by reason thereof she was injured, and in the way and manner and to the extent stated. There was no contrariety of evidence as to the extent of her injuries. The appellee introduced one witness, whose testimony tended to show that the jerk made in starting the car was not sudden or unusual. We are of the opinion that the preponderance of the evidence favored claim of appellant, but we are not authorized to reverse the judgment of the lower court on that account.

Instruction, No. 3, complained of by appellant, is an instruction in the usual form upon the question of contributory neglect. The objection to this instruction is that there was no evidence upon which to base it. It is true that there was a bare scintilla of evidence, if any, to authorize it. It is a doubtful question as to whether or not it should have been given, but in our opinion the giving of it did not prejudice the substantial rights of the appellant.

Instruction No. 2 reads as follows: "It was not the duty of the agent and servant of the defendant in charge of the car to have the car remain standing until the plaintiff was seated in said car; and, unless you believe from the evidence that the said agent or servant in charge of the car failed to exercise that degree of care with which he was charged, as set out in instruction No. 1, and by a reckless or unnecessary jerk or lurch of said car started the same, and the plaintiff was injured thereby, the law is for the defendant, and you should so find." By the first instruction the court, in effect, instructed the jury that it was the duty of the agent of appellee, in operating the car upon which appellant was a passenger, to observe the highest degree of care which a prudent person would exercise under like circumstances, in the management and control of the car, to enable appellant to board it with safety; and, if the jury believed from the evidence that the agent in charge failed to exercise the degree of care stated, and, by a reckless or unnecessary jerk or lurch of the car, started the same, and appellant was thereby thrown against the seat and injured, then the law was for her.

The appellant complains of that part of the second instruction which told the jury that it was not necessary for the agent in charge of the car to have it remain standing until the appellant was seated. This instruction seems to be in conformity with the rule enunciated in the case of Louisville & N. R. Co. v. Hale, 102 Ky. 600, 42 L.R.A. 293, 44 S. W. 213, and Sheffer v. Louisville, H. & St. L. R. Co. 22 Ky. L. Rep. 1305, 60 S. W. 403. Both of these cases, however, were against steam railways, but we can see no reason why the same rule should not be made applicable to street railways. It would be impracticable to require in every instance those in charge of a street car to have it remain still until every passenger that boards it takes a seat. This would make street car travel slow, vexatious, and inconvenient.

There are instances in which a car should be permitted to remain still until the passenger is seated; that is, where the passenger is old, feeble, crippled, or in any condition which makes it reasonably apparent to those in charge of the car that the person needs unusual care and precaution for his or her protection. But the case at bar does not come within this rule. It is true that she was proved to be large and fleshy, but there was no proof that her flesh was any great burden to her, nor was there anything proved which might have indicated to the motorman in charge of the car that any extra precautions were required on his part for her safety.

The judgment is affirmed.

Petition for rehearing overruled.

4 L.R.A.(N.S.)

KENTUCKY COURT OF APPEALS.

FLORENCE FEAST, Appt.,
v.
CHARLES AUER.

(— Ky. —, 90 S. W. 564.)

Slander—epithets.

Stating of one that "she is a dirty, vile woman" does not impugn her virtue, and is not actionable.

(January 24, 1906.)

Case Note.—Actionable character of epithets that impute immorality to a woman.—The question whether certain epithets applied to a woman do or do not imply unchastity, and are or are not actionable, frequently arises; and the decisions vary greatly.

In K—— v. H——, 20 Wis. 239, 91 Am. Dec. 397, it was held that the word "bitch," applied to a woman, while it is a word of reproach, does not impute the crime of prostitution, and therefore is not actionable; nor can the innuendo extend the meaning so as to make it charge prostitution. This case is cited and followed by Schurick v. Kollman, 50 Ind. 336, and Craig v. Pyles, 101 Ky. 593, 39 S. W. 33, cited in FEAST v. AUER, where the epithets used were the same; and it was similarly held in Peters v. Garth, 20 Ky. L. Rep. 1934, 50 S. W. 682, where the epithets complained of were "damned slut," "damned bitch" and "damned sow."

APPEAL by plaintiff from a judgment of the Circuit Court for McCracken County dismissing a petition filed to recover damages for slander. Affirmed.

The facts are stated in the opinion.

Mr. J. Mark Worten, for appellant:

If the appellee meant to convey the idea, and his hearers understood that he meant, that the appellant was an immoral woman, the words are actionable *per se*.

The sense in which words would naturally be received by the world is the sense which courts of justice ought to give them in determining whether a publication is libelous.

Pennsylvania v. Chambers, 4 Ky. L. Rep. 75; Stroebel v. Whitney, 31 Minn. 384, 18 N. W. 98; Newell, Slander, 2d ed. 85; Young v. Miller, 3 Hill, 21; Finch v. Vifquain, 11 Neb. 280, 9 N. W. 43; Toye v. McMahon, 21 La. Ann. 308; Spotorno v. Fourichon, 40 La. Ann. 423, 4 So. 71; Smith v. Smith, 73 Mich. 445, 3 L.R.A. 52, 16 Am. St. Rep. 594, 41 N. W. 499; Page v. Merwin, 54 Conn. 426, 8 Atl. 675; Morgan v. Livingston, 2 Rich. L. 573.

Any defamatory words calculated to degrade and injure the reputation of a person in society, when maliciously written and published, are libelous.

Allen v. Wortham, 89 Ky. 485, 13 S. W. 73; Brooker v. Coffin, 5 Johns. 190, 4 Am. Dec. 337; Bissell v. Cornell, 24 Wend. 354; Cooley, Torts, 196; Lemons v. Wells, 78 Ky. 117; Pett-Morgan v. Kennedy (Morgan v.

In Roby v. Murphy, 27 Ill. App. 394, it was held that the words "bitch" and "slut," when applied to a woman and taken in their common acceptation, do not impute unchastity, and are not actionable *per se;* and similar decisions upon the word "bitch" were made in Logan v. Logan, 77 Ind. 558, and Robertson v. Edelstein, 104 Wis. 440, 80 N. W. 724.

In Claypool v. Claypool, 56 Ill. App. 17, it was held that the expressions "bitch" and "whore," in common parlance, do not impute unchastity, and therefore are not actionable; and in Boyd v. Brent, 3 Brev. 241, it was held that to call a woman a "whore" was not actionable. In Linney v. Maton, 13 Tex. 449, it was held that to call a woman a "whore" was not actionable without proof of special damages.

In Nealon v. Frisbie, 11 Misc. 12, 31 N. Y. Supp. 856, the complaint contained the following allegation: "That he (the defendant) called the plaintiff a God-damned Irish bitch, whereby the plaintiff was injured in her reputation." The court sustained a demurrer to the complaint, holding that the words charged, though opprobrious, did not necessarily impute unchastity, and were not actionable *per se*.

In some cases epithets similar to the above are held actionable *per se* upon the ground that they impute a crime. Thus, Davis v. Sladden, 17 Or. 259, 21 Pac. 140, held that to call a married woman a prostitute imputed unchastity, and charged the crime of adultery, and so was actionable *per se*. In Riddell v. Thayer, 127 Mass. 487, the words "damned bitch" and "whore" were apparently considered not actionable *per se*, because not imputing unchastity; but, where used in connection with the expression "bad woman," the court held that the jury would be warranted in finding that the words did impute unchastity or the crime of prostitution.

In Ranger v. Goodrich, 17 Wis. 79, words charging a married woman with being a whore were held to impute the crime of adultery, and were actionable *per se*.

In Hendrickson v. Sullivan, 28 Neb. 329, 44 N. W. 448, it was held that to call a woman a "whore" was to impute the commission of a crime, and was therefore actionable *per se*. Similar decisions regarding the same epithet were made in Rhoads v. Anderson, 10 Sadler (Pa.) 247, 13 Atl. 823, Pledger v. Hathcock, 1 Ga. 550, and in Noyes v. Hall, 62 N. H. 594, and, as to the epithet "old prostitute" in Sheridan v. Sheridan, 58 Vt. 504, 5 Atl. 494.

In most of the cases in which the decisions are upon the ground that the epithet imputed a criminal offense, the act charged was an indictable offense; but in Kelley v. Flaherty, 16 R. I. 234, 27 Am. St. Rep. 739, 14 Atl. 876, it was held that, in Rhode Island, it was actionable to call an unmarried woman a "bitch" and a "whore," because such epithets impute the crime of fornication, though that crime is only a misdemeanor.

Some cases hold that, if prostitution and such offenses are not crimes under the statutes, it is not actionable to use these epithets, although they may impute immorality. In Blake v. Smith, 19 R. I. 476, 34 Atl. 995, it was held that the words "damned bitch," when spoken of a woman, though suggestive of vicious and immoral conduct, do not charge a crime, and are not actionable. And in Douglas v. Douglas, 4 Idaho, 293, 38 Pac. 934, it was held that, as neither adultery, fornication, nor prostitution, was a crime under the laws of Utah, it was not actionable to call a woman a "public prostitute."

Some decisions hold that epithets of this character are slanderous *per se*, and therefore actionable without reference to whether they impute a criminal offense or not. Thus, in Kennenberg v. Neff, 74 Conn. 62, 49 Atl. 853, it was held that to charge an unmarried woman with being a certain man's "slut" was to impute unchastity, and was actionable *per se;* and in Courtney v. Mannheim, 39 N. Y. S. R. 124, 14 N. Y. Supp. 929, it was held that to call a woman a "whore" was slanderous *per se*.

In Smith v. Silence, 4 Iowa, 321, 66 Am. Dec. 137, the court upheld the charge to the jury that to call a woman a "whore" is actionable of itself without proof of special

Kennedy) 62 Minn. 348, 30 L.R.A. 521, 54 Am. St. Rep. 652, 64 N. W. 912.

Admitting the words are not actionable *per se*, still, the action is maintainable for special damages.

Mudd v. Rogers, 102 Ky. 280, 43 S. W. 255.

Mr. A. L. Harper also for appellant.

Paynter, J., delivered the opinion of the court:

In this action the appellant charges the appellee with slander. It is averred in the petition that the appellee is a Catholic priest; that he has been in charge of St. John's Church as a priest for many years; that she and the appellee had a slight disagreement over a trivial matter; that the appellee became hostile towards her; that shortly thereafter, while the appellee was delivering a sermon to his congregation at St. John's Church, he said of and concerning her in the presence of the congregation that "she (meaning the appellant) is a dirty, vile woman," thereby meaning and intending to have his hearers understand that she "was an immoral woman, a woman without virtue, and a woman of general bad character for virtue, morals, and otherwise." The court sustained a demurrer to and dismissed the petition, and that action of the court is here for review.

At common law an action for slander will lie for the malicious publication of a false accusation, although made in general words, if it imports that the person accused is guilty of a felony or other crime for which an indictment would lie. McNamara v. Shannon, 8 Bush, 558. It was held in Watson v. Hampton, 2 Bibb, 319, that a charge that the plaintiff had sworn to a lie "was not actionable;" and in Martin v. Melton, 4 Bibb, 99, it was held that, where one said to another, "You have sworn a lie, and I can prove it," is not actionable unless laid with a *colloquim* concerning an oath in some judicial proceeding. It was held in Caldwell v. Abbey, Hardin (Ky.) 529, that it was not actionable to call a man "a damned rogue." It was held in Craig v. Pyles, 18 Ky. L. Rep. 1043, 39 S. W. 33, that the charge, where a party spoke of and concerning another, "she is a dirty bitch; she has no character, and is no account,"—are not actionable words in themselves; and did not import that the party accused "was a whore, common prostitute, or was guilty of fornication and adultery." The court reached this conclusion by the well-settled rule that an innuendo cannot extend the meaning of words beyond their natural import, it can only serve to explain some matter already expressed. It may show the application, but cannot add to or enlarge or change the sense of words. Watson v. Hampton, *supra*. We are of the opinion that the words of which complaint is made did not amount to a charge that the appellant has been guilty of the offense of adultery. We are likewise of the opinion that they are not actionable.

The judgment is affirmed.

damages; and a similar decision was rendered in Cox v. Bunker, Morris (Iowa) 269.

In Burke v. Stewart, 81 Ill. App. 506, it was held that the word "whore" was slanderous *per se*, and therefore actionable; and this case was cited and followed by Schmisseur v. Kreilich, 92 Ill. 347, where the words, spoken in French, meant "She acted the whore;" and in Boldt v. Budwig, 19 Neb. 743, 28 N. W. 280, the court sustained the charge of the trial judge, that words charging a woman with being a "whore," were slanderous and actionable in themselves.

In some states the imputation of unchastity to a woman is made actionable by statute. In Williams v. Greenwade, 3 Dana, 432, it was held that to call a woman a "drunken whore" was actionable, under a statute which provided that a charge of fornication or adultery was slanderous. So, also, in Freeman v. Price, 2 Bail. L. 115, it was held that to call a woman a "strumpet" was to impute unchastity, and such imputation was actionable under the statute. And it was similarly held, under similar statutes, in Stewart v. Major, 17 Wash. 238, 49 Pac. 503, and in Hudson v. Garner, 22 Mo. 423, where the epithets used were "whore," and in Pink v. Catanich, 51 Cal. 420, where the epithet was "damned whore."

MAINE SUPREME JUDICIAL COURT.

MEDOMAK NATIONAL BANK
v.
FANNIE L. WYMAN, Admrx., etc., of L. L. Kennedy, Deceased.

(100 Me. 556, 62 Atl. 658.)

Note—limitation of actions—new promise.

A note indorsed by an accommodation indorser before delivery, for the interest due on outlawed notes, upon which he was

Case Note.—An extensive search has failed to reveal another case involving the same facts as MEDOMAK NAT. BANK v. WYMAN. The logic of the opinion seems unassailable in the light of the Maine decisions on kindred questions. Had the court in the first instance sustained the contention of the defendant that her intestate signed the interest note as a surety, and not as an original promisor, a different question would have been presented for consideration.

jointly and severally liable, will remove, as to him, the bar from the earlier notes.

(December 19, 1905.)

REPORT by the Supreme Judicial Court for Lincoln County for the opinion of the full bench of an action brought to recover the amount alleged to be due on certain promissory notes. Judgment for plaintiff.

The facts are stated in the opinion.

Messrs. Heath & Andrews and William H. Miller, for plaintiff:

Payments on a note already barred remove the bar.

Sinnett v. Sinnett, 82 Me. 278, 19 Atl. 458; Manson v. Lancey, 84 Me. 380, 24 Atl. 880; Pond v. French, 97 Me. 405, 54 Atl. 920.

Payments of interest take the case out of the statute with like effect as payments of principal.

Parsonage Fund v. Osgood, 21 Me. 176.

A partial payment by note is as effectual to take the original debt out of the operation of the statute as payment in any other manner.

Ilsley v. Jewett, 2 Met. 168; Sigourney v. Wetherell, 6 Met. 553; Wenman v. Mohawk Ins. Co. 13 Wend. 267, 28 Am. Dec. 464; Roseboom v. Billington, 17 Johns. 182; Rose v. Bryant, 2 Campb. 321; Adams v. Tucker, 6 Colo. App. 393, 40 Pac. 783; Block v. Dorman, 51 Mo. 31; Bowman v. Downer, 28 Vt. 532.

Both the ice company and Kennedy were original promisors.

Rice v. Cook, 71 Me. 559; Kennebec Bank v. Tuckerman, 5 Me. 130, 17 Am. Dec. 209; Colburn v. Averill, 30 Me. 310, 50 Am. Dec. 630; Irish v. Cutter, 31 Me. 536; Adams v. Hardy, 32 Me. 339; Malbon v. Southard, 36 Me. 147; Leonard v. Wildes, 36 Me. 265; Lowell v. Gage, 38 Me. 35; Childs v. Wyman, 44 Me. 433, 69 Am. Dec. 111; Woodman v. Boothby, 66 Me. 389; Bradford v. Prescott, 85 Me. 482, 27 Atl. 461; Merchants' Trust & Bkg. Co. v. Jones, 95 Me. 335, 85 Am. St. Rep. 412, 50 Atl. 48.

Mr. A. S. Littlefield, for defendant:

A payment, in order to relieve against a bar of the statute, must be under such circumstances and in such manner as will raise an implied promise to pay the original debt.

Weston v. Hodgkins, 136 Mass. 326; Coles v. Kelsey, 2 Tex. 541, 47 Am. Dec. 674; Frey v. Kirk, 4 Gill & J. 509, 23 Am. Dec. 587; Shoemaker v. Benedict, 11 N. Y. 176, 62 Am. Dec. 101; Rainey v. Link, 25 N. C. (3 Ired. L.) 376, 40 Am. Dec. 412.

The declaration should be upon the new promise, and the original liability alleged as a consideration thereof.

Van Keuren v. Parmelee, 2 N. Y. 523, 51 Am. Dec. 332; Shoemaker v. Benedict, 11 N. Y. 178, 62 Am. Dec. 101.

The part payment must be such an acknowledgment as reasonably leads to the inference that the debtor intended to renew his promise of payment.

Campbell v. Baldwin, 130 Mass. 200; Lang v. Gage, 65 N. H. 175, 18 Atl. 795; Holmes v. Durell, 51 Me. 202; Engel v. Brown, 69 N. H. 184, 45 Atl. 402.

A payment is simply evidence to be taken into account in finding the fact that a new promise has been made, and does not, as a matter of law, raise a new promise.

Holmes v. Durell and Engel v. Brown, *supra;* Littlehale v. Maberry, 43 Me. 264.

When a person, not the payee of a promissory note, writes his name upon the back of it, at its inception, in blank, he is to be regarded as surety, and an original promisor.

Colburn v. Averill, 30 Me. 317, 50 Am. Dec. 630; Berry v. Hall, 33 Me. 494.

Spear, J., delivered the opinion of the court:

This is an action of assumpsit upon seven promissory notes, only four of which are in controversy, and comes up on report. The four notes in question were all substantially in the same form, as follows: For value received, we jointly and severally promise to pay the Medomak National Bank of Waldoboro or order $500 on demand, and interest. They were all signed by the Medomak Ice Company and indorsed upon the back before delivery by L. L. Kennedy, the defendant's intestate. These notes were all intended for the benefit of the ice company and in no respect for the benefit of the indorser. In the report "it is admitted that all the indorsements upon the last-described four notes, except the last indorsement on each, were made from funds delivered to the plaintiff by the Medomak Ice Company."

"The plaintiff admits that the said four notes are barred by the statute of limitations against Lincoln L. Kennedy, defendant's intestate, unless the bar in the statute was removed by the note for $152.61 above offered under the sixth count."

This note was as follows: "$152.61. Waldoboro, Maine, May 8, 1902. For value received, we jointly and severally promise to pay the Medomak National Bank of Waldoboro or order one hundred fifty-two and sixty-one one hundredths dollars on demand, and interest,"—and was signed by the Medomak Ice Company and indorsed by L. L. Kennedy, precisely as the four notes in controversy were signed and indorsed. It will also be observed by com-

parison that it was in the same form as the other four notes. "It is further admitted that said note for $152.61 is made up of the aggregate of the last indorsements appearing upon the aforesaid four notes, and that said note for $152.61 was entered upon the books of the bank as 'Note, Medomak Ice Company,' and that entry was balanced by a credit of the same amount to profit and loss." The last indorsements appearing upon these notes show that the note for $152.61 was given to pay the interest upon them to June 5th, March 16th, March 25th, and March 28th, 1902, respectively.

The only question presented by this case is whether the payment of interest upon the four notes by giving the note of $152.61 removed these four notes from the operation of the statute of limitations with respect to the indorser L. L. Kennedy; whether the payment was such an acknowledgment by him of the debt created by these four notes as to warrant the inference of a new promise on his part to pay them. This is not a question as to whether these notes were revived as to the ice company, but whether they were revived as to the indorser. While the name of L. L. Kennedy appears upon the note in the usual place of an indorser, his legal relation to it under our decisions was that of an original promisor. It will therefore appear that the defendant's intestate stood in the capacity of original promisor upon each of the four notes, and also upon the note which was given for the payment of interest.

After the four notes became outlawed, Mr. Kennedy was relieved by the operation of the statute from payment. At this juncture he was free from any liability, and it was absolutely within his privilege to decline to make himself further liable for the payment of these notes. But he did not do this. On the other hand, he became a joint and several promisor with the ice company upon the note, and gave it to the bank in payment of interest as above stated. As a matter of law, he gave his own individual obligation for the payment of the interest, the note given being joint and several. Here it may be remarked that the peculiar wording of this note makes the apparent indorser an original promisor in fact as well as law. The only name upon the face of the note is that of the Medomak Ice Company. It could not be joint and several as to the company, a single signer. It must therefore have reference to the indorser as one of the joint and several promisors. This is also true with respect to the relation of Mr. Kennedy to the four notes upon which the interest was paid. They were, in fact as well as law, his individual notes. There can be no presumption, under the wording of these notes, either in fact or law, of any other relation of L. L. Kennedy to all of them than that of an original promisor, individually liable.

It would therefore affirmatively appear from the form of these notes that Mr. Kennedy, by the note given, was not only making a payment of interest upon the notes of the Medomak Ice Company, but upon his own notes as well. He gave no notice to the bank that he did not intend to revive his liability upon the barred notes, and no evidence in the case tends to show that his relation to the notes was other than that shown by the notes themselves. It therefore seems clear that the natural inference from the facts disclosed by this transaction is that Mr. Kennedy intended this note at the time it was given as a payment of interest upon these four notes as much as if he had made the payment with his own money or his own check in lieu of the note. We think that, instead of requiring evidence to show that the payment of interest by the note was intended to acknowledge and revive the debt, it would rather require some evidence to overcome the inference that it was not.

In view of the above construction of the relation of the defendant's intestate to the notes in controversy, it becomes unnecessary to consider her contention that the note given for the payment of interest was the note of the Medomak Ice Company only, the payment of which was guaranteed by the indorser as surety provided the company failed to pay.

The principles of law applicable to the removal of the bar of the statute of limitations are well settled. Payments on a note already barred remove their bar. Sinnett v. Sinnett, 82 Me. 278, 19 Atl. 458; Manson v. Lancey, 84 Me. 380, 24 Atl. 880; Pond v. French, 97 Me. 405, 54 Atl. 920.

Payments of interest take the case out of the statute with like effect as payments of principal. Parsonage Fund v. Osgood, 21 Me. 176.

A partial payment by note is as effectual to take the original debt out of the operation of the statute as payment in any other manner. Ilsley v. Jewett, 2 Met. 168; Sigourney v. Wetherell, 6 Met. 553; Wenman v. Mohawk Ins. Co. 13 Wend. 267, 28 Am. Dec. 464; Bowman v. Downer, 28 Vt. 532.

In Sigourney v. Wetherell, *supra*, it was held that a note given by a guarantor, in payment of the interest due upon the guaranteed note, takes the debt out of the operation of the statute of limitations.

The above decisions follow and rest upon the well-settled rule in Maine that the giv-

ing and acceptance of a negotiable note is presumably payment. Varner v. Nobleborough, 2 Me. 121, 11 Am. Dec. 48; Bunker v. Barron, 79 Me. 62, 1 Am. St. Rep. 282, 8 Atl. 253. But in the case at bar it is unnecessary to rely upon the presumption of payment as it is admitted that the note was given for the express purpose of paying and did pay the last indorsements on the four original notes. Our conclusion is that the note given in payment of interest upon the four notes removed the bar of the statute upon these notes as to the defendant's intestate, and that she is liable in this action for their payment.

The plaintiff is entitled to judgment upon the first count in its writ for $3,300 and interest at 6 per cent from October 1, 1902; under the second count for $500 and interest at 6 per cent from June 5, 1902; under the third count for $336.95 and interest at 6 per cent from March 16, 1902; under the fourth count for $135 and interest at 6 per cent from March 25, 1902; under the fifth count for $300 and interest at 6 per cent from March 28, 1902; under the sixth count for $152.61 and interest at 6 per cent from May 8, 1092, and under the seventh count for $250 and interest at 6 per cent from April 1, 1904.

MARYLAND COURT OF APPEALS.

JAMES A. WHITCOMB, Appt.,
v.
THOMAS J. MASON TO USE OF M. ALBERT LEVINSON et al.

(102 Md. 275, 62 Atl. 749.)

Landlord—duty to provide egress.

1. The duty of the owner of an office building to keep in proper condition the common portions retained in his possession does not extend to keeping outer doors unlocked on Sunday to enable tenants to remove large pieces of furniture in case of fire.

Appeal—questions raised by motions for new trial.

2. A motion for new trial cannot be employed as a means of preparing for the appellate court matters occurring during the trial, to which objection was not made at the time.

(December 6, 1905.)

APPEAL by defendant from a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to hold defendant liable for the value of furniture alleged to have been destroyed through his negligence. Reversed.

The facts are stated in the opinion.

Messrs. **Hinkley & Morris** for appellant.

Messrs. **Thomas Ireland Elliott** and **M. Albert Levinson,** for appellee:

Plaintiff had the right to free ingress to and egress from his office, and the unobstructed use of the passageways and means of exit, so as to enable him to remove his goods and save them from the impending destruction.

Wilber v. Follansbee, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; Totten v. Phipps, 52 N. Y. 354; 18 Am. & Eng. Enc. Law, 2d ed. p. 629; 2 McAdam, Land. & T. p. 1398.

The same circumstances of impending destruction which induced the plaintiff to endeavor to remove his goods from a threatened danger ought to have evoked some display of prudence on the part of the landlord or his agent in providing a means of exit for his tenants.

1 Shearm. & Redf. Neg. 5th ed. p. 31; 21 Am. & Eng. Enc. Law, 2d ed. p. 498; Deming v. Merchants' Cotton-Press & Storage Co. 90 Tenn. 353, 13 L.R.A. 518, 17 S. W. 89; East Tennessee, V. & G. R. Co. v. Kelly, 91 Tenn. 704, 17 L.R.A. 691, 30 Am. St. Rep. 902, 20 S. W. 312.

Schmucker, J., delivered the opinion of the court:

This is an appeal from a judgment of the court of common pleas of Baltimore city. The suit was instituted to recover damages alleged to have been caused by the fault and negligence of the appellant in preventing the appellee from removing his furniture from an office, rented by him from the appellant, in time to prevent its destruction by fire. No questions of pleading or admissibility of evidence are raised by the appeal. The only

Case Note.—Right of tenant to have entrances kept open.—Appurtenances of ingress and egress essential to the use of the leased premises, and reasonably within the contemplation of the parties at the time of leasing, are a part of the estate conveyed, and with which the lessor has no right to interfere. Shaft v. Carey, 107 Wis. 273, 83 N. W. 288.

So, the act of the landlord in boarding up the side doorway to a liquor store, which the tenant of the store and his customers frequently used, and which opens into a hall way through which the tenants of the house over the store pass in going to their apartments from the street, amounts to an eviction of the tenant from a substantial part of the demised premises. Seigel v. Neary, 38 Misc. 297, 77 N. Y. Supp. 854.

And a doorway connecting the office of the landlord's hotel with a room in the hotel block leased for a saloon is essential to the proper enjoyment of the leased premises, and the right to its use cannot lawfully be

exceptions taken at the trial of the case were to the court's rulings on the prayers, which will be referred to later on in this opinion.

It appears from the record that at the time of the great fire which occurred in Baltimore city on February 7, 1904, the appellee, Mason, occupied, as tenant of the appellant, Whitcomb, a room on the second floor of the office building No. 110 St. Paul street. Whitcomb, who owned the building, was a nonresident, and it was in charge of his resident agent, J. A. Miller. The suit was originally brought against both Whitcomb and Miller, but it was dismissed as to the latter at the trial. The building was about 123 feet deep. A hall way running through it from front to rear on each floor afforded ingress and egress from the rooms rented as offices, and was used in common by their tenants. On one side of this hall way, and about 30 feet back from the front of the building, there was an elevator, and also a stairway, affording access to the different floors. There were two entrances to the building from the street,—one at the front end of the hall way on the first floor; and the other at a similar position on the second floor. The entrance on the first floor was on the level of the street, and the one on the second floor was reached from the street by a flight of stone steps ascending sidewise on the outside of the building. The office rented by the appellee was on the second floor, adjoining the elevator and stairway. There is evidence in the record tending to prove that at about 3 o'clock P. M. on the day of the fire Mason, having been informed of its threatening character, went from his home at Hampden, in the suburbs of the city to his office in Whitcomb's building, and took from it his insurance policies, and then went out to see the fire. At that time he found the door to the second-story entrance locked, and he went to his office through the door on the first floor, which was open. Becoming alarmed at the increasing speed and fury of the fire, he returned in about an hour and a half, with a wagon, to his office, for the purpose of removing its contents to a place of safety. With the aid of several other persons, he removed his valuable papers and some of his books by way of the passage and door on the ground floor, but, when he attempted to take his desk and other large articles of furniture out by that way, he found the stairway too cramped to permit them to be carried down to the first floor. He then, with a view of taking those articles out of the building by way of the front door on the second story, again tried that door, but found it still locked, and was unable to open it. It being Sunday, the elevator was not running. About that time he heard that a house in the rear of the building was about to be dynamited in the effort to check the progress of the fire. He thereupon abandoned the attempt to save the residue of his office furniture, and it was soon overtaken and destroyed by the fire. He did not see Mr. Miller, the landlord's agent, on the premises at either visit to his office, nor did he know who had locked the second-story front door. There was evidence, on the contrary, tending to prove that on the afternoon of the fire the second-story front door of the building was not tightly locked, but was held only by a night latch or other fastening that could be easily opened from the inside without a key. In fact, the tenant of one of the other rooms in the building testified without contradiction that at about 2 o'clock on the same afternoon he had opened that door from the inside without difficulty, and gone out through it to the platform of the outside steps leading up to it, and stood there ten or fifteen minutes looking at the passers-by, and then re-entered the building by the same door, which he closed after him without locking it. The amended *narr.* on which the case was tried, in setting forth the conduct of the defendant complained of by the plaintiff, alleges that the removal of the furniture "was prevented by the fault and negligence of said defendant, who, notwithstanding and in spite of repeated demands by this plaintiff, made by him of the agent of defendant then in possession, the said agent barred and maintained barred the necessary means of exit from said building and office," and by that means alone the

interfered with by the lessor or his grantee during the term of the lease. Shaft v. Carey, *supra*.

A ticket broker who has a lease of a room on the ground floor of a hotel building, with a back door opening into a hall way leading to the hotel rotunda, is entitled, when sued for nonpayment of rent, to set up as a counterclaim his damages arising from the lessor's boarding up the latter entrance to his place of business. Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. (Unof.) 340, 96 N. W. 487.

Tenants occupying offices on the second floor of a business and office building are entitled to enjoin the tenant on the ground floor from obstructing the entrance to the block, by the erection of signs and show cases. Miller v. FitzGerald Dry Goods Co. 62 Neb. 270, 86 N. W. 1078.

But the lessee of one side of a double business block cannot insist on a right of access through the other part, the use of which is a great convenience to him in caring for his freight, where there are other means of access to his portion, and the lease makes no provision for such right. Ward v. Robertson, 77 Iowa, 159, 41 N. W. 603.

plaintiff was unable to remove his furniture, and it was destroyed by the fire. There is, however, no evidence in the record tending to show the making of the alleged demand by the plaintiff upon the defendants' agent.

The theory of the plaintiff's case, as stated on his brief, is that it was the duty of his landlord to secure to him at all times free ingress and egress to and from his office, and the unobstructed use of such passageways and means of exit as to enable him to remove his goods and save them from an impending destruction. The precise question thus arising is one of first presentation, but its solution, in a case like the present one, where there is a mere verbal renting with a total absence of any express covenant on the part of the landlord, must be found in a consideration of the implied obligation resting upon a landlord as such in reference to the physical condition of the demised property. The general doctrine applicable to this subject has recently received careful consideration by us in the case of Smith v. State, 92 Md. 529, 530, 51 L.R.A. 772, 48 Atl. 93. We then said: "There is no implied covenant requiring the landlord to make repairs. Gluck v. Baltimore, 81 Md. 326, 48 Am. St. Rep. 515, 32 Atl. 515. 'There is no implied warranty on a lease of a house or of land that it is or shall be reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property.' 'When a lease contains no express contract of warranty that the property is or shall be fit for the purpose for which it may be rented, there is no implied warranty to that effect, and in case the property falls down in consequence of some inherent defect the lessor is not bound to repair, and yet the lessee will be compelled to pay the rent.' Hess v. Newcomer, 7 Md. 337. After fully recognizing the landlord's liability to third persons not claiming under the tenant, it is said in Taylor on Landlord and Tenant, § 175 A, that the 'lessor's liability to the lessee is, however, much more restricted, as the former does not warrant the condition of the premises, and the tenant, because he can inspect them, assumes the risk of their state. For any injury suffered by him during his occupancy by their defective condition, or even faulty construction, he cannot make the lessor answerable, unless there was misrepresentation, active concealment, or perhaps a total inability on the tenant's part to discover the defect before entering.'" After citing many cases in support of the doctrine there stated, we further say in that case: "The reason of the rule is perfectly apparent. If the lessee knows the condition of the premises, and rents it without requiring the owner to repair it, he takes it as he finds it, and has no right to complain of injuries sustained on account of its condition."

Although the liability of the landlord as to the physical condition of the premises covered by the lease is as above stated, the weight of modern authority supports the rule that, where he leases separate portions of the same building to different tenants, and reserves under his control the halls, stairways and other portions of the building used in common by all of the tenants as means of access to their respective rooms or apartments, he is under an obligation to use reasonable diligence to keep the portions so retained under his control of the building in a safe condition and free from improper obstructions. 18 Am. & Eng. Enc. Law, 2d ed. pp. 220, 221; Gillvon v. Reilly, 50 N. J. L. 26, 11 Atl. 481; Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295; Vanderbeck v. Hendry, 34 N. J. L. 471, 472; Brunker v. Cummins, 133 Ind. 443, 32 N. E. 732; McGinley v. Alliance Trust Co. 168 Mo. 257, 56 L.R.A. 334, 66 S. W. 153; Dollard v. Roberts, 14 L.R.A. 238, and notes thereto (130 N. Y. 269, 29 N. E. 104). This obligation of the landlord to the tenants of different parts of the same building in reference to the halls, stairways, doors, etc., of which he has kept possession for their common use, has been held not to result from the implied covenant for quiet enjoyment incident to the leases of the several portions of the building, but to be of the same character as that of any other owner of real estate, who permits or invites others to use it for a particular purpose, to keep it safe for those using it, within the scope of the invitation. Gillvon v. Reilly, Looney v. McLean, and Vanderbeck v. Hendry, *supra;* Camp v. Wood, 76 N. Y. 92, 32 Am. Rep. 282. Whatever may be the true origin and character of this obligation of the landlord, it ought not to be extended beyond the uses and purposes to which it is reasonable, from the situation and nature of the building containing the demised apartments, to infer that the halls, stairways, etc., were intended to be subjected in making the leases to the respective tenants.

Now, what were the reasonable uses for which the appellant, as landlord, was under obligation to keep in proper condition the halls, stairways, and outer doors of the building containing the office leased by him to the appellee? It appears from the evidence that it was an office building located in the business portion of the city opposite the courthouse. With the exception of a lunch room and restaurant on the ground floor, the entire building was rented out as offices, mainly to lawyers. The reasonable use of the outer doors, halls, and stairways

of such a building, so located, so far at least as related to the lawyers' offices, required that they should be kept open and free from improper obstruction during such hours of the day and evening as their tenants and persons having business with them might reasonably be expected to desire access to the offices. But such use did not require that the doors, halls, etc., should be kept in that condition throughout the entire night, nor on Sunday, which is a *dies non* when secular avocations are presumed to be suspended. It certainly did not require the outer doors of the building to be kept open on Sunday to such an extent as to admit of the removal by the tenants of large pieces of furniture. The access afforded to the building on Sunday, as shown by the evidence, through the open door and hallway on the ground floor, which connected with the stairway, was, in our opinion, reasonable and adequate for all ordinary occasions. The occurrence of the great fire of February 7, 1904, which destroyed the entire center of the city, was a sudden and unexpected calamity. Even then at 3 o'clock in the afternoon, when the appellee first went to his office, he did not regard the danger of its destruction as serious, for he merely took from it his insurance policies and made no effort to remove its other contents until an hour and a half later. There is no evidence that the landlord or his agent was on the premises at the time when the appellee alleges that the second-story front door was locked, or was aware that the destruction of the building was so seriously threatened by the fire that any of the tenants desired to remove their furniture. Under these circumstances, we are of opinion that the appellant, as owner and landlord of the building, discharged his obligation in reference to access to it on Sunday by having the door and hall way on the ground floor open and unobstructed.

At the close of the case the plaintiff offered one prayer, and the defendant offered six. The plaintiff's prayer, which related to the measure of damages in the event of a verdict in his favor, was unobjectionable in form, and was properly granted by the court.

The defendant's first prayer asked the court to take the case from the jury for want of legally sufficient evidence that the defendant or any of his agents denied the plaintiff access to his office, or prevented him from removing his goods therefrom on the day of the fire. This prayer was properly rejected, because, although there was no such evidence that the plaintiff was denied access to his office by anyone, there was evidence tending to prove that the only door by which the furniture could be removed was securely locked at both visits of the plaintiff to the building. If the jury had believed this evidence, they might have concluded that the defendant did prevent the removal of the furniture, for, the doors being under the control of his agents, he was primarily responsible for their open or closed condition. The court should, therefore, not have taken the case from the jury on that prayer.

There was, however, fatal error in the rejection of the defendant's fourth and fifth prayers. The fourth prayer asserted the proposition that, as the fire occurred on Sunday, and was an emergency which could not have been foreseen by ordinary care, the defendant was, as a matter of law, under no obligation to provide at that time means of egress from the building suitable for the removal of furniture therefrom. The fifth prayer in effect instructed the jury that, if they believed from the evidence that the plaintiff, at the time he attempted to remove his furniture from the building, could, by reasonable efforts, have opened the upper front door, he was not entitled to recover. From what we have said concerning the legal obligation as to the condition of the hall ways and doors of the building resting upon the defendant as landlord, it is apparent that both of these prayers should have been granted. We find no reversible error in the action of the lower court upon the other three prayers of the defendant.

There is an exception in the record, taken after the trial of the case, at the hearing of a motion for a new trial, to the court's refusal to grant the motion. The main ground of the motion was the fact that the plaintiff's counsel, in his argument before the jury at the trial of the case, had made certain statements which the defendant's counsel claimed were improper, but to which he neither made objection nor took any exception at the time they were made, or at any time prior to filing the motion for a new trial. It is well settled that no appeal will lie from an order granting or refusing a new trial, the motion for which is always addressed to the sound discretion of the court. Nor will a litigant be permitted to employ a motion for a new trial as a means of bringing to this court for its review any matter occurring during the trial of the case to which objection was not made at the time of its occurrence.

For the error committed in rejecting the fourth and fifth prayers of the defendant, the judgment must be reversed, and, as the case made out by the record does not show the plaintiff entitled to recover, no new trial will be granted.

Judgment reversed, with costs, without a new trial.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CHARLES E. WESTON
v.
BOSTON & MAINE RAILROAD.

(190 Mass. 298, 76 N. E. 1050.)

Carrier—failure to transport theatrical scenery—damages.

A carrier who fails to perform promptly his contract to transport the scenery and properties of a traveling show, knowing that their absence will prevent a performance, is liable for the value of the ordinary earnings of the properties during the time the owner is deprived of their use, less the expenses which he is saved by inability to exhibit; and the fact that such damages are not provided for in the shipping articles is immaterial.

(February 26, 1906.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Essex County, made during the trial of an action brought to recover damages for defendant's failure promptly to transport certain property delivered to it for that purpose, which resulted in a verdict for a less sum than he demanded. New trial ordered.

The facts are stated in the opinion.

Messrs. **Sanborn & Sanborn**, for plaintiff:

Where property is designed for a special use of a party in his business, and such party is deprived of that use by the negligence or wrong of another, the usual measure of damages is the value of the use of the property during the time of deprivation.

5 Am. & Eng. Enc. Law, 2d ed. p. 390; Stickney v. Allen, 10 Gray, 352; Whitehead & A. Mach. Co. v. Ryder, 139 Mass. 366, 31 N. E. 736; Munnerlyn v. Alexander, 38 Tex. 125; Vicksburg & M. R. Co. v. Rags-

Case Note.—Measure of carrier's liability for preventing exhibition or show by breach of contract of carriage.—Damages which depend upon the particular character or business of the one carried, or the special use to which the property transported is designed to be put, may be recovered if the carrier was informed of these facts at the time of entering into the contract of carriage.

Thus, a contract by a carrier to carry to a designated place, an opera troupe, which the carrier was informed must reach such place by a certain time or the disaster to the troupe would be great, and which the carrier guaranteed would arrive at such time, but broken by failure to arrive there at the appointed time, caused by a delay of such length that the troupe was unable to play as expected upon the day it was to arrive and also upon the next day, authorizes a recovery for the loss of the performances advertised for those days. Foster v. Cleveland, C. C. & St. L. R. Co. 56 Fed. 434.

The measure of damages for the breach, by a railroad company, of a contract to carry excursionists at a stipulated amount per passenger, no limit being set as to the number, to a designated place where public amusements were to be held, by repudiating it after preparations had been made for the exhibition, is the advance in price of tickets actually sold by the one who had charge of the exhibition over the price he was to pay the railroad company for them; and to this amount may be added the difference between the sum paid as passage money for persons whom the exhibitor had agreed to transport, and did actually transport, and what it would have cost him to have them carried had the contract been fulfilled by the railroad company. Houston & T. C. R. Co. v. Hill, 63 Tex. 381, 51 Am. Rep. 642.

In Yoakum v. Dunn, 1 Tex. Civ. App. 524. 21 S. W. 411, it was held that, while the owner of a museum, under a contract with a railroad company for its transportation to a fair at a designated place and time, for exhibition at the fair, which was broken by delay in the transportation, so that it did not arrive in season, although their agent had been notified of the purpose for which the musuem was being shipped, might not be able to recover the probable net profits of an exhibition at the fair as such, because they are too speculative and remote, yet he would be entitled to recover for the value of the use of the property at such place and time, and such value could not be more properly determined than by ascertaining what the probable net profits of the exhibition would have been.

But it was held in Georgia R. Co. v. Hayden, 71 Ga. 518, 51 Am. Rep. 274, that the difference between the amount of tickets sold for a theatrical performance, which had to be refunded, and the cost of the transportation of the troupe, was too remote or speculative in character to be the measure of damages, in an action against a railroad company by a theatrical manager, who purchased tickets for himself and troupe over a railroad, at the terminus of which they were to take a connecting train and proceed to a place at which a performance was to be given, but who were delayed by a collision upon the first road so as to miss connection with the train on the other road, and so failed to reach their destination and to meet the engagement to give a performance, where he first notified the railroad company of his arrangements by telegraph late at night at the point of delay, and it does not appear that the telegram was received in time to enable the railroad company to remedy the difficulty.

And it was held in Brown v. Weir, 95 App. Div. 78, 88 N. Y. Supp. 479, that, in an action by an actress against an express company which had undertaken to transport a trunk containing her wardrobe without knowledge as to the importance of its contents, or that she was under contract to fulfil any engagements, the measure of

dale, 46 Miss. 458; Cincinnati Chronicle Co. v. White Line Central Transit Co. 1 Cin. Sup. Ct. Rep. 300; Abbott v. Gatch, 13 Md. 333; Green v. Mann, 11 Ill. 613; Priestly v. Northern Indiana & C. R. Co. 26 Ill. 206, 79 Am. Dec. 369; Warfield v. Walter, 11 Gill & J. 80; Foster v. Cleveland, C. C. & St. L. R. Co. 56 Fed. 434.

Messrs. **Henry F. Hurlburt** and **Damon E. Hall** for defendant.

Loring, J., delivered the opinion of the court:

This case presents in different forms but one question, namely: To what damages is the owner of a theatrical exhibit entitled in case of a negligent delay in the transportation of his scenery and other theatrical properties by a carrier who had full knowledge that they were to be used in an exhibition previously widely advertised at the place of destination, and that the owner was under an expense of $300 or $400 a week in that connection. The judge ruled that the plaintiff was limited to $4, "the actual money lost or expended in looking up his goods."

The first ground on which the defendant has undertaken to support this ruling is that the shipping receipt, or the shipping receipt and the shipping order, constitute a written contract between the parties, by which, and by which alone, their rights are to be determined. No authorities have been cited for this contention, and we conceive that none can be found to support it. We assume, for the purposes of this decision, that this shipping receipt, or, at any rate, the shipping order and this receipt taken together, constitute a written contract. But it is always competent to show knowledge by the contracting parties to a written contract of the circumstances on the basis of which it is made, for the purpose of showing what was within the contemplation of the parties in making the contract. Knowledge of the circumstances which form the basis on which the contract is made is competent on the question of what damages were in contemplation of the parties to it, whether a party seeks to recover ordinary or special damages. That has been laid down in all the cases on the subject. See, for example, Scott v. Boston & N. O. S. S. Co. 106 Mass. 468; Harvey v. Connecticut & P. Rivers R. Co. 124 Mass. 421, 26 Am. Rep. 673; Mather v. American Exp. Co. 138 Mass. 55, 52 Am. Rep. 258; Lonergan v. Waldo. 179 Mass. 135, 88 Am. St. Rep. 365, 60 N. E. 479; Hadley v. Baxendale, 9 Exch. 341; Horne v. Midland R. Co. L. R. 7 C. P. 583, L. R. 8 C. P. 131; Simpson v. London & N. W. R. Co. L. R. 1 Q. B. Div. 274; Grébert-Borgnis v. Nugent, L. R. 15 Q. B. Div. 85.

The next ground on which the defendant has sought to support the ruling is on the authority of Waite v. Gilbert, 10 Cush. 177; Harvey v. Connecticut & P. Rivers R. Co. *supra*, and Swift River Co. v. Fitchburg R. Co. 169 Mass. 326, 61 Am. St. Rep. 288, 47 N. E. 1015. But the plaintiffs in those cases were confined to the damages to which the plaintiff was confined in the case at bar, for want of proof of notice, while in the case at bar proof of the necessary notice was plenary. While a plaintiff is deprived of the use of property valuable for use, and the property is something that can be replaced, his damages are the expenses of hiring the property which he is forced to substitute for it. But, if the property is such that it cannot be replaced, the measure of damages is what such property is ordinarily worth for use. See Fletcher v. Tayleur, 17 C. B. 21, 28; Cory v. Thames Iron Works & Shipbuilding Co. L. R. 3 Q. B. 181; Ex parte Cambrian Steam Packet Co. L. R. 6 Eq. 396, 408, L. R. 4 Ch. 112, 117. There are no cases in this commonwealth very near to the one under discussion. Perhaps the nearest are the cases in which it is held, in an action of trover, that where the property converted has no market value, but has a special value to the plaintiff, he can recover that value. Stickney v. Allen, 10 Gray, 352;

damages is not what she would have received from such engagements, where the only claim for damages is based upon her failure to appear at several performances, alleged to be due to the refusal of the express company to deliver her trunk unless an excessive charge was paid.

In Leach v. New York, N. H. & H. R. Co. 89 Hun, 377, 35 N. Y. Supp. 305, it was held that, in an action against a railroad company for failure to deliver, at the time contracted for, a car, of the contents of which the company had no knowledge, but which contained the personal baggage of the members of a troupe, whereby the theatrical company was prevented from giving an exhibition advertised, and was compelled to refund the money for tickets sold, the measure of damages is such loss of profits as can be shown to be the direct result of the breach of contract; and, for the purpose of arriving at the profits lost through the breach of the contract, the court further held that, where it was shown that before it was known that the equipment would not arrive tickets for the performance were sold to the amount of nearly $400, a person who had for several years been engaged in the sale of tickets for that particular place of amusement, and who sold the tickets on this occasion, may be permitted to testify that about one fourth of the whole amount of tickets sold were usually sold in advance.

Green v. Boston & L. R. Co. 128 Mass. 221, 35 Am. Rep. 370; Mather v. American Exp. Co. *supra*. See also, in this connection, Wall v. Platt, 169 Mass. 406, 48 N. E. 270.

Where the article of the use of which the plaintiff has been wrongfully deprived cannot be replaced, and the plaintiff recovers for being deprived of the use of what such property ordinarily earns, he recovers profits in one sense of the word, but not in that sense of the word in which it is used when it is said that profits cannot be recovered because too remote. What is meant by that is that the plaintiff cannot recover for the loss of special profits, such as a particular bargain which he has lost. For a good statement of the distinction, see Masterton v. Brooklyn, 7 Hill, 62, 42 Am. Dec. 38. There are cases where contracts are made with reference to such special profits, and where such special profits can be recovered. Such profits were recovered in Grébert-Borgnis v. Nugent, *supra;* and it was such special profits that were unsuccessfully sought for in Waite v. Gilbert; Harvey v. Connecticut & P. Rivers R. Co.; Swift River Co. v. Fitchburg R. Co.; Hadley v. Baxendale; and Horne v. Midland R. Co.,— *supra*. The difference between those cases and the case at bar is this: Delay in the delivery of scenery and the other properties of a traveling theatrical company ordinarily means no performance by the company. But delay in the transportation of the broken shaft of a mill, for example, as in Hadley v. Baxendale, *supra*, does not ordinarily mean that the mill will stop.

We construe the statement of the plaintiff's counsel in the case at bar, "that he claimed no loss of profits and no loss in the market value of the goods by reason of the delay in the delivery of the goods, but that he did claim loss in the rental value or the loss of the use of the property," to be a statement that he did not ask for loss of special profits, but for loss of the ordinary earnings of the property here in question. The case at bar is not a case of special profit or special damage, but a case of the ordinary damages consequent on a delay in the delivery of scenery and other properties of a traveling theatrical company. That a common carrier with notice is liable in such a case is plain from the decision made in Simpson v. London & N. W. R. Co. *supra*, as to delay in the delivery of samples to be exhibited at a cattle show. The ordinary damages in case of a delay in the transportation of such property as we have in the case at bar are different from the ordinary damages in case of a delay in the transportation of ordinary merchandise, and for that reason carriers usually put such property in a different classification from that in which ordinary merchandise is put. The question, however, is the ordinary damage from a delay in the transportation of that kind of freight. To get those ordinary damages, notice that the freight to be transported is that kind of freight, and that it is to be used at its destination, must be given to the carrier; and the damages recoverable are the ordinary earnings of the property in question. See Cory v. Thames Iron Works & Shipbuilding Co. and Ex parte Cambrian Steam Packet Co. *ubi supra*.

The case at bar presents a further question not raised by the facts of the cases last cited. There was evidence here that the plaintiff told the defendant that he was "under a big expense, between $300 and $400 a week," in the use of the thing delayed in transportation. In such a case, since the owner has to pay the expenses, or some of the expenses, incident to using the property, he can recover, not the ordinary net earnings, but the ordinary gross earnings, less such expenses, if any, as the deprivation of the use of the property saved him from. The concession made by the plaintiff's counsel, that he did not ask for special profits, saves us from considering the suggestion thrown out in Lonergan v. Waldo, 179 Mass. 135, 138, 88 Am. St. Rep. 365, 60 N. E. 479, that it may be that the fact that a carrier cannot refuse to carry goods offered to him for transportation prevents him from being held for special damages or special profits, as to which see Kelly, C. B., in Horne v. Midland R. Co. L. R. 8 C. P. 131, 136, 137, and Mayne, Damages, 7th ed. 42.

The defendant raised a question as to whether an exception was properly taken to the refusal of an offer to prove the expense the plaintiff was under while waiting for the goods in question. But since, in our opinion, the case must go back for a new trial by reason of his other exceptions, it is not necessary to decide whether that exception was properly saved or not.

The plaintiff is entitled to a new trial on the question of damages. So ordered.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MARY HABERLIL

v.

CITY OF BOSTON.

(190 Mass. 358, 76 N. E. 907.)

Highway—location of voting booth in.

1. Authority to locate a voting booth in the traveled part of a highway is not

Case Note.—Right of municipal corporation to place polling booth in street.—There seems to be no other decision as to the

conferred upon the public officers by a statute directing them to designate a polling place in a public, orderly, and convenient portion of the precinct, and, if no such place can be found within the precinct, then in an adjoining one.

Same—defect.

2. The location, without authority, of a voting booth in a public highway, may constitute a defect therein which will require the municipal corporation to exercise reasonable diligence to protect the public travel.

(February 28, 1906.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County, made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict in defendant's favor. Sustained.

The facts are stated in the opinion.

Messrs. James E. Cotter and Joseph P. Fagan, for plaintiff:

The erection and maintenance of the voting booth in a public highway was an unlawful obstruction to public travel, and rendered traveling on the highway unsafe and dangerous.

Griffin v. Boston, 182 Mass. 409, 65 N. E. 811; Chase v. Lowell, 151 Mass. 422, 24 N. E. 212.

Unless explicitly authorized by statute, such an obstruction in the highway would be an indictable nuisance.

Com. v. Gloucester, 110 Mass. 491; Com. v. Vermont & M. R. Corp. 4 Gray, 22; Com. v. Nashua & L. R. Corp. 2 Gray, 54; Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 56 Am. Rep. 6, note, 8 N. E. 537; King v. Morris, 1 Barn. & Ad. 441.

The statute will not protect a defendant, unless it has acted in strict compliance with its terms.

right of a municipal corporation to place a voting booth in the street. But, as the highways of the state, including city streets, are under the paramount and primary control of the legislature; and as the authority of a municipality over them depends entirely upon its charter or legislative enactments (2 Dill. Mun. Corp. 4th ed. § 680); and, as any unauthorized obstruction of a public street is an indictable nuisance, and a municipal corporation cannot, by virtue of any implied or general powers, license the erection or commission of a nuisance (Id. §§ 659, 660),—there can be no question that, in the absence of legislative authority, a municipality cannot place in a street a voting booth, or anything else which interferes with the public convenience and enjoyment in the use of the street.

A case very similar in principle to HABERLIL v. BOSTON is that of Wartman v. Philadelphia, 33 Pa. 202, where it was held that the general right to build market houses, and to shift them from place to place as occasion might require, did not imply a right to build them on the public highway, and that market houses built in the middle of the street without legislative authority were nuisances, and that those who maintained them might have been indicted, and any citizen could have abated them. And the court added that the members of the common council were mistaken when they voted that they were satisfied of their right to obstruct the middle of the street if they left a proper space on each side for the passage of carriages; holding that they could no more obstruct it partially than obstruct it altogether, and that a nuisance erected and maintained by a public corporation in a highway dedicated to the use of the whole people was as liable to legal punishment as the same acts done by private parties.

This case cites the prior case of State v. Mobile, 5 Port. (Ala.) 279, 30 Am. Dec. 564, where it was also held that a city has no right to erect a market house in the center of a street or highway, which interferes with commodious passage through the street; and that such a market house is a nuisance which may be restrained.

To the same effect are Columbus v. Jaques, 30 Ga. 506; Lutterloh v. Cedar Keys, 15 Fla. 306; Savannah v. Wilson, 49 Ga. 476; Ketchum v. Buffalo, 14 N. Y. 374.

But it has been held that an obstruction which is temporary and reasonable in its character, and intended for the public safety and convenience, such as a rope stretched across a street during a parade, is not a nuisance. Simon v. Atlanta, 67 Ga. 618, 44 Am. Rep. 739.

So, it has held that a city may place, or authorize to be placed, in a public street, obstructions and erections for a public purpose (such as reservoirs or water tanks for sprinkling the streets) which would otherwise be deemed nuisances on the ground that such erections or structures conduce to the public convenience and enjoyment, and are merely putting the street to a new and improved use, as demanded and required by the necessities of the times and the modern conveniences and appliances. Savage v. Salem, 23 Or. 381, 24 L.R.A. 787, 37 Am. St. Rep. 688, 31 Pac. 832; West v. Bancroft, 32 Vt. 367.

On the other hand, it was held in an Iowa case that a city had no right, without the consent of the abutting proprietor, to construct a cistern in the street underneath the surface, near the line of the abutting owner's lot. Dubuque v. Maloney, 9 Iowa, 450, 74 Am. Dec. 358. But this case is criticized as unsound in 2 Dill. Mun. Corp. 4th ed. § 690.

And in Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep. 77, it is held that a city has no right to erect a water tank and steam engine in the street for the purpose of supplying the city and its inhabitants with water; and that an abutting owner may maintain an action for damages done to his property thereby.

Com. v. New Bedford Bridge, 2 Gray, 339; Com. v. Goodnow, 117 Mass. 114; Chase v. Lowell, *supra;* Stormfeltz v. Manor Turnp. Co. 13 Pa. 555; Randle v. Pacific R. Co. 65 Mo. 325.

Mr. Arthur L. Spring for defendant.

Hammond, J., delivered the opinion of the court:

The first question is whether the voting booth was lawfully in the public street. It was a one-story structure, 25 feet long, about 10 feet wide, and it was placed within the traveled part of the street; one side of it resting upon the curbstone of the sidewalk, and the remainder extending out into the street. The defendant relies upon Rev. Laws, chap. 11, § 186, which, so far as material, reads as follows: "The aldermen in cities and the selectmen of every town divided into voting precincts shall, thirty days at least before the annual state or city election and ten days at least before any special election of a state or city officer therein, designate the polling place for each voting precinct, and shall cause it to be suitably fitted up and prepared therefor. It shall be in a public, orderly, and convenient portion of the precinct; but, if no such polling place can be had within the precinct, they may designate a polling place in an adjoining precinct. No building, or portion of a building, shall be designated or used as a polling place in which intoxicating liquor has been sold within the thirty days preceding the day of the election." This is a general law applicable throughout the commonwealth, except that in Boston this power is vested in the board of election commissioners of that city, instead of the mayor and aldermen.

In construing this statute, it is to be noted that there is no language explicitly providing that a polling place may be located in a street. The natural and easy reading of the language is that this polling place is to be located in a building and consequently in a place where buildings generally are located, namely, not in the traveled part of a street, but outside the limits of the street, or at least outside the part worked for public travel. It is to be further noted that the possibility is contemplated that the officers charged with this duty may be unable to find in a precinct a suitable polling place, and in such case a polling place may be designated in an adjoining precinct. This possibility scarcely could arise if it were contemplated that the polling place could be located upon the traveled part of a street or highway. The business of voting has no necessary or natural relation to the purpose to which the traveled part of a highway is devoted, and the establishment of a polling place thereon which shall be large enough to meet the requirements of the statute as to the accommodations required for the voters and the election officers must interfere very materially with the public travel. The ground worked and used as the traveled part of a street is already devoted to one public purpose, and its use for this purpose is not to be interrupted except by language expressly or by necessary implication authorizing such interruption. In view of these considerations, we are of opinion that the statute does not confer upon the election commissioners the right to locate a polling booth in the traveled part of a public street. Nor could the vote of the aldermen passed September 11, 1901, confer any such authority. The case is clearly distinguishable from cases like Young v. Yarmouth, 9 Gray, 386; Cushing v. Bedford, 125 Mass. 526; Washburn v. Easton, 172 Mass. 525, 52 N. E. 1070; and other similar cases cited by the defendant. The booth was illegally in the street, and may be properly found to constitute a defect. Griffin v. Boston, 182 Mass. 409, 65 N. E. 811, and cases there cited. This being so, it was the duty of the defendant to exercise reasonable diligence to protect the public travel.

The questions of the due care of the plaintiff and of the negligence of the defendant were for the jury.

Exceptions sustained.

MICHIGAN SUPREME COURT.

LOG OWNERS' BOOMING COMPANY, Plff. in Err.,
v.
CHARLES HUBBELL et al.

(135 Mich. 65, 97 N. W. 157.)

Replevin—demand.

1. Demand for possession is not necessary before bringing replevin against one who has bought personal property with notice of a defect in the title.

Case Note.—Abandonment of personal property.—The cases involving the abandonment of personal property are not numerous. LOG OWNERS' BOOM CO. v. HUBBELL holds that to prove abandonment both intention and actual relinquishment must be shown, and the cases generally hold both of these elements to be essential.

In McGoon v. Ankeny, 11 Ill. 558, it was held that, if the owners of an article, considering it entirely worthless, cast it away with the intention of abandoning it, they thereby devest themselves of their title to it, and can have no more cause to complain when it is taken by another than if they

Same—ownership.

2. That plaintiff's right to recover personal property was made to depend, by the court in its instruction, upon ownership rather than right of possession, is not reversible error, where the word "ownership" was used in the sense of right of possession, and it is improbable that the jury was misled.

Logs—forfeiture.

3. Merely permitting logs to remain upon the rollways will not forfeit title to them under a statute providing for forfeiture of logs allowed to float on land adjoining a stream,—especially where no steps are taken under the statute to enforce a forfeiture.

Same—abandonment—jury.

4. Whether or not logs left for many years upon a rollway had been abandoned, so that title to them was lost, is a question for the jury.

Same—intention.

5. The intention to abandon logs left upon a rollway so long that they have become embedded in the earth and covered with grass and bushes is necessary to work a change of title; but it may be inferred from the conduct of the owners and the situation of the property.

Same—failure to remove.

6. Mere failure to remove logs from a rollway for many years will not operate as an abandonment, or prove intention to abandon.

Evidence—opinion of attorney.

7. Testimony as to the opinion of an attorney concerning the title to personal property in dispute is not admissible in an action to recover possession of it.

(November 17, 1903.)

ERROR to the Circuit Court for Newaygo County to review a judgment in favor of defendants in an action brought to recover possession of certain logs. Reversed.

Statement by Grant, J.:

This is an action of replevin, brought in justice's court to recover a small amount

had never owned it. The court further held that the question of abandonment is one for the jury.

In Haslem v. Lockwood, 37 Conn. 500, 9 Am. Rep. 350, it was held that manure dropped in the street belongs to the owner of the animal, but, being left by him, is abandoned property; and that one who adds to its value by collecting it into piles has a good title to it as against a stranger.

In Livermore v. White, 74 Me. 452, 43 Am. Rep. 600, where the owner of a tannery, in removing his hides, failed to remove all of them, and, the tannery having been sold, the hides were not discovered until forty years afterwards, the court held that the hides had not been abandoned, so that they would belong to the first finder, but that abandonment includes both intention to abandon and the external act by which the intention is carried into effect.

In Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528, where the plaintiff gave to defendant a secondhand safe to sell, with permission to use it, and the defendant discovered a roll of bills between the lining and the outside of the safe, and the plaintiff sued for the possession thereof, the court held that the bills were not abandoned, as there was no intention of relinquishing ownership, but that they were lost; and that the finder of lost property is entitled to it as against all the world except the owner; and that ordinarily the place where it is found makes no difference.

In Kershaw v. Boykin, 1 Brev. 301, where a state had taken no steps for twenty years to secure possession of certain confiscated property, the court held that abandonment of personal property by a state will not be presumed from mere lapse of time, where there is no evidence of possession by individuals, sufficient to authorize such presumption.

The question of the abandonment of personal property frequently arises where a vessel with its cargo, has sunk. In Eads v. Brazelton, 22 Ark. 499, 79 Am. Dec. 88, where a steamboat and its cargo sank in the Mississippi river, and remained there thirty years without any attempt of the owner to recover it, and there arose a dispute between two salvage companies as to their respective rights to it, the court, holding that it was abandoned property, said: "Property is said to be abandoned when it is thrown away, or its possession is voluntarily forsaken by the owner, in which case it will become the property of the first occupant; or when it is involuntarily lost or left without the hope and expectation of again acquiring it, and then it becomes the property of the finder, subject to the superior claim of the owner."

And in Creevy v. Breedlove, 12 La. Ann. 745, it was held that property sunk in a steamboat, and remaining at the bottom for twenty-three years, was clearly derelict.

But in Murphy v. Dunham, 38 Fed. 503, it was held that where a vessel sinks with its cargo the mere fact that it is lying at the bottom of the sea does not create an abandonment; nor is the title of the owner to the property devested, however long it may remain there; and no other person can acquire such title except by condemnation and sale in admiralty.

And in Whitwell v. Wells, 24 Pick. 25, it was held that goods found derelict upon the ocean, after having been abandoned by the owners to the underwriters, when brought into port belonged to the underwriters, subject to the claim for salvage.

This note is not intended to cover cases involving an abandonment of a particular title or interest in property, as where a chattle mortgagor abandons the property to the mortgagee.

of lumber cut from logs taken by the defendants from a rollway on the Muskegon river; plaintiff claiming the right of possession, but not ownership. Plaintiff was organized for the purpose of running, driving, booming, and rafting logs, etc., on Muskegon lake and river, and their tributaries. It claimed authority, by contract from the log owners along this river, to take possession of and run all the logs put in the river, or upon the bank of the river and on the rollways, and deliver them to the various owners at their places of destination. Among such were the alleged owners of the logs in question, which were marked with marks claimed to be owned by two firms, —Alberts & Company and Gow & Campbell. Defendants claimed ownership by bill of sale from one Dickinson, the owner by purchase of the land where the rollway, known as the "Carmichæl rollway," was situated. Some were wholly or partly exposed to view. Others were covered with sand and dirt, and grass and brushes had grown over them. Defendants claim title by abandonment: their theory being that the original owners had left these logs in this rollway so long that they had lost title by abandonment, and that, when Dickinson bought the land, title to the logs passed with it. Plaintiff, upon discovering that the defendants had taken the logs, went to their mill, found the lumber manufactured therefrom, and brought this action to recover it. The issue was submitted to a jury, who found in favor of the defendants. Defendants waived the return, and asked judgment for the value.

Mr. William Carpenter, with Mr. M. Brown, for plaintiff in error:

Lapse of time alone will not work an abandonment.

Livermore v. White, 74 Me. 452, 43 Am. Rep. 600.

Mr. E. L. Gray for defendant in error.

Grant, J., delivered the opinion of the court:

1. No demand of possession was necessary before bringing suit. Defendants knew that these logs bore marks of other owners, and that the title which they would obtain by a purchase from Dickinson rested entirely upon abandonment. Dickinson did not actually claim title, but informed defendants that they could take whatever title he had. They admitted that they knew the logs were claimed by others, and anticipated trouble. Under such circumstances, they were not bona fide purchasers.

2. Error is assigned upon the instruction of the court that the plaintiff must establish its ownership of the property. It is manifest from the entire instruction that "ownership" was used in the sense of "right of possession," for near the close of his instruction the judge said: "I charge you that such prima facie ownership has been shown in the plaintiff, if you believe the testimony offered, as would give it a right, in the first instance, to take these logs as they might have along the river bank; that is, logs either afloat, or intended to be put afloat."

It would seem from this that the jury were instructed that the result of the case depended entirely upon ownership, and this was correct. The evidence was mainly directed to this question. If those under whom plaintiff claimed the right of possession did not own the logs, then plaintiff could not maintain the suit. It is improbable that the jury were misled by the failure of the court to instruct them that right of possession was sufficient.

3. The court instructed the jury as follows: "It is also a rule of law that, if the logs are afloat, and the owner or proprietor allow them to stay drifted upon the shore, or the property of any man who owns along the river, for eighteen months, without doing anything by way of removing them, he would forfeit his right or his ownership in that property; that is the law."

This instruction was evidently based upon § 5098, 2 Comp. Laws, providing for the disposition of logs floating upon lands adjoining the streams, and for the forfeiture of all right thereto by the owners. It was erroneous for two reasons: (1) Because the logs, or at least part of them, were never afloat, and had never drifted upon the shore of the land of the owner; and (2) no steps were taken by the owner under the statute to obtain title according to its provisions. The statute does not mean that the title to the property is forfeited by allowing it to remain for eighteen months upon the land. It is doubtful if such a provision would be constitutional. Such title is only lost when the landowner has taken proceedings thereunder to sell the logs. If this instruction of the court were correct, no proceedings would be necessary for a sale of the logs, and that part of the statute would be useless.

4. The main issue was title by abandonment. This issue was left to the jury, and we think correctly. Defendants gave testimony tending to show that these logs had been in this rollway from twenty to thirty years, that they had become imbedded in the sand and earth, and that grass and bushes had grown over many of them. If it be true that the owners had run other logs past them for many years, and had taken no steps to remove those imbedded

in the rollway, or any of them, it would not be an unreasonable inference to draw that they were abandoned, because ordinarily they would become decayed and worthless. On the other hand, plaintiff insists that the owners placed them upon the rollway, intending to convey them to places of manufacture and sale, and that, if any floated there and became imbedded in the sand, they were cut and placed in the water with the same intent; and that no intent to abandon, under such circumstances, is to be implied merely from lapse of time. This contention is sound, and is sustained by the authorities. The logs were not lost, for the owners knew that they had logs in this rollway partly buried, and the defendants knew it also. There is evidence that the original owners had taken logs therefrom from time to time. This was a circumstance for the consideration of the jury in determining the intent of the owners. The intention to abandon is essential to maintain defendants' title. This may be inferred from the conduct of the owners and the situation of the property. If these logs were so situated that there was no danger of injury by decay or otherwise, and the owners had from time to time taken logs therefrom, as they annually drove the river, the intent to abandon could hardly be presumed from lapse of time. If the parties had abandoned logging upon the river, it is apparent that the intent to abandon would be more readily presumed from failure to remove for any considerable length of time. But the mere failure to exercise the act of removal would not operate as an abandonment, or proof of an intention to abandon. Both the intention to abandon and actual relinquishment must be shown. 1 Cyc. Law & Proc. p. 4, and authorities there cited.

5. It is claimed by the plaintiff that some of the logs manufactured by the defendants were not taken from the Carmichael rollway. If this be the fact, the court, as to these logs, marked D and BD, should have directed a verdict for the plaintiff. If, upon a new trial, this conclusively appears, the plaintiff would be entitled to a verdict therefor.

6. Mr. Dickinson, a witness for the defendants, was permitted to testify that he had consulted an attorney about his right to these logs, and that he told the defendants that the attorney advised him that he did have a right to them. This testimony was clearly incompetent.

There are many other assignments of error upon the admission and rejection of testimony, but we do not deem them of sufficient importance to discuss, as they are not likely to arise upon a new trial.

Judgment reversed, and new trial ordered.

The other Justices concur.

MISSOURI SUPREME COURT.

STATE OF MISSOURI, Respt.,
v.
JAMES FORSHA, Appt.

(190 Mo. 296, 88 S. W. 746.)

Appeal — information — administration of oath.

1. A decision by the trial court that the oath to an information was administered by the clerk instead of his deputy is conclusive on appeal.

Information—verification—seal.

2. The verification of an information is not invalidated by the omission of the seal of the court to the jurat.

Juror—acceptance—challenge.

3. Error in the acceptance of jurors cannot be preserved by the mere objection, "challenged for cause."

Same—qualification—expression of opinion.

4. That a juror has formed and expressed an opinion as to the guilt of accused from rumors and newspaper reports does not disqualify him if he states that he

Subject Note.—Withdrawal from participation in homicide, which will relieve from criminality.

The responsibility of a principal in the second degree, or an aider or abettor in homicide, for the acts done by the principal offender in furtherance of the common purpose, continues as long as he acts in concert with his principal. State v. McCahill, 72 Iowa, 111, 30 N. W. 553, 33 N. W. 599; Com. v. Nellis, 2 Brewst. (Pa.) 553.

And where a person, together with a large body of other striking miners, assembled together without any specific agreement or understanding as to what they would do, and attacked nonstriking men from another mine, and drove them away, after which he withdrew from his associates, and they went to another mine for the purpose of driving nonstriking miners away from it, and in the prosecution of such purpose killed a man, he is criminally responsible therefor, though he did not in fact go to the latter mine, if he advised, aided, or encouraged others to go there; his omission to go not being a sufficient withdrawal. State v. McCahill, *supra*.

But where the position of a person as principal in the second degree in homicide arises out of a concert of action simply, without any previous agreement or compact as to its extent or purpose, his responsibility for the acts of his principal ceases

can give accused a fair and impartial trial upon the testimony introduced.

Evidence—contradiction of witness.

5. The principal actor in a homicide charged to have been committed by the concerted action of several strikers, who is called as a witness for one of them, may be contradicted by testimony that, in reply to a statement in his presence that the strikers could not win by violence, he stated that that was the only way to win, as tending to refute the theory of self-defense, although made in the absence of accused after the homicide.

Same—conclusion.

6. The exclusion of testimony that one accused of homicide was not actuated by anything witness said or did is not error, where he has been permitted to detail all the facts; since it is a mere conclusion which it is the province of the jury to reach.

Witness—impeachment.

7. One jointly accused of murder with one on trial, who is called as a witness on his behalf, who admits, on cross-examination, that he has pleaded guilty to a charge of common assault, may be shown by the record to have pleaded guilty to an assault with intent to kill, as tending to affect his credibility.

Evidence—absence of objection—refusal to strike out.

8. It is not error to refuse to strike out

when he abandons the common purpose and withdraws from further concert, and withdraws his aid, countenance, and encouragement from the enterprise. Ibid.; Com. v. Neills, *supra*.

And where a large body of striking miners, including the accused, assembled together without any specific agreement or understanding as to what they would do, and attacked and drove away men employed in a neighboring mine who were not striking, the accused, taking part in such attack, but withdrawing from the crowd when such attack was ended, and withdrawing all his aid and encouragement in any further action, he is not criminally responsible for a homicide committed by his associates at another mine to which they afterwards went, which he did not aid, encourage, or advise. State v. McCahill, *supra*.

And where there is evidence, in a prosecution for homicide, tending to show that the accused abandoned the common enterprise in which he and his associates were engaged, and left them before anything was done toward its final execution, it is the duty of the court to submit affirmatively to the jury the law with reference to abandonment of a criminal enterprise and its effect upon responsibility for an ensuing homicide. Harris v. State, 15 Tex. App. 629.

One who advises and directs unlawful acts by others cannot escape responsibility for a resulting homicide, however, by merely withdrawing from the scene. His guilty act consists of the encouragement and advice he gives to those who commit the crime, and the influence and effect of such encouragement, continued until he withdraws it by acts or words showing that he disapproves or opposes the contemplated crime. He cannot escape responsibility by the coward's expedient of running away. State v. McCahill, *supra*.

This is the doctrine of STATE v. FORSHA.

A person aiding and abetting in a murder by another is not entitled to an acquittal upon the ground that he abandoned the enterprise before the murder was committed, unless the principal had notice of such abandonment. Wilson v. United States, 5 Ind. Terr. 610, 82 S. W. 924.

And where two persons concert together to commit a murder, and the plan agreed on is that one of them shall lie in wait in ambush for their victim, the mere declaration of the one so lying in ambush that at one time he mentally gave up the idea of committing the crime, where the evidence shows no act indicating an abandonment or change of purpose, and where the crime is actually perpetrated in pursuance of the original plan, is not sufficient to show an abandonment of the criminal design, and does not warrant an acquittal of the person so lying in ambush, in a prosecution for the killing. State v. Gray, 55 Kan. 135, 39 Pac. 1050.

But information by an aider, abettor, or accessory to a homicide, of his withdrawal from the unlawful enterprise in which he and his associates are engaged, may be either by words or acts; and if, with the intention of notifying his associates of his withdrawal, he does acts which should be effectual for that purpose, but which do not produce upon the minds of his associates the effect which he intends, and which they naturally should produce, such acts are proper for the jury to consider in determining his relation to the homicide which his associates afterwards commit. State v. Allen, 47 Conn. 121.

So, in Owens v. State, 82 Miss. 18, 33 So. 718, it was held that one who has instructed another to kill a third person, and furnished him with the means for that purpose, is not responsible for the killing, where, after being diverted from his purpose, the person receiving the instructions effects the killing to aid a stranger with whom the intended victim has become involved in a quarrel. But it would appear that this decision is based upon the theory that the killing was done, not pursuant to the advice and instruction of the accessory, but in carrying out an entirely different purpose, rather than that of withdrawal or abandonment by the accessory.

The question of effect of abandonment of purpose by a coconspirator, in case of homicide, in carrying out a conspiracy to do an unlawful act, is fully considered in a note, on homicide in carrying out unlawful conspiracy, to People v. Lawrence, 68 L.R.A. 193.

F. H. B.

testimony to which no objection is made at the time it is given.

Witness—defendant—rebuttal.

9. The testimony of a defendant who rests his case in chief without taking the stand, and offers himself as a witness after the state's evidence is in, is properly confined to rebuttal of the rebuttal evidence introduced by the state.

Homicide—attempt to retreat—responsibility.

10. The mere attempt to flee from the scene of a homicide before the fatal shot is fired will not absolve from responsibility one who aided, abetted, and encouraged its commission to the extent of commanding the one who committed it to shoot deceased.

(July 3, 1905.)

APPEAL by defendant from a judgment of the Criminal Court for Jackson County convicting him of murder in the second degree. Affirmed.

Statement by **Fox, J.:**

On the 19th day of April, 1904, there was filed in the criminal court of Jackson county, Missouri, by the prosecuting attorney thereof, an information against Edgar G. Bailey, James Forsha, and William Moon, jointly charging them with the crime of murder in the first degree, it being alleged in the information that the parties named killed Albert Ferguson upon the 19th day of March, 1904, in Jackson county, by shooting him with a pistol. Upon application of the defendant, the court granted a severance, and the state elected to try Edgar G. Bailey first. His trial began on the 27th day of June, and ended the 2d day of July, and his conviction of murder of the first degree was affirmed by this court (State v. Bailey, 190 Mo. 257). The state elected to try James Forsha next, and his trial began upon the 18th day of July, at the April term of the criminal court of Jackson county, and ended upon the 23d day of July, 1904, resulting in a conviction of murder in the second degree, and a sentence of eighteen years in the state penitentiary. The evidence in the case offered by the state and the defendant was substantially as follows:

In the month of March, 1904, there was a strike in Kansas City, Missouri, on the part of the hack drivers' union against the hack companies, in an effort to compel them to employ only union men. The defendant Forsha was a member of the union, and he, Bailey, and Moon (both of whom are also members of the union) were taking an active part in the strike. The headquarters of the Hack Drivers' Union was located on Central street, a little to the north of Ninth street, and, for two weeks prior to the date of the homicide, Bailey had been living with a woman by the name of Gertrude Biggs at the Thelma hotel, at the corner of Ninth and central, and the room in this hotel occupied by Bailey and Mrs. Biggs, and the saloon that was located therein, seem to have been a place of rendezvous for Bailey, Forsha, and Moon, and from which upon the night of the homicide they started out. By the 18th of March the feeling engendered by the strike had become so pronounced that the defendant and his associates seemed to have determined upon a course of violence in order to accomplish the purpose of the strike, and this determination appeared in evidence from the statements shown to have been made by the defendant and his associates, in which nonunion hack drivers were referred to as "scabs," such designation being further emphasized by the use of vile epithets, accompanied by threats of death or bodily harm. On the night of the 18th of March, 1904, the defendant, Bailey, Moon, and Mrs. Biggs were together at labor headquarters, just north of the Thelma hotel. From there they went in a hack driven by one W. E. Ferguson, who was a union hack driver, to a saloon kept by one O'Flaherty upon South Main street. After drinking a while at this saloon, the Biggs woman ordered a hack, by telephone, of the Walnut Street Livery Company, a hack company employing nonunion hack drivers, to come to 1625 Main street, which was a house of prostitution. After ordering this hack, it being directed to come to the house of prostitution so as not to excite suspicion as to the purpose of the call, the defendant, Bailey, Moon, and Mrs. Biggs went to the house of ill repute, and when the hack arrived they entered it and order the driver, whose name was Andrew Meyers, to take them to a roadhouse at Twenty-ninth and Southwest boulevard. They stopped, however, on the way at Broadway and Southwest boulevard at a saloon, at which place they had the hack driver bring them out a round of drinks. When they arrived at the roadhouse at Twenty-ninth and Southwest boulevard, Meyers, the hack driver, was invited to go into the roadhouse by Moon, who helped him hitch his team. After they entered the roadhouse, Meyers was invited to take a drink with the party, who were standing in front of the bar. While they were standing there, Bailey asked Meyers what it was that he had on his coat, and if he had a pistol. Meyers told them that he had a star as a special officer, and that he had a pistol in order to protect himself and his passengers. At that Bailey jerked the star from Meyers' coat, passed it to Moon, who handed it to Forsha. As Meyers was starting to take the star from Forsha, who was pretending to return it, Bailey drew his pistol upon

Meyers, threatening to kill him if he took the star or put it on again, and at that Meyers received two blows on the head, delivered from behind. Moon grabbed him around the neck, while Bailey took his pistol, and Forsha took from him his cartridge belt. Forsha began beating Meyers over the head with the cartridge belt, and he fell to the floor unconscious. When the hack driver regained consciousness, he tried to run from the room, but Forsha struck at him again with the cartridge belt, which was filled with cartridges, and Meyers dodged to avoid the blow, and Moon then struck him, knocking him to his knees upon the floor. At that Bailey fired at Meyers, failing, however, to hit him, and Meyers regained his feet and ran from the roadhouse. Bailey followed him from the roadhouse, and while he was partially dazed from his previous blows and partially blinded by blood flowing from his wounds, Bailey struck him twice over the head with a pistol, felling him again to the ground and rendering him again unconscious. While Meyers was being disarmed and beaten up in the roadhouse saloon, he kept begging for mercy, saying to his assailants: "Please don't shoot me; please don't hurt me; I will go away, and you won't have to pay me for your hack fare." The answer these three men gave to these supplications for mercy were the assaults that have been described, accompanied by vile epithets which they applied to the hack driver. Leaving Meyers unconscious and covered with blood in the roadhouse yard, the party of four separated, Bailey and the Biggs woman leaving together, and Moon and Forsha together. They met, however, about a block from the roadhouse, where, in discussion of the assault, they expressed the opinion that they had killed Meyers. Fearing that they might be arrested, they again separated, but were soon together again at the Thelma hotel. Bailey and Mrs. Biggs arrived there first and went up to their room. Bailey, after wiping the blood from the nonunion hack driver's pistol, secreted it, and one which he himself carried, behind the radiator in their room. They then went downstairs to the saloon, where, with Forsha and Moon, as usual, a round of drinks was ordered. While in the saloon, at the request of Bailey, Mrs. Biggs went upstairs and got the pistol which had been taken from Meyers, and gave it to Bailey, who in turn handed it to the bartender. The circumstances of the assault were then gone over in the presence and hearing of the bartender, each one telling his part in the assault. Bailey stated that he believed that he had killed the hack driver, to which remark Forsha made reply by saying that if he did not "kill him he ought to have done so." After having remained in the saloon for some time, Mrs. Biggs went upstairs to go to bed, but at the request of Bailey she dressed herself and came back downstairs, and the four then went to labor headquarters, where the three men discussed the question as to what carriage company they would be most likely to get a driver from whom they could beat up with impunity. Bailey suggested the Depot Carriage & Baggage Company, but Forsha objected to this company, as the men that they employed would not, he contended, be as easy to beat up as the man that they had at the roadhouse. At Moon's suggestion, a hack driver was called from the Landis Livery Company and notified to be at the Coates house in half an hour. This occurred in the neighborhood of half past 2 o'clock. When the party left labor headquarters, Bailey told Mrs. Biggs to go upstairs in their room in the Thelma hotel and get his revolver. To this Mrs. Biggs objected, telling Bailey that he should not have his pistol; that she had the key to the room, and would not give it up; that he, Bailey, was drinking too much, and that they had gotten into enough trouble for one evening. Bailey replied that he wanted a pistol, as he was going to get another son of a bitch before morning. Forsha then told Bailey to go into the saloon and get the revolver he had given to the bartender. Bailey went into the saloon and secured the revolver from the bartender. The party went up to the Coates house, and, when the hack arrived, Forsha directed the driver, who was Albert Ferguson, the deceased, to drive them to Fifteenth and Central, this place having been agreed upon on the way to the Coates house at the suggestion of Forsha that it was a dark place suitable for beating up nonunion hack drivers. As they were riding from the Coates house to Fifteenth and Central, a plan of action was agreed upon when they should arrive at the point of destination. It was agreed that Forsha and Moon should get out of the hack and grab Ferguson, the hack driver, and then he was to be beaten up, as Meyers had been served earlier in the night. Bailey added prophetically that if the hack driver "started anything" he would kill him. Bailey was carrying his pistol in his hand. The plan of action decided upon seemed to be that if Ferguson, when seized and disarmed, quietly submitted to being "beat up" by these three men at this lonely place at this hour of the morning, then they would be satisfied; but if he should attempt to "start anything,"— that is, to defend himself,—then he was to be killed. When the hack arrived at Fifteenth and Central, it stopped near the northeast

corner. Ferguson, the driver, opened the door, and Forsha stepped out, quickly followed by Moon, and the two grappled with the driver. As soon as Bailey got out of the hack, Forsha, standing on the corner, said, "Shoot him; shoot him; kill the son of a bitch;" and then he and Moon ran east on Fifteenth street. Mrs. Biggs had immediately followed Bailey out of the hack, and started to run east on Fifteenth street, preceded by Forsha and Moon. Bailey and Ferguson were at that time in the rear of the hack. When the Biggs woman had gone about a half block she heard a shot, followed by the cry from Ferguson, "Help! help! oh my God! I'm shot." This cry was immediately followed by another shot, and then in a short interval a number of shots were fired. Bailey, leaving the scene of the murderous assault, ran in the direction of his associates, overtaking them at the first corner east on Fifteenth street, where he said that he thought that he had killed the son of a bitch, and that they must "run like hell," or they would get caught. It was agreed that they should scatter; Moon and Forsha going in one direction, and Bailey and the woman in another. The party of four, however, went to the Thelma hotel according to agreement, where they met at Bailey's room. There they proceeded to coolly discuss the incidents of the homicide, Forsha relating how he had hit the deceased with a pair of brass knucks, and that it "didn't seem to daze him." Moon told how he hit him, and Bailey said deceased had put up "a hell of a fight," but that he "thought he had killed him," and Moon added that "if he did not he ought to." Forsha exhibited a bruise on the jaw he had received in the fight, and told how he had left the cartridge belt, a knife, and a pair of brass knucks at a saloon up on Ninth street. Forsha and Moon soon left the hotel, after having another round of drinks at the saloon.

Ferguson was taken from the place of the homicide to the police station, from which place he was taken to the German hospital, where he made a dying declaration to the assistant prosecuting attorney, A. S. Lyman, which is as follows:

Mch. 19, 1904.

I, Al. Ferguson, now at the German hospital, believing that I am about to die, and having no hope of recovery, do make the following statement of the facts leading up to my being shot and wounded this morning at about 3 o'clock:

This morning, shortly before 3 A. M., we got a call from the Coates house. Went there, and took three men and a man dressed in woman's clothes into my hack. They wanted me to drive them to Fifteenth and Central street. I drove there, and got down to let them out. I opened the hack door. I found that the man had removed his woman's clothes, and there were four men there. As they got out they began to attack me. I defended myself as best I could. The third man who got out of the hack shot me in the abdomen. He was a medium-sized man, with black hair. The first man who got out of the hack said to me, "We have got you, you son of a bitch; what are you going to do now?" After the third man shot me, they all ran away. I did not know any of them.

his
Al. X Ferguson.
mark

Witnesses:
A. S. Lyman.
Dr. E. L. Stewart.

At the hospital, Ferguson was operated on by a physician in the vain hope of saving his life, but the next day he died. The fatal wound received by Ferguson was from a bullet which entered the abdomen 3 inches below and 2 inches to the right of the navel, taking a downward, backward, and outward course, perforating the bowels and lodging under the spine at a point about 2½ inches below the brim of the hip and 3 inches in front of the spinal column.

A number of people who resided near Fifteenth and Central, that neighborhood being a residence, and not a business, section of the town, testified to being awakened by the shots and cries of the deceased. Their testimony agrees upon the proposition that there were two series of shots, between which there was a slight interval, and that the cries for help which they heard immediately followed the first shot. The testimony of the witness which was of most importance was that of William A. Satterlee, assistant general manager of the Metropolitan Street Railway Company, who resided at 221 West Fifteenth street, and who testified that he was awakened by the first shot, went to his window, and saw a man stand at the northeast corner of Fifteenth and Central and fire two or three shots in a westerly direction, and then turn and run east on Fifteenth street. Before these shots were fired, during the firing, and, afterwards, he heard the cries for help.

The evidence in behalf of the defendant consisted of the testimony of Bailey and Moon, and that given by three painters who were working in the county jail on the date before the trial, and claimed to have heard Mrs. Biggs say that a representative of the state had told her father, her lawyer, and herself that if she testified against Forsha she would get out of jail, but if she didn't

she would get ten years in the penitentiary, and that she had also said if the sons of bitches didn't treat her right they would not get any evidence out of her.

Bailey, testifying in behalf of his associate, Forsha, stated that they, Forsha, Moon, Mrs. Biggs, and himself, had been at labor headquarters some fifteen or twenty minutes before Moon had called the hack from the Landis company, and that Forsha had not said anything in regard to a hack prior to that time; that, on the way from the Coates house to Fifteenth and Central, Forsha had called to the driver when he was going in the wrong direction, asking if he didn't know the way to Fifteenth and Central, saying that he ought to know, as he had "scabbed long enough;" that to this remark Ferguson made reply by some muttered curses; that, when the hack arrived at Fifteenth and Central, Ferguson, with a revolver in his hand, opened the door and said, "Get out of here, you union bastards;" that Forsha then got out of the door, and was promptly knocked down by Ferguson; that Moon, following, dodged a blow; and that, as he himself got out of the hack, Ferguson shot at him, the bullet passing by his head; that he was in such position that he could not run, and so he grappled with the hack driver, who fired again, the bullet passing through his clothing and grazing his stomach, making him think that he was shot; that then he threw Ferguson from him, and that the latter thereupon drew his gun over the wheel of the hack, and at that "I jerked my gun and commenced to shoot, and he done the same." He denied that Forsha said anything to him as he got out of the hack, and claimed that, at the time the shooting had begun, Forsha and Moon were running away. He also testified that there was nothing said at headquarters, or on the way to Fifteenth and Central, about shooting anybody; that he and the balance of the party were all under the influence of liquor, and while in the hack were "jollying back and forth" and singing "Bedelia." On cross-examination he admitted that he did get the revolver which he had given to Robinson, the bartender, before he left the saloon, but was not positive whether Forsha was present at the time or not. He denied having sent Mrs. Biggs up to the room to get the revolver which he afterwards gave to the bartender, claiming that he had given it to him "in a drunken way." He stated that Fifteenth and Central had been selected as the destination of their hack ride on the impulse of the moment, and that their intention in having a nonunion hack driver drive them there was "to give him a bogus call, then get out and walk away, because they (nonunion hack drivers) had been in the habit of sending us on bogus calls;" that he knew the driver of this hack was a nonunion man, and to give him a "bogus call" was the sole purpose of the ride. Witness further testified that he was not a member of the "wrecking crew" of the Hack Drivers' Union. He admitted that upon Monday after the homicide he moved from the Thelma hotel to Hasbrook place, and did not give his name at his new location, but claimed that he did not remain there in hiding; that he stayed close to his room because he felt bad over the "difficulty." He declined to answer as to what statements he made to the officers when arrested, but admitted that he had given Mrs. Biggs money to leave town on, but denied that it was at his suggestion that she left. Bailey stated that he had hold of Ferguson's hand in which the latter had his revolver when the second shot was fired, but could point out no powder burns upon the clothing which he claimed to have had on at the time and which he exhibited in court. He further stated that the deceased did not begin to cry for help until he, Bailey, had started to run away from the scene of the homicide. He declined to state what he did with the pistol with which he had shot Ferguson, and declined to answer as to where it then was.

Moon, called as a witness by the defendant, was instructed by the court that, as he had not yet been tried, it was his right and privilege to refuse to answer any question that he might think would tend to incriminate him. Under that admonition, he testified, in substance, as follows: That he was twenty-four years old, and a native of Missouri; a hack driver by profession; that he was at Fifteenth and Central on the morning of the 19th of March, in a hack, in company with the defendant, Bailey, and Gertrude Biggs; that when the hack came to a stop the hack driver got down with a pistol in his hand, and said, "Get out of here, you union bastards, as I am ready for you;" that thereupon Forsha got out of the hack, and that the driver with his left hand knocked Forsha to his knees; that witness, following Forsha out of the hack, was struck at by the driver, and thereupon he and Forsha both ran away; that they said nothing to the hack driver or to Bailey; that when they reached the corner of Fifteenth and Wyandotte they heard some shots fired; witness stated that he himself had called the hack without any suggestion from Forsha; that on the way to Fifteenth and Central the driver had gotten off his course; that Forsha had said to him that he had been "scabbing" long enough to know the way to Fifteenth and Central, to which the driver replied by saying, "I am next to you,

you union bastard," and continued mumbling up to Fifteenth street, and was angry when he opened the door; that Forsha made no threats against Ferguson. On cross-examination he stated that their only purpose in going to Fifteenth and Central was to give the driver a "bogus call;" that there was no talk between Forsha, Bailey, and himself as to what they were going to do to the hackman. He stated that when he and Forsha were arrested they had denied to the chief of police being connected in any way with the homicide.

This constituted the testimony in behalf of the defendant.

Upon rebuttal, John Hayes, chief of police of Kansas City, testified that, upon the 16th of April, Bailey, Moon, and Forsha were arrested and brought to police headquarters; that Moon and Forsha there made a written statement in reference to the homicide, which was signed by each; that at first Forsha had denied any knowledge of the affair, but that afterwards, on Bailey telling him (Forsha) that he (Bailey) had "told everything," Forsha then said: "I will admit I was out there. We took him out there for a damn good licking,—to slug him."

A portion of the written statement of Moon, to which his attention was called, and in which he said, "I had not got over 20 feet when I heard a shot, then three or four shots fired afterwards," was then admitted without objection.

The written statement of Forsha was then offered in evidence, over the objection and exception of the defendant, on the ground that the same was not rebuttal, and incompetent, irrelevant, and immaterial. The written statement is as follows:

Kansas City, Mo., April 16th, 1904.

My name is James Forsha. I room at 212 West 7th street. On the morning of the 19th day of March, 1904, Moon, Bailey, Mrs. Biggs, and I got into a hack at the Coates house and drove to 15th and Central street. I don't remember who it was that told the driver to go to that place. When we got there the driver got down off the hack; he had a pistol in his hand, and opened the door. I was the first one to get out, and as I was getting out the driver struck me on the chin with a pair of brass knucks; he knocked me to the ground. When I got up the shooting was going on; after he knocked me down there was a shot fired. After I got up I started away, and when I got near 14th and Central I heard four or five shots fired. Bailey told me he had shot the driver; I did not see the shooting. We had the driver go to 15th and Central because it was our intention to beat him up; we did not intend to do him great harm. I made this statement because it is the truth, without fear or promise of reward.

James Forsha.

Moon, recalled to the witness stand, denied, after stating again that the purpose of the hack ride was entirely an innocent one, that the linings of Ferguson's hack were torn and cut by him and his associates. On examination by the defendant's counsel, he testified that he had pleaded guilty in the criminal court of Jackson county to a charge of common assault, served a sentence in jail, and had been paroled by Judge Wofford. In rebuttal of this last statement of Moon's the state offered in evidence an information filed in the criminal court of Jackson county, Missouri, at the January term, 1902, by the then prosecuting attorney of Jackson county, charging William Moon with felonious assault, and to which he had pleaded guilty.

E. Landis testified that he was the owner of the hack that Ferguson was driving at the time of the homicide; that he had seen it about 12 o'clock midnight March 18th, and a few minutes after the killing, and that the lining was then all cut and was torn, but that there were no bullet holes in the hack, the only damage being to the inside. He further testified that Ferguson was a man about 5 feet 7 inches tall, weighing about 140 pounds, and that he had a crippled hand; that he, the witness, had given Ferguson a loaded pistol in order to defend himself from the assaults that might be made upon him by union hack drivers.

Mrs. Biggs, called again to the stand, described how Forsha, Moon, and Bailey had torn and cut the lining of the hacks in which they had ridden to the roadhouse on Southwest boulevard and to Fifteenth and Central.

Bailey, recalled for further examination, denied that on March 19th, at the registration booth, where he was serving as judge of registration, he replied to a remark made by one L. R. Cooper. "The strikers can never expect to win as long as they are using violence and shooting people," by saying, "That is the only way to win."

L. R. Cooper, called to the stand, testified that on the 19th of March he had said in Bailey's presence, "The strikers could never expect to win as long as they are using violence and shooting people; they will get public sentiment down on them;" and that Bailey made reply, "That is the only way to win."

The witness Cooper, David Buck, an ice dealer in Kansas City, and John L. Huntsman, a member of the police force, testified

that they were acquainted with the general reputation for moral character of Edgar Bailey in the community in which he lived, and that it was bad.

Matt S. Kinney, a detective, testified that after the defendant Forsha was arrested he told him, the witness, that he had given to a bartender on Ninth street the cartridge belt that he had taken from Meyers, and also his knife.

After the close of the testimony in rebuttal by the state, the defendant was sworn as a witness. As numerous complaints are made at the action of the court in respect to the examination of this witness, his testimony will be fully stated and considered during the course of the opinion.

At the close of the evidence the court fully and fairly instructed the jury as follows:

"No. 1. The information in this case was filed by the prosecuting attorney on the 19th day of April, 1904, and charges the defendant with murder in the first degree. Murder in the first degree is the wilful, felonious, deliberate, and premeditated killing of a human being with malice aforethought. Murder in the second degree has all the elements of murder in the first degree except that of deliberation. As used in these instructions, the word 'wilful' means intentional, not accidental. 'Felonious' means wickedly and against the admonition of the law—unlawfully. 'Deliberately' means in a cool state of the blood. It does not mean brooded over, considered, reflected upon for a week, a day, or an hour, but it means an intent to kill, executed by a party not under the influence of a violent passion suddenly aroused by some just or lawful cause of provocation to passion, but in the furtherance of a formed design to gratify a feeling of revenge or to accomplish some other unlawful act; and the passion here referred to is that only which is produced by what the law recognizes as a just or lawful cause of provocation to passion. 'Premeditated' means thought of beforehand for any length of time, no matter how short the time. 'Malice,' as used in these instructions, signifies a condition of the mind void of social duty and fatally bent on mischief, or an unlawful intention to kill or do some great bodily harm to another without just cause or excuse. 'Aforethought' means thought of beforehand. In defining the words 'just or lawful cause of provocation,' as used in these instructions, the court instructs the jury that opprobrious epithets or insulting gestures, when applied to a person, constitute a just cause of provocation to passion; and, if the person to whom they are applied is thereby aroused to a sudden heat of passion, and before such passion has had time to cool, with a deadly weapon kills the person who applies such opprobrious epithets or gestures to him, then such killing is done without deliberation, and a homicide committed under such circumstances is murder in the second degree. The court instructs the jury that an assault made upon the defendant constitutes a lawful cause of provocation to passion; and, where a homicide is committed with a deadly weapon in a heat of passion suddenly aroused by an assault, and before such heat of passion has had time to cool the defendant kills the person making such assault with a deadly weapon, such killing is manslaughter in the fourth degree. The words 'heat of passion,' as used in these instructions, means a heated state of the blood, caused by a lawful or just provocation, which deprives the defendant of the power of self-control.

"No. 2. The court instructs the jury that, if you find and believe from the evidence that at the county of Jackson and state of Missouri, at any time before the 19th day of April, 1904, the defendant, James Forsha, either alone or acting in concert with another or others, wilfully, deliberately, premeditatedly, and of his malice aforethought, did with a certain revolving pistol, and that the same was a dangerous and deadly weapon, shoot one Albert Ferguson, inflicting upon him a mortal wound, from which said mortal wound the said Albert Ferguson within one year thereafter, at the county of Jackson and state of Missouri, died, then you will find the defendant guilty of murder in the first degree, and so say in your verdict. In that event you will have nothing to do with the punishment; that is fixed by law.

"No. 3. The court instructs the jury that, if you fail to find a verdict according to the law as declared in instruction No. 2, but shall find and believe from the evidence that at the county of Jackson and state of Missouri, at any time before the 19th day of April, 1904, the defendant, James Forsha, either alone or acting in concert with another or others, wilfully, premeditatedly, and of his malice aforethought, did with a certain revolving pistol, and that the same was a dangerous and deadly weapon, shoot one Albert Ferguson, inflicting upon him a mortal wound, from which mortal wound the said Albert Ferguson within one year thereafter, at the county of Jackson and state of Missouri, died, then you will find the defendant guilty of murder in the second degree, and assess his punishment at imprisonment in the state penitentiary for any term not less than ten years.

"No. 4. The court instructs the jury that, if they find and believe from the evidence that James Forsha was present aid-

ing and abetting Edgar G. Bailey in the act of homicide in evidence in this case, he is in law equally guilty with him who fired the shot. When two or more persons are engaged in the same illegal purpose, any act done by one of the party in pursuance of that purpose, and with reference to it, is, in contemplation of law, the act of all; and proof of such act is evidence against any or either of the others who were engaged in the combination.

"No. 5. The court instructs the jury that, if you find and believe from the evidence that defendant, James Forsha, conspired and agreed with William Moon and Edgar G. Bailey to assault and beat Albert Ferguson, but not to the extent to doing him great bodily harm, and absolutely without any intention in Forsha's mind of shooting said Ferguson, and that, in pursuance of said agreement, any one or all of the parties thereto assaulted said Albert Ferguson with the intention aforesaid, and that thereafter or thereupon Edgar G. Bailey, without the consent, aid, or encouragement of defendant, James Forsha, shot and killed Albert Ferguson, then in that case you will find the defendant guilty of manslaughter in the fourth degree.

"No. 6. The court instructs the jury that, if you shall believe and find from the evidence that at the time it is charged that Albert Ferguson was killed, the defendant, James Forsha, William Moon, and Edgar G. Bailey were acting together, and that Albert Ferguson was about to kill Edgar G. Bailey or do him great bodily harm, that then he had the right to kill Albert Ferguson under such circumstances; but to justify such killing you must find from the evidence that he did believe, and had reasonable cause to believe, that such injury was about to be done, and that deceased was killed to prevent such injury. It is not necessary that the danger should have been actual and about to fall on him, but it is necessary for him to have believed it, and that there should have been at the time of such killing reasonable grounds for such belief. It is for you to say from the evidence in the case whether Edgar G. Bailey did believe, and had reasonable cause to believe, that such impending harm at the time the deceased was shot was about to fall on him. If, as a fact, he did not have reasonable cause to believe that such danger was impending at the time the deceased was shot, then such killing is not justifiable. His believing himself in danger is not sufficient; he must have had reasonable cause to believe it, and of that you are to determine from all the facts and circumstances in the case. If you find that Bailey shot in self-defense as defined, then you should find defendant not guilty.

"No. 7. If the jury believe and find from the evidence that Bailey, Forsha, and Moon confederated together and engaged in a common design to take deceased out on the night in question and beat him up, and that it was part of their common design and purpose, if deceased made resistance, to kill him or to do him some great bodily injury, then whatever Bailey did in carrying out the common purpose was in law the act of Forsha, the defendant, and they are equally liable for such act; and if the defendant and Bailey and Moon, in pursuance of such common design, brought on the difficulty in which Albert Ferguson was killed, and entered into it with the intention of killing or inflicting great personal injury upon Ferguson, if he should resist them, then the danger in which they, or any of them, found themselves or himself, would not extenuate the offense or reduce its grade, and there could be no self-defense in the case.

"No. 8. The court instructs the jury that if you find from the evidence that James Forsha, William Moon, and Edgar G. Bailey conspired and agreed to entice Albert Ferguson to Fifteenth and Central streets, and there assault him, but not to the extent of killing him or doing him great bodily harm, and that, upon arriving at said place, James Forsha struck at, or struck, Albert Ferguson, but did not inflict upon him any injury sufficient to endanger his life, and that immediately thereafter the defendant James Forsha ran away, and endeavored in good faith to withdraw from said difficulty, and Edgar G. Bailey then killed Ferguson, but not under circumstances to constitute complete self-defense, as elsewhere in these instructions defined, then you will find defendant guilty of manslaughter in the fourth degree. But if defendant, at the time or immediately before he ran away, incited or encouraged Bailey to kill Ferguson or to do him great bodily harm, and intended that he should kill or inflict upon him great bodily harm, then his running away would not avail the defendant anything.

"No. 9. The court instructs the jury that if defendant and Bailey and Moon voluntarily entered into the difficulty, or brought it on, but without any intention of killing or inflicting upon Ferguson any great personal injury, and without intending to kill him or to do him great bodily harm if he resisted, and during such difficulty Ferguson, before he was assaulted, with a deadly weapon attempted to kill Bailey or Moon or Forsha, and it became necessary for Bailey to kill said Ferguson to save himself or to save Moon or Forsha from being killed or receiving great personal injury, then the

defendant cannot be entirely excused on the ground that Bailey killed Ferguson in self-defense, but in that case you should find the defendant guilty of manslaughter in the fourth degree.

"No. 10. The court instructs the jury that, if they find the defendant guilty of manslaughter in the fourth degree, they will assess his punishment at imprisonment in the state penitentiary for a term of two years, or by imprisonment in the county jail not less than six months nor more than twelve months, or by a fine not less than $500, or by both a fine of not less than $100 and imprisonment in the county jail not less than three months, nor more than twelve months.

"No. 11. The court instructs the jury that any statements which the proof shows Edgar Bailey made after the homicide was committed, and not in the presence of the defendant Forsha, are not binding upon the defendant, but can only be considered so far as it may throw light upon the acts or testimony of Bailey.

"No. 12. If verbal or written statements of the defendant have been proved in the case, you may take them into consideration, with all the other facts and circumstances proved. What the proof may show you, if anything, that the defendant has said against himself, is presumed to be true, because against himself; but anything you may believe from the evidence the defendant said in his own behalf you are not obliged to believe, but you may treat the same as true or false, just as you believe it true or false, when considered with a view to all the other facts and circumstances in the case.

"No. 13. The court instructs the jury that the law presumes the innocence, and not the guilt, of the defendant; and this presumption of innocence attends the defendant throughout the trial, and at the end entitles the defendant to an acquittal, unless the evidence in the case, when taken as a whole, satisfies you of the defendant's guilt beyond a reasonable doubt as defined in these instructions.

"No. 14. The court instructs the jury that the burden of proof in this case rests upon the state.

"No. 15. The court instructs the jury that before they can convict the defendant they must be satisfied of his guilt beyond a reasonable doubt. Such doubt, to authorize an acquittal upon reasonable doubt, must be a substantial doubt of the defendant's guilt, with a view to all the evidence in the case, and not a mere possibility of the defendant's innocence.

"No. 16. The jury are the sole judges of the credibility of the witnesses, and of the weight and value to be given to their testimony. In determining as to the credit you will give to a witness, and the weight and value you will attach to a witness's testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, the motives actuating the witness in testifying, the witness's relation to, or feeling for or against the defendant or the alleged injured party, the probability or improbability of the witness's statements, the opportunity the witness had to observe and to be informed as to the matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit, and the testimony of each witness such value and weight, as you deem proper. If, upon a consideration of all the evidence, you conclude that any witness has sworn wilfully false as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness's testimony.

"No. 17. The court instructs the jury that the defendant is a competent witness in this case, and you must consider his testimony in arriving at your verdict; but, in determining what weight and credibility you will give to his testimony in making up your verdict, you may take into consideration, as affecting his credibility, his interest in the result of the case, and that he is the accused party on trial, testifying in his own behalf.

"No. 18. The court instructs the jury that the statement read to you as the dying declaration of Albert Ferguson should be received by you as such declaration, but because it is a dying declaration you are not necessarily bound to believe it, but you will give it that weight which you think it ought to have when considered in connection with all the other facts and circumstances in evidence.

"No. 19. The court instructs the jury that the defendant is not charged in this case with making an assault upon Albert Meyers, and you will not consider the testimony before you upon that subject, except in so far as it may tend to throw light upon the motives or intentions of Bailey, Moon, and this defendant; whether or not it does throw light on the motives and intentions of defendant and Moon and Bailey, you will be the judges, when it is viewed in connection with all the other facts and circumstances in the case."

The cause was submitted to the jury upon

the testimony and the instructions of the court as herein indicated, and they returned a verdict of guilty of murder of the second degree, and assessed defendant's punishment at imprisonment in the penitentiary for eighteen years. Sentence and judgment were rendered in accordance with the verdict, and from this judgment defendant prosecutes this appeal, and the cause is now before us for consideration.

Mr. **W. F. Riggs** for appellant.

Messrs. **Herbert S. Hadley**, Attorney General, and **North T. Gentry** for respondent.

Fox, J., delivered the opinion of the court:

Numerous complaints are urged by learned counsel for appellant as grounds for the reversal of the judgment in this cause. This is a companion case of State v. Bailey, 190 Mo. 257, 88 S. W. 733, and the testimony as to the main facts upon which this judgment rests, with a few exceptions, is substantially the same as in that case.

At the very inception of the consideration of this cause, it is well to see what legal propositions were disposed of in the Bailey Case, for, as to questions involved in that case, we see no reason to depart from the conclusions announced, and they must be treated as being settled.

The defendant Bailey, Forsha, and Moon were jointly charged with murder in the information now under consideration, and its sufficiency is challenged in this cause upon the same ground as urged in State v. Bailey, *supra*. It is unnecessary to repeat the reasons assigned in the Bailey Case, for, holding the charge as made in the information sufficient, that proposition must be treated as settled. State v. Bailey, *supra;* State v. Nelson, 181 Mo. 340, 103 Am. St. Rep. 602, 80 S. W. 947. It will be sufficient to say, as to the additional ground urged in the motion to quash the information, "that the seal of the court was not affixed to the jurat of the clerk, and that the oath was administered by the deputy clerk," that there is no merit in such contention. The court to whom this motion was addressed is presumed to know its officers and their signatures, and the omission of the seal of the court to the jurat does not invalidate the verification. The purpose of affixing the seal of the court to the jurat of the clerk is in the nature of an attestation of the genuineness of his signature, but the affixing of the seal is not an indispensable requisite to such jurat, as was very appropriately said by the court of appeals in State v. Pfenninger, 76 Mo. App. 313: "The judge of a court having a clerk will take judicial notice of the signature of the clerk, and an attestation of such signature by a seal is not indispensable to satisfy the judge of the genuineness of his signature; and, when the attention of the judge was called to the signature of the clerk by the motion to quash in this case, it will be presumed, in the absence of any evidence to the contrary, that he inspected the signature of the jurat and saw that it was genuine."

The assignment of error upon the admission of testimony in respect to the difficulty with Meyers on the night of the homicide was fully and exhaustively treated by Judge Gantt in State v. Bailey, and it is only necessary to say that we are fully satisfied with the conclusions reached upon that proposition, and see no reason for a reconsideration of that question, or departing from the rules of evidence announced in that case.

It is insisted by appellant that the court erred in retaining jurors Shaw, Duncan, Bell, and Ryan on the panel from which the jury of 12 was to be selected to try this cause. We have carefully considered the record disclosing the examination of the jurors upon their *voir dire*. The record discloses that, after the close of the examination of each juror, counsel for appellant contented themselves with a simple objection, "challenged for cause." This was insufficient to preserve the error complained of for review. It has been uniformly held by this court that the grounds of challenge must be specifically stated. State v. Taylor, 134 Mo. 109, 35 S. W. 92, and cases cited; State v. Evans, 161 Mo. 95, 84 Am. St. Rep. 669, 61 S. W. 590; State v. McGinnis, 158 Mo. 105, 59 S. W. 83. We may also add that, in addition to the failure to preserve the question of disqualification of the jurors for review in this court, their examination did not disclose their disqualification. While they had formed and expressed opinions as to the guilt of the defendant from rumor or newspaper accounts of the killing of Ferguson, they finally stated that they could give the defendant a fair and impartial trial upon the testimony as it might be introduced before them. In State v. Reed, 137 Mo., loc. cit. 132, 38 S. W. 574, the rule upon this subject was clearly and tersely stated. It was there said: "It is well settled in this state that a person otherwise qualified to sit as a juror in a criminal case is not disqualified by reason of having formed an opinion as to the guilt or innocence of the accused from reading partial newspaper accounts of the homicide, or from rumor, when he states on his *voir dire* that he can give the defendant . . . a fair and impartial trial;" and, moreover, a general objection did really not amount to an objection.

Numerous complaints are made upon the admission and exclusion of evidence during

the progress of this trial. Some of them are doubtless not seriously made; however, we have fully considered all of them, but must be content with the expression of our views upon those which are of sufficient merit to demand serious consideration. It is insisted by appellant that the testimony of L. R. Cooper, in which the witness stated that on the 19th of March he had said in the presence of Bailey that "the strikers could not expect to win as long as they are using violence and shooting people; they will get public sentiment down on them;" and that Bailey replied, "That is the only way to win,"—was incompetent, and its admission constituted reversible error. The objection to this testimony is predicated upon two theories: First, that the statement was made in the absence of this defendant, and cannot be binding upon him; and, secondly, that it was in the nature of a confession or admission of a coconspirator after the commission of the act and termination of the conspiracy. Appellant clearly misconceives the purpose of the testimony of Cooper. Bailey was called as a witness for defendant in this cause, and the state was, beyond question, privileged to introduce any testimony which tended to contradict him, and, Bailey having denied upon cross-examination that he had made any such statement as testified by Cooper, it was clearly competent for the state to contradict him in that respect. The statements of Bailey were relevant in this controversy, for he was the principal actor in the commission of the homicide, and his statement to Cooper tended to refute the theory of self-defense, and was therefore material, and, being so, the state had the right to contradict the witness in respect to such testimony.

There was no error in the exclusion of the answer of Bailey to a question propounded, that, in shooting Ferguson, he (Bailey) was not actuated by anything that this defendant said or did. He had fully testified on that subject, had denied that this defendant had said anything to him about killing Ferguson, or that there was any agreement or understanding that any violence was to be inflicted upon anyone, and stated that the mission in taking the drive with Ferguson was purely an innocent one. We are unable to see what force the answer to the question could have added to what he had already testified. His answer was nothing more than a conclusion of the witness from the facts to which he had given testimony, and it was the province of the jury to frame their conclusions from such facts, and the testimony was properly excluded.

The record discloses complaint upon the cross-examination of witness Moon, for defendant. A careful consideration of that entire examination fails to disclose any error. The state, as affecting the credibility of the witness, could legitimately inquire of the witness if he had been previously convicted of a criminal offense. After the witness admitted that he had pleaded guilty to a common assault, there was nothing improper in permitting the state to show by the record that the witness had pleaded guilty to a charge of an assault with intent to kill. This testimony was admissible as affecting the credibility of the witness. State v. Howard, 102 Mo. 142, 14 S. W. 937; State v. Blitz, 171 Mo. 530, 71 S. W. 1027.

Again, it is urged that the testimony of witnesses W. E. Ferguson and Mrs. Clara Stevens was incompetent, and should have been excluded. An examination of the record as to the testimony of the witnesses above noted discloses that the examination of these witnesses was complete before any effort was made to exclude this testimony, and, while the questions and answers in the examination cover a number of pages, there is an entire absence of a single objection or exception to the testimony given. After the testimony was all submitted to the jury, then counsel for appellant moved that it be stricken out. This method of preserving complaints to the action of the trial court has not met with the approval of this court. It was ruled in State v. Marcks, 140 Mo., loc. cit. 668, 669, 41 S. W. 973, 43 S. W. 1095, that, where timely objections and exceptions were not made to testimony at the time of its introduction, it was not error to refuse to exclude it afterwards; and, in the discussion of the proposition, Gantt, J., in speaking for this court, said: "A party cannot speculate upon the effect of evidence which is objectionable upon its face when offered, as this clearly was, if ever, and then complain of a refusal to reject it later in the trial. Maxwell v. Hannibal & St. J. R. Co. 85 Mo. 95; State v. Hope, 100 Mo. 347, 8 L.R.A. 608, 13 S. W. 490; People v. Chacon, 102 N. Y. 669, 6 N. E. 303; Miller v. Montgomery, 78 N. Y. 282; Quin v. Lloyd, 41 N. Y. 349; Barkly v. Copeland, 86 Cal. 483, 25 Pac. 1, 405; 1 Rice, Ev. §§ 258, 259; Hickman v. Green, 123 Mo. 165, 29 L.R.A. 30, 22 S. W. 455, 27 S. W. 440." This rule of practice as announced in the case last cited was approved in Roe v. Bank of Versailles, 167 Mo. 426, 67 S. W. 303.

This leads us to the complaint urged in respect to the examination of defendant in this cause as a witness in his own behalf. The record before us discloses that the defendant rested his case in chief without being introduced as a witness in the cause, and the court properly ruled that his testimony should be confined to rebuttal of the rebuttal testimony introduced by the state. The rec-

ord discloses numerous questions propounded to the defendant, and his answers excluded without any objection or exception on the part of the appellant; hence the action of the court as to those questions and answers was not properly preserved, and is not subject to be reviewed by this court. Counsel for appellant, with commendable frankness, concede that no proper objections or exceptions were made in respect to these matters. The defendant was permitted to testify fully as to all matters which were in rebuttal of the testimony introduced in rebuttal by the state. It is apparent from the record that the main purpose of introducing defendant as a witness was to explain the statement in writing made by him, introduced by the state. There is no pretense that he did not make the statement offered in evidence, or that it is ambiguous or uncertain in any of its terms; and, so far as concerns any explanation of this statement at the time it was made, and what was said at the time he signed it, and any other statements which he made at the time which were not correctly reduced to writing, the state, by its counsel, expressly announced that it had no objection to such showing; but the record discloses that notwithstanding such announcement by the state's counsel, no examination was made along that line. That we may fully appreciate just what was done in respect to the examination of the defendant touching the statement he had made, which was introduced by the state, we quote from the record upon that subject: "Q. I will ask this question, Mr. Forsha: Tell the jury what you said at police station at the time this signed statement was made by you; tell the jury all that you said about the shooting of Ferguson, and what part you said, if anything, was not included in the statement; and tell the jury all of the facts leading up to and including the shooting of Ferguson by Bailey, and all that you said and did in that connection. Mr. Reed: The state does not object to that part of the question which asks the witness, Forsha, to tell the jury what he said at the police station at the time he signed the statement, nor to the witness's telling any other statement which he made at the time of the signing of the statement which he claims wasn't correctly taken down in the statement; but the state does object to the latter part of the question which is, 'State all of the facts and circumstances leading up to and including the shooting of Ferguson by Bailey, and all that you said and did in that connection,' for the reason that it isn't surrebuttal, and should have been introduced, if at all, in the defense in chief. The Court: Sustained. To which ruling of the court the defendant did then and there at the time duly except." This clearly indicates an express waiver of any objection by the state to the testimony of defendant as to all proper explanations of the statement made by him in writing. The defendant, at the close of the state's case in chief, had every opportunity to go on the stand and testify fully as to the entire difficulty, but, failing to do so, we are of the opinion that it was not error for the court to limit his examination in the manner it did. There was offered appellant an opportunity to explain fully what he said at the time he made the statement at the police station; but his counsel declined to avail themselves of such opportunity, and moved the court to reopen this cause and permit them to introduce defendant as a witness in chief. This the court declined to do, and, we think, properly so. Courts, in the administration of justice, are fully justified in adhering to the well-recognized and uniform rules of procedure in the trial of causes. To grant the request of appellant in this cause, and adopt a rule suggested by such request, could not help but result in endless trials and a weak and feeble administration of the law.

We have read with care and interest the instructions given by the court in this cause, and have herein fully reproduced them. They are a full and fair presentation of the law as applicable to the facts developed at the trial. They fully meet every phase of this case, and are extremely favorable to the defendant.

We have fully considered the refused instructions requested by appellant, and it is sufficient to say that a number of them did not declare the law and were properly refused, and those correctly announcing legal principles were fully covered by those given by the court. In oral argument it was earnestly insisted that instructions Nos. 10 and 12, requested by defendant, should have been given. They are as follows:

"No. 10. The court instructs the jury that, even if you find from the evidence that defendant, James Forsha, conspired and agreed with Edgar G. Bailey to kill or inflict great bodily harm upon Albert Ferguson, and that during the difficulty, if any, with said Albert Ferguson, defendant told, advised, or encouraged Edgar G. Bailey to shoot said Albert Ferguson, still if you further find and believe from the evidence that, before Bailey fired the fatal shot, Forsha in good faith withdrew from said difficulty, and abandoned the design to kill or inflict great bodily harm upon said Ferguson, and that Bailey, knowing that Forsha had withdrawn from and abandoned said difficulty and design, thereafter, from and on account of motives, intentions, and purposes actuating his, the said Bailey's, mind alone, shot and killed

Albert Ferguson, then in that case you should find the defendant, James Forsha, not guilty; and statements made by Bailey, and not in the presence of the defendant, wherein Bailey states his views as to the way strikes should be conducted, should not be considered by the jury as prejudicial to the defendant, nor binding upon him."

"No. 12. The court instructs the jury that, even if you find and believe from the evidence that James Forsha agreed with Edgar G. Bailey and others to kill or inflict great bodily harm upon Ferguson, still, if you further find from the evidence that before Edgar Bailey shot and killed Albert Ferguson, defendant, James Forsha, attempted in good faith to withdraw from and abandon said assault upon or difficulty with Ferguson, and succeeding in so doing, and that said Edgar Bailey knew and believed, and had reasonable cause to believe from all the facts and circumstances, that said James Forsha had so withdrawn from said assault and difficulty, and that thereafter said Edgar G. Bailey, from and on account of motives, purposes, or incentives actuating his own mind and heart, and without the consent, aid, or encouragement of Forsha, shot and killed said Albert Ferguson, then in that case you should find the defendant not guilty."

It will be observed that instruction No. 4 given by the court fully covered the law as applicable to the question of defendant's aiding and abetting in the commission of the homicide. Instruction No. 8 given by the court was the only instruction to which the defendant was entitled upon the subject of withdrawing from the difficulty. We are unable to assent to the legal principles announced in the refused instructions as quoted. If the defendant aided, abetted, or encouraged Bailey in the commission of this homicide, as some of the witnesses put it, at the time the difficulty was in progress, commanding Bailey to "shoot him; shoot him; kill the son of a bitch,"—the mere fact that he undertook to flee from the scene of the difficulty before the fatal shot was fired by no means can relieve him of responsibility for his participation in the commission of the act. We are unwilling to sanction as the law of this state that a defendant can first, by words and actions, put in operation a difficulty, or aid and abet in the commencement of it, and, after having by his course of conduct brought the principal actors into a deadly contest, that he can then flee from the scene of the struggle and thereby relieve himself absolutely from the results of such fatal difficulty. Such is not the law of this state, and the court very properly refused the instructions requested upon that subject.

Many other objections to the admission of testimony are presented by the record. Upon a careful consideration of them, we think they are without merit.

We have fully considered the questions involved in this case as presented by the record before us, and, if the jury believed the testimony as introduced by the state, we are deeply impressed with the exceedingly great tenderness manifested by the jury in fixing the punishment of the defendant. In view of the results of the finding of the jury in the companion case of State v. Bailey, which was fully supported by the evidence, we confess that, upon the showing as developed in this cause, which, as to the essential elements of the crime charged, was equally damaging, there is little ground for complaint on the part of the appellant at the conclusions reached by the jury.

Finding no error in the record prejudicial to the rights of the defendant, the judgment should be affirmed, and it is so ordered.

All concur, except Burgess, P. J., not sitting.

NORTH CAROLINA SUPREME COURT.

ASHER EDWARDS, Appt.,
v.
CITY OF GOLDSBORO.

(— N. C. —, 53 S. E. 652.)

Municipal corporation—building—location.

1. No recovery can be had for breach of a contract by a municipal corporation to locate public buildings at a certain place in consideration of a donation toward the expense, since the contract is void as against public policy.

Same—issue as to effect of partial compliance.

2. An issue as to the effect of the partial compliance by a municipal corporation with its contract upon the value of the land

Case Note.—Contract as to location of public buildings.—It has been tersely, but strikingly, said by an English judge that the principle of public policy, as applied to contracts, is an unruly horse that carries you, when you bestride it, you know not whither; and nothing better illustrates this aphorism than the application of the principle to such agreements as the one sought to be enforced in the case above. Every court in the land would doubtless assent to the proposition that any contract, made chiefly in contemplation of private advantage, for the purpose of securing the location of a building in which the public has an interest, or for the purpose of preventing its removal when the necessities of business or the public interest demand it, tends to the injury of the public service, and is therefore void; that the tendency of these contracts is improperly to influence public serv-

of one who donated money toward the expense of certain public buildings in consideration of an agreement by the municipality to locate them at a certain place is immaterial in an action to recover for breach of the agreement, since the contract is void as against public policy.

Same—recovery of money paid.

3. One whose property has been improved by the partial compliance by a municipality with its agreement to locate public buildings near it in consideration of a donation by him towards their cost cannot, upon the refusal of the municipality fully to comply with its agreement, recover back the amount paid by him as money had and received.

(April 10, 1906.)

APPEAL by plaintiff from a judgment of the Superior Court for Wayne County in defendant's favor in an action brought to recover money paid by plaintiff to defendant. Affirmed.

Statement by Walker, J.:

The plaintiff, in his complaint, alleged that, by an act of the general assembly, the defendant was authorized to build a city hall and market house, and that plaintiff and other citizens of Goldsboro, who owned real estate therein, and who believed that the location of the proposed public buildings near their property would greatly enhance its value, offered to subscribe and pay to the city divers sums of money, amounting in the aggregate to $1,035, if the city authorities

ants, and to subordinate the public welfare to private gain; and that even the making of them should be prohibited where they induce individual interest to overbear the public welfare. The principle of public policy itself is not troublesome in this connection, except in the application of it. While the weight of authority is undoubtedly with the opinion above, the courts are not unanimous in holding such contracts void. This disagreement seems to arise from the different aspects in which such contracts are viewed by the conflicting authorities. Those in line with EDWARDS v. GOLDSBORO strictly hold void all such agreements regardless of the motives and conduct of the parties or the result sought to be obtained. Those in conflict consider that such contracts are not against public policy where no public interest has in fact been jeopardized, and no improper motives have actuated the parties, and no corruption has been practised in the execution of their mutual promises. The cases that consider the validity of contracts involving the location of public buildings are not numerous and most of those that are in harmony with the opinion above are there cited. In addition to those cases reference may be made to the following, which include all that could be found:

Where a postmaster, before his appointment to office, in consideration of getting a designated place for the postoffice at a nominal rent, agrees to remove the postoffice to such place as soon as he shall receive his commission, and to keep it there as long as he shall remain in office, such contract is void, even though the place is suitable and convenient for the public use. Spence v. Harvey, 22 Cal. 336, 83 Am. Dec. 69. In the language of the court: "The office of postmaster is a public office, and is established for the benefit of the public. In the discharge of his duties, the plaintiff was bound to locate the postoffice and to continue it at a place suitable and reasonably convenient for the use of the public. In the discharge of this trust, he was bound to exercise his judgment for the public benefit, and any contract by which this exercise of his judgment was sold for his private emolument interfered with the proper discharge of his duties as a public officer. By this contract, in consideration of a gain to himself, . . . he obligated himself to keep the postoffice at a particular spot during the term of his office. He thus, for a consideration, contracted to conduct the business of his office, in one particular, in a stipulated manner. He was not free to exercise his judgment for the public benefit. However unsuitable the location might become, he was under an obligation, if the contract is valid, not to change it."

A covenant to pay a gross sum for a storehouse and a stock of goods, and the promise and guaranty on the part of the vendor that a postoffice shall be removed from a neighboring village to the place of business of the vendee, and that he shall be appointed postmaster are one indivisible agreement, and are wholly illegal and void on the ground of public policy. Wilson v. Hines, 5 Pa. 452, 47 Am. Dec. 422.

In Randolph County v. Jones, Breese (Ill.) 103, a subscription to pay the sums therein designated for the purpose of defraying in part the expenses of erecting a courthouse on designated land proposed to be granted to the county by its owner was held void, because the erection of a courthouse was a duty imposed by law upon the county commissioners, and could not be a consideration to support a promise. The court added that the location designated might have been an injury to other citizens than the subscribers, and, "upon the ground of public policy, it is very questionable whether the court ought not to decide the contract void for that reason alone."

A contract is void, as contrary to public policy, whereby the county commissioners agree perpetually to maintain a courthouse on a certain site; and an injunction will not issue, at the suit of one who conveyed land to the county in consideration of such agreement, to restrain the commissioners from removing the courthouse to another site, even though the county erected and for a time maintained a courthouse on the site contemplated in such contract. Colburn v. El Paso County, 15 Colo. App. 90, 61 Pac. 241.

would erect said buildings on a site near the property of the subscribers; and the offer was made and the money was afterwards actually subscribed and paid for the purpose and with the intent of inducing the city to locate the buildings at said place, and with the view of enhancing the value of their property and receiving the benefit of the said location; and the money was accepted by the city with knowledge of said intent. That plaintiff paid the sum of $600 to the fund for that purpose, and that, notwithstanding the receipt of the money by the defendant, and its promise, in consideration of the sum, to locate both buildings at the said place, the defendant has erected the city hall as it promised to do, but has failed, and, upon demand, has refused, to so erect the market house, but, instead, has put up fish stalls, which have proved to be a real detriment to their property. That the erection of the city hall, while of some, is yet of very little, benefit; the location and erection of the market house being the main object of their subscription. The plaintiff demanded the return of the $600 paid by him, and, upon refusal of the defendant to comply therewith, brought this action to recover the same with interest, and the prayer of his complaint is to that effect. The principal allegations of the complaint as to the subscription and its purpose are admitted in the answer, though the defendant denies that it has not complied with the agreement, and alleged that the structures erected had improved the value of plaintiff's

This might seem at first glance to be in conflict with Fearnley v. De Mainville, 5 Colo. App. 441, 39 Pac. 73, an earlier case in the same jurisdiction, where a similar contract was held not to be void as against public policy. The facts of the case were these: The government, finding it necessary to exercise economy, without consulting the convenience of the people, required that the postoffice should be furnished gratuitously or at a nominal rent; and, for the purpose of retaining the postoffice where it had been, the owners of the building leased the same to the government for $1.00 a month, and entered into a contract with the property owners and business men in the vicinity, whereby the latter agreed to contribute money to reimburse the owners for the loss of the rent if such lease was made and if the postoffice remained where it was. It will be noticed that this contract attempted in no wise to interfere with the judgment or discretion of a public officer in reference to a matter of public interest, but was intended merely to reimburse the owner of the building for a loss of rent occasioned by the avowed policy of the government itself.

The decisions opposed to EDWARDS v. GOLDSBORO all seem to be based upon the theory that, where there is no improper motive or corrupt conduct in the inducement of the contract, and the welfare of the body politic is not in fact threatened, no principle of public policy is in fact violated, and the agreement should therefore be upheld. These cases are not many, and all that could be found are the following:

Where the county commissioners had begun the erection of a new courthouse on a different site from the public square where the old one stood, and suits had been started to enjoin the building on the new site, and certain citizens petitioned the commissioners to build the new courthouse on the public square where it had been, promising if this were done to pay into the county treasury the sums respectively set opposite their names, and the commissioners accepted the proposal and entered upon their record an order for such relocation, such agreement was not void as against public policy. Stilson v. Lawrence County, 52 Ind. 213.

Where the trustees of a state reform school were authorized by statute to select a site for the institution, and, for the purpose of securing such site for a certain locality, the citizens thereof subscribed the money for the purchase of the necessary land, the promissory note of a subscriber for the amount of his subscription, executed to one of the trustees, is valid. Wisner v. McBride, 49 Iowa, 220.

Where the freeholders of a county agree that, in case certain land is chosen by the commissioners as a courthouse site, they will procure a good and sufficient warranty deed for the land without expense to the county, such contract is not void as being against public policy, the commissioners as individuals deriving no benefit therefrom, the offer being to the county and the benefit accruing to the public. Island County v. Babcock, 17 Wash. 438, 50 Pac. 54.

Where a courthouse had become old and dilapidated, and the proper board had determined to build a new one, and certain citizens of the locality petitioned the board to build the new one on a different site from that on which the old one was situated, and offered to make a donation to the county of a lot for that purpose, which was eligible therefor,—more so than the one upon which the old one was situated,—and the board was inclined to accept the proposition and change the location, and other persons owning property near the old courthouse proposed to pay the county $2,000 towards the erection of the new building if the board would build it on the site of the old courthouse, which proposition the board accepted, and did build on the same lot, the contract was held not to be against public policy. Odineal v. Barry, 24 Miss. 9. The court said: "What principle of public policy does it violate? The members of the board of police, as individuals, will not receive any portion of the money for which the note was given. At the time of the contract it was not intended or expected that they should receive it. It was not a proposition by the defendants to pay them so much as individ-

property. It is not necessary to make further reference to the answer. Issues were submitted to the jury which, with the answers thereto are as follows: "(1) Did the defendant city fail to locate and erect a market near the property of the plaintiff as alleged? A. Yes. (2) Did the plaintiff pay to the defendant $600 on agreement that the defendant would locate the city hall and market house near plaintiff's property? A. Yes. (3) What amount, if any, has the property of the plaintiff been enhanced by the erection of the buildings by the defendant on the location mentioned in the pleadings? A. $600." The plaintiff, upon the first two findings of the jury, prayed *ore tenus* for judgment in the nature of a mandamus to compel the defendant to locate and erect a market house as it had agreed to do. This prayer was refused, and the plaintiff excepted. The court thereupon entered judgment for the defendant, that it go without day and recover its costs. The plaintiff excepted and appealed.

Messrs. **Aycock & Daniels** and **W. C. Monroe**, for appellant:

Evidence as to the probable enhancement of the value of the plaintiff's property by the erection and location of the city market near it was competent.

2 Lewis, Em. Dom. § 296; Murray v. Northwestern R. Co. 64 S. C. 520, 42 S. E. 617; Louisville, A. & P. Valley Electric R. Co. v. Whipps, 25 Ky. L. Rep. 2312, 80 S. W. 507; St. Louis & N. A. R. Co. v. Crandall (Ark.) 86 S. W. 855.

The measure of damages was the difference in the value of plaintiff's land with, and without, the building.

2 Lewis, Em. Dom. § 296; Stilwell v. St. Louis & H. R. Co. 39 Mo. App. 221; Louisville, A. & P. Valley Electric R. Co. v. Whipps and St. Louis & C. A. R. Co. v. Crandall, *supra*.

If the plaintiff was not entitled to prove the damages, he was entitled to a specific performance of the contract.

2 Lewis, Em. Dom. § 296; Murray v. Northwestern R. Co. *supra;* Texas & P. R. Co. v. Marshall, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846.

Messrs. **Dortch & Barham** for appellee.

Walker, J., delivered the opinion of the court:

While the plaintiff, in his complaint, prayed for the judgment to which we think

uals in consideration that they would not change the site of the courthouse; . . . but the contract was made by them in their official capacity for the benefit of the county. When collected, the money will become the property of the county, and be under its direction and control, applicable to any purpose that may be deemed beneficial or promotive of its interests."

In Beal v. Polhemus, 67 Mich. 130, 34 N. W. 532, the supreme court of Michigan, in striking contrast to the opinion of Judge Cooley in Gale v. Kalamazoo, referred to in EDWARDS v. GOLDSBORO, has gone to the farthest extreme in upholding a contract to secure the location of a postoffice through political influence. An agreement to pay a certain sum of money if the owner of land near the obligor's property should erect a building thereon and secure the removal of the postoffice there before a specified date was held in this case not to be in contravention of public policy. The facts of the case were these: The owner of the land, "a prominent member and leader of the then dominant party in the nation," as he is styled in the opinion, erected the building contemplated in the agreement, went to Washington, and secured the postoffice where he wanted it. The court seemed to make the failure to show corrupt practice on the part of the obligee an excuse for holding the contract valid, as there was no evidence that he used any improper means to gain his point, or even that he influenced any senator or representative in Congress, or any officer of the government, to interfere in his behalf. The court naively added that, "for aught we know, he appeared, as any citizen might, and has a right to do, before the proper office at Washington, and stated the merits of his claim so convincingly and conclusively that the location desired seemed to be the most proper and available one. Certainly there could be nothing wrong in this."

In another line of cases contracts have been declared valid whereby donations of land or money have been offered to the state, in accordance with the terms of a statute authorizing the same; the courts refusing to question their propriety where they have been thus sanctioned by the legislature and are not open to any constitutional objections. Carpenter v. Mather, 4 Ill. 374; State v. Johnson, 52 Ind. 197; Brown v. Anderson, 1 T. B. Mon. 198; State Treasurer v. Cross, 9 Vt. 289, 31 Am. Dec. 626.

In two early New England cases subscription papers, in which the signers agreed to pay the respective sums set opposite their names if a courthouse was erected on a certain site, were upheld as binding agreements; but the principle of public policy was not considered, the decisions turning on the question as to the sufficiency of the mutual promises of the subscribers as a consideration. Bull v. Talcot, 2 Root, 119, 1 Am. Dec. 62; George v. Harris, 4 N. H. 533, 17 Am. Dec. 446.

A different question, and one not covered in the note, arises where grants of land are actually made upon a condition, expressed in the deed itself, that a public building shall be located on a certain site; or where the validity of contracts involving the location or removal of county seats is challenged on grounds of public policy.

he was legally entitled, instead of a mandamus, if the contract with the city had been valid, yet his cause of action was not properly conceived, and he cannot recover the $600 which he subscribed and paid because the contract with the city was broken by it, as it was void, being against public policy and founded upon an illegal consideration. For the same reason, the third issue was immaterial, as constituting the basis for affirmative relief, in behalf of the defendants. The enhancement in value of plaintiff's property by the erection of the city hall on the site designated in the contract cannot be used as a counterclaim, as the city can gain nothing, either directly or indirectly, by the illegal transaction. It surely cannot benefit in any way by a void contract, for, when it is determined that the transaction was invalid, any increase in value of the plaintiff's property becomes a mere incident of the erection of the building at that place, and the case stands the same as if the contract had not been made, and what the city did was merely a voluntary act on its part. There is nothing, therefore, to support the claim for an allowance because of the enhancement, for the reason already stated and for the reason hereafter assigned for denying relief to the plaintiff. The form of the issues indicates that the court proceeded in the trial upon the theory that the contract was valid, and had been broken, and for this reason submitted the third issue, whereas the case should have been tried upon the opposite idea,—that the contract was void, and that no question of damages or other question which presupposed the validity of the contract, such as the enhancement in value of plaintiff's property, was presented. While the third issue was not material in the respect indicated, it is material in another respect, as will hereafter appear. If the contract is void, and plaintiff is not, by his relation to the transaction, prevented from recovering, it follows that he would be entitled to judgment, as for money had and received to his use, or for money paid upon a consideration which has failed, or upon a condition, compliance with which cannot be enforced, which practically amounts to the same thing. For the same reason as that just given, plaintiff's prayer for a mandamus, or coercive process, was properly denied. This sufficiently disposes of all preliminary matters, and brings us to the consideration of the real issues involved.

The case naturally resolves itself into two questions which require discussion: First. Was the contract against public policy, or based upon an illegal consideration, and therefore void? Second. The plaintiff being a party to the illegal transaction, if it was illegal, is he in a position to ask for a return of the money, or is he debarred of a recovery, being *in pari delicto*?

The statute provides that the authorities of a town, whether commissioners or aldermen shall make such orders for the disposition or use of its property as the interest of the town may require. Revisal 1905, § 2916. Judge Dillon, referring to the general duty of municipal officers with respect to the affairs which they have in charge, says: "Powers are conferred upon municipal corporations for public purposes; and, as their legislative powers cannot, as we have just seen, be delegated, so they cannot, without legislative authority, express or implied, be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties. The cases cited mark the scope and illustrate the application of this salutary principle in a great variety of circumstances, and, for the protection of the citizen, it is of the first importance that it shall be maintained by the courts in its full extent and vigor." 1 Dill. Mun. Corp. 4th ed. § 97, p. 156. It will be seen, therefore, that public office in a city is a public trust to be administered for the equal benefit and advantage of all the citizens of the municipality; and the governing body will not be permitted to contract at any time so as to deprive itself of the free exercise of its judgment and discretion in providing for what may afterwards turn out to be the best interest of all citizens alike; and especially will it not be allowed, by an obligatory agreement, to discriminate in favor of one citizen or class of citizens as against another entitled to equality of privilege and benefit, even for a valuable consideration. It must at all times retain freedom of judgment, so that its decisions will be influenced only by a regard for the public welfare. We take it that any contract by which it should be attempted to prevent the city authorities from deciding impartially on a matter affecting the general welfare would be unenforceable. If public trustees or officers may, by contract, devest themselves of any portion of the essential powers intrusted to them, they may just as well alienate all of them, though by degrees, and thus eventually abdicate the exercise of every governmental function. Such agreements are, therefore, contrary to the true principles upon which society is founded, and subversive of all well-regulated government. These propositions would seem to be self-evident. "All agreements, for pecuniary considerations, to control the business oper-

ations of the government, or the regular administration of justice, or the appointment to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." Providence Tool Co. v. Norris, 2 Wall. 45, 17 L. ed. 868; Cameron v. M'Farland, 4 N. C. (2 Car. Law Repos.) 415, 6 Am. Dec. 566; Wharton, Contr. § 403..

The leading case of Martin v. Brooklyn, 1 Hill, 546, is one in which the principle was applied, and where it appeared that, for a consideration, public trustees agreed with a lot owner to make certain improvements, which they refused to do. The court held that they might decline to go forward with the improvement on the ground that it was injurious or unprofitable to the public, and that in this respect they enjoyed a discretion which individuals have no power to control and the trustees no power to part with. It was further said: "To allow that commissioners of streets and highways may bind themselves by contract to subserve the interest of individuals would be a clear violation of public policy. They are officers of municipal corporations or quasi corporations, and, in respect to the laying out of streets and highways, are primarily bound to consult the interests of the community at large." The doctrine there enforced was that a contract will not be sustained which tends to restrain or control the judgment of public officers, which must always be impartial. But all promises of individuals to pay a portion of the expenses of public improvements do not necessarily fall within the principle, and may not be void. The validity of the particular contract will depend, of course, upon whether it has the evil tendency to influence the officer in the discharge of his public duty by trammeling his judgment in matters about which he should be left free to act as the public interest alone may dictate or require. This is the vitiating element, and if the agreement has that tendency in the eye of the law, it makes no difference what is the actual motive in the particular instance, or how pure it may be. In the case of Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730, the rule was said to rest upon the ground that a corporation, acting for the benefit of others, has no power to enter into a contract which would prevent it from performing its public duties, and that this restriction upon the power of a corporation to make such contracts is nothing more nor less than the application of the familiar principle which avoids the contracts of individuals when they are detrimental to the public rights. This identical question was fully considered by a court of exceptional ability in Gale v. Kalamazoo, 23 Mich. 344, 9 Am. Rep. 74, in which Cooley, Ch. J., for the court, said: "If a municipal corporation can preclude itself in this manner from establishing markets wherever they may be thought desirable, or from abolishing them when found undesirable, it must have the right, also, to agree that it will not open streets, . . . or introduce water for the supply of its citizens, except from some specified source, or buy fire engines of any other than some stipulated kind, or contract for any public work except with persons named; and, if it might do these things, it is easy to perceive that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumerable inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description. Individual citizens, looking only to the furtherance of their private interests, might, in various directions, engage it in permanent contracts, which, while ostensibly for the public benefit, would impose obligations precluding further improvements and depriving the town prospectively of those advantages and conveniences which the municipality was created to supply, and without which it is worthless. For, if the village might bind itself to one market house for ten years, it might do so for all time to come; and, if it might agree that improvements and conveniences of one class might be confined by contract to one quarter of the town, a reckless or improvident board might agree with a greedy or unscrupulous proprietor of town lots that all improvements of every description should be so located or made as to conduce to his benefit, irrespective of the general good. It will not do to say of such a contract that it must be assumed to have been reasonable in view of the actual condition and wants of the village, and of its probable growth and future needs. . . . Indeed, it is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise." The court concludes that the village had incurred no liability to the plaintiff by its breach of the contract, as it was void, being against public policy.

We have quoted liberally from the opinion in that case, not only because the personnel of the court entitles its judgments to the greatest respect, but because the proposition is stated in concrete form and sustained by

most cogent reasoning and apt illustration. We do not ignore the fact that there the contract involved the idea of permanency in the location of the market house; but the court attached no special importance to that feature, but decided the case rather upon the ground that, if the agreement was held to be valid, the town commissioners would be deprived of the exercise of that judgment and discretion in the premises so essential to the public welfare. In our case the promise that the buildings shall remain near the plaintiff's property is, it seems to us, necessarily implied by the nature of the contract, for it could be of little or no benefit to him if they could be removed at any time, even if such a course were practicable. The principle of that case is applicable here, and the closing words of the court, as quoted by us, clearly so indicate. The question is fully discussed in Fuller v. Dame, 18 Pick. 472, in which Chief Justice Shaw, with his accustomed learning and ability, presents most satisfactory reasons and unanswerable arguments in condemnation of such agreements, and proves their invalidity to a demonstration. He argues that it is not a satisfactory excuse to say that, when the agreement was entered into, the officers or trustees had come to the opinion that the location in question was the best for the interests of the public, and for the interests of the corporation. Such an opinion might be changed by new views and new offers. Upon all these questions the influence of the promise of separate and distinct advantage deprived the officers of the power of exercising a free, disinterested, and unbiased judgment. Any influence from any quarter, created by the promise of a sum of money, to induce them so to contract, and to yield to particular terms, with a view to benefit separate and individual interests, operated as an injury to the public, and rendered the contract void. The confidence of the people in the proper transaction of business by its officials could only be safely reposed under the belief that they will fairly exercise their best and unbiased judgment upon the question of fitness, without being influenced by extraneous considerations having no connection whatever with the accommodation of the public. The conclusion is thus substantially stated: It is obvious that, if one large landholder may make a valid, conditional promise to pay a large sum of money to a stockholder or influential citizen, on condition that a work of great public improvement may be so fixed as to enhance the value of his estate, all other landholders may make like promises on similar conditions, and public works, which should be conducted with a view to the public interest, and to the just rights of those who make advances for the public benefit, would be in danger of being overlooked and sacrificed in a mercenary conflict of separate local and private interests.

We regard the reasons advanced in that case as conclusive of the question, and find that the courts and text writers have generally adopted the same views. "'A contract may not be sustained which tends to restrain or control the unbiased judgment of public officers;' . . . it being contrary to public policy and void as abdicating a public function." Ingersoll, Pub. Corp. 310. The powers conferred upon officers of cities, to be exercised for the public good in making improvements demanded by public convenience, are continuing and inalienable. 2 Dill. Mun. Corp. 4th ed. § 685. "This power the city cannot refuse to exercise when public necessity or convenience demands that it shall be done; nor can it be allowed to excuse its failure in this particular upon the ground that it has, by contract, deprived itself of the right to act." Louisville City R. Co. v. Louisville, 8 Bush, 417; Columbus Gas Light & Coke Co. v. Columbus, 50 Ohio St. 65, 19 L.R.A. 510, 40 Am. St. Rep. 648, 33 N. E. 292; New Haven v. New Haven & D. R. Co. 62 Conn. 257, 18 L.R.A. 256, 25 Atl. 316; Indianapolis v. Indianapolis Gaslight & Coke Co. 66 Ind. 404; McKeesport v. McKeesport & R. Pass. R. Co. 2 Pa. Super. Ct. 242; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Matthews v. Alexandria, 68 Mo. 119, 30 Am. Rep. 776. The court, in Jackson v. Bowman, 39 Miss. 682, said: "Even if we suppose the city to have legislative power and control over the liquor license, which it clearly has not, it was not competent for the board to bind the city by a contract taking away the legislative discretion; nor would the exercise of its legislative discretion violating the terms of the contract subject the city to the payment of damages or penalty. The authorities on this point are clear, but the reason of the thing is enough." The question has frequently arisen in the establishment of railroad depots. Railway companies are quasi public corporations, and it has been said that the public have an interest in the location of their depots; the public convenience and accommodation being involved. "It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points and in such manner as to subserve the public necessities and convenience, that it has been held by all the courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against public policy, and therefore void." People ex rel. Hunt v. Chicago & A. R. Co. 130 Ill. 175, 22 N. E. 857. "It seems to be universally well settled that contracts undertaking

to obligate a railroad company to establish its depot exclusively at a particular point are void as against public policy." Florida C. & P. R. Co. v. State, 31 Fla. 508, 20 L.R.A. 419, 34 Am. St. Rep. 30, 13 So. 106. Cases and text-books to the same effect can be cited numerously. We give only a few of them. St. Joseph & D. C. R. Co. v. Ryan, 11 Kan. 602, 15 Am. Rep. 357; Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369; Mobile & O. R. Co. v. People, 132 Ill. 559, 22 Am. St. Rep. 556, 24 N. E. 643; Texas & P. R. Co. v. Marshall, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; Louisville City R. Co. v. Louisville, *supra;* Holladay v. Patterson, 5 Or. 177; Marsh v. Fairbury, P. & N. W. R. Co. 64 Ill. 414, 16 Am. Rep. 564; Greenhood, Pub. Pol. 319; 2 Beach, Modern Law of Contracts, § 1517.

When a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract, and not its actual result. 15 Am. & Eng. Enc. Law, 2d ed. p. 934. We must not be understood as holding that in no conceivable case can a citizen contribute to the expense of erecting a public building. We can easily imagine circumstances where such contributions might be lawful and proper to be considered in determining the best location for the public, but the donation of money must not be the inducement to the selection of a site apart from the public interests concerned. Cases which strongly approve the doctrine by which the particular contract in this case is condemned, and in which the authorities are reviewed at length, are Woodman v. Innes, 47 Kan. 26, 27 Am. St. Rep. 274, 27 Pac. 125, and Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746. This court has recently had under consideration, in Glenn v. Moore County, 139 N. C. 412, 52 S. E. 58, a question very similar to the one now presented. The plaintiff in that case alleged that the defendants had contracted to maintain a public bridge over a river at a certain point on his lands for the considerations set forth, and that they were about to abandon the bridge and erect a new one at another place on the river not far away. He sought to enjoin the defendants from constructing the other bridge. This court held that the discretion of the commissioners could not be thus controlled or coerced. The reasons for this conclusion are fully stated by Mr. Justice Connor in the opinion of the court delivered by him. Citing Washington Toll Bridge Co. v. Beaufort, 81 N. C. 491, the court says: "The essential powers of government conferred for wise and useful purposes should remain undiminished and unimpaired in the legislative body itself, and pass in full force to its successors. When a contract undertakes to alienate any of these it is inoperative, and, as no right vests, so no obligation is created under it." The two cases are not distinguishable in principle. The court would be fully as reluctant to give the plaintiff relief in the case at bar as it was in the case cited, because here it is expressly alleged that the money was paid for the purpose of inducing the defendant to erect the buildings near the plaintiff's lands so that the latter would be enhanced in value. This was virtually inducing them to part with a discretion which should have been exercised in behalf of the public, and not of the plaintiff.

This brings us to the consideration of the next question,—whether, the contract being void as founded upon an illegal consideration, the plaintiff can recover the money he has paid in part execution of the same. With reference to this subject, certain rules may be taken as settled. The law gives no action to a party upon an illegal contract, either to enforce it directly, or to recover back money paid on it after it has been executed. Webb v. Fulchire, 25 N. C. (3 Ired. L.) 485, 40 Am. Dec. 419; Warden v. Plummer, 49 N. C. (4 Jones, L.) 524; 15 Am. & Eng. Enc. Law, 2d ed. p. 997. The rule rests upon the broad ground that no court will allow itself to be used when its judgment will consummate an act forbidden by law. The maxim is, *Ex dolo malo* (or *ex turpi causa*) *non oritur actio*, and the kindred one is, *In pari delicto potior est conditio defendentis*. In such cases the law leaves the parties where it finds them. When parties are *in pari delicto* in respect to an illegal contract, and one obtains advantage over the other, a court will not grant relief (Wright v. Cain, 93 N. C. 296); and when they have united in an unlawful transaction to injure another or others or the public, or to defeat the due administration of the law; or when the contract is against public policy, or *contra bono mores*,—the courts will not enforce it in favor of either party. York v. Merritt, 77 N. C. 213, 80 N. C. 285; King v. Winants, 71 N. C. 469, 17 Am. Rep. 11; Pinckston v. Brown, 56 N. C. (3 Jones, Eq.) 494; Sparks v. Sparks, 94 N. C. 532. Chief Justice Smith said, for the court, in the last case: "But the principle is that such an agreement will not be enforced at the instance of either party, not that what may have been done in carrying out its purpose will be undone by the court. It will not assist when its aid is asked; or, in . . . [other words], its provisions 'will not be enforced in this court,'—a court exercising equitable functions. The rule that refuses to compel the execution of such a contract, for similar reasons refuses to relieve from the

consequences of what the parties have done under it, in giving it full effect." The rule is departed from when there is inequality of condition as between the parties, or one of them has come under the subjection of the other, or has been induced by oppression, imposition, undue influence, or improper means, to make the contract, in which case he is not equally at fault with the other. While *in delicto*, he is not *in pari delicto*, but stands, as it were, *in vinculis*. Pinckston v. Brown, *supra;* 15 Am. & Eng. Enc. Law, 2d ed. p. 1004. When the contract is executory, the court will not enforce it, and, when executed, will not set it aside as against one party at the instance of the other. We need not decide nor inquire whether, when money is paid on an illegal contract, the aid of the court can be successfully invoked for its recovery, though the other party refuses to perform any part of the agreement, so that it is wholly executory on his side. There is conflict of authority upon this question. Id. p. 1001; 1 Page, Contr. § 526; Greenhood, Pub. Pol. p. 80; Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347; Knowlton v. Congress & E. Spring Co. 57 N. Y. 518; Kearley v. Thomson, L. R. 24 Q. B. Div. 742; White v. Franklin Bank, 22 Pick. 181; Wald's Pollock, Contr. 3d Am. ed. p. 502. We have seen that he may recover where there has been any unfair advantage taken or any imposition practised. Webb v. Fulchire, *supra*.

But it must not be supposed from what has been said that, in order to deprive a party of the right to repudiate an illegal contract and to recover money already paid thereon, it is necessary that the illegal transaction should have been fully executed, as it is quite sufficient for that purpose that there has been a partial fulfilment of the illegal undertaking by the party against whom the action is brought for the recovery of the amount so paid to him. 15 Am. & Eng. Enc. Law, 2d ed. p. 1007. We believe that the law writers and the courts are fairly well agreed upon that proposition. Kearley v. Thomson, *supra;* Knowlton v. Congress & E. Spring Co. 57 N. Y. 518; Ullman v. St. Louis Fair Asso. 167 Mo. 273, 56 L.R.A. 606, 66 S. W. 949; Wald's Pollock, Contr. 3d Am. ed. pp. 502, 507; Hooker v. De Palos, 28 Ohio St. 251. Especially should this be the law where the party who has thus partially performed the contract in return for the money received by him from the plaintiff cannot be put *in statu quo*, which is the case here. Lord Justice Fry, in Kearley v. Thomson, *supra*, for the court, said: "I hold, therefore, that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under that illegal contract can be recovered back." Chief Justice Coleridge, Lords Esher, Bowen, and the other eminent judges who sat with them fully concurred in this view. This has been generally accepted as the correct rule, even by the courts which hold that money paid on an illegal contract may be recovered back, where the contract is executory on the other side or as to the defendant. The principle should certainly apply to our case, in which it appears that the defendant has substantially performed the contract in part, and cannot be restored to its original position, and that the plaintiff has received a benefit which is not only substantial, but fully commensurate with the amount he has paid on the contract. While he loses the right to have the unexecuted portion of the contract performed, he does not by any means depart from the court empty handed. Having received an equivalent for his money in the increased value of his property by the placing of the city hall where it is, he has no just ground to complain. We find no error in the conclusion and judgment of the court upon the verdict.

No error.

OHIO SUPREME COURT.

CHARLES HARVEY MASON, Plff. in Err.
v.
WILLIAM MOORE et al.

(73 Ohio St. 275, 76 N. E. 932.)

Bank—default of cashier—liability of directors.

1. To the directors of a bank are committed the general management and supervision of its affairs, but they are authorized to appoint a cashier and confer upon him the usual powers pertaining to such an of-

Headnotes by the COURT.

Case Note.—Liability of directors of bank for default or negligence of cashier.—It is difficult to lay down any general rule by which the liability of bank directors for the acts of their subordinate officers can be measured. As the directors are usually men who are engaged in other pursuits, and who are not expected to devote their whole time and attention to the affairs of the bank, they must necessarily confide the active management of the business largely to their executive officers, and just what degree of supervision and control will be sufficient to relieve them from liability for the acts of such officers is rather uncertain. The courts have been reluctant to establish a strict rule of liability, lest, as has been frequently said, by so doing they deter men of integrity and ability from accepting the responsibilities

fice, and to him may be properly confided the custody of the money, securities, and valuable papers of the bank, and the supervision of its books and accounts; and, while this does not absolve the directors from the duty of reasonable supervision and the exercise of that degree of care which is exercised by ordinarily careful and prudent men, acting under similar circumstances, yet they are not insurers of the fidelity of the cashier and other agents whom they have appointed; and, where such directors act in good faith, and with ordinary care as defined above, they are not responsible for losses resulting from the wrongful acts or omissions, of such cashier or other agents, unless the loss is a consequence of their own neglect of duty.

Same—duty of directors.

2. The directors of a bank are not held, as a matter of law, to know all its affairs, or what its books and papers would show; and such knowledge cannot be imputed to them for the purpose of charging them with liability.

Same—attestation of report.

3. In an action against the directors of a national bank by one who purchases some of its stock, relying on the statements contained in its report to the Comptroller of the Currency as to its resources and liabilities, which report was attested by the directors and published as the statute directs, some of which statements are false, whereby the purchaser is damaged, it is not error for the court to charge the jury that "it must appear by a preponderance of the evidence that, at the time of the attesting and publication of said report, the directors so attesting this report, or who assented to

of the position. Generally it is declared that directors must exercise reasonable care and prudence, but this rule is necessarily indefinite, since in many cases it is hard to determine just what reasonable care and prudence would be. And the courts have also differed as to whether reasonable care and prudence mean the care and prudence which men would exercise in regard to their own affairs, or that which bank directors generally exercise.

It is well settled that directors who have exercised care to select honest men as cashiers or other officers are required to exercise only ordinary care and diligence in the supervision and control of their conduct, and are not insurers of their fidelity. Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; Dunn v. Kyle, 14 Bush, 134; Savings Bank v. Caperton, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; Union Nat. Bank v. Hill, 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012; Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120; Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

The directors are not expected to give their whole time and attention to the business of the company; and they are entitled to commit the actual management of the business to their duly authorized officers. Briggs v. Spaulding, *supra;* Clews v. Bardon, 36 Fed. 617; Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587, Affirming 82 Fed. 181.

Nor are they guilty of want of ordinary care in permitting the same person to discharge the double duty of bookkeeper and cashier, where he is regarded as a man of high moral and financial standing, and the directors have no reason to doubt his integrity. Savings Bank v. Caperton, *supra.*

But they are not intended to be mere figureheads, and their duties do not end with the appointment of honest men to the executive offices. They must maintain a general supervision over the affairs of the bank, and have a general knowledge of the manner in which its business is conducted; and they cannot confide the exclusive management and control of the business to the cashier, relying entirely on his good faith and judgment, and then escape liability for losses from his dishonesty or mismanagement on the ground of their ignorance of his negligent or wrongful conduct. Gibbons v. Anderson, 80 Fed. 345; Wheeler v. Aiken County Loan & Sav. Bank (C. C. D. S. C.) 75 Fed. 781; Robinson v. Hall, 12 C. C. A. 674, 25 U. S. App. 48, 63 Fed. 222, Reversing 59 Fed. 648; Union Nat. Bank v. Hill, *supra;* Hanna v. People's Nat. Bank, 35 Misc. 517, 71 N. Y. Supp. 1076; Wallace v. Lincoln Sav. Bank, *supra;* Warren v. Robison, 19 Utah, 289, 75 Am. St. Rep. 734, 57 Pac. 287.

The neglect which will render them responsible for not exercising proper control and direction must depend upon the circumstances of each particular case. Briggs v. Spaulding, *supra;* Percy v. Millaudon, 8 Mart. N. S. 68; Wallace v. Lincoln Sav. Bank and Warren v. Robison, *supra.*

And it has been held that, in determining whether or not bank directors exercise the ordinary care which the law requires of them, regard must be had to the usages of the particular business. Thus, it is said, if the directors of a bank perform their duties as such in the same manner as they were performed by all other directors of all other banks in the same city, it could not fairly be said that they were guilty of gross negligence. Swentzel v. Penn Bank, 147 Pa. 140, 15 L.R.A. 305, 30 Am. St. Rep. 718, 23 Atl. 405.

The duties of the board of directors and the cashier are correlative. On one side are those of an executive nature, which relate mainly to the details; on the other side are those of an administrative character, which relate to the direction and supervision. The directors are not expected to watch the routine of every day's business, or observe the particular state of the accounts, unless there is special reason: nor are they to be held responsible for any sudden and unforeseen dereliction of officers, or other accidents which there was no reason to apprehend. Gibbons v. Anderson; Campbell v. Watson; and Warren v. Robison,—*supra.*

They are not required to be expert or

and directed the publication of the same, did so knowing said report to be false, or under such circumstances as will warrant the jury in finding, by a preponderance of the evidence, that such director, or directors, by the exercise of ordinary care and prudence, would have known that the said report was false in some one or more of the particulars set forth in the petition."

(February 2, 1906.)

ERROR to the Circuit Court for Columbiana County to review a judgment affirming a judgment of the Court of Common Pleas in defendants' favor in an action brought to hold the directors of a national bank liable for losses alleged to have resulted to plaintiff because of action upon their fraudulent representations. Affirmed.

Statement by Price, J.:

The plaintiff in error was plaintiff below in an action against Reason B. Pritchard, William Moore, John McVicker, James K. Frew, and David A. Pritchard, to recover of them $2,000 damages which he sustained by reason of the representations and conduct of said defendants while they were acting as directors of the First National Bank of New Lisbon. They were the lawful directors during the year 1897, and were elected again to the same positions on the 11th of January, 1898. They qualified and entered upon the discharge of their duties. During both years, and until the 21st day of October, 1898, Reason B. Pritchard was president and William Moore, vice president of the bank. On the latter day, the Comp-

competent bookkeepers, or to procure a periodical expert examination of the books, or to exercise any system of espionage over the cashier, where there is no reason to distrust his integrity or efficiency. Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587, Affirming 82 Fed. 181; Savings Bank v. Caperton, *supra*.

Thus, where the cashier, at the time of his appointment, possessed a high character for integrity, having the confidence of the entire community in which he lived, and had held his place for about twelve years, while the frauds practised by him occurred during the last four or five years of this period, the directors were held not to be liable, in the absence of bad faith and gross negligence, for loss to the stockholders caused by the cashier's frauds. Dunn v. Kyle, 14 Bush, 134.

And they are not liable to stockholders for losses caused by the act of the cashier in making loans in excess of the legal limit, where such acts were without the participation or knowledge of the directors, and the cashier was supposed by all to be entirely competent and trustworthy, and acted as manager of the loan and discount business, while the directors acted merely as advisors when applied to, and the promoter of the bank, who was also a stockholder, knew, and the other stockholders must be presumed to have known, that the directors were entirely unfamiliar with the banking business. Clews v. Bardon, 36 Fed. 617.

So, where they have intrusted the management of the bank to the president and cashier they are not liable for losses resulting from improvident loans made by the latter, where the loans were made in good faith, with no other desire than to serve the interests of the bank. Wheeler v. Aiken County Loan & Sav. Bank (C. C. D. S. C.) 75 Fed. 781.

The failure of bank directors to examine the individual ledger of the bank, which, by the rules of their bank and of most other banks in the city, directors are not permitted to see, and in which alone the frauds by which the bank is wrecked can be discovered, will not make them liable for the fraud of the cashier and president and other employees of the bank. Swentzel v. Penn Bank, *supra*.

But, if they become acquainted with any fact calculated to awaken suspicion of the fidelity of the cashier, a degree of care commensurate with the evil to be avoided is required; and the want of that care renders them personally liable. Percy v. Millaudon, 8 Mart. N. S. 68.

And where the fraud or mismanagement of the cashier is made possible by the gross inattention and negligence of the directors, there is no question that they are liable to the bank or stockholders for a resulting loss. Mutual Bldg. Fund & Dollar Sav. Bank v. Bossieux, 4 Hughes, 387, 3 Fed. 817; Ackerman v. Halsey, 37 N. J. Eq. 356.

So, where a bank suffered a heavy loss through the thefts of its cashier, carried on through several years, which were accomplished by drawing drafts on the insolvent bank's correspondent and entering them on the insolvent bank's books for smaller amounts, by drawing drafts which were never credited, and by false charges and overcharges against the correspondent bank; and, while the defalcations did not show on the insolvent bank's books, they might have been examined by a comparison of the books with the balance sheets of the correspondent bank, which were sent in once a month, upon which each of the drafts was entered with its number, and the vouchers returned therewith; and the directors failed to make any examination, but trusted the cashier entirely with such correspondent's accounts, while the bank's charter required the directors to make quarterly statements of the bank's actual condition, and the by-laws required them to examine the bank every three months,—it was held that the perpetration of the cashier's fraud was the consequence of the directors' negligence, which made them liable to the receiver of the bank. Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120.

But where the directors of a bank have, from their number, appointed a discount and an examining committee, to whom the over-

troller of the Currency took possession of the bank, and on the 12th day of November, 1898, I. B. Cameron was appointed receiver on account of its insolvency. On or about the 15th day of January, 1898, the plaintiff below, now plaintiff in error, purchased from W. S. Potts, as administrator of the estate of Simon Wisden, deceased, 10 shares of the capital stock of said bank for a consideration of $1,000, and procured the shares to be duly transferred to him on the books of the bank, and he owned the stock when the receiver was appointed and the affairs of the bank wound up. He, with other stockholders, was assessed 100 per cent on his shares for the purpose of dis-

sight of the bank is intrusted, the committees, and not the general board of directors, are responsible to the stockholders for a loss resulting to the bank through the action of the cashier in continuing through several years to discount for a dealer in cheap musical instruments notes of purchasers, who were unknown to the bank, which made no attempt to ascertain whether or not they were responsible and able to pay their notes; such discounts finally amounting to fully two thirds of the bank's capital. Hanna v. People's Nat. Bank, 35 Misc. 517, 71 N. Y. Supp. 1076.

So, directors of a national bank who are members of the discount and examining committees will be held liable for the losses occasioned by the reckless and fraudulent loans by the cashier, where they made not even a cursory examination of the discounts or overdrafts beyond looking over such notes as the cashier saw fit to consult them about. Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587, Affirming 82 Fed. 181,

While, as to the bank itself, or the stockholders, the directors are liable for loss because of default of cashier resulting from their nonfeasance or their mere failure to exercise ordinary care, the rule is otherwise as to creditors. As to the latter, it seems that they are liable only for losses resulting from their actual misfeasance. Utley v. Hill, 155 Mo. 232, 49 L.R.A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; Union Nat. Bank v. Hill, 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012.

The relation between the directors of a banking corporation and its creditors is not that of trustee and *cestui que trust*, and the directors are not liable to the creditors for loss resulting from the mere failure of the directors to exercise ordinary prudence in the management and supervision of the affairs of the bank, because of which the bank becomes insolvent through the act of the cashier in making improvident loans. Union Nat. Bank v. Hill, *supra*.

And a depositor in a bank cannot, after the bank has become insolvent, bring a suit, either at law or in equity, against its directors, to hold them personally liable, on the ground of their negligence and their inattention to the affairs of the bank, for losses caused by the act of the cashier in loaning large sums of money to his father, who was one of the organizers of the bank, where the directors were guilty of no wilful or fraudulent conduct. Deaderick v. Bank of Commerce, 100 Tenn. 457, 45 S. W. 786.

The directors of a bank, who serve gratuitously, are not personally liable to a depositor for losses resulting from the defalcations of a codirector acting as cashier, teller, and bookkeeper, when they had no reason to suspect his fidelity, and he was selected for his position because of his high character for integrity and because of his experience as a banker. Savings Bank v. Caperton, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885.

False statements in a report which a banking corporation is required to make to the secretary of state by a statute making it a misdemeanor, punishable by fine or imprisonment, for the directors to refuse to make the statement, or wilfully and corruptly to make a false statement, will not make the directors liable to a common-law action for deceit, by one who made a deposit in the bank relying on such report, if they made the statements in good faith, relying on details furnished to them by the cashier, whose reputation was good, but through whose fraud and carelessness the bank was wrecked. Utley v. Hill, *supra*.

The liability of bank directors and officers, under Mo. Rev. Stat. 1889, § 2760, for deposits accepted with the directors' assent after they had knowledge that the bank was insolvent or in failing circumstances, does not extend to deposits received at a time when the bank was insolvent as a result of the fraud and carelessness of the cashier, when the directors did not have actual knowledge of the bank's condition, but acted in good faith and were innocent of wrongdoing, although they were negligently ignorant of the bank's condition, which they could have ascertained if they had not neglected to investigate or keep posted as to its affairs. Ibid.

But in Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120, which was a suit by a receiver against the directors of a bank to recover losses alleged to have been due to their negligence, the court said that directors are trustees, not only for the corporation, but also, though perhaps in a modified sense, for the creditors of the corporation, who become such by depositing their money in the bank in the ordinary course of such business; that a depositor has a right to rely upon the character of the directors and officers of the bank, and that they will perform their sworn duty to manage the affairs of the bank according to law, and devote to its affairs the same diligent attention which ordinary, diligent, and prudent men pay to their own affairs.

As to liability of directors of corporation generally to the corporation, see note in 55 L.R.A. 751.

charging the liabilities of the bank, which he says he paid. This amount and the original purchase price of the stock constitute the sum for which he asks judgment in his petition. He alleges that, "on the 24th day of December (which was a short time before he purchased the stock referred to above), the said corporation (the bank) professing to comply with the acts of Congress requiring reports exhibiting the resources and liabilities of national banking corporations to be made to the Comptroller of the Currency, made, with the knowledge, assent, and direction of the defendants, a report to the said Comptroller, of the resources and liabilities of said corporation as they existed on the 15th day of December, 1897, which report was sworn to by M. J. Child, as cashier, and was attested as correct by said Reason B. Pritchard, James K. Frew, and John McVicker. A copy of said report, marked 'exhibit A,' is hereto attached and made a part hereof."

The following is the report:

Exhibit A.

Statement of the Condition of the First National Bank at Lisbon, in the State of Ohio, at the Close of Business December 15, 1897.

Resources.

Loans and discounts		$ 74,208 01
Overdrafts, secured and unsecured.		7,509 25
U. S. bonds to secure circulation..		12,500 00
Banking house, furniture, and fixtures		7,850 00
Due from national banks (not reserve agents)		1,089 95
Due from approved reserve agents		13
Checks and other cash items		72 00
Notes of other national banks		1,520 00
Fractional paper currency, nickels, and cents		112 77
Lawful money reserved in bank, viz. Specie	$24,345 60	
Legal tender notes	6,920 00	
U. S. Certificates of deposit for legal tenders		31,265 60
Redemption funds with U. S. Treasurer (5 per cent of circulation)		562 50
Total		$137,590 21

Liabilities.

Capital stock paid in	$ 50,000 00
Surplus fund	1,198 38
Undivided profits, less expenses and taxes paid	2,331 29
National bank notes outstanding	10,950 00
Due other national banks	1,635 77
Individual deposits, subject to check	48,013 40
Demand certificates of deposit	17,461 37
Bills payable	6,000 00
Total	$137,590 21

The State of Ohio, Columbiana County } ss.

I, M. J. Child, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief. M. J. Child, Cashier.

Subscribed and sworn to before me this 24th day of December, 1897. James W. Clark, Notary Public.

Correct. Attest: R. B. Pritchard, James K. Frew, John McVicker, Directors.

The said report and attestation were caused by the defendants, as directors and officers of the bank, to be duly published on or about the 27th day of December, 1897, in the Lisbon Journal, a newspaper published in Lisbon, Ohio. The petition alleges that said report was false in this, to wit: The loans and discounts that were good and collectible did not exceed $40,000, instead of being $74,208.01, as stated in the report. The remaining $34,208.01 of said loans and discounts were, on December 15, 1897, uncollectible and worthless, as defendants then knew. The overdrafts did not exceed $1,000, instead of being $7,509.25; the remaining $6,509.25 of said overdrafts were, on December 15, 1897, uncollectible and worthless, as defendants then knew. The total resources did not exceed $96,873.95, instead of being $137,590.40, as stated in the report. The plaintiff also avers in his petition that the individual deposits exceeded $68,000, instead of being $48,013.40, as reported. The demand certificates of deposit exceeded $46,000, instead of being $17,461.37, as reported. The bills payable exceeded $19,000, instead of being $6,000, as reported. The total liabilities exceeded $199,115.44, instead of $137,590.54, as reported. It is further alleged that on the 15th day of December, 1897, and ever since, the bank was insolvent and unable to meet its liabilities, and its capital stock utterly worthless, all of which was well known to the defendants; and that any examination of said reports and of the books would have disclosed to defendants as such directors that said report was wholly false, and that said bank was being mismanaged and its moneys and assets misappropriated and squandered; that said directors, in failing to exercise the slightest diligence or make the slightest investigation of the business of the bank, were grossly negligent of their duties. He further alleges that in purchasing his stock he relied upon the statements contained in said report as published, and, believing them to be true, he made said purchase, which he would not have done if the true condition of the bank had been stated in the report. The answer admits that the defendants were directors and officers of the bank, as plaintiff alleged, and that on or about October 21, 1898, the Comptroller of the Currency took possession of the bank, and that on November 12, 1898, I. B. Cameron was appointed receiver; and they admit that on or about the 24th day of December, 1897, the bank made a report to the Comptroller of the Currency of its resources and liabilities, which was duly published in the Lisbon Journal. The answer denies each and every other allegation in the peti-

tion. On the issues thus made up the case was tried to a jury.

The bill of exceptions contained in the record shows that on the trial evidence was given tending to prove that the report of the Comptroller of the Currency on the 24th of December, 1897, was made as set out in the petition; that the report was attested as correct by the defendants Reason B. Pritchard, James K. Frew, and John McVicker, and caused by M. J. Child, cashier, to be published on the 3d day of January, 1898, in the Lisbon Journal, a newspaper published in Lisbon, Ohio; that the report was false in this, to wit, that the amount due individual depositors was $68,902.65, and on certificates of deposit $41,781.92,—making the amount of total liabilities $179,270.34; that the bank, on the 15th day of December, 1897, was, and ever since has been, insolvent and unable to meet its liabilities; that John McVicker and James K. Frew signed said report without any examination, at the time, of the books of said bank, as to its correctness; that an examination by a competent bookkeeper on said day, of the balances stated in the accounts of the individual depositors, would have shown the total amount due them to have been $68,902.65, and an examination of the entries in the journal as to certificates of deposits paid, with the ledger of said bank as to the "certificate deposit account," would have shown— Here follows in detail the comparison between the amounts of various certificates paid as entered on the journal, and the amounts of same certificates as posted in the ledger at different times between April 11, 1891, and October 29, 1897, making a total of $31,117.25 of false entries in the ledger to the debtor side of the certificate of deposit account. One certificate for $125 which had been paid April 11, 1891, was entered as paid again for $9,117.25 and carried into ledger for that amount. The evidence further tended to show that the plaintiff relied on the statements contained in the said report on the 15th day of January, 1898, when he purchased the shares of stock set out in the petition; that he paid $1,000 therefor, and was assessed thereon $1,000, which he paid.

Before argument the plaintiff requested the court to give the following instructions: "Gentlemen: If you find that the defendants John McVicker, James K. Frew, and Reason B. Pritchard, or any of them, attested as correct the report of the condition, on the 15th day of December, 1897, of the First National Bank of New Lisbon, Ohio, said attestation as to the persons making the same vouched for, or certified to, the absolute truthfulness of the statements contained in said report; and if you find that said report was not correct, in that the assets were much less, or the liabilities, especially to the individual depositors, or on certificates of deposit, were much greater, than represented in said report, or that said bank was insolvent at said time; and if you further find that said report and attestation was caused by said defendants, or any of them, to be duly published in the Lisbon Journal, and that the plaintiff, relying upon said report and the statements therein contained, purchased some of the capital stock of said bank, and has been damaged thereby,—you will find in favor of the plaintiff against such of said defendants as so attested and published said report, for the amount of such damage." The court refused to give this request, and the plaintiff excepted. In the charge to the jury, which will be considered in the opinion, the court instructed the jury that, as there was no evidence to show that William Moore and David A. Pritchard, who had not attested said report, were present or took any part either in attesting the report or in assenting to or directing its publication, they should not find a verdict against them: and that, as Reason B. Pritchard had deceased during the pendency of the action, and there had been no competent evidence introduced to bind his estate in the hands of his executrix, the jury was not warranted in finding a verdict against said estate. The case was submitted as to the two other defendants, John McVicker and James K. Frew, and the verdict was in their favor, upon which the court rendered judgment. This judgment was affirmed by the circuit court, and the plaintiff prosecutes error here to reverse both of said judgments.

Messrs. **Potts & Wells**, for plaintiff in error:

If false and fraudulent statements of the condition of the corporation are put forth under the authority of the directors, it is not necessary that they should know them to be such; it is their duty to know them to be true, and they are liable for damages sustained by anyone dealing with the corporation relying upon the truth of such official reports.

Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; Caldwell v. Bates, 118 N. C. 323, 24 S. E. 481; 3 Thomp. Corp. § 4244; Hauser v. Tate, 85 N. C. 81, 39 Am. Rep. 689; German Sav. Bank v. Wulfekuhler, 19 Kan. 60; Bank of St. Marys v. St. John, 25 Ala. 566.

The directors of a bank are conclusively presumed to know its condition.

Tate v. Bates, 118 N. C. 287, 54 Am. St. Rep. 719; 24 S. E. 482; Hauser v. Tate,

supra; Gerner v. Mosher, 58 Neb. 135, 46 L.R.A. 244, 78 N. W. 384.

Messrs. Carey & Mullins and Charles S. Speaker, for defendants in error:

Knowledge of all the affairs of a bank, or of what its books and papers would show, cannot be imputed to a director.

Savings Bank v. Caperton, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; Briggs v. Spaulding, 141 U. S. 161, 35 L. ed. 674, 11 Sup. Ct. Rep. 924; Swentzel v. Penn Bank, 147 Pa. 140, 15 L.R.A. 305, 30 Am. St. Rep. 718, 23 Atl. 405; Warfield v. Clark, 118 Iowa, 69, 91 N. W. 833; Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432; Warner v. Penoyer, 82 Fed. 181, Affirming 44 L. R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587; Clews v. Bardon, 36 Fed. 617; Utley v. Hill, 155 Mo. 232, 49 L.R.A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684.

In order to hold bank directors in an action for deceit for damages suffered by reason of negligence generally in the performance of their duties or in signing the required reports, it must be shown that such directors have been guilty of actual, palpable fraud, or of such negligence as amounts to fraud.

Warfield v. Clark, *supra;* Boddy v. Henry, 113 Iowa, 462, 53 L.R.A. 769, 85 N. W. 771; Kountze v. Kennedy, 147 N. Y. 129, 29 L.R.A. 360, 49 Am. St. Rep. 651, 41 N. E. 414; Cook, Corp. Law, 2d ed. 335; Bishop, Non-Contract Law, 316.

Price, J., delivered the opinion of the court:

We have made the foregoing extended statement of this case because of the importance of the questions involved and the necessity for a consideration of all the material facts, in order to reach a proper judgment. The bill of exceptions is brief in its statement of such facts which the evidence tends to prove, and contains the special charges requested by the plaintiff and the general charge to the jury. It is not in dispute that the plaintiff in error relied wholly on the report made by the bank through its cashier, Child, to the Comptroller of the Currency on the 24th of December, 1897, attested by three of its directors, Reason B. Pritchard, James K. Frew, and John McVicker. He purchased the 10 shares of stock on the 15th day of January, 1898. The report referred to was published in the Lisbon Journal on the 3d day of January of that year. The bank was in fact insolvent on and ever since December 15, 1897, but the defendants were ignorant of that fact. The evidence also tends to prove that John McVicker and James K. Frew, directors, signed said report without any examination, at the time, of the books of the bank as to its correctness; that an examination by a competent bookkeeper at that time would have shown the total amount due individual depositors to be $68,902.65, and an examination of the entries in the journal as to certificates of deposit paid, with the ledger of the bank as to "certificate deposit accounts," would have shown quite a number of false entries made by the absconding cashier, between April 11, 1891, and October 29, 1897, making a total of false entries in the ledger of $31,117.25, to the debtor side of the certificate deposit account. So that the cashier, or some one for him, during the period mentioned, frequently manipulated the books, and especially the ledger accounts, at various times producing false entries of the condition of the bank, both as to its resources and liabilities. There is no evidence tending to prove that either of the attesting directors had any knowledge of these false entries, or that anything had previously occurred to their knowledge to excite their suspicion or distrust of the cashier. There is no evidence tending to show that either of them was a competent bookkeeper, and we therefore assume that neither of them was a competent bookkeeper. There is no evidence tending to prove that the directors received any salary or compensation, and we assume that they served without compensation. In short, it seems, as may be the fact in most cases, the directors had implicit confidence in the cashier, who made up the bank's report to the Comptroller, and did not examine the books so as to test its accuracy. And if they had examined the books in order to have discovered the false entries as finally found, their investigation of the preceding year would not have been sufficient, but it must have included each year back to 1890. The bill of exceptions recites, in substance, that an examination by a competent bookkeeper would have shown these false entries and the true condition of the bank. We suppose that a competent bookkeeper is one who is qualified by education and experience to examine and compare the various books kept by the bank, and trace the bearing of one entry upon another in the different books. No doubt that, where a cashier turns to be dishonest, it is within his power to purposely complicate his accounts, and thus thwart all ordinary efforts to ascertain the truth from the books. False entries seem to have been the bane in this case. In the presence of these facts how shall the attesting directors be judged? By their attestations did they vouch for the absolute truth-

fulness of the statements in the report? Or are they held merely by the rule or ordinary care,—care commensurate with the business intrusted to them and the duties properly incumbent upon them?

The plaintiff contends for the former standard, as found in his request appearing in our statement of the case. The trial court declined to charge that proposition, and this is one of the errors assigned. In its stead the court, in paragraph 4 of the general charge, said to the jury: "It must appear by a preponderance of the evidence that, at the time of the attesting and publication of said report, the directors so attesting this report, or who assented to and directed the publication of the same, did so knowing the report to be false, or, under such circumstances as will warrant the jury in finding by a preponderance of the evidence that such directors, by the exercise of ordinary care and prudence, would have known that said report was false in some one or more of the particulars set forth in the petition." The court further charged: "Inasmuch as there has been a large amount of testimony introduced tending to show the manner in which the affairs of said bank were conducted for many years prior to its dissolution, and inasmuch as a great deal has been said by counsel in argument as to the manner in which the directors of said institution attended to its affairs, I feel it my duty to say to you, at the outset, that this is an action for deceit based on the publication of said report as set out in the petition, and the question for you to determine is not whether the directors were generally negligent in the performance of their duties as directors, but whether or not the report in question was false, and whether or not the defendants, or any one of them, knew the same to be false, or would have known the same to be false, had they given such attention to their duties as the law requires under the instructions I shall hereafter give you. . . . " The same standard of liability is repeated in later portions of the charge applying the law to the facts of the case. The plaintiff was not satisfied with the charge, and excepted. The plaintiff, as we have seen, submitted his theory by the request to charge, and we have the different theory of the court in the above instructions. Which of the two is correct?

Section 5211, U. S. Rev. Stat. (U. S. Comp. Stat. 1901, p. 3498), requires the reports of national banks, such as the one under consideration. It provides that "every [banking] association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association and attested by the signature of at least three of the directors. Each such report shall exhibit in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified, and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller it shall be published in a newspaper published in the place where such association is established. . . ." Section 5146 (U. S. Comp. Stat. 1901, p. 3463) prescribes the qualifications of directors: (1) Every director must, during his whole term of service, be a citizen of the United States, and at least three fourths of the directors must have resided in the state, territory, or district in which the association is located, for at least one year immediately preceding their election, and must be residents therein during their continuance in office. (2) Every director must own in his own right at least 10 shares of the capital stock of the association. A director who ceases to be the owner of 10 shares, or otherwise becomes disqualified, shall thereby vacate his place. By section 5147 (U. S. Comp. Stat. 1901, p. 3464) each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title, and that he is the owner in good faith and in his own right of the number of shares of stock required, etc. Having the qualifications named in § 5146, and taking the oath prescribed in § 5147, the directors entered upon the discharge of their duties. They were not required to be bookkeepers, or to possess the expert or technical knowledge of bookkeeping usually adopted by the executive officers of such associations. When they attested the bank's report they did it as the act of ordinary men, or men of common and ordinary intelligence. This report had two purposes: Primarily to inform the Comptroller of the condition of the bank as to resources and liabilities; and its publication is for the information of the stockholders and the general public. There were no personal representations made to the plaintiff. As one of the public, he read the report and relied upon it in purchasing his stock, and was deceived. His action is grounded upon the deceit thus practised upon him as a member of the public.

As to the liability of the bank and its directors, U. S. Rev. Stat. § 5239 (U. S.

Comp. Stat. 1901, p. 3515), provides: "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited, . . . and in cases of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." We have in this section the statutory standard of liability, and it relates to every director who "participated in or assented to" the violations of the provisions of the title of which said section forms a part. If he did not participate in or assent to such violation, this statute fixes no individual or personal liability against him. In this case there was no evidence tending to prove that the defendants participated in or assented to any violation of the banking statute, except such participation or assent as may be ascribed to the attestation of the bank's report; and it would seem that such an act will not be sufficient to establish the participation and assent contemplated and penalized by the statute. Participating and assenting both imply affirmative action of some sort, as distinguished from mere silence and inaction. This statute does not preclude a liability at common law.

If we leave the statute just considered, and look to the common-law liability of directors, we find that actions for damages against them, founded on a published false report of the bank, which they attested, are actions for deceit, and they are controlled by the law governing actions of that character. This doctrine is laid down in numerous cases, some of which are cited later in this opinion. Pomeroy, in his second volume on Equity Jurisprudence (§ 884), states the rule as follows: "It is now a settled doctrine of the law that there can be no fraud, misrepresentation, or concealment without some moral delinquency. There is no actual legal fraud, which is not also a moral fraud. This immoral element consists in the necessary guilty knowledge and consequent intent to deceive,—sometimes designated by the technical term the *scienter*. The very essence of the legal conception is the fraudulent intention flowing from the guilty knowledge. No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party at the time when he makes it." The author then proceeds to illustrate his proposition, which we think fairly represents the text writers on the subject of fraud and deceit.

Diligent counsel have cited many adjudicated cases on the subject, to some of which we add others found in our own research. Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924, is a leading case decided by a court frequently called upon to interpret the laws governing national banking associations. To economize space we omit the facts stated in that case, and summarize the principles it determines. It is there decided that directors of a national bank are not insurers of the fidelity of its agents whom they have appointed, and are not responsible for losses resulting from the wrongful act or omission of other directors or agents, unless the loss is a consequence of their own neglect of duty; they must exercise ordinary care and prudence,—such degree of care as ordinarily prudent and diligent men would exercise; knowledge of all the affairs of a bank, or what its books and papers would show, cannot be imputed to a director for the purpose of charging him with liability. It is true, as said by counsel, that the decision was made by a divided court; but it is the opinion of the majority, and that majority, as in all such cases, declares the law. But the dissenting opinion is not in conflict with the rule we here adopt. The case has wide support in the decisions of the courts of last resort in many states, some of which we will notice.

Kountze v. Kennedy, 147 N. Y. 124, 29 L.R.A. 360, 49 Am. St. Rep. 651, 41 N. E. 414, was an action to recover damages for fraud and deceit alleged to have been practised by Kennedy, by which plaintiff claimed to have been induced to purchase certain stock and bonds of the Howe Machine Company, a corporation. Two of the prevailing principles of the case appear to be: (1) That in an action for deceit the misrepresentation upon which an action is based must be shown not only to have been false and material, but it must be also shown that the defendant, when he made it, knew that it was false, or, not knowing whether it was true or false, and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue. (2) The written statement of the president of the corporation as to its entire assets and liabilities, and the fact that he furnished the statement as a statement of the entire assets and liabilities, were not

of themselves sufficient to warrant the inference that he represented that the statement was true of his own knowledge. In Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684, it is held that directors in a stock corporation, as to the stockholders, are not technical trustees, but are as mandatories, and are bound to apply no more than ordinary skill and diligence. The court, through Sharswood, J., reviews many cases and discusses the relation and liability of directors at length. Decided in 1872. The same court, in Swentzel v. Penn Bank (1892) 147 Pa. 140, 15 L.R.A. 305, 30 Am. St. Rep. 718, 23 Atl. 405, cites with approval Spering's Appeal, *supra*, and holds that "a director of a bank, whose services are gratuitous, and whose duties are to attend the bank once or twice a week to assist in discounting paper, to see how much money there is to loan, and once or twice a year to count the cash on hand and examine the bills receivable and securities to see whether they correspond with the statement furnished by the officers, does not owe the creditors of the bank such care as a reasonably prudent man exercises in his own business, but is amenable only for fraud, or for such gross negligence as amounts to fraud." In the opinion of Paxton, Ch. J., on page 150 of 147 Pa., page 316 of 15 L.R.A., page 721 of 30 Am. St. Rep., and page 414 of 23 Atl. it is said: "Negligence is the want of [ordinary] care according to the circumstances, and the circumstances are everything in considering this question. The ordinary care of a business man in his own affairs is one thing; the ordinary care of a gratuitous mandatory is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give, in a short space of time, to the business of other persons from whom he receives no compensation." The entire opinion is very pertinent to the controversy in the case at bar. See also Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432; Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; and Clews v. Bardon, 36 Fed. 617.

Utley v. Hill, 155 Mo. 232, 49 L.R.A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091, was an action by a depositor in a state bank against the directors to recover money lost by failure of the bank. By the statute of that state, such banks were required to make periodical reports to the secretary of state, and the depositor claimed he was induced to make his deposit by reason of the representations consisting of the reports made to the secretary of state. The court laid down the rule recognized in the above cases. In Warfield v. Clark, 118 Iowa, 69, 91 N. W. 833, 834, it is held that, in an action against the secretary of an insurance company for deceit consisting of false representations contained in its official statement, an instruction that defendant was charged with knowledge of the true condition of the company, and, if the statement filed by him was not correct, it was untrue and false, and so known to be by the defendant, was erroneous, since the action could be maintained only on proof of active, conscious, and intentional fraud. See also Warner v. Penoyer, 82 Fed. 181. That case was reviewed on appeal by the United States circuit court of appeals, as found in volume 61 of United States Appeals at pages 372 et seq., 44 L.R.A. 761, 33 C. C. A. 222, 91 Fed. 587. On page 764 of 44 L.R.A., page 226 of 33 C. C. A., page 379 of 61 U. S. App., and page 591 of 91 Fed. the court says: "Before they [bank directors] can be made responsible for losses which have occurred through the mismanagement or dishonesty of the cashier, it must appear that such losses resulted as a consequence of the omission of some duty on their part. If in all probability these would have occurred just the same, notwithstanding they had been ordinarily diligent and vigilant, there is no justice in shifting them upon the directors, and no principle of law to justify it. They are responsible for their own acts and omissions, but not for those of codirectors in which they have not actively or passively participated." See first paragraph of the syllabus of the case.

There are many other cases of like import for which we have no space in this opinion. We do not overlook the fact that they are in conflict with some other causes, notably Gerner v. Mosher, 58 Neb. 135, 46 L.R.A. 244, 78 N. W. 384, where it is held that the attestation of bank reports by the directors is a positive statement that the condition of the bank is as represented therein; and such directors are personally liable for injuries sustained by false representations of the solvency of the bank, contained in the report, even though they were unaware that such report and representations were false or untrue, and their attestation was made without intention to defraud. That decision was made February 23, 1899, and by a divided court; Irvine and Ryan dissenting from the proposition quoted, but concurring in other points decided. The case seems to be in conflict with the judgment of the same court rendered on February 9th of the same year, in Stuart v. Bank of Staplehurst, 57 Neb. 569, 78 N.

W. 298. The case of Gerner v. Mosher, *supra*, has some support in Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478, and Hauser v. Tate, 85 N. C. 81, 39 Am. Rep. 689; also in Tate v. Bates, 118 N. C. 287, 54 Am. St. Rep. 719, 24 S. E. 482. But we think those cases are extremely harsh, and not in accord with the great weight of authority which establishes a doctrine more consonant with sound reason and the methods commonly adopted and practised by prudent and careful men in the business affairs of everyday life.

The directors of a bank are surely authorized to appoint a cashier, conferring upon him the powers usually exercised in such an office. He is properly confided in as to the custody of its money, securities, books, and valuable papers, and the supervision of its books and accounts. While it is true that the directors cannot devest themselves of the duty of general supervision and control, they may properly intrust to him the powers usually appertaining to the direct management of the business, and, where they have acted in good faith and with ordinary diligence in their general supervision, they are not liable for losses resulting through secret speculations and secret false entries of the cashier. Their position does not require them to devote themselves to the details of the business, which may be left to the clerks and bookkeepers under the supervision of the cashier. They are not required to look with suspicion upon the conduct of these agents or employees, nor to practise a system of espionage over the cashier or his subordinates, without apparent reason; and they have a right to assume they are honest and faithful, where no circumstances transpire to excite doubt or suspicion. On the other hand, they cannot excuse their indifference or negligence by pleading more honesty of intention.

We believe this a fair summary of the law as deduced from the weightier cases and the opinions of text writers. In harmony with the authorities as we approve them, the trial court instructed the jury in the present case with commendable clearness, and properly applied this law to the facts before the jury. It then was a question of fact for the jury to determine whether, under the rules submitted for its guidance, the defendants should be held liable. The verdict was for the defendants. The judgment rendered on the verdict was affirmed by the circuit court, and we are content with that judgment.

Judgment affirmed.

Davis, Ch. J., and Shauck, Crew, Summers, and Spear, J., concur.

4 L.R.A. (N.S.)

OKLAHOMA SUPREME COURT.

DEMING INVESTMENT COMPANY, Plff. in Err.,
v.
SHAWNEE FIRE INSURANCE COMPANY.

(— Okla. —, 83 Pac. 918.)

Insurance—warranties.

1. In an application for fire insurance, made for the purpose of informing the insurance company of the facts with reference to the property sought to be insured, and to furnish it information upon which it is to act in accepting or refusing the risk, and wherein the applicant warrants his answers to be true, a stipulation in an application and policy that, if any of the statements made in the application by the applicant are untrue, the policy shall be void, is a reasonable stipulation.

Same—waiver.

2. Where a waiver of the stipulations and conditions contained in a policy of fire insurance relied upon is the act and con-

Headnotes by BEAUCHAMP, J.

Case Note.—Effect of agent's insertion in the application of false answers to questions correctly answered by the insured.—The general proposition that, if the agent of an insurance company, authorized to solicit insurance, either fraudulently or negligently inserts in the application false answers to questions correctly answered by the applicant, his wrong will be imputed to the company, and it will be estopped to defend an action on the policy upon the ground of the falsity of such answers, is declared in general terms by a large number of cases decided both before and since the decision in New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837 (referred to in t e foregoing opinion), without suggesting or intimating any exception to, or qualification of, the rule in case of stipulations or statements in the application like those in the Fletcher Case, limiting the authority of the agent, or declaring that the company shall not be bound by verbal statements or representations not reduced to writing and embodied in the application. Among many other cases to this effect are the following: Alabama Gold L. Ins. Co. v. Garner, 77 Ala. 210; Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 So. 46; Parrish v. Rosebud Min. & Mill. Co. (Cal.) 71 Pac. 694; Provident Sav. Life Assur. Soc. v. Cannon, 201 Ill. 260, 66 N. E. 388; Phœnix Ins. Co. v. Stark, 120 Ind. 444, 22 N. E. 413; Stone v. Hawkeye Ins. Co. 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47; McArthur v. Home Life Asso. 73 Iowa, 336, 5 Am. St. Rep. 684, 35 N. W. 430; Taylor v. Anchor Mut. F. Ins. Co. 116 Iowa, 625, 57 L.R.A. 328, 93 Am. St. Rep. 261, 88 N. W. 807; Sullivan v. Phenix Ins. Co. 34 Kan. 170, 8 Pac. 112; Continental Ins. Co. v. Pearce, 39

duct of an agent of the insurance company, it must be shown that the agent had express authority from the company to make the waiver, or that the company subsequently, with the knowledge of the facts, ratified the unauthorized action of the agent.

Same—acts of agent.

3. An agent for a fire insurance company, whose powers are strictly defined and limited by the express terms of the contract of insurance, cannot act so as to bind his company beyond the scope of his authority.

Same—construction.

4. A contract in writing, if its terms are free from doubt and ambiguity, must be permitted to speak for itself, and cannot, by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; and this principle is applicable to contracts of insurance.

Same—materiality of representations.

5. Where, by the express terms of the application for and a policy of fire insurance, the application is made a part of the contract of insurance, the representations contained in the application made by the applicant are warranted by him, and that the policy shall be void if any such representations are not true, the question of the materiality of such representations becomes unimportant; for under such stipulations, in a suit to recover loss occasioned by the destruction by fire of the property insured, the insurance company is relieved from showing, and the insured is estopped from denying, that they were material to the contract.

Kan. 396, 7 Am. St. Rep. 537, 18 Pac. 291; Standard Life & Acci. Ins. Co. v. Davis, 59 Kan. 521, 53 Pac. 856; Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 541, 9 S. W. 812; Temmink v. Metropolitan L. Ins. Co. 72 Mich. 388, 40 N. W. 469; Steele v. German Ins. Co. 93 Mich. 81, 18 L.R.A. 85, 53 N. W. 514; Beebe v. Ohio Farmers' Ins. Co. 93 Mich. 514, 18 L.R.A. 481, 32 Am. St. Rep. 519, 53 N. W. 818; Ormsby v. Laclede Farmers' Mut. F. & Lighting Ins. Co. 105 Mo. App. 143, 79 S. W. 733; Fidelity Mut. F. Ins. Co. v. Lowe, 4 Neb. (Unof.) 159, 93 N. W. 749; Hayes v. Saratoga & W. F. Ins. Co. 81 App. Div. 287, 80 N. Y. Supp. 888, Affirmed in 179 N. Y. 535, 71 N. E. 1131; Farmers' Ins. Co. v. Williams, 39 Ohio St. 584, 48 Am. Rep. 474; Kister v. Lebanon Mut. Ins. Co. 128 Pa. 553, 5 L.R.A. 646, 15 Am. St. Rep. 696, 18 Atl. 447; Smith v. People's Mut. Live Stock Ins. Co. 173 Pa. 15, 33 Atl. 567; Home Ins. Co. v. Hancock, 106 Tenn. 513, 52 L.R.A. 665, 62 S. W. 145; Continental F. Ins. Co. v. Whitaker, 112 Tenn. 151, 64 L.R.A. 451, 105 Am. St. Rep. 916, 79 S. W. 119; Mullin v. Vermont Mut. F. Ins. Co. 58 Vt. 113, 4 Atl. 817; McCall v. Phœnix Mut. L. Ins. Co. 9 W. Va. 237, 27 Am. Rep. 558; Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227; Hanson v. Milwaukee Mechanics' Mut. Ins. Co. 45 Wis. 321; Dunbar v. Phenix Ins. Co. 72 Wis. 492, 40 N. W. 386.

As none of the foregoing cases expressly repudiate the doctrine of the Fletcher Case, or expressly declare that the rule above stated is applicable to cases presenting the state of facts upon which the Fletcher Case was distinguished from Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617, and American L. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593, which sustain the general principle above stated, they are perhaps not necessarily irreconcilable with the doctrine of that case, though their failure to observe, or even to refer to, the distinction on which the decision in that case rested, goes far to justify the assertion that they did not regard it as a limitation or qualification of the rule announced by them.

But in a few instances in which the general doctrine above stated has been applied the cases were distinguished by reason of the absence from the application of the statements or stipulations upon which the decision in the Fletcher Case rested. Mutual Ben. L. Ins. Co. v. Robison, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 723; Equitable L. Ins. Co. v. Hazlewood, 75 Tex. 338, 7 L.R.A. 217, 16 Am. St. Rep. 893, 12 S. W. 621; Glover v. National F. Ins. Co. 30 C. C. A. 95, 42 U. S. App. 728, 85 Fed. 125; Wheaton v. North British & M. Ins. Co. 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758; Standard Life & Acci. Ins. Co. v. Fraser, 22 C. C. A. 499, 44 U. S. App. 694, 76 Fed. 705.

In Phœnix Ins. Co. v. Warttemberg, 24 C. C. A. 547, 48 U. S. App. 344, 79 Fed. 245, where the company was held estopped notwithstanding the stipulation in the contract of insurance that the company would not be bound by any statement made to or by the agent, unless embodied in writing, the court referred to the statement in the opinion in the Fletcher Case, that, if the company had been aware of the true state of facts, the risk would probably not have been assumed, and undertook to distinguish the case at bar upon the ground that there was nothing in the record to show that the insurance company would have declined the risk if it had been aware of the fact as to which incorrect answer was inserted in the application. Referring to the Fletcher Case, the court said: "But we are not disposed to apply the doctrine of that case further than to the state of facts under which the decision was rendered."

But in German Ins. Co. v. Horan, 15 Ky. L. Rep. 208, the company was held estopped, although the agent was a mere soliciting agent with restricted powers, which appeared in the application itself.

And in State Ins. Co. v. Gray, 44 Kan. 731, 25 Pac. 197, the company was held estopped, notwithstanding a stipulation in the application that the company shall not be bound by representations of assured or promises of agent, not contained in the application. The case, however, was distinguished from the Fletcher Case upon the ground that the applicant was illiterate.

Estoppel—pleading.

6. All acts, representations, and conduct relied on as an estoppel should be specially pleaded before evidence to establish the same can be received.

(September 6, 1905.)

ERROR to the District Court for Cleveland County to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. Affirmed.

The facts are stated in the opinion.

Messrs. Snyder & Clark and A. Miller Hammett for plaintiff in error.

Messrs. Shartel, Keaton, & Wells, for defendant in error:

The fact that the agent filled out the application would not be sufficient to hold that the company had knowledge of the falsity of the answers.

American Ins. Co. v. Gilbert, 27 Mich. 429; Cuthbertson v. North Carolina Home Ins. Co. 96 N. C. 480, 2 S. E. 258; Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co. 11 Okla. 579, 69 Pac. 936.

Beauchamp, J., delivered the opinion of the court:

This action was commenced by plaintiff in error against defendant in error in the district court of Cleveland county to recover upon a fire insurance policy, issued by the defendant in error to the plaintiff in error, covering the dwelling house situated upon a farm in Cleveland county, which was to-

And in Foster v. Pioneer Mut. Ins. Asso. 37 Wash. 288, 79 Pac. 798, the company was held estopped notwithstanding a clause in small type in the application containing a limitation on the authority of the agent.

Again, in a number of cases the insurance company has been held estopped under the circumstances stated at the beginning of the note, notwithstanding an express stipulation that the person soliciting the insurance should be deemed the agent of the applicant, and although there was no statute declaring otherwise. Fidelity & C. Co. v. Oehne, 94 Ill. App. 117; Kausal v. Minnesota Farmers' Mut. F. Ins. Asso. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430; Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521; American L. Ins. Co. v. Mahone, 56 Miss. 180.

It was held in Royal Neighbors v. Boman, 177 Ill. 27, 52 N. E. 264, that the company was estopped where the medical examiner inserted a false answer to a question correctly answered by the applicant, notwithstanding a stipulation in the application purporting to make the medical examiner the agent of the applicant. The court, in this case, expressly disapproved of the decision in the Fletcher Case, remarking that the courts in the majority of the states had refused to follow the rule there laid down.

A similar decision was made in Sternaman v. Metropolitan L. Ins. Co. 170 N. Y. 13, 57 L.R.A. 318, 88 Am. St. Rep. 625, 62 N. E. 763, with reference to erroneous answers inserted by the medical examiner. The court intimated that the rule might be otherwise with respect to false answers inserted by the person soliciting the insurance, in the part of the application relating to age, health, family history, etc., of the applicant; but this distinction was repudiated in Reilly v. Empire L. Ins. Co. 99 App. Div. 535, 90 N. Y. Supp. 866, holding that, where the insurance company repudiates liability because of false statements contained in the application, the beneficiary may show that the insured gave truthful answers to the agent taking the application, and that the latter inserted false answers therein, notwithstanding a stipulation in the application by which the insured agreed that the person soliciting or taking the application should be deemed his agent.

The doctrine of the Fletcher Case was held, in Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87, not to apply where the law of the state governing the contract provides that a person who solicits or procures applications for insurance shall be held to be the agent of the insurance company; and, the Fletcher Case having thus been distinguished, the rule declared at the beginning of the note was applied, and the company held estopped.

The Fletcher Case was distinguished upon the same ground in New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 95, and Marston v. Kennebec Mut. L. Ins. Co. 89 Me. 266, 56 Am. St. Rep. 412, 36 Atl. 389, involving state statutes substantially like that involved in the Chamberlain Case.

Although, as is apparent from the cases above cited, the doctrine of the Fletcher Case has not been very generally followed by the state courts, yet it has been adopted in a few states. See Dimick v. Metropolitan L. Ins. Co. 69 N. J. L. 384, 62 L.R.A. 774, 55 Atl. 291; Leonard v. State Mut. Life Assur. Co. 24 R. I. 7, 96 Am. St. Rep. 698, 51 Atl. 1049; O'Rourke v. John Hancock Mut. L. Ins. Co. 23 R. I. 457, 57 L.R.A. 496, 91 Am. St. Rep. 643, 50 Atl. 834. The same doctrine was adopted by the Connecticut supreme court in Ryan v. World Mut. L. Ins. Co. 41 Conn. 168, 19 Am. Rep. 490, before the decision of the Fletcher Case; and the Massachusetts supreme court, in McCoy v. Metropolitan L. Ins. Co. 133 Mass. 82, also decided before the Fletcher case, goes even farther than that case, refusing to follow the doctrine of Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617, and American L. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593, which, as already shown, support the principle stated at the beginning of the note, in the absence of statements or stipulations in the application like those in the Fletcher Case.

The Maryland supreme court, in Globe Reserve Mut. L. Ins. Co. v. Duffy, 76 Md.

tally destroyed by fire. Trial was had in that court, resulting in a judgment for the defendant in error for costs. A motion for a new trial was heard and overruled by the court. Exceptions saved, and plaintiff in error brings the case here by petition in error and case made for review.

At the trial of the case the parties stipulated relative to certain facts, which stipulation is as follows: "It is hereby stipulated and agreed by and between the plaintiff and defendant that at the time of the making of the application in writing for the insurance involved in this action, and at the time of the writing of the policy, that the Deming Investment Company, plaintiff herein, had been the defendant in an action commenced by Lulu Davidson, as the next friend of the minor heirs of John Davidson, deceased, involving the land upon which the buildings insured by the policy involved in this case is situated, in Cleveland county, Oklahoma; that in said action the Deming Investment Company, as one of the defendants, filed its answer by way of cross-petition for the foreclosure of a second real-estate mortgage, upon said premises, executed by John D. Davidson and Lulu Davidson, husband and wife, in which said case Jane Lyons was one of the defendants and by answer discloses that she was the owner of a mortgage on said real estate described in said policy of insurance, by an assignment from the Deming Investment Company, plaintiff herein, for the sum of $1,000; that in said action the Deming Investment Company recovered a judgment for the amount claimed by way of foreclosure of said second mortgage, and that said judgment was subject to a first mortgage of which Jane Lyons was the owner, and assigned from the Deming Investment Company; that thereafter execution was issued on the said judgment, the property was advertised by the sheriff of Cleveland county, and sold subject to the mortgage of Jane Lyons, the Deming Investment Company becoming the purchaser at said sale, and that thereafter, on motion of the purchaser, the Deming Investment Company, the sale was confirmed in the Deming Investment Company, and approved by the district court of Cleveland county; that thereafter an appeal was prosecuted in said cause to the supreme court of the territory of Oklahoma, which said appeal was pending in the supreme court of the territory of Oklahoma at the time the insurance was applied for in this action, to wit, the 22d day of November, 1901, and at the time said policy involved in this action was issued, on, to wit, the same date; that thereafter the supreme court of the territory of Oklahoma, by a proper mandate, dismissed the said appeal prosecuted by the said heirs

293, 25 Atl. 227, thus states the rule on the subject under discussion: "And so, where false answers have been written by the agent without the knowledge of the assured, but the latter has the means at hand to discover the falsehood and negligently omits to use them, he will be regarded as an instrument in the perpetration of the fraud, and no recovery could be had upon the policy. [Citing the Fletcher Case.] . . . If the assured be neither an accomplice nor an instrument, and be imposed upon, without fault on his own part, by the agent of the company, his beneficiary will be entitled to recover, notwithstanding the statements are inaccurate or untrue."

In disposing of the question at bar upon the ground that the insurer's agent had no authority to waive any provisions or conditions of the policy or application, the court, in DEMING INVESTMENT CO. v. SHAWNEE F. INS. CO., appears to have followed the reasoning in the Fletcher Case. This mode of disposing of the question, however, seems entirely to ignore the distinction between waiver and estoppel. The facts which appeared in the DEMING CASE, namely, that the applicant correctly answered the questions to the insurer's agent, but that the latter either negligently or fraudulently inserted false answers in the application, would seem to present the question whether the company was not estopped, by reason of the fraud or negligence of its agent, to rely on the falsity of the answers, rather than on the question whether the agent had authority to waive the condition that the company should not be affected by statements not embodied in the application. A different case would have been presented if it had appeared that the applicant knew that the answer inserted in the application was erroneous, but relied upon the assurance of the agent that it was immaterial. Upon the latter state of facts, the question would clearly have been one as to waiver, and not as to estoppel. Upon the first state of facts, the contention of the insured is, or should be, not that the agent waived a correct answer, but that by the fraud or negligence of the agent he was deceived into making a false answer to a question which he intended to answer correctly, and that, having been thus misled by the insurer's agent, it ought to be estopped to take advantage of the falsity of the answer. The force of this contention is doubtless weakened by the applicant's opportunity to discover the fraud or negligence of the insurer's agent before signing the application, and that feature of the situation doubtless renders the question whether the company ought to be held estopped one of considerable difficulty; but, upon the assumption that the applicant answered the question correctly and did not know that the agent had inserted a false answer, it seems unsatisfactory to dispose of the point upon the ground of the agent's lack of authority to waive a correct answer.

of John Davidson, for the reason that the case made was not made and served within the time allowed by the court, and as prescribed by law therefor, affirming the judgment of the confirmation of the district court appealed from, which said mandate was spread upon the records of the district court of Cleveland county after the policy of insurance was issued to the plaintiff herein, and thereafter the district court of Cleveland county directed the then sheriff, by proper order, to make and execute to the Deming Investment Company a deed for said premises, said order being made on the 2d day of December, 1901, as shown in Journal 6, pp. 541, 542, which order is here referred to, and the recitals therein are agreed to, and which order is as follows, to wit:" [Here follows the order of the district court of December 2, 1901, directing the sheriff to execute a deed to defendant in error.]

November 26, 1901, the plaintiff in error entered into a written contract with Samuel F. Sewell, in consideration of the sum of $3,800, to sell and convey to him the land upon which the house covered by the insurance policy was situated, which contract recited the court proceedings mentioned in the stipulation hereinbefore set out, and provides that as soon as a proper judgment could be obtained in the district court in conformity to the mandate of the supreme court that would enable the plaintiff in error to procure a sheriff's deed to the land, and the court should hold that another suit then pending did not create a cloud upon its title, the plaintiff in error would immediately thereafter make and execute a warranty deed to Sewell upon payment to it within twenty days thereafter of $3,800, less $250 paid; the receipt of which is acknowledged. And it is further provided that, if the plaintiff in error did not acquire and furnish to Sewell a good title to the land on or before February 1, 1902, it would, upon demand, return to Sewell the $250, with interest thereon at the rate of 6 per cent per annum. The house was totally destroyed by fire on the evening of December 4, or morning of December 5, 1901. The deed was executed by the sheriff to plaintiff in error December 7 or 8, 1901, after the fire. A deed to Sewell was executed by plaintiff in error before the fire, but not delivered until December 30th, after the fire, at which time Sewell made a further cash payment, and executed a mortgage for deferred payments.

The petition in error contains five assignments of error under which the questions involved herein and argued by counsel in their briefs are as to whether the insurance policy was invalidated:

First. By reason of certain misstatements in the written application, signed by the insured. The insurance policy involved was written by A. Kinkaid, who was at the time local agent for defendant at Norman, with power to solicit insurance and to receive applications therefor, and with power to write and countersign policies of insurance as such agent, subject to the approval of the defendant. That before writing the policy he was requested to get insurance on the building by Mr. Rule of Oklahoma City, agent for plaintiff. Kinkaid was at the time of writing the policy acquainted with the property to be insured, and familiar with all the conditions of the title of the plaintiff in the land; that at the time he wrote and signed the policy he prepared and wrote an application on the form used by defendant, from his personal knowledge of the facts with reference to the property, and forwarded by mail to Mr. Rule at Oklahoma City, to be signed by him as agent for plaintiff if found correct, which, when received, was signed by Mr. Rule, and returned to Mr. Kinkaid. Contained in the application is the following:

"(18) Is the title in your own name? If other than fee-simple title, what kind of a title have you? Explain fully. A. Property was sold under foreclosure. Court has ordered sheriff to make deed to this company. Plaintiff made appeal to supreme court, which causes delay in issuing deed.

"(20) Is it encumbered in any way? If so how much and when due? A. The entire encumbrance is 'None.' No.

"It is understood by the applicant that the company will not be bound by any representation of the applicant, or promises of the agent not contained herein, and any subsequent encumbrance, insurance, change of ownership, occupancy, or premises becoming vacant without consent of the company, will render the policy void. Having read the foregoing application and fully understanding its contents, I warrant it to contain a full and true description and statement of the condition, situation, value, occupancy, and title of the property hereby proposed to be insured, and I warrant the answer to each of the foregoing questions to be true; and I agree that this insurance shall not be binding on said company until approved by its secretary."

That the application misstated the facts is not disputed, but it is argued by plaintiff that, in view of the facts that the agent of the defendant, who wrote the policy, wrote the application, and was at the time informed as to the true condition of the title of plaintiff, that the defendant cannot now be heard to deny the validity of the policy for reason of such misstatements; Mr. Kinkaid testified that he knew of the Lyon mortgage and the condition of plaintiff's ti-

tle at the time that he wrote the policy and application. It is not shown or claimed that the knowledge of Kinkaid was ever communicated to the defendant, or that it had any actual knowledge of the condition of plaintiff's title before the building was destroyed by fire, other than that contained in the application. The policy contains the following provision: "If an application, survey, plan, or description of property is taken, it shall be a part of this contract and warranty by the insured." And it further provides: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein." Under the express provisions and conditions of the application and policy, the application is made a part of the contract of insurance, and the defendant warranted its answers to the questions in the application to be true, and it cannot now be permitted to say that it was ignorant of its contents, in the absence of fraud or mistake; so that unless the conduct and knowledge of defendant's agent as to the condition of the title of the plaintiff would be held to be a waiver of the stipulated warranty, then the contract of insurance is invalidated, and the plaintiff cannot recover; for it will not be disputed that a misrepresentation by an applicant for a policy of fire insurance, in his application as to his title to the property insured, avoids the contract of insurance as to the property covered by the policy.

The case of American Ins. Co. v. Gilbert, 27 Mich. 429, was a case in which there was a misrepresentation in the application as to the value of the property insured. When the insurance was applied for the agent of the insurance company personally inspected the property and knew its true value, but wrote into the application, which was signed by the applicant, the valuation in excess of the true value, and which was known by the applicant not to be a true statement of its value. We quote from the syllabus: "An applicant for insurance cannot escape responsibility for the statement of facts which he inserts himself in the application, or permits an agent of the insurer to insert as his, upon which he is just as well informed as the agent himself, such as the condition, situation, and value of his own property to be insured, by showing that he was induced by such agent, knowingly and against his own judgment, to state them falsely."

The case of New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837, was a case wherein a person applied in St. Louis to an agent of a New York insurance company for insurance on his life. The agent, under general instructions, questioned him on subjects material to the risk. He made answers which, if correctly written down and transmitted to the company, would have probably caused it to decline the risk. The agent, without the knowledge of the applicant, wrote down false answers, concealing the truth, which were signed by the applicant without reading and by the agent transmitted to the company, and the company thereupon assumed the risk. It was conditioned in the policy that the answers were part of it, and that no statement to the agent, not thus transmitted, should be binding on his principal. Held, that the policy was void. The opinion of the court was delivered by Mr. Justice Field, and we quote from a portion of the opinion: "It is conceded that the statements and representations contained in the answers, as written, of the assured to the questions propounded to him in his application, respecting his past and present health, were material to the risk to be assumed by the company, and that the insurance was made upon the faith of them, and upon his agreement accompanying them that, if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements and representations to which his name is signed; that he truthfully answered those questions; that false answers written by an agent of the company were inserted in place of those actually given, and were forwarded with the application to the home office; and it is contended that, such proof being made, the plaintiff is not estopped from recovery. But, on the assumption that the fact as to the answers was as stated, and that no further obligation rested upon the assured in connection with the policy, it is not easy to perceive how the company can be precluded from setting up their falsity, or how any rights upon the policy ever accrued to him. It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon, and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. As the present action is

not for such a cancelation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid, and to that only would he be entitled by virtue of the statute of Missouri. But the case as presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions if the party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposal, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove, not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of his agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed. In Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 329, 24 L. ed. 388, the policy declared that the agents of the company were not authorized to waive forfeitures, and this court held that effect must be given to the provision, except so far as the subsequent acts of the company permitted it to be disregarded. In Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 240, 24 L. ed. 691, the policy contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts, or waive forfeitures; and this court held that the company could have insisted upon those terms had it so chosen. . . . The present case is very different from Union Mut. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617, and from American L. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that the parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to effect insurance, 'as the full and complete representative of the company in all that is said or done in making the contract;' and the court held that the powers of the agent are prima facie coextensive with the business intrusted to his care, and would not be narrowed [down] by limitations not communicated to the person with whom he dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements."

In the case of Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, Mr. Justice Shiras delivered the opinion of the court, and, after citing from a number of New York cases, uses the following language: "It is doubtless true that in several later cases the New York court of appeals seems to have departed from the principles of the previous cases, and to have held that the restrictions inserted in the contract upon the power of an agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent has delivered it and received the premiums *with full knowledge of the actual situation*. To take the benefit of a contract *with full knowledge of all the facts*, and attempt afterwards to defeat it, when called upon to perform by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party. Robbins v. Springfield F. & M. Ins. Co. 149 N. Y. 484, 44 N. E. 159; Wood v. American F. Ins. Co. 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80. But see Rohrbach v. Germania F. Ins. Co. 62 N. Y. 63, 20 Am. Rep. 451, and Owens v. Holland Pur-

chase Ins. Co. 56 N. Y. 565, which are irreconcilable. The fallacy of this view is disclosed in the phrases we have italicized. It was thereby assumed that the agent had full knowledge of all the facts, that such knowledge must be deemed to have been disclosed by the agent to his principal, and that, consequently, it would operate as a fraud upon the assured to plead a breach of the conditions. This mode of reasoning overlooks both the general principle that a written contract cannot be varied or defeated by parol evidence, and the express provision that no waiver shall be made by the agent except in writing indorsed on the policy. As we shall hereafter show when we come to consider the meaning and legal purport of the contract in suit, such express provision was intended to protect both parties from the dangers involved in disregarding the rule of evidence. The mischief is the same whether the condition turned upon facts existing at and before the time when the contract was made, or upon facts subsequently taking place."

There is no evidence in the record to show that Kinkaid, the local agent, either before or after he had delivered the policy and received the premium, communicated with the insurance company the true condition of the title of the plaintiff to the property insured, or that he at any time informed the company that the property insured was encumbered by mortgage in the sum of $1,000, or any other sum, or that the company, previous to the destruction of the property by fire, had any knowledge whatever of such encumbrance. The purpose of the application was to inform the insurance company of the facts with reference to the property sought to be insured, and to furnish it information upon which it was to act in accepting or refusing the risk; and the stipulation in the application and policy, that, if any of the statements made in the application were untrue, the policy should be void, was a reasonable stipulation, and, if the plaintiff had referred to the policy issued and delivered to it, it would have found by the provisions thereof that the same was void if it concealed or misrepresented any fact or circumstance concerning the insurance or subject thereof, or if it had not stated truly its interest in the property insured, and that the policy was made and accepted subject to the stipulations and conditions therein contained, and that no agent or officer of the insurance company had power or should be deemed to have waived any of the provisions or conditions of the policy, unless such waiver should be in writing and attached to the policy. The application, after being filled out by the agent of the insurance company, was forwarded to the agent of the plaintiff to be signed as such agent, if found correct. The mere fact that the answers to the questions contained in the application were written out by the agent of the insurance company did not relieve plaintiff's agent from the duty or necessity of examining the same, and to seeing to it that the statements in the application were true. In the case of Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co. 11 Okla. 585, 69 Pac. 938, the rule is stated: "Where the waiver relied on is the act of an agent of the insurance company, it must be shown that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the unauthorized action of the agent."

There is no evidence to show, nor is it claimed by the plaintiff, that defendant had any knowledge of the Jane Lyons mortgage, or that the statement in the application for insurance, that the property was not encumbered, was false. Kinkaid was an agent, with powers strictly defined and limited by the express terms of the contract of insurance, and could not act so as to bind the defendant beyond the scope of his authority. The question here presented is not as to whether the insurance company, by either its officers or agents, could waive the conditions and stipulations in its policy, but is a question as to the competency of the evidence to prove such waiver. The contract of insurance is fully set forth in the policy, and it is expressly provided by its terms that no waiver or stipulation shall be considered except the same be in writing, and attached thereto, and that no representation of any agent shall be binding unless set forth in writing. As we understand, it is not pretended that by any language or declaration of Kinkaid, the agent at the time the policy was delivered and the premiums paid, claimed to have power to waive any provisions or conditions of the policy. The contract was in writing, and in clear and unambiguous terms provided that the answers of the plaintiff contained in its application were warranted to be true, and that the entire policy should be void, if the interest of the insured in the property were not truly stated, and that no officer, agent, or other representative of the company, had power to waive the provisions and conditions of the policy, except in writing, and attached to the policy; so that to hold that the conditions and stipulations in the policy had been waived by the knowledge and conduct of its agent would be to violate the well-settled principles declared by the former decision of this court in the case of Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co. *supra*, wherein it is held: "A contract in

writing, if its terms are free from doubt or ambiguity, must be permitted to speak for itself, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; and this principle is applicable to contracts of insurance."

But it is insisted by counsel for plaintiff in error that the statements in the application for insurance in this case are not warranties, but only misrepresentations of facts which did not affect the insurance company in its action; and that the written application is not made a part of the policy, or referred to therein. By the express terms of the policy the application is made a part of the contract of insurance, and by the terms of both the application and policy the statements contained in the application are stipulated warranties. The parties had a right to make their own contract upon terms and conditions in this respect as they saw fit, and, if the plaintiff chose to make his representations warranties, the question of their materiality becomes unimportant; for, under such stipulation, the defendant was relieved from showing, and the plaintiff was estopped from denying, that they were material to the contract, and we are not permitted to say that the defendant did not deem them material to the risk, or that it would have made the contract upon other terms than it did. The secretary of the insurance company testified that the matter of encumbrance was material; and, had the company had any knowledge of the encumbrance, it would not have issued the policy. And it may be that from experience he may be satisfied that the matter of encumbrance upon property sought to be insured is material to the risk, and, while this materiality he may not be able to prove to the satisfaction of the court or jury, he has a right to refuse to insure property encumbered, and to insist that the statements of the applicant in his application as to such matters shall be a warranty by the insured to be true; and when, as in this case so made, it was an agreement on the part of the plaintiff, not only to warrant the truth of such matters, but that they are material to the contract, and that if false, the contract shall be void, therefore all the statements, representations contained in the application, must be treated as warranties, and must be true to authorize a recovery upon the policy. American Ins. Co. v. Gilbert, 27 Mich. 429; Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183–189, 30 L. ed. 644–646, 7 Sup. Ct. Rep. 500; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133.

Again, the pleadings in this case contain not a word in reference to the knowledge, acts, or conduct of Kinkaid, which it is contended estops the defendant from denying the validity of this policy. The petition simply declares upon the policy of insurance, the loss by fire, and the refusal of payment. The answer of the defendant alleges that a material condition of the contract had been broken; that the policy of insurance was issued by the defendant in the belief, and upon the plaintiff's special warranty, that the answers to all of said questions were true; that, at the time that the application was issued and the policy written, the answers were false, and that the rights of the assured under the policy had been forfeited. The plaintiff replied by a general and special denial of the matters contained in the answer, and alleged that the loss set out in plaintiff's petition is a total loss, and that, under the laws of the territory, defendant was required to pay plaintiff, by reason of said policy and said loss, the face of the policy. Under our Code, the facts relied upon as a ground of action or of defense must be clearly and concisely stated, and a definite issue presented, so that the opposite party may be fairly notified of what he is required to meet. Under the pleadings as they exist, evidence could not be received to establish the acts, conduct, or knowledge of Kinkaid relied on as an estoppel. All acts, representations, and conduct, relied on as an estoppel, should be specially pleaded before evidence to establish the same can be received. Tonkawa Mill. Co. v. Tonkawa, 83 Pac. 915, opinion handed down at this sitting, and cases therein cited; Dwelling-House Ins. Co. v. Johnson, 47 Kan. 1, 27 Pac. 100, and other cases cited.

Having reached the conclusion that, under the provisions and terms of the contract of insurance sued upon, and under the pleadings, the plaintiff cannot recover for the reasons stated, it will not be necessary to consider the other questions raised.

The judgment of the District Court of Cleveland County is affirmed, with costs to plaintiff in error.

All the Justices concur except Irwin, J., who tried the case in the court below, not sitting, and Pancoast, J., as to section 5 of the syllabus.

RHODE ISLAND SUPREME COURT.

MARY E. WRYNN

v.

MICHAEL R. DOWNEY.

(— R. I. —, 63 Atl. 401.)

Stare decisis.

1. The courts cannot change a rule of

law that has been in force for fifty years, that proof of seduction cannot be allowed to aggravate damages in an action for breach of promise of marriage.

Breach of promise—seduction.

2. Proof of seduction cannot be made in an action for breach of promise of marriage, in aggravation of damages.

Same—evidence of contract or breach.

3. Evidence of seduction is not admissible to show either a contract of marriage or its breach.

Same—restricting argument.

4. Preventing counsel in an action for breach of promise of marriage from commenting, in his argument to the jury, upon the fact that a similar action had been brought by another woman against defendant, is not an abuse of discretion on the part of the trial court.

Same—evidence of compromise.

5. Evidence of an attempted compromise is inadmissible in an action for breach of promise of marriage.

(February 5, 1906.)

PETITION by defendant for new trial of an action in which a verdict had been found against him for damages for breach of promise of marriage. Granted.

The facts are stated in the opinion.

Messrs. **Barney & Lee** and **Prince H. Tirrell, Jr.**, for defendant:

In an action for breach of promise of marriage, evidence either of seduction, or of

Case Note.—Right to prove seduction in aggravation of damages in breach of promise case.—Several objections are raised to allowing seduction to be considered in aggravation of damages in a breach of promise case. It is urged that the parties are *in pari delicto;* that, since a woman cannot, at common law, recover for her own seduction, she should not be permitted to do indirectly that which the law forbids her to do directly; that an action for seduction is given to the parent, or to him who stands *in loco parentis* to the person seduced, and to permit the seduced person herself, also, to recover would subject the seducer to double damages.

Thus, it is said in Weaver v. Bachert, 2 Pa. St. 80, 44 Am. Dec. 159: "Illicit intercourse is an act of mutual imprudence, and the law makes no distinction between the sexes as to the comparative infirmity of their common nature. A woman is not seduced against her consent, however basely it be obtained; and the maxim, *Volenti non fit injuria*, is as applicable to her as to a husband whose consent to his own dishonor bars his action for criminal conversation. This maxim runs through a variety of actions. . . . It extends even to contracts in the forming of which the parties are equally culpable, the consideration being immoral or illegal. If, then, a woman cannot make her seduction a ground of recovery directly, how can she make it so indirectly?" But it is urged by the courts which sustain the right to recover aggravated damages that the parties are not *in pari delicto* where the seduction is practised upon the woman under color of a false promise of marriage, and Lord Mansfield said, in the early English case of Morton v. Fenn, 3 Dougl. K. B. 211, which, however, did not involve the question of the right to increased damages because of the seduction, that, if the woman's consent was obtained by means of the promise of marriage, which the man did not intend to fulfil, this was a cheat on the part of the man.

And Bishop (1 Marr. & Div. § 232) says, in distinguishing between a woman's right to recover for her seduction and her right to increased damages, because of seduction, in a breach of promise case, that, notwithstanding the apparent similarity between the two cases, yet, looking more minutely into the question, it will be seen that, in seeking to enhance her damages by showing seduction, she does not complain of the wrong involved in the immoral act, but of the breach of the moral and commendable promise of marriage committed as a separate transaction.

And it is well said in Cooley on Torts, 2d ed. § 512, in reply to one part of the argument in Weaver v. Bachert, that, between the case of a husband consenting to the prostitution of his wife and that of a woman deceived by a false promise of marriage into surrendering her virtue, there does not seem to be any such analogy as to make the legal rules which should govern the one throw light upon the other, since the husband consents from motives which can only be base, while the woman is the victim of perfidy.

In answer to the objection that the law has already provided a remedy for the seduction by giving the father of the one seduced a right of action therefor, it is urged that, in an action by the father, the gist of the action is the loss of services, and that, in estimating the damages, the humiliation and mental suffering of the daughter are not considered. In Tubbs v. Van Kleek, 12 Ill. 446, the court said: "It is also a mistaken notion to say that a father has a distinct cause of action for the seduction of his daughter. No action lies by the father simply for the seduction; but he may have an action for the loss of service, . . . and it is only by a fiction of law invented by the courts that he is allowed damages in that action for the seduction. The damages, even then, are only such as he may have sustained in the disgrace brought upon his family and his wounded feelings or otherwise, and nothing is allowed on account of the suffering and disgrace of the daughter. It does not follow, therefore, that the seducer will be made to pay double damages for the same injury. He pays the father for the injury done him. If the daughter is permitted to recover, it is for the injury

illicit intercourse between the parties, is inadmissible to enhance damages when the admission of the same is objected to by the defendant at the trial, unless specially alleged in the declaration.

Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768; Felger v. Etzell, 75 Ind. 417; Tyler v. Salley, 82 Me. 128, 19 Atl. 107; Leavitt v. Cutler, 37 Wis. 46; Bedell v. Powell, 13 Barb. 183; MacGregor v. Rhode Island Co. 27 R. I. 85, 60 Atl. 761; Geiger v. Payne, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571; Osmun v. Winters, 25 Or. 260, 35 Pac. 250; Spellings v. Parks, 104 Tenn. 352, 58 S. W. 126; Giese v. Schultz, 53 Wis. 462, 10 N. W. 598; Judy v. Sterrett, 153 Ill. 94, 38 N. E. 633; Haymond v. Saucer, 84 Ind. 3; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Wilds v. Bogan, 57 Ind. 453; Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Button v. Hibbard, 82 Hun, 289, 31 N. Y. Supp. 483; Daggett v. Wallace, 75 Tex. 352, 16 Am. St. Rep. 908, 13 S. W. 49; McKinsey v. Squires, 32 W. Va. 41, 9 S. E. 55; Hattin v. Chapman, 46 Conn. 607; Sheahan v. Barry, 27 Mich. 217; Smith v. Braun, 37 La. Ann. 225; Graves v. Rivers, 123 Ga. 224, 51 S. E. 318.

Illicit relations between a man and a woman are not proof of a promise to marry.

Bleiler v. Koons, 132 Pa. 401, 19 Atl. 140; Boyer v. Sherer, 28 Ill. App. 545; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925.

done her; and it often happens that by one act a wrong may be done to several persons, for which each has a right of action."

It is also contended that in an action *ex contractu*, such as a breach of promise case, the plaintiff can recover only such damages as will afford compensation for the loss of the contract; and that vindictive or exemplary damages cannot be recovered. In reply to this, the cases on the other side contend that an action for breach of contract of marriage, though an action *ex contractu*, partakes of the character of actions *ex delicto*, and that the rules governing ordinary actions upon contract have no application in such a case; also, that it would be impossible to estimate correctly the damages resulting from the broken promise without taking into consideration all the facts as to the condition of the woman when deserted.

The ruling in Weaver v. Bachert is approved in Baldy v. Stratton, 11 Pa. 316; McFadden v. Reynolds, 9 Sadler (Pa.) 105; 20 W. N. C. 312, 11 Atl. 638; and Gring v. Lerch, 112 Pa. 250, 56 Am. Rep. 314, 3 Atl. 841.

The right to consider the seduction in aggravation of damages is also denied in Burks v. Shain, 2 Bibb, 343, 5 Am. Dec. 616, where the court said that "it was unquestionably a wrong in the defendant to have debauched the plaintiff: but it is a wrong of which she was *particeps criminis*, and had no right to complain in a court of justice. Besides, it appears that her father has brought suit for the seduction and the consequent expense and loss of service." But in this case the seduction took place before the promise of marriage was made, which fact the court recognized as a further consideration for denying the right to damages therefor, and well said that the seduction might have been the cause of the promise, but could not have been the consequence.

So, in Espy v. Jones, 37 Ala. 379, it was held that, if seduction can ever be allowed to aggravate the damages where the action is for breach of promise of marriage, it is only in those cases where the seduction follows the promise and is effected by means of it, and that seduction before the promise of marriage, which, therefore, could not have been the consequence of such promise, should not be permitted to swell the damages in an action on the contract.

But it is universally admitted that the promise must precede the seduction in order that the latter may affect the damages.

These cases and the case of WRYNN v. DOWNEY are believed to be the only ones which deny the right to give evidence of seduction in aggravation of damages, although the decision in favor of the right has been by a divided court in some cases; and in the case of Fidler v. McKinley, 21 Ill. 308, where the court ruled in favor of the admission of such evidence, Breese, J., filed a strong dissenting opinion, reviewing the history of the question and many authorities.

The court, in WRYNN v. DOWNEY, has made an extensive review of the authorities; but, in addition to the authorities there cited, the right to consider seduction in aggravation of damages has been sustained in Anderson v. Kirby (Ga.) 54 S. E. 197; Haymond v. Saucer, 84 Ind. 3; Geiger v. Payne, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571; Sramek v. Sklenar (Kan.) 85 Pac. 566; Smith v. Braun, 37 La. Ann. 225; Wilbur v. Johnson, 58 Mo. 600; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Roper v. Clay, 18 Mo. 383, 59 Am. Dec. 314; Jennette v. Sullivan, 63 Hun, 361, 18 N. Y. Supp. 266; Getzelson v. Bernstein, 15 Misc. 627, 37 N. Y. Supp. 220; Matthews v. Cribbett, 11 Ohio St. 330; Jarvis v. Johnson, 2 Ohio Dec. Reprint, 312; Osmun v. Winters, 25 Or. 260, 35 Pac. 250; Spellings v. Parks, 104 Tenn. 351, 58 S. W. 126; Biela v. Urbanczyk (Tex. Civ. App.) 85 S. W. 451.

And the fact that the seduction was committed beyond the limits of the territory where the suit is brought does not render evidence thereof inadmissible. Davis v. Pryor, 3 Ind. Terr. 396, 58 S. W. 660.

And it has been held that the fact of seduction may be given in evidence notwithstanding the statutes give an unmarried woman over twenty-one years of age a right

Messrs. Charles P. Ryan, Henry F. Nickerson, and Joseph J. Cunningham, for plaintiff:

The fact that plaintiff yielded to the defendant is almost conclusive corroboration of her testimony concerning the promise of marriage, and, as evidence bearing upon the fact of the existence of the contract, it is competent without a special averment in the declaration.

McConahey v. Griffey, 82 Iowa, 564, 48 N. W. 983; Jennette v. Sullivan, 63 Hun, 361, 18 N. Y. Supp. 266; Logan v. Gray, Tappan (Ohio) 37.

It was evidence of the breach of promise.

Wells v. Padgett, 8 Barb. 323; Millington v. Loring, L. R. 6 Q. B. Div. 190; Dent v. Pickens, 34 W. Va. 240, 26 Am. St. Rep. 921, 12 S. E. 698; Sheahan v. Barry, 27 Mich. 217.

The testimony was competent on the question of damages.

Baldy v. Stratton, 11 Pa. 316; Tubbs v. Van Kleek, 12 Ill. 446; Fidler v. McKinley, 21 Ill. 308; Coil v. Wallace, 24 N. J. L. 291; Millington v. Loring, *supra;* Sherman v. Rawson, 102 Mass. 395; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Berry v. Da Costa, L. R. 1 C. P. 331; Lowden v. Morrison, 36 Ill. App. 495; Whalen v. Layman, 2 Blackf. 194, 18 Am. Dec. 157; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Sauer v. Schulenberg, 33 Md. 288, 3 Am. Rep. 174; Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95; Bennett v. Beam, 42 Mich. 353, 36 Am. Rep. 442, 4 N. W. 8; Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672; Bird v. Thompson, 96 Mo. 424, 9 S. W. 788; Musselman v. Barker, 26 Neb. 737, 42 N. W. 759; Kniffen v. McConnell, 30 N. Y. 285; Matthews v. Cribbett, 11 Ohio St. 330; Kelley v. Highfield, 15 Or. 277, 14 Pac. 744; Conn v. Wilson, 2 Overt. 233, 5 Am. Dec. 663; Goodall v. Thurman, 1 Head, 209; Kaufman v. Fye, 99 Tenn. 145, 42 S. W. 25; Daggett v. Wallace, 75 Tex. 352, 16 Am. St. Rep. 908, 13 S. W. 49; White v. Campbell, 13 Gratt. 573.

Douglas, Ch. J., delivered the opinion of the court:

This case was brought to recover damages for breach of promise of marriage, and, after verdict for the plaintiff for $10,000, the defendant petitions for a new trial on the grounds that the verdict is against the law and the evidence, that the damages are excessive, and that the presiding justice erred in admitting certain evidence against the objection of the defendant, and in restricting the argument of defendant's counsel.

The evidence to the admission of which exception was taken was offered to enhance the damages by showing that the defendant had seduced the plaintiff after he had promised to marry her. What the plaintiff actually testified to was that at some time after the promise to marry there was sexual intercourse between the plaintiff and defendant. No circumstances are given, nor is it said, even, that the misconduct was suggested by the defendant.

The evidence is as follows:

Q. Whether or not any time after the promise to marry which you have related, was there sexual intercourse between you and Mr. Downey?

A. Yes.

Q. When after the promise of marriage?

A. I don't just remember how long after.

Q. What month was it in?

of action for her own seduction. Osmun v. Winters, *supra.*

But in Giese v. Schultz, 53 Wis. 462, 10 N. W. 598, 65 Wis. 487, 27 N. W. 353, 69 Wis. 521, 34 N. W. 913, an instruction that, if the jury believed the defendant seduced the plaintiff under promise of marriage and got her with child, they might take into account this fact, and give "such damages as she sustained by reason of that additional injury," was held to be too broad, as, under this rule, the jury might consider all the consequential damages which might have been caused to the plaintiff by her having been got with child, while the only elements of damage resulting from the seduction which the jury should be permitted to consider were the loss of virtue and reputation and the mental suffering and sense of disgrace thereby caused.

And some cases hold that the seduction must be alleged in the complaint in order that evidence thereof may be introduced. Leavitt v. Cutler, 37 Wis. 46; Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768; Herriman v. Layman, 118 Iowa, 590, 92 N. W. 710; Tyler v. Salley, 82 Me. 128, 19 Atl. 107; Daggett v. Wallace, 75 Tex. 352, 16 Am. St. Rep. 908, 13 S. W. 49. *Contra:* Ferguson v. Moore, 98 Tenn. 344, 39 S. W. 341; Peehlmann v. Kertz, 105 Ill. App. 249. Affirmed in 204 Ill. 418, 68 N. E. 467; Dent v. Pickens, 34 W. Va. 240, 26 Am. St. Rep. 921, 12 S. E. 698.

Whatever may be the justice of permitting evidence of seduction to be introduced in aggravation of damages, it would be difficult to prevent the jury from taking the fact of seduction into consideration in estimating damages; for, as suggested in Coil v. Wallace, 24 N. J. L. 291, "it may be . . . affirmed that, so long as the human breast remains what it is, whatever the law may decide, or a judge may declare, jurors, in an action for a breach of promise of marriage, will know whether the plaintiff has been ruined under color of the defendant's promise, and will measure their damages accordingly."

A. I think June.

Q. State the circumstances preceding it; what was the conversation?

A. I don't just remember.

Q. I will ask you directly, Was it done under the promise of marriage?

A. Of course; I wouldn't have thought of such a thing if I didn't think he was going to marry me.

Q. Did that intercourse continue, Miss Wrynn?

A. Yes.

This is all the evidence on the subject, except the defendant's denial of the fact and the statement of a witness that the defendant confessed the fact to him. If the jury had scrutinized the evidence with the care which such an accusation demands they might have declined to believe that a woman who was virtuous before could yield to the persuasion of a lover, and then forget the month in which her fall occurred, and the circumstances which led up to it. One would suppose that so serious an event in her life would have marked itself in her recollection more sharply than an ordinary experience. But the evidence quoted above was admitted and accepted by the jury as proof of seduction, and the defendant's exception raised the question which is now before us: Whether or not in Rhode Island evidence of seduction may be admitted in aggravation of damages in an action for breach of promise of marriage.

1. The question came up for decision by the court, in 1851, in Perkins v. Hersey, 1 R. I. 493. At that time the full bench of the supreme court sat in jury cases, and the charge of Chief Justice Greene is therefore the opinion of the court. In directing the jury as to the rule of damages, he says: "The fact that the plaintiff was seduced you will not consider in this connection. We have a statute which affords the plaintiff a remedy for the injury thus done her in a more appropriate form." The last statement of the charge is not clear. If it refers to the statute (Digest 1844, § 78, p. 392) punishing as a criminal any person who should "obtain carnal knowledge of a female by virtue of a feigned or pretended marriage, or by a false or feigned expressed promise of marriage," it may be said that this affords no remedy to the plaintiff. The statute, though superseded in terms, is still substantially embraced in the statute (Gen. Laws 1896, chap. 281, § 5) enacted as "An Act for the Better Protection of the Persons of Women and Girls," etc. (R. I. Pub. Laws 1889, chap. 738, p. 210, January, 1889), which has, however, a much broader scope than the former law. The action of tort which the father or master has for the seduction of his daughter or servant, which in the case of father and daughter would be practically available for her benefit, is not given by statute. The report of the case recites that the plaintiff had given birth to a child, and it seems most likely that the "more appropriate" statutory remedy was the process by which the putative father is compelled to take upon him the care of his child. Whatever may have been the allusion, the doctrine is plainly declared and has been followed in this state for more than fifty years. The principle on which it is founded has been reaffirmed by this court as lately as October 13, 1891, in Conlon v. Cassidy, 17 R. I. 518, 23 Atl. 100, where it is said: "All the counts in the declaration except that entitled 'additional count' are to be regarded as counts for seduction, the promises of marriage being introduced merely in aggravation. To these counts the demurrer is sustained. The plaintiff cannot allege her own criminal misconduct as a ground of action." The opinion in Mainz v. Lederer, 21 R. I. 370, 375, 43 Atl. 876, attempts to explain away the decision in Perkins v. Hersey, *supra*, and, while affirming the doctrine of Conlon v. Cassidy, that for mere seduction there can be no action, holds that, "assuming seduction brought about solely through a promise of marriage," the fact of seduction may be considered in assessing damages. The court, in this decison, therefore, presume to change the law which had always prevailed in this state. The defendant asked for a reargument, which was granted just before Chief Justice Matteson resigned; and the reargument was had, after Judge Stiness became chief justice, before all four justices of the appellate division. The result was an even division of the court, and the petition for a new trial was denied. So that, while the ruling of the trial court stood for that case, there was no authoritative decision of the question of law involved. The case at bar, then, brings the question before us anew.

Shall this court now give to a woman the right to recover damages from her seducer, who has likewise violated his promise to marry her? Can it hold that, while a woman cannot allege seduction as a cause of action and a breach of promise of marriage in aggravation of damages, she may hereafter in this state allege a breach of promise of marriage as a cause of action and seduction in aggravation of damages? It does not seem to us to be within the province of the judiciary to alter a rule of law which has been so long in force. It is for the court, indeed, to find and declare new applications of old principles, adapting them to the diversified circumstances of the time; but for the legislature alone, under constitutional limitations, to repeal and

modify such laws, either statute or common, as it deems outworn or hurtful. The court may foster and direct the growth and development of established rights, but may not suppress or ignore them, or create new ones. The case at bar presents no new relations or problems. Unhappily, seductions and breaches of the promise of marriage have been dealt with by the courts from time immemorial. Y. B. 45 Edw. III. fol. 23, case 30; Stretch v. Parker, Rolle, Abr. 22; Holcroft v. Dickenson, Carter, 233; Holt v. Clarencieux, 2 Strange, 937; Harrison v. Cage, 1 Ld. Raym. 386.

It is true that, in most of the United States, the courts have ignored these limitations on judicial construction, and have sustained the contention of the plaintiff as to the admissibility of such evidence. But, aside from the objection just set forth, an examination of the decisions does not convince us that the conclusions which they have reached are supported by sound reason. It was shown by Breese, J., in his able dissenting opinion in Fidler v. McKinley, 21 Ill. 316, that all the cases up to his time, 1859, were founded upon a *dictum* of Parsons, Ch. J., in Paul v. Frazier, 3 Mass. 73, 3 Am. Dec. 95. He mentions and criticizes Conn. v. Wilson (1814) 2 Overt. 233. 5 Am. Dec. 663; Boynton v. Kellogg (1807) 3 Mass. 189, 3 Am. Dec. 122; Whalen v. Layman (1828) 2 Blackf. 194, 18 Am. Dec. 157; Green v. Spencer (1834) 3 Mo. 318, 26 Am. Dec. 672; and Tubbs v. Van Kleek (1851) 12 Ill. 446,—where the chief justice dissented. The case of Paul v. Frazier was an action for seduction, and the court held that it could not be maintained, saying: "She is a partaker of the crime, and cannot come into court to obtain satisfaction for a supposed injury to which she was consenting:" and then the learned judge discusses the propriety of amending the law so as to give such an action, and utters the following *dictum*: "As the law now stands, damages are recoverable for a breach of promise of marriage; and, if seduction has been practised under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages."

What was said by Judge Breese in 1859 is substantially true at the present day. All the leading cases, with two or three exceptions referred to below, are based simply upon the authority of this *dictum* and the cases through which it has been transmitted. King v. Kersey (1850) 2 Ind. 402, relies on Whalen v. Layman; Wells v. Padgett (1850) 8 Barb. 323, quotes Paul v. Frazier, Green v. Spencer, and another case in the same volume,—Hill v. Maupin (1834) 3 Mo. 323. Coil v. Wallace (1854) 24 N. J. L. 291, holds that the action of breach of promise of marriage is an exception to all rules of damages, and cites Paul v. Frazier. Potts, J., dissenting, says, on this point (p. 318): "I am not able to assent to the doctrine that, in an action for breach of promise of marriage, the plaintiff can legally give in evidence her seduction by the defendant in aggravation of damages. She cannot have an action for seduction; she cannot recover damages directly for such an injury. This is the result of principles as well fixed and established as any in the law. She is a party to the mischief, in the eye of the law, equally guilty with her seducer: and I cannot see, with this well-established doctrine standing in the way, how she can be allowed to recover damages for the seduction under the form of an action for breach of promise." Goodall v. Thurman, 1 Head (1858) 209, follows Conn. v. Wilson. Matthews v. Cribbett (1860) 11 Ohio St. 330, contains no argument and no citation. Kniffen v. McConnell (1864) 30 N. Y. 285, approves Wells v. Padgett. Sherman v. Rawson (1869) 102 Mass. 395, argues the point as follows (page 399), Colt, J.: "It may be true that damages for the seduction, as a distinct ground of action, cannot be added to the damages which the plaintiff is entitled to recover for a breach of the alleged promise to marry. It would be an indirect mode by which the plaintiff could recover damages for an act which cannot be the foundation of an action in favor of the party seduced, because the policy of the law forbids satisfaction, to a partner in the crime, for a supposed injury to which she was consenting. But it does not follow that the fact of the seduction is not to be taken into consideration at all by the jury. The action is nominally for a breach of contract, but the measure of damages is fixed by rules not precisely like those which apply to ordinary contracts where injury to the person is not involved. They are awarded upon principles more commonly applicable in actions of tort. The plaintiff is entitled to compensation, but that term implies indemnity for all that she has suffered by the defendant's bad faith. It includes injury to her affections and wounded pride. It involves necessarily a consideration of all the circumstances of the plaintiff's actual situation at the time of the breach of the promise. If, by reason of an imprudent or criminal act in which both participated, she is brought to such a state that the suffering occasioned to her feelings and affections must necessarily be increased by his abandonment, then that would be but an inadequate and poor compensation which did not take it into account. Damages, it is true, must be awarded solely for the suffering which results

from the defendant's refusal to perform his promise. But under this rule, even they cannot be justly estimated without regarding the increased exposure to mortification and distress to which she has been left by a seduction under promise of marriage afterwards broken. We understand this to have long been the law of this commonwealth. The remark of Parsons, Ch. J., in Paul v. Frazier, 3 Mass. 71, 73, 3 Am. Dec. 95, in reference to the damages to be awarded in these cases, seems to go farther,"—Citing Weaver v. Bachert, 2 Pa. 80, 44 Am. Dec. 159, which holds that seduction cannot be given in evidence, but circumstances may; Baldy v. Stratton, 11 Pa. 316; Wells v. Padgett; Tubbs v. Van Kleek; Kniffen v. McConnell,—*supra*.

This is the first attempt to show that the doctrine can be reconciled with the established principle that a wrongdoer cannot recover from his accomplice compensation for what he has lost by committing the offense. The argument of the learned judge is: A woman cannot recover damages for her seduction directly or indirectly, because it is an offense on her part to consent to the seduction: but she may recover more damages, when she has been seduced, because of the condition in which seduction leaves her, than she may when she has not been seduced, *i. e.*, seduction as a fact constitutes no cause of action or basis for damages, directly or indirectly; seduction as a circumstance is the basis of increased damages. We cannot assent to this reasoning. If a woman recovers additional damages when she has been seduced, she is recovering indemnity for the consequences of an offense against the law, in which she has been a consenting actor. If, during a promise of marriage, a woman should be seduced by a third person, could she recover more damages against her promisor in an action for a breach of the promise on that account, as a circumstance? On the contrary, her yielding to such seduction would absolve the promisor entirely, or in some jurisdictions would go in mitigation of damages. Dupont v. McAdow, 6 Mont. 227, 9 Pac. 925. It follows clearly, then, that, if she may recover, it is only against the seducer, and really for the seduction. If she may recover such indemnity in an action of breach of promise of marriage, it is the only action of contract or tort known to the common law where it is allowable. In any case of tort, where the injury is the result of her own act and another's, her action is wholly barred by her contributory negligence. In any action of contract, she cannot voluntarily enhance the damages and recover them so aggravated by herself. Sauer v. Schulenberg (1870) 33 Md. 288, 3 Am. Rep. 174, relies on Paul v. Frazier; Wells v. Padgett; Kniffen v. McConnell; Coil v. Wallace; Tubbs v. Van Kleek; Whalen v. Layman; Conn. v. Wilson,—*supra*.

Sheahan v. Barry (1873) 27 Mich 217, argues that seduction is itself a breach of the promise to marry, that the law does not regard the parties as equally at fault, and that the practice to admit such testimony is sustained by the common law and the sentiment of mankind. A subsequent case, Bennett v. Beam (1880) 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8, still further develops these views, as follows (page 351 of 42 Mich., page 444 of 36 Am. Rep., and page 11 of 4 N. W.): "That the act of seduction, under a promise of marriage, should go a great ways with a jury in estimating the damages, ought to be true both in law and fact. In many cases, the loss sustained from a breach of the agreement to marry may be but slight indeed; but never can this be the case where the lifelong blight which seduction entails enters into the case. Respectable society inflicts upon the unfortunate a female a severe punishment for her too confiding indiscretion, and which the marriage would largely, if not wholly, have relieved her from. The fact of seduction should, therefore, go a great ways in fixing the damages, as in no other way could amends be made the plaintiff for the injury she sustained, or the defendant be properly punished for his aggravated offense. It would seem, also, to be in full accord with the sense of justice implanted in the heart of every right, highminded person, and therefore with the reason of the common law."

The argument of the Michigan court is more logical than the Massachusetts opinion, though the premises from which it proceeds are unstable. It denies, first, that the parties are *in pari delicto*, and states, secondly, that the doctrine is established by the common law. Neither of these statements is true, if predicated of the English common law, as adopted by us. See opinion of Treat, Ch. J., in Tubbs v. Van Kleek. The American current of decisions, as we have seen, flows from the Massachusetts *dictum*. In Michigan a statute was in force permitting a woman to sue her seducer for damages in the name of her parent if she were a minor or in the name of any relative whom she might select if she were of full age. Sheahan v. Barry. This might have been construed to declare the public policy of Michigan, and nothing but the rules of pleading would then stand in the way of decision; but, when the court proceeds to invoke the deceitful authority of the human heart, he forgets that that organ is figuratively the seat of the emotions, and not of

the understanding. The heart deals with individual cases, not with general principles; and the common law leaves sufficient scope for the sentiments of pity or righteous indignation in the latitude of penalties within which the court fixes sentences for crime, and in the still broader discretion of a petit jury in tort cases calling for vindictive damages.

Williams v. Hollingsworth (1873) 6 Baxt. 12, contains no citation and no argument. A new trial was granted on other grounds. Leavitt v. Cutler (1875) 37 Wis. 46, contains no argument. Collins v. Mack (1877) 31 Ark. 684, is the converse of our case of Conlon v. Cassidy. There were apparently two counts in the declaration, one for breach of promise, one for seduction. It was held that the first would lie, and the second might be treated as an allegation in aggravation of damages. The question is not discussed. The only citation is Sedgwick on Damages, 6th ed. 248. In Hattin v. Chapman (1879) 46 Conn. 607, there is no discussion and there are no citations. Bennett v. Bean (1880) 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8, we have already considered. Kurtz v. Frank (1881) 76 Ind. 594, 40 Am. Rep. 275, cites cases to the effect that punitive damages may be allowed. The doctrine was already adopted in that state by Whalen v. Layman. Giese v. Schultz (1881) 53 Wis. 462, 10 N. W. 598, and the same case again before the court in (1886) 65 Wis. 488, 27 N. W. 353, grants a new trial twice because damages for sickness resulting from seduction were allowed. Cole, Ch. J., dissents, but on what ground does not appear. Kelley v. Highfield (1887) 15 Or. 277, 14 Pac. 744, is not in point. McKinsey v. Squires (1889) 32 W. Va. 41, 9 S. E. 55, is a bill in equity for breach of promise of marriage and seduction, and relies on Sherman v. Rawson; Sauer v. Schulenberg; Wells v. Padgett; Kniffen v. McConnell,—*supra*. The decision that the two causes of action can be joined in a bill in equity depends on a state statute. Bird v. Thompson (1888) 96 Mo. 425, 9 S. W. 788, affirms the law as theretofore settled in Missouri. Musselman v. Barker (1889) 26 Neb. 737, 42 N. W. 759, cites Matthews v. Cribbett; Tubbs v. Van Kleek; Coil v. Wallace,—*supra*. Lowden v. Morrison (1889) 36 Ill. App. 495, follows Tubbs v. Van Kleek, *supra*, Burnett v. Simpkins, 24 Ill. 265, and Fidler v. McKinley, *supra*. Daggett v. Wallace, 75 Tex. 352 (1889) 16 Am. St. Rep. 908, 13 S. W. 49, cites Sherman v. Rawson, *supra*, and Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336. Jennette v. Sullivan (1892) 63 Hun, 361, 18 N. Y. Supp. 266, follows the former New York decisions. Kaufman v. Fye (1897) 99 Tenn. 145, 42 S. W. 25, follows Goodall v. Thurman and Williams v. Hollingsworth, *supra*.

The remarkable unanimity among so many eminently respectable tribunals in imposing this doctrine upon the common law must be founded on some supposed natural equity, and this can be none other than the conviction, which some of the opinions quoted come very near expressing,—that sexual intercourse between persons who are engaged to marry each other is not criminal. But this is not the doctrine of the common law. Such an act could be innocent only if intended as an assumption of the marriage relation. The common law made *verba de futuro cum copula* evidence of marriage itself, not the basis of an action for breach of promise. The question in such cases is one of intention purely. Peck v. Peck, 12 R. I. 485, 34 Am. Rep. 702. If the intention is to consummate a marriage, it is a marriage and the act is innocent; if it is not so intended by the parties, the act is criminal in both. The presumption that the intercourse is innocent therefore precludes an action for not doing what the presumption says has been done. See 1 Bishop, Marr. Div. & Sep. § 353, and following. And whether the act be innocent or guilty, the maxim, *Volenti non fit injuria*, takes from both consenting parties the right to sue at common law. Against these authorities we are constrained to adhere to the conclusions of Treat, Ch. J., in Tubbs v. Van Kleek, *supra;* of the court of Kentucky, in Burks v. Shain, 2 Bibb, 341, 5 Am. Dec. 616; of the court of Pennsylvania, in Weaver v. Bachert, *supra;* Hay v. Graham, 8 Watts & S. 27; and Baldy v. Stratton, *supra;* of Judge Breese in Fidler v. McKinley, *supra;* of Potts, J., in Coil v. Wallace, *supra;* and upon the uniform practice of our own court since the time of Chief Justice Greene. If the question were to be decided with reference to the justice and expediency of the present law, we should doubt the propriety of making the suggested alteration.

The criminal statutes now make a wide distinction between the seducer and his victim in the punishments they allot to each. If the female be under eighteen years of age, or if the seduction be obtained by fraud or threats, the seducer may be imprisoned for five years. The penalty may be ten years' imprisonment if the female is under sixteen. —Gen. Laws 1896, chap. 281, §§ 4, 5; but there can be no conviction upon the uncorroborated testimony of the *particeps criminis*. The common law gives to the father or master of a minor female an action for damages against the seducer in which vindictive damages are allowable; but otherwise hold both parties as free agents to an

equal responsibility. It may be doubted, in the words of Chief Justice Parsons, in Paul v. Frazier, *supra*, in case the lawmakers give an action to a woman to recover for her own seduction, "whether seductions will afterwards be less frequent, or whether artful women may not pretend to be seduced in order to obtain a pecuniary compensation." And may not an artful woman who has had illicit relations with a man as easily pretend to have received a promise of marriage in order to recover damages for seduction? Fraud and cunning and avarice and desire are not exclusive characteristics of either sex. We may not assume that the roles of temptress and tempted, as cast in the earliest recorded human tragedy, are always inverted in the dramas of modern society. It seems to us that social morality will not be promoted by relieving either sex of legal responsibility for voluntary action. In California, Indiana, Iowa, and Tennessee the legislatures have taken a different view and have expressly conferred upon a seduced woman, if unmarried, a right of action for her seduction,—note to Weaver v. Bachert, 44 Am. Dec. 166, and cases cited. If the change in our law is thought desirable it should be made by the general assembly, as we have said before. What the law ought to be is for the legislature, not for the court, to decide.

The plaintiff's counsel argues that, if this evidence was not pertinent to aggravate the damages, it was admissible to prove, first, the contract of marriage; secondly, the breach of that contract. He is not without citations which support both propositions; but sound reason and the weight of authority are on the other side. For the first purpose this evidence could be deemed relevant only in a community where such misconduct was an ordinary and usual incident of betrothal. It would be an unwarranted insult to virtuous men and women to adopt such a premise. The remarks of Howk, Ch. J., in Felger v. Etzell, 75 Ind. 418, 421, are just and conclusive. He says: "We are aware that there are many cases in which it has been held that evidence of the conduct of the parties towards each other is admissible as tending to prove the existence of a promise of marriage; but such evidence, we think, should be limited, and, so far as we are advised, it has been limited, to the open, visible, or public conduct of the parties toward each other. The illicit intercourse of parties is generally consummated in the strictest privacy and secrecy, and is known only to the parties themselves; and the evidence of the parties, or of others, in regard to such intercourse, can have no possible tendency to prove the existence of a promise of marriage. This must be so, as it seems to us, in the very nature of things, unless it can be correctly said (and we need hardly say that the proposition is unreasonable and untenable) that illicit sexual intercourse naturally, necessarily, or generally, attends upon the mere promise of marriage, and is, therefore, one of the *indicia* of the existence of such promise." Such evidence is held not to support an alleged promise in Bleiler v. Koons, 132 Pa. 401, 19 Atl. 140; Boyer v. Sherer, 28 Ill. App. 545. As is said in Dupont v. McAdow, 6 Mont. 227, 9 Pac. 925: "We think the fact that a man has lived with a woman as his mistress raises a very strong presumption that he does not intend to marry her at all."

Neither is the evidence logically admissible for the second purpose. While seduction may be considered an outrage which violates the trust reposed in the stronger party, it is not a refusal to marry, although by consenting to it the weaker party may invite the repudiation of the promise. But it cannot be seriously urged that such circumstances are ever introduced by a plaintiff except with the object of increasing damages. The record plainly shows that such was the intent in this case. A meritorious case could hardly arise where the contract and the breach of it could not be proved by other evidence. In England, by Stat. 32 & 33 Vict. chap. 68, § 2, the testimony of a party will not support a verdict "unless his or her testimony shall be corroborated by some other material evidence in support of such promise." 2 Enc. Laws of England, 238. But it has been held in Rhode Island that no such corroboration is necessary here. Kelley v. Brennan, 18 R. I. 41, 25 Atl. 346. The evidence, as we conclude, was improperly admitted, and was so calculated to prejudice the jury against the defendant as to entitle him to a new trial.

2. Of the other exceptions taken by the defendant during the trial, only two are relied upon in his brief and argument before this court. He complains that his argument to the jury was unduly restricted by the court, in that he was not permitted to comment upon the fact which appeared in evidence, that some six months before the beginning of this suit a similar action for alleged breach of promise of marriage had been brought by one Mary J. Fuller, who was at one time housekeeper in a certain hotel in which this plaintiff was at the same time assistant housekeeper. The record and the affidavit do not show what inferences counsel was attempting to draw with sufficient definiteness to enable us to pass upon the legitimacy of them. So far as we can see, the circumstances shown had very little, if any, relevancy to the issues

of the case. The justice who presides at a jury trial must exercise a sound discretion in confining counsel to the discussion of vital issues, and we cannot say that such discretion was abused in the present case.

The last exception is based upon the introduction of testimony apparently showing an attempt by the defendant to compromise the plaintiff's claim. Such evidence is, of course, inadmissible. In this case the defendant's counsel say that it was so insidiously led up to that no fair opportunity to object was given. We think the record shows some ground for this complaint; but, as a new trial must be granted on other grounds, we need not further discuss this exception, and for the same reason we express no opinion upon the weight of the evidence.

Petition for new trial granted, and case remitted to the Superior Court for further proceedings.

RHODE ISLAND SUPREME COURT.

ANTONIO CAPPELLI
v.
HENRY M. WOOD:

SUSAN A. McDERMOTT, Garnishee.

(— R. I. —, 62 Atl. 978.)

Garnishment—verdict.

A verdict upon which no judgment has been entered is not subject to garnishment.

(December 22, 1905.)

CERTIFICATION by the Superior Court for Providence County for the opinion of the Supreme Court upon an agreed statement of facts of a proceeding to garnish a verdict which had been recovered in favor of plaintiff's debtor. Garnishee discharged.

The facts sufficiently appear in the opinion.

Mr. **Simon S. Lapham, Jr.**, for plaintiff:

A debt is not necessarily put beyond the reach of garnishment by being put in suit, where both suits are in the same jurisdiction.

Drake, Attachm. §§ 618–621; McConnell, Trustee Process, §§ 318–320; Smith v. Carroll, 17 R. I. 125, 12 L.R.A. 301, 20 Atl. 227, 21 Atl. 343.

This rule applies even after a verdict has been rendered in the case, and before judgment has been entered.

Ulrich v. Hower, 156 Pa. 414, 27 Atl. 243; Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co. 62 Iowa, 494, 17 N. W. 737.

Mr. **Albert D. Bean** for defendant.

Johnson, J., delivered the opinion of the court:

Assumpsit. Heard on certification from the district court of the sixth judicial district upon an agreed statement of facts, as follows:

"The defendant, Henry M. Wood, on the 13th day of October, A. D. 1905, obtained a verdict of a jury in the superior court, Providence county, in the case of Henry M. Wood v. Susan A. McDermott, for the sum of $150. On the 14th day of October, A. D. 1905, after verdict and before judgment in the case of Wood v. McDermott, the plaintiff in this case sued out of the district court of the sixth judicial district a writ of attachment, and said Susan A. McDer-

Case Note.—Garnishment of verdict before judgment.—The cases where there has been an attempted garnishment of a verdict before the entry of judgment are not numerous. Most of the reported cases arise from the attempted garnishment of a verdict in an action for tort, although it does not appear in CAPPELLI v. WOOD out of what the action did arise. The cases very generally hold that a mere verdict is not subject to garnishment.

In Wilde v. Mahaney, 183 Mass. 455, 62 L.R.A. 813, 67 N. E. 337, it was held that a claim for unliquidated damages arising out of contract is not the subject of trustee process, although a verdict has been rendered for it in favor of the principal debtor against the trustee, in which judgment has not been entered under a statute authorizing process only when the trustee has in his possession "goods, effects, or credits" of the principal debtor, and contemplating that the whole matter shall be disposed of on the answer of the trustee.

In Gamble v. Central R. & Bkg. Co. 80 Ga. 595, 12 Am. St. Rep. 276, 7 S. E. 315, the plaintiff recovered a verdict against the railroad for personal injuries, and thereafter several of his creditors served summonses of garnishment on the railroad company. The court held that the defendant, in an action for tort, is not subject to garnishment until final judgment is recovered, and a garnishment issued and served after a first verdict for the plaintiff in the action, which verdict is subsequently set aside and a new trial granted, and answered before a second trial is had, the answer denying any indebtedness, seizes nothing and takes no lien on the final recovery.

In Lehmann v. Farwell (Lehmann v. Deuster) 95 Wis. 185, 37 L. R. A. 333, 60 Am. St. Rep. 111, 70 N. W. 170, the defendant recovered a verdict in an action for personal injuries against the garnishee defendant and, before judgment was entered, the plaintiff herein commenced garnishee proceedings. The court held that a mere ver-

mott was duly served with a copy of said writ as garnishee of said Henry M. Wood. That said Susan A. McDermott duly filed her garnishee's affidavit which is a part of the record hereof. That execution in case of Wood v. McDermott has been stayed. That said case of Cappelli v. Wood is now pending in the district court of the sixth judicial district in said state on a written motion to discharge the garnishee, made by the defendant Wood. That the defendant Wood in case Cappelli v. Wood does not dispute the amount of the claim of said Cappelli, and that judgment shall be entered for the plaintiff for $246 and costs, and this court shall consider the validity of the attachment only."

The garnishee's affidavit referred to in said statement is as follows:

Providence—Sc.:
District Court of the Sixth Judicial District.
Antonio Cappelli v. Henry M. Wood.

In the above-entitled case, I, Susan A. McDermott, of the city and county of Providence and state of Rhode Island, the garnishee therein named, make affidavit and say that at the time of the service of the writ of garnishment in said case the defendant in said suit, Henry M. Wood, had received a verdict in the superior court for the county of Providence for the sum of one hundred and fifty dollars ($150), and that said decision has now become a judgment, and that execution thereon has been stayed by order of the presiding justice of the superior court.

Susan A. McDermott.

Subscribed and sworn to before me, in Providence, this 25th day of October, A. D. 1905.

Henry A. Palmer,
Notary Public.

Service of the trustee process in this case having been made after verdict and before the entry of judgment in the case of Wood v. McDermott, the question raised for consideration is: Can the garnishee be charged? In Foster v. Dudley, 30 N. H. 463–465, the court says: "If the trustee suit is commenced while the debtor trustee has yet an opportunity to ask for delay, and to plead a recovery against him, if one should be had, he may be charged as trustee if no other objection appears." This statement of the law was approved by this court in Smith v. Carroll, 17 R. I. 125–127, 12 L.R.A. 301, 20 Atl. 227, 21 Atl. 343. In Thayer v. Pratt, 47 N. H. 470, where, as in Foster v. Dudley, *supra*, the attempted garnishment was after verdict and before judgment, the court says: "Our statute must be construed in reference to existing remedies, and we are aware of no practice that will justify setting aside a verdict that has been fairly and properly rendered to let in a defense arising afterwards."

These cases state the law correctly, as far as they go. They hold, substantially, that a verdict cannot be made the subject of garnishment, because, after verdict, the opportunity to plead the garnishment has passed. There is a further reason, which appears to us to be equally conclusive. Garnishment is a proceeding in the nature of an involuntary suit by the defendant against the garnishee for the benefit of the plaintiff. The person sought to be garnished must be one against whom the defendant has a present right of action. In this

dict in a purely tort action is not the subject of garnishment before judgment.

In Thayer v. Southwick, 8 Gray, 229, it was held that in an action for tort the verdict did not convert the cause of action into a debt, and that a verdict before judgment could not be reached by trustee process.

In Detroit Post & Tribune Co. v. Reilly, 46 Mich. 459, 9 N. W. 492, the court held that, until judgment was entered on the verdict in a suit for libel, there was no indebtedness which could be garnished.

In Dibrell v. Neely, 61 Miss. 218, the court held that in a suit for trespass the defendant is not the plaintiff's debtor so as to be held as garnishee until final judgment is entered, and that at any time during the term in which a judgment is rendered against himself the defendant may secure a new trial by agreement with the plaintiff, extinguish the claim for damages by payment of an agreed sum, and thus defeat the garnishing claimant.

In Ulrich v. Hower, 156 Pa. 414, 27 Atl. 243, a creditor of the plaintiff having, subsequently to verdict and before judgment in an action for wages, attached the money in the defendant's hands, and the plaintiff, after judgment, having issued a fi. fa., it was held that the fi. fa. should have been set aside on the application of the defendant. The court said that the defendant, as garnishee in that action, was entitled to protect himself, and that whether plaintiff's claim against defendant was exempt from attachment was a question that the latter, as garnishee, was not bound to decide at his own risk. The court further said that the plaintiff could have gone into court and tested the validity of the attachment on a rule to dissolve the attachment, but that his conduct in entering judgment and issuing a fi. fa. after service of the attachment showed an intention to harass the appellant, which the court should not have permitted to be successful.

case the defendant had no such right of action against the garnishee at the time of the service of the trustee process. He had simply a verdict, on which the entry of judgment was necessary to give him a right of action. No matter how long a verdict remained on the records of the court, no action could be brought upon it. In such case garnishment therefore fails, not only because after verdict the time to plead the garnishment has passed, but because the verdict itself is entirely lacking in the essentials of a subject of garnishment.

The attempted garnishment was invalid, and the garnishee cannot be charged.

Case remanded to the District Court of the Sixth Judicial District, with direction to enter judgment for the plaintiff in accordance with the agreement of the parties.

WASHINGTON SUPREME COURT.

NATHAN DEGGENDER, Receiver, etc., of Stumpf & Morgan, Respt.,
v.
SEATTLE BREWING & MALTING COMPANY et al., Appts.

(— Wash. —, 83 Pac. 898.)

Intoxicating liquors—license—right of receiver.

1. A license to sell intoxicating liquors, which, under the terms of the statute, is transferable, and therefore has a money value, is an asset of the estate of the licensee to which a receiver for the benefit of his creditors is entitled.

Same—assignment of license.

2. A contract assigning a liquor license as collateral security is not valid as against creditors where it is neither executed, acknowledged, filed nor recorded, as required by law, and the license is left in possession of the assignor.

(January 9, 1906.)

APPEAL by defendants from an order of the Superior Court for King County temporarily restraining them from transferring a liquor license. Affirmed.

The facts are stated in the opinion.

Messrs. **George Meade Emory** and **Scott Calhoun**, for appellants:

The title of a receiver is the same as that of any other citizen who attempts to engage in the liquor business; and he would have no right to engage in that business by virtue of a license issued to Stumpf & Morgan until the city council had ratified and sanctioned the transfer to him of the license and the conduct of the business.

Re McArdle, 126 Fed. 442; Fisher v. Cushman, 51 L.R.A. 292, 43 C. C. A. 381, 103 Fed. 860.

The lower court had no power to restrain or interfere with the free exercise of the discretion of the licensing body.

McNeeley v. Welz, 166 N. Y. 124, 59 N. E. 697; E. S. Bonnie & Co. v. Perry, 117 Ky.

Case Note.—Liquor license as asset.—The different connections in which the nature of the right conferred by a liquor license has been the subject of consideration by the courts have given rise to a variety of characterizations, ranging from "a permit to do something otherwise unlawful," through "a personal privilege," "a personal privilege with some of the characteristics of property," "qualified property," to "property," which have a tendency to involve the question in confusion. To this is doubtless attributable the fact that the courts have not always, as the following cases show, considered a liquor license as an asset which may be subjected to the claims of creditors, even where the right of transfer is regarded as having monetary value.

In Re Summa, 2 Pa. Dist. R. 651, and Re Breen, 13 Pa. Co. Ct. 141, it is held that, where the transfer of the license is entirely in the discretion of the granting authority, a creditor of the licensee has no interest or right in the question whether or not the license should be transferred.

Where the law authorizes the transfer of licenses from one house to another when the house, from any cause, is destroyed and no longer fit for the purpose, or when the landlord, during the life of the license, refuses to renew the lease to the licensee in possession of the premises at the expiration of the term, such license is not transferable to one claiming through a purchaser at sheriff's sale. Re Hotel Cambridge, 7 Pa. Dist. R. 102.

And in Re Ulrich, 6 Pa. Dist. R. 408, it is held that, where the original licensee cannot transfer without the approval of the court, a liquor license cannot be levied upon and sold, because the sheriff has no power to make title to the purchaser.

A liquor-tax certificate, issued under the liquor-tax law of 1896, although assignable upon the condition that the proposed assignee is eligible, under the statute, to carry on the business for which such liquor-tax certificate was issued upon the premises described therein, and that the consent of the officer issuing the certificate be obtained, is not subject to levy and sale under execution,—at least unless a warrant of attachment has been issued and a levy made by virtue thereof. McNeeley v. Welz, 166 N. Y. 124, 59 N. E. 697. The court says: "The judgment creditors, therefore, acquired no lien upon the certificate through their execution and the proceedings thereunder. In order to obtain a lien thereon so as to test the good faith of the mortgage, or the transfer by virtue of the mortgage, they should have resorted to proceedings supplementary to execution, or to a creditor's action."

But in Koehler v. Olsen, 68 Hun, 63, 22 N.

459, 78 S. W. 203; Christian Feigenspan v. Mulligan (N. J. Eq.) 51 Atl. 191; Semple v. Flynn (N. J. Eq.) 10 Atl. 177; Niles v. Mathusa, 162 N. Y. 546, 57 N. E. 184; D. M. Koehler & Son Co. v. Flebbe, 21 App. Div. 210, 47 N. Y. Supp. 369; State ex rel. Kelley v. Bonnell, 119 Ind. 494, 21 N. E. 1101; 19 Am. & Eng. Enc. Law, 2d ed. p. 822; Miles v. State, 53 Neb. 305, 73 N. W. 679.

A contract between parties whereby a pledgee or mortgagee is permitted to take possession of personalty is a perfectly valid one, and is frequently enforced in the courts.

McClellan v. Gaston, 18 Wash. 472, 51 Pac. 1062; Bancroft-Whitney Co. v. Gowan, 24 Wash. 66, 63 Pac. 1111.

Messrs. Allen, Allen, & Stratton, for respondent:

The license was property.

Fisher v. Cushman, 51 L.R.A. 292, 43 C. C. A. 381, 103 Fed. 860; Re Fisher, 98 Fed. 89; Re Gallagher, 16 Blatchf. 410, Fed. Cas. No. 5,192; People v. Durante, 19 App. Div. 292, 45 N. Y. Supp. 1073.

When the license was issued it clothed the holder with certain property rights which the city council could not take away except for some misconduct. Those property rights have come to the plaintiff, and the city cannot arbitrarily take them away, directly or indirectly.

People ex rel. Negus v. Dwyer, 90 N. Y. 402.

Mount, Ch. J., delivered the opinion of the court:

This appeal is from an order of the lower court temporarily restraining the defendants from transferring a retail liquor license issued by the city to one I. G. Morgan, and directing the Seattle Brewing & Malting Company to deliver the paper evidence of said license to the respondent. It appears from the complaint and the affidavits filed at the hearing that on December 20, 1904, the city of Seattle issued to I. G. Morgan, of the firm of Stumpf & Morgan, copartners, a retail liquor license, authorizing the sale of liquors at retail for the term of one year at No. 1222 Second Avenue, at what is known as the "Brooklyn Café," in said city. The consideration for such license was $1,000, which was paid in advance. The money for the purchase of this license was furnished to Stumpf & Morgan by the Seattle Brewing & Malting Company. Morgan agreed to repay this money in monthly payments of $100 each until the amount due was fully paid, and, to secure the repayment, executed an agreement as follows:

Collateral Pledge of License.

Seattle, Washington, December 9, 1904.

For and in consideration of money advanced and guaranties made in my behalf and for me, and for and in consideration also, of the notes hereto attached, made payable by me to the said Seattle Brewing & Malting Company, I do hereby pledge

Y. Supp. 677, it is held that, where a liquor license is transferable only with the written permission of the board of excise, the interest or right which the debtor has in such license is not property which can be reached by a creditor's action, as the court has no power to enforce a transfer.

In Semple v. Flynn (N. J. Eq.) 10 Atl. 177, it is held that a liquor license in New Jersey is personal to the holder, and cannot be delegated, nor assigned, nor committed to the care of a receiver, by any court.

In Albany Brewing Co. v. Barckley, 42 App. Div. 335, 59 N. Y. Supp. 65, the right of a receiver in supplementary proceedings to a liquor-tax certificate is recognized.

It is also generally held that a liquor license forms no part of the assets of a decedent's estate. Porter v. Johnson, 96 Ga. 145, 23 S. E. 123; Blumenthal's Petition, 125 Pa. 412, 18 Atl. 395; Re Grimm, 181 Pa. 233, 37 Atl. 403; Immendorf's Estate, 7 Pa. Dist. R. 449.

Nor will his decedent's license confer upon a personal representative a right to sell liquor. United States v. Overton, 2 Cranch, C. C. 42, Fed. Cas. No. 15,979; People v. Sykes, 96 Mich. 452, 56 N. W. 12.

But where the executor or administrator succeeds in procuring a transfer of a license, securing the consent of the proper authorities, he becomes liable to account for the proceeds as assets of the decedent's estate. Reilly's Estate, 6 Pa. Dist. R. 252.

The holding of the courts that a liquor license shall be considered as an asset in bankruptcy seems to turn on a peculiar provision of the bankruptcy law, which vests in the trustee all property which, prior to the filing of the petition, the bankrupt "could by any means have transferred."

Thus, in Re Becker, 2 N. B. N. Rep. 245, 98 Fed. 407, the court says: "The statutes of the state permit a license to be transferred, subject to the approval of the court of quarter sessions; and I regard it, therefore, as so far property, 'which, prior to the filing of the petition, a bankrupt could by any means have transferred,' that the right to sell it (I do not say the right to exercise it) will pass to the trustee. No doubt there is a clearly visible distinction between a right to property and a mere personal privilege; but I see no abstract reason why some personal privileges may not also come to have qualities belonging usually to property rights alone,—such, for example, as capacity to be transferred, and sufficient attractiveness to make other persons willing to pay money for the opportunity to acquire them. Where, as in the case of a license to sell liquor, these qualities are found to exist in fact, it seems to me the privilege has ceased to be a privilege merely, and has become, in

all interest, claim, or demand of whatsoever nature, I have now or may have in any sum of money or in any interest in that certain license of the city of Seattle directed to me, permitting the sale of intoxicating liquors at that certain place known as "Brooklyn Cafe," and I do authorize said Seattle Brewing & Malting Company, for the better securing to it of the full payment of any and all indebtedness of any kind whatsoever that may be due it from me, to take possession and control, by any means convenient, and with as little expense to me as possible, of any claim or interest in any money growing out of the said license, or of any interest in said license. The said license herein intended to be treated as a collateral pledge for the better securing of my indebtedness to the said Seattle Brewing & Malting Company, and I do hereby waive any proceedings of foreclosure upon the same, and direct that upon my failure to pay my indebtedness to the said Seattle Brewing & Malting Company, as agreed by the oral understanding, and by the terms and conditions of the annexed notes by me made, the said Seattle Brewing & Malting Company is then and there to take possession of all interest I have in any manner or form in said license, and take possession and control of the said license as the said Seattle Brewing & Malting Company, shall see fit, without expense and without suit, the license certificate being left in possession of the pledgee herein for the purpose of complying with ordinance No. 4,205.

[Signed] I. G. Morgan.

Witness: Charles A. Thorndyke.

After the license was issued a retail liquor saloon was conducted by authority of the license, at the place therein described, by the firm of Stumpf & Morgan. On January 17, 1905, certain creditors of Stumpf & Morgan brought an action against them and attached all the property of the firm, including the saloon known as the "Brooklyn Café," and took possession thereof. The retail liquor license was at that time hanging upon the wall of the saloon. On January 21, 1905, an agent of the Seattle Brewing & Malting Company obtained possession of the license certificate by taking it from the saloon. On January 26, 1905, respondent was appointed receiver of the assets of Stumpf & Morgan, and duly qualified, and thereupon demanded the possession of the license certificate, which was refused. The brewing and malting company, on January 27, 1905, presented to the city a petition, signed by themselves and said Morgan, for a transfer of said license to one Nick Kennedy, and also asking for a change of location for the use of the license. The ordinances of said city provided for a transfer of an unexpired license, and for a change of location by consent of the city, upon application therefor, and upon the observance of certain formalities. The city was about to make the transfer, when the respondent, as receiver, brought this action for a restraining order and for possession of the certificate of license.

Appellants argue that the license, or the right to do business, in controversy, is a personal privilege conferred by the city upon the licensee, and is not such property as is subject to debts of the licensee, and that none of the rights secured thereby can be enjoyed by the receiver; that the license is merely an intangible privilege. A number of the state courts have held in accord with this position of the appellants. See Voight v. Board of Excise, 59 N. J. L. 358, 37 L.R.A. 292, 36 Atl. 686; Christian Feigenspan v. Mulligan (N. J. Eq.) 51 Atl. 191; State v. Lydick, 11 Neb. 366, 9 N. W. 560, and cases there cited; E. S. Bonnie & Co. v. Perry, 117 Ky. 459, 78 S. W. 208; Black, Intoxicating Liquors, § 130. This rule is based upon the idea that the right is a species of public trust, conferred only upon those who possess certain qualifications; that it is a police regulation, and is therefore in no sense property. Under statutes which do not permit transfers of the license from one per-

some sense, and in some degree, property also. It can hardly be sound to hold that a bankrupt's creditors may not avail themselves of the fact that money can be had for the chance of stepping into the licensee's place, but that the bankrupt himself may make the same bargain, and put the money safely into his pocket. The license court may or may not accept the buyer as the bankrupt's successor. That is the buyer's affair, and is not decisive upon the point now being considered. He buys a contingency, and buys it with his eyes open; but, in my opinion, the trustee has the contingency to sell, and the bankrupt is bound to execute the instrument necessary to carry out the sale." See also Re Brodbine, 93 Fed. 643.

And the same conclusion is reached by the circuit court of appeals in Fisher v. Cushman, 51 L.R.A. 292, 43 C. C. A. 381, 103 Fed. 860.

But in E. S. Bonnie & Co. v. Perry, 117 Ky. 459, 78 S. W. 208, it is held that a liquor license confined by statute to the place and person named in the order granting it, although transferable, at the option of the authorities, when the owner of the license dies or sells his stock or place of business, is a personal, intangible privilege, the value of which cannot be recovered by a trustee in bankruptcy from a preferred creditor to whom it has been assigned.

son to another, and where the right is a personal privilege only, we think the rule stated is undoubtedly correct. But where the statute recognizes the right of transfer from one to another, and where the right is a valuable right, capable of being surrendered and reduced to money, a different rule prevails. In such cases the license or right to do business becomes a valuable property right, subject to barter and sale. It is property with value and quality. The United States courts have held that liquor licenses issued under statutes authorizing a transfer are assets of an estate, under the bankruptcy act. Fisher v. Cushman, 51 L. R.A. 292, 43 C. C. A. 381, 103 Fed. 860; Re Becker, 98 Fed. 407; Re Fisher, 98 Fed. 89; Re Brodbine, 93 Fed. 643; Re Gallagher, 16 Blatchf. 410, Fed. Cas. No. 5,192. Mr. Black, in discussing these cases and the question involved in this action, in his note appended to the case of Fisher v. Cushman, 43 C. C. A. 392, says: "If these questions [referring especially to franchises to collect tolls and the like] should again arise, it is probable that they would be decided in accordance with the rule laid down in regard to liquor licenses; the true test being found in the question whether the franchise or right is actually transferable, with the consent of the authorities and without any practical difficulty, and whether it has a market value and can be disposed of by sale." This, it seems in reason, must be the correct rule. If a license to sell liquors is transferable, valuable, and is subject to sale, it is certainly not merely a personal privilege, but it has all the attributes of property, except tangibility, and must be treated as property. People v. Durante, 19 App. Div. 292, 45 N. Y. Supp. 1073. In this case the ordinance under which the license was issued provided for a transfer of the license upon the observance of certain formalities, about which there is no practical difficulty. The license fee was $1,000, payable in advance, and was so paid in this case. The license was good for one year from its issue. At the time the receiver took possession of the business the license had run only about one month. The license or right to do business, therefore, had a marketable value of about $900. Under these circumstances the license was more than a personal privilege. It was valuable personal property, and an asset of the firm of Stumpf & Morgan.

Appellants contend that the brewing company is entitled to the license under the contract or collateral pledge quoted above. We think this contention is without force as against creditors. The agreement was neither executed, acknowledged, filed, nor recorded as required by law, and the license certificate was left in possession of Stumpf & Morgan. It has been held that a contract of this kind constituted an equitable mortgage, which was not included within a statute requiring mortgages upon "goods and chattels" to be filed, upon the ground that a liquor license did not fall within the classification of goods and chattels, and would therefore be enforced. Niles v. Mathusa, 20 App. Div. 483, 47 N. Y. Supp. 38. Our statute, however, provides that "mortgages may be made upon all kinds of personal property" (Pierce's Code, § 6549 [Sess. Laws 1899, p. 157]), and "every such instrument, within ten days from the time of the execution thereof, shall be filed in the office of the county auditor" (Pierce's Code, § 6550 [Sess. Laws 1899, p. 158]). No transfer of personal property shall be valid as against creditors, where the property is left in possession of the vendor, unless the bill of sale is recorded within ten days after such sale. 1 Ballinger's Anno. Codes & Statutes, § 4578. We have held above that the license was personal property. Whether we construe the contract as a bill of sale or a chattel mortgage, it did not conform to the statute in either event, and was void as to creditors. It follows, upon the showing made, that the receiver was entitled to the possession of the certificate of license for the benefit of creditors, and that the court properly restrained the transfer thereof by the appellants.

The order appealed from is therefore affirmed.

Crow, Root, Dunbar, Hadley, and Fullerton, JJ., concur.

WASHINGTON SUPREME COURT.

R. CUNNINGHAM, Respt.,
v.
CITY OF SEATTLE, Appt.

(40 Wash. 59, 82 Pac. 143.)

Municipal corporation—injury by fire horse.

A municipal corporation is not liable for injury to a lawn by a horse kept for the use of the fire department, which escapes from custody through the negligence of one of the employees of that department.

(Rudkin, Dunbar, and Fullerton, JJ., dissent.)

(September 7, 1905.)

Case Note.—Municipal liability for acts or negligence of members of fire department.—That the rule that a municipal corporation is not liable for nonfeasance or malfeasance in the performance of its governmental functions is applicable to relieve it from liability for the acts or negligence of

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for injury to plaintiff's lawn through the alleged negligence of defendant. Reversed.

The facts are stated in the opinions.

Messrs. Mitchell Gilliam and Hugh A. Tait, for appellant:

The city is not liable in any event for damage caused in the maintenance or operation of its fire department.

Lawson v. Seattle, 6 Wash. 184, 33 Pac. 347; Sutton v. Snohomish, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; Russell v. Tacoma, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; Murtaugh v. St. Louis, 44 Mo. 479.

On petition for rehearing.

Mr. H. E. Foster, for respondent:

If, at the time of the commission of the trespass complained about, the city, through its servants and officers, was not performing, or attempting to perform, some governmental or public duty, then, and in such event, a right of action accrued in favor of anyone that was damaged or injured by the neglect, on the part of the city, to restrain its animals, kept for the purpose of aiding it in the performance of a public function,

members of its fire department, upon the ground that such department is not maintained for the benefit of the corporation as such, and that its members, although appointed, employed, and paid by the corporation, are not its agents and servants, but, rather, officers of the city, for whose negligence no action can be maintained against the city in the absence of statute, is well settled. As the following cases show, it has been applied under a great variety of circumstances.

On this ground, a municipal corporation was held not liable for damages arising from the destruction of property by fire, alleged to have been due to the neglect and failure of certain officers and agents of the fire department to perform their duties in regard to the extinguishing of said fire, in Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368.

Nor can a city be held liable for the destruction of property by fire which is alleged to have occurred through the negligence of the fire department in not having hose in proper condition to withstand the pressure of the water, and in being unfitted for duty by drinking and carousing. Robinson v. Evansville, 87 Ind. 334, 44 Am. Rep. 770.

A legislative or discretionary power to establish a fire department, conferred upon a city by the legislature, does not render the municipality liable for a loss by fire which might have been extinguished by proper exertion upon the part of the officers of the fire department. Heller v. Sedalia, 53 Mo. 159, 14 Am. Rep. 444.

A city cannot be held liable for the destruction of property by fire, on the ground that the failure of the fire department to respond to the alarm was due to the fact that it had been ordered on parade duty to attend the funeral of the city physician. Irvine v. Chattanooga, 101 Tenn. 291, 47 S. W. 419.

Nor on the ground that the firemen were, by permission of the common council, attending a fair, although a tax is levied toward the support of the department. Yule v. New Orleans, 25 La. Ann. 394.

Negligent driving of a fireman belonging to the city fire department, while going to a fire, cannot render the city liable for damages thereby caused. McKenna v. St. Louis, 6 Mo. App. 320; Freeman v. Philadelphia, 13 Phila. 154.

The reckless driving of a member of the fire department while exercising a team of horses in the street, attached to a hook and ladder truck, does not render the city liable for personal injuries or death caused thereby. Lilly v. Scranton, 18 Pa. Co. Ct. 433; Gillespie v. Lincoln, 35 Neb. 34, 16 L.R.A. 849, 52 N. W. 811.

A city cannot be held liable for the negligence of an employee whose duty it was to assist in the loading and weighing of coal purchased by the city for its fire department, and who, in recklessly moving scales which were to be used in weighing such coal, injured the plaintiff. Manske v. Milwaukee, 123 Wis. 172, 101 N. W. 377.

A municipal corporation is not liable to one injured by the negligence of the officers and employees of its fire department while they are practising with the water tower in one of the public streets. Frederick v. Columbus, 58 Ohio St. 538, 51 N. E. 35.

Nor for the killing of a person by the fall of a water tower being tested in a public place, preparatory to the purchase thereof. Thompson v. New York, 20 Jones & S. 427.

A city cannot be held liable for personal injuries caused by the explosion of a steam fire engine in the street. Woolbridge v. New York, 49 How. Pr. 68.

A city is not liable for the negligence of members of its fire department in leaving a ladder truck standing so that a ladder projects across the sidewalk in front of an engine house, in consequence of which a passerby is injured. Dodge v. Granger, 17 R. I. 664, 15 L.R.A. 781, 33 Am. St. Rep. 901, 24 Atl. 100.

A municipality is not liable for the frightening of a horse by the negligent and wanton ringing of a bell attached to fire apparatus which was being handled by members of the fire department. Saunders v. Ft. Madison, 111 Iowa, 102, 82 N. W. 428.

A city is not liable for damage to a stock of goods by water negligently thrown by its firemen. Davis v. Lebanon, 108 Ky. 688, 57 S. W. 471.

The distinction made between acts in a governmental and acts in a corporate capacity, with respect to municipal liability

or a private function, from trespassing upon and destroying the property of an individual.

Small v. Danville, 51 Me. 359; Lorillard v. Monroe, 11 N. Y. 392, 62 Am. Dec. 120; Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485; Dayton v. Pease, 4 Ohio St. 80; Little v. Madison, 42 Wis. 643, 24 Am. Rep. 435; Schultz v. Milwaukee, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; Chicago v. Schmidt, 107 Ill. 187; Newark v. Frye, Partial report in Robinson v. Greenville, 42 Ohio St. 629, 51 Am. Rep. 857.

A municipal corporation, in its private character as the owner of lands, houses, or other property, is to be regarded in the same light as a private corporation or an individual, and held liable accordingly.

Pekin v. McMahon, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; Weymouth v. New Orleans, 40 La. Ann. 344, 4 So. 218; Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 185; Carrington v. St. Louis, 89 Mo. 209, 58 Am. Rep. 108, 1 S. W. 240; Briegel v. Philadelphia, 135 Pa. 451, 20 Am. St. Rep. 885, 19 Atl. 1038; Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565.

Municipal corporations are liable for an unlawful entry upon the premises of another, and for injuries to the property of another, caused by the negligent operation of their waterworks system.

Pekin v. McMahon, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; Weymouth v. New Orleans, 40 La. Ann. 344, 4 So. 218; Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 185; Carrington v. St. Louis, 89 Mo. 209, 58 Am. Rep. 108, 1 S. W. 240; Briegel v. Philadelphia, 135 Pa. 451, 20 Am. St. Rep. 885, 19 Atl. 1038; Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565.

Municipal corporations are liable for an unlawful entry upon the premises of another, and for injuries to the property of another, caused by the negligent operation of their waterworks system.

therefor, is brought out in the case of Aschoff v. Evansville, 34 Ind. App. 35, 72 N. E. 279, in which it is held that, although a city cannot be held liable for damages resulting from water flowing from a broken water pipe into an adjacent cellar during a fire, because of its refusal and neglect to shut off the water after the breaking of the pipe, which would have interfered with the purely governmental use being made of the waterworks system at the time, it is liable for its negligence in not keeping its water system in condition to withstand such pressure as might have been anticipated; since, in the maintenance of a water system for general purposes, as well as for the use of its fire department, it acts in its corporate, and not in its governmental, capacity.

The rule under discussion is also applied in cases where the injury complained of is to a member of the department. Thus, in Shanewerk v. Ft. Worth, 11 Tex. Civ. App. 271, 32 S. W. 918, it is held that a city is not liable for an injury to the engineer of a fire engine, due to the gross negligence and incompetency of the driver, on the ground that the officers of the fire department are not the agents or servants of the corporation appointing them, but of the general public; and therefore that the doctrine of *respondeat superior* does not apply.

A municipality is not liable for injuries to an employee of its fire department because of its negligence in permitting the hose reel on which he was required to ride to get out of repair. Peterson v. Wilmington, 130 N. C. 76, 56 L.R.A. 959, 40 S. E. 853.

In Lawson v. Seattle, 6 Wash. 184, 33 Pac. 347, in denying the liability of a municipal corporation for an injury to a fireman because of a defective appliance furnished, the court said that a city can no more be held liable for the defective condition of the apparatus used by a fire company than it can for its negligent operation.

A municipality is not liable for an injury inflicted upon an employee of a fire department while acting in the line of duty, by a vicious horse which the chief had represented to be gentle. Lynch v. North Yakima, 37 Wash. 657, 80 Pac. 79.

A city is not liable to a lineman on its fire-signal system for negligence in respect to the condition of a pole, which breaks and injures him. Pettingell v. Chelsea, 161 Mass. 368, 24 L.R.A. 426, 37 N. E. 380; Peaty v. New York, 33 Misc. 231, 67 N. Y. Supp. 276.

A different view is taken in Bowden v. Kansas City, 69 Kan. 587, 66 L.R.A. 181, 105 Am. St. Rep. 187, 77 Pac. 573, which holds that a municipal corporation is performing a ministerial public duty in maintaining a fire station, and is liable in damages to an employee for personal injuries sustained, occasioned by the stumbling of a horse into a hole in the floor, causing it to fall against plaintiff.

Courts of admiralty have refused to apply the rule under discussion in cases of negligent collision of a fire tug with another vessel. Thus, in Thompson Nav. Co. v. Chicago, 79 Fed. 984, it is said that a municipal corporation may, in such cases, be held liable *in personam*, since, under the maritime law, the liability of an owner for injuries caused in a collision by negligence or misconduct is not dependent upon the relation of master and servant, or principal and agent, existing between him and the crew manning the vessel, but rests solely upon the fact of ownership; since the vessel committing the unlawful injury is considered the offender.

A municipality was held liable in admiralty as the owner of a fire tug, in Henderson v. Cleveland, 93 Fed. 844, for injuries to shipping, due to the speed with which the tug was proceeding to render aid in extinguishing a fire; there having been an abundance of time for the tug to reach its destination without running any risk to itself or other vessels.

In Workman v. New York, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212, the liability, under the maritime law, of a city for a collision caused by the negligent handling of a fire boat while hastening to a fire, was put upon the ground that the relation of master and servant existed between the city and those in charge of the boat, so that the rule of *respondeat superior* was applicable; a conclusion from which four of the judges dissented.

The earlier cases upon the question of the liability of a municipal corporation for acts of firemen, not included in this note, may be found in a note in 15 L.R.A. 781.

er, whereby injury to his property has been occasioned.

Urquhart v. Ogdensburg, 91 N. Y. 67, 43 Am. Rep. 655; Seifert v. Brooklyn, 110 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Byrnes v. Cohoes, 67 N. Y. 204; Wood, Nuisances, § 752.

At the time of the commission of the acts complained about the city was managing its property, and at such time it was acting as a legal entity; its duties, so far as the complaint is made in this action, were purely ministerial. In such event, a right of action must accrue in favor of anyone who is damaged or injured.

Small v. Danville; Lorillard v. Monroe; Oliver v. Worcester; Newark v. Frye, Partial report in Robinson v. Greenville; Dayton v. Pease; Little v. Madison; Schultz v. Milwaukee; and Chicago v. Schmidt,—*supra*.

Crow, J., delivered the opinion of the court:

Respondent instituted this action against the city of Seattle, appellant, to recover damages occasioned by a certain horse trespassing upon and destroying respondent's lawn. On trial the court made findings of fact to the effect that on September 6, 1904, appellant city was maintaining near respondent's residence a certain engine-house as a part of its fire department, and keeping there numerous horses; that on said date, through the negligence of said city, one of said horses trespassed upon respondent's lawn, by running over, tearing up, and destroying the same; and that said horse was owned, kept, and used by said city exclusively in said fire department. Upon said findings, judgment was entered in favor of respondent, and this appeal has been taken.

It clearly appears from the evidence that said horse was in the exclusive charge, care, and control of the regular employees of said fire department. Appellant contends that no negligence on the part of the city or its employees has been shown; but, without passing on that question, we will, in disposing of this case, accept the findings as made by the trial court. Appellant further contends that, even though negligence be conceded, still it is not liable to respondent for any damage caused by its employees in the maintenance and operation of its fire department. This contention, we think, should be sustained. The maintenance of a fire department by a municipal corporation is the exercise of a public or governmental function. "The rule is general that a municipal corporation is not liable for alleged tortious injuries to the persons or property of individuals, when engaged in the performance of public or governmental functions or duties." 20 Am. & Eng. Enc. Law, 2d ed. p. 1193. The only question here is whether appellant is liable for damage done to respondent's property by reason of negligent acts of the members of its fire department. Under the authorities, this question has been almost uniformly answered in the negative. The supreme court of Ohio in Frederick v. Columbus, 58 Ohio St. 546, 51 N. E. 35, says: "The ground on which the nonliability of municipal corporations is placed in such cases is that the power conferred on them to establish a department for the protection of the property of its citizens from fire is of a public or governmental nature, and liability for negligence in its performance does not attach to the municipality unless imposed by statute. The nonliability of the city in such cases rests upon the same reasons as does that of the sovereign exercising like powers, and are distinguished from those cases in which powers are conferred on cities for the improvement of their own territory and the property of their citizens." The holdings of this court have been to the same effect. Lawson v. Seattle, 6 Wash. 185, 33 Pac. 347; Russell v. Tacoma, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; Simpson v. Whatcom, 33 Wash. 392, 63 L.R.A. 815, 99 Am. St. Rep. 951, 74 Pac. 577; Lynch v. North Yakima, 37 Wash. 657, 80 Pac. 79. In Lynch v. North Yakima this court, speaking by Root, J., said: "But it may generally be accepted that a city is not liable for an improper discharge by its officers of a purely governmental function. The duties of an officer or employee of a fire department are regarded as for the benefit of the community, and not for the mere advantage of the municipality as a corporate body. The city, possessing, as it does, a portion of the sovereignty of the state, in the exercise thereof provides and maintains a fire department. The services of this department are for the benefit of all persons who may have property in the city limits capable of injury by fire. It would seem, therefore, that, in creating, maintaining, and operating the fire department, the city was exercising governmental functions."

Under the above authorities, we think the city of Seattle was not liable to respondent for damages resulting from negligent acts of the employees in its fire department. The trial court, therefore, erred in entering judgment for said respondent. The judgment is reversed, with instructions to dismiss the action.

Mount, Ch. J., and Root and Hadley, JJ., concur.

Rudkin, J., dissenting:

The majority opinion states the question presented on this appeal in the following language: "The only question here is whether appellant is liable for damage done to respondent's property by reason of negligent acts of the members of its fire department." It seems to me a more correct statement of the proposition would be this: Can a municipality owning horses, and having exclusive dominion over them, permit them to trespass upon the private property of others, with impunity? Judge Cooley, in his work on Torts, states the rule of nonliability of municipal corporations for taking, or neglecting to take, strictly governmental action as broadly as this or any other court; yet, in discussing the question now under consideration, the learned author says: "Municipal corporations are to be considered, first, as parts of the governmental machinery of the state, legislating for their corporators, and planning and providing for the customary local conveniences for their people; second, as corporate bodies through proper agencies putting into execution their plans, and discharging such duties as they have imposed upon themselves, or as the state has imposed upon them; and, third, as artificial persons owning and managing property. In this last capacity they are chargeable with all the duties and obligations of other owners of property, and must respond for creating or suffering nuisances under the same rules which govern the responsibility of natural persons. Under this head, therefore, nothing more need be said in this place." Cooley on Torts, 2d ed. p. 738. Judge Dillon, in his work on Municipal Corporations, states the rule as follows: "Upon similar grounds, municipal corporations are liable for the improper management and use of their property, to the same extent and in the same manner as private corporations and natural persons. Unless acting under some valid, special legislative authority, they must, like individuals, use their own so as not to injure that which belongs to another, or unjustly or improperly invade private rights." Dill. Mun. Corp. 4th ed. § 985. In Rowland v. Kalamazoo County, 49 Mich. 553, 14 N. W. 494, an action was brought against the county superintendents of the poor to recover damages for negligently suffering the cholera to be communicated to the plaintiff's hogs. The court cited Cooley on Torts, *supra*, and Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552, and said: "An examination of the above authorities will show that municipal corporations, in the care and management of their property, like an individual, are in duty bound to produce no injury to others. In clearing up the poor farm the superintendents could not, nor could those in their employ, with impunity negligently set fires, or carelessly permit them to extend to and destroy the property of their neighbors; nor could they permit the farm stock to trespass upon the lands of adjoining proprietors, and claim exemption from all liability therefor." In Moulton v. Scarborough, 71 Me. 267 36 Am. Rep. 308, a town was held liable for injuries caused by a vicious ram owned by it. In Kies v. Erie, 135 Pa. 144, 20 Am. St. Rep. 867, 19 Atl. 942, it was held that the city was not liable for injuries resulting to a foot passenger through the negligence of a fireman in throwing open the doors of an engine house; but, in an action between the same parties to recover for the same wrong, the court held, in 169 Pa. 598, 32 Atl. 621, that the city was liable for injuries resulting from the improper construction of the engine house.

Some of the authorities make a distinction between the liability of municipal corporations for injuries resulting from property held for governmental purposes and property held for gain and profit, holding that a recovery may be had in the latter case, but not in the former. In view of such distinction, a recovery might be had for a trespass committed by a horse used in the street department, but not in the fire department. I do not think there is any just foundation for such distinction, and the authorities generally do not recognize it. Speaking on this subject, Jones, in his work on Negligence of Municipal Corporations, § 150, says, "Moreover, the weight of authority does not justify a distinction of this character; and an examination of the cases upon this question will sustain the conclusion that municipal corporations are responsible in damages for all injuries occasioned by their negligence in the management or care of public property, irrespective of the question whether an income is derived from it." See also Bishop, Non-Contract Law. §§ 755 et seq. I do not think this case depends upon the negligence of the firemen at all. It is a case of trespass, pure and simple, and the question of negligence does not necessarily enter into it. Cooley, Torts, 2d ed. p. 397. It seems to me the majority opinion is a misapplication of the rule that a municipal corporation is not liable for injuries resulting from purely governmental action, and a perversion of the maxim that one must so use his own property as not to injure another.

The judgment should be affirmed.

Fullerton and Dunbar, JJ., concur.

A petition for rehearing having been

granted, Root, J., on March 5, 1906, handed down the following additional opinion:

A petition for a rehearing was granted in this case. After reargument and a careful consideration of the question involved, the majority of the court have been unable to reach a conclusion different from that heretofore announced. An exhaustive examination of the authorities convinces us that there is no legal escape from that conclusion. It is sought to distinguish this case as being one of trespass and not controlled by the ordinary rule that municipalities are not holden for damages occasioned by its officers and agents in the exercise of its governmental functions. We think no such distinction is established by the authorities, or sustainable on principle. To uphold such a distinction would be to entail absurd consequences. To illustrate: A fireman negligently absents himself from the city's fire engine, under his control, and for lack of attention the boiler explodes, hurling a mass of iron which damages a citizen's lot. It is admitted that the citizen cannot recover against the city. The same fireman absents himself from the engine horses under his care, and for lack of attention one escapes and tramples the citizen's lawn. The latter, under respondent's theory, is entitled to recover damages because it is a trespass. Take another illustration: A fireman purposely or accidentally "turns the hose" upon a citizen's yard and injures it without subjecting the city to damage. But if he purposely or carelessly permitted the city's fire-engine horses to go into said yard, respondent says the city would be liable. Another: If a city's policeman, while on duty, should go upon the premises of a citizen and unlawfully beat him, the city would not be liable. But if the policeman had one of the city's horses under his control and permitted it to stray upon the citizen's lawn, it is contended that the city would be liable. Again: If the horses hauling the fire engine are negligently handled by the driver, and, on account of his carelessness, run across a citizen's lawn, no liability is thereby occasioned against the city. But if the fireman's attention is drawn from the horses to the fighting of a dangerous fire or for any other purpose, and the horses in the meantime trespass upon the premises of a citizen, it is urged that the city is holden for damages. In the absence of a statute or established judicial authority, we are not justified in recognizing such distinctions. In the discharge of governmental functions, the city exercises a portion of the state's sovereignty. "The King can do no wrong" was long ago a familiar maxim. The principle is still extant and pervades our laws except where its application has been limited by Constitutions, statutes, and the customs, institutions, and conditions of our people. It is a logical consequence of the conditions where it obtains. Politically and socially, what is a city? An aggregation of people. Who own the fire-engine horses? The people comprising the city. Respondent owned as great an interest in this horse as any other citizen of Seattle. Can a person maintain an action against his associates for injury done him by an animal owned jointly by him and them? Can he sue them for the result of a trespass which could not have occurred but for the neglect of the animal's keeper, who was the servant of himself and them jointly? When this respondent sues the city of Seattle for the injuries occasioned by its trespassing horse, is he not prosecuting his joint owners (perhaps himself also) for damages done by his horse while running loose as a result of the neglect and carelessness of his own servant, the fireman? It is said that the case does not depend upon the negligence of the fireman. Let us see if this argument is consistent with respondent's other contentions. He claims that it was the duty of the city to prevent its horses from trespassing. It was necessary that this duty should be performed by some agent or servant of the city. The fireman was the agent or servant upon whom the city fixed that obligation. If he had not neglected the duty, the horse would not have escaped. His neglect was negligence. Hence it is impossible to conceive of the horse being at large, except as a result of negligence—of a breach or neglect of duty—on the part of some agent employed to care for the horse.

The rule exempting municipalities from liability for negligence in the matter of governmental functions has one well-recognized exception,—that in regard to injuries sustained upon sidewalks, streets, and public places. Possibly there are other exceptions, but we are not advised of any covering a case like that at bar. In Lawson v. Seattle, 6 Wash. 184, 33 Pac. 347, this court, through Dunbar, Ch. J., said: "We believe there are no authorities which support appellant's contention that a municipal corporation is liable for the negligence of firemen engaged in the line of their duty. The authorities cited by appellant certainly do not maintain this proposition, but, on the contrary, most of them assert exactly the opposite proposition, *viz.*, the rule that a municipal corporation is not liable for the negligence of firemen engaged in the line of their duty. This is so plainly the well-established rule that it is scarcely necessary to discuss it. See Dill. Mun. Corp. 4th ed. § 976, and cases cited." In Russell v. Tacoma, 8 Wash. 156. 40 Am. St. Rep. 895, 35 Pac. 605, Anders, J.,

speaking for the court, employed this language: "While it is not always easy to draw the line between the public, or governmental, and private powers of municipal corporation, we think the respondent city, under the facts in this case, in improving the park, was exercising a power or franchise conferred upon it for the public good, and not for private corporate advantage. And, this being so, it is not liable for the acts or omissions of its officers in that behalf." In Sutton v. Snohomish, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273, this court spoke as follows: "In preserving the peace, caring for the poor, preventing the destruction of property by fire, and preserving the public health, it [the city] assumes duties which are said to be in their nature solely governmental (Jones, Neg. Mun. Corp. chap. 4), and for the nonexercise or negligent exercise of which the corporation is not generally liable to individual citizens." In Lynch v. North Yakima, 37 Wash. 657, 80 Pac. 79, the following appears: "It would seem, therefore, that in creating, maintaining, and operating the fire department, the city was exercising governmental functions. This seems to have been the view entertained by the courts that have considered this subject. In the case at bar the respondent had provided. and was maintaining, a fire department. The horses, engines, and apparatus were under the charge of a fire chief. In view of these facts, and in view of the character of the employment in which appellant was engaged, it impresses us as a case where the circumstances of his injury occasion no liability upon the part of the city." In the case last cited there was a second cause of action based upon negligence of the city officers in handling a smallpox patient. Touching that branch of the case the following language was used: " The handling of persons sick with contagious diseases is a duty which the city performs through its officers and agents, in the exercise of governmental functions. The benefits of such service go to the public, and not to the municipality as a corporate body. Hence, the manner in which the officers of the city perform said service cannot, ordinarily, render the municipality liable in damages." In Murtaugh v. St. Louis, 44 Mo. 479, the supreme court of Missouri spoke as follows: "Where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties. But where the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, the corporation is not liable for the consequence of such acts or omissions on the part of officers and servants."

Cooley on Torts, 2d ed. p. 739, says: "For taking, or neglecting to take, strictly governmental action, municipal corporations are under no responsibility whatever, except the politica[1] responsibility to their corporators and to the state. The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised within prescribed limits, at discretion, for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries. Therefore one shows no ground of action whatever when he complains that he has suffered damage because the city he resides in has made insufficient provision for protection against fire, or because cattle are not prohibited from running at large." Dillon on Municipal Corporations, vol. 2, § 976, uses this language: "The exemption from liability in these and the like cases is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable, but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without being expressly given; the maxim of *respondeat superior* has, therefore, no application." Thompson, Commentaries on Negligence, at § 5789, vol. 5, says: "A frequent expression of this doctrine is that no private action will lie against a municipal coporation for damages sustained in consequence of its neglect to perform a public or governmental duty, or in consequence of the trespasses or misfeasances of its officers or agents in the performance of such a duty." In Current Law, vol. 4, p. 737, the following appears: "In the extinguishment of fires and in making arrangements therefor, a municipal corporation acts in a governmental capacity, and is not liable for the negligent construction, maintenance, or use of its appliances."

The following are a few of the many cases bearing upon the question involved herein:

Hafford v. New Bedford, 16 Gray, 297; Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Jewett v. New Haven, 38 Conn. 368, 9 Am. Rep. 382; Mead v. New Haven, 40 Conn. 72, 16 Am. Rep. 14; Burrill v. Augusta, 78 Me. 118, 57 Am. Rep. 788, 3 Atl. 177; Grube v. St. Paul, 34 Minn. 402, 26 N. W. 228; Bryant v. St. Paul, 33 Minn. 289, 53 Am. Rep. 31, 23 N. W. 220; Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; Ham v. New York, 70 N. Y. 459; Wilcox v. Chicago, 107 Ill. 334, 47 Am. Rep. 434; Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762; Fisher v. Boston, 104 Mass. 87, 6 Am. Rep. 196; Curran v. Boston, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 465, 24 N. E. 781; Robinson v. Evansville, 87 Ind. 334, 44 Am. Rep. 770; Rivers v. Augusta, 65 Ga. 376, 38 Am. Rep. 787; Hart v. Bridgeport, 13 Blatchf. 289, Fed. Cas. No. 6,149; White v. Yazoo City, 27 Miss. 357; Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Hunt v. Boonville, 65 Mo. 620, 27 Am. Rep. 299; Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151; McCrowell v. Bristol, 5 Lea, 685; Kansas City v. Lemen, 6 C. C. A. 627, 12 U. S. App. 640, 57 Fed. 905; Cooley v. Essex, 27 N. J. L. 415; Condict v. Jersey City, 46 N. J. L. 157; Nicholson v. Detroit, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Edgerly v. Concord, 59 N. H. 78. In Lawson v. Seattle, *supra*, this court, *inter alia*, said: "It is a well-known fact that the apparatus used by a fire company is not under control of the city, but is under the special control and inspection of the fire company." If this be a correct proposition, it would seem to irresistibly follow that the horse involved in this case was not under the control of the city. Ordinarily, an action for damages caused by a trespassing animal must be maintained against the person having the custody and control of said animal. As a rule, the owner is not liable where the custody and control is at the time in someone else. Cooley, Torts, 2d ed. p. 401; Ingham, Animals, p. 234; Reddick v. Newburn, 76 Mo. 423; Ozburn v. Adams, 70 Ill. 291. It is, however, not necessary to base our decision upon this ground.

It is a hardship for respondent to be denied damages in this case. His would seem to be one of a class and character of injuries for which the legislature might properly permit recovery against the municipality. But, until the lawmaking body makes provision therefor, we are without authority to award a judgment for damages in such a case. Courts must follow the law as they find it.

The decision heretofore announced will not be disturbed.

Mount, Ch. J., and Hadley and Crow, JJ., concur.

Dunbar, Fullerton, and Rudkin, JJ., dissent.

Second petition for rehearing denied June 5, 1906.

WASHINGTON SUPREME COURT.

AMELIA STARR, Appt.,
v.
ÆTNA LIFE INSURANCE COMPANY, Respt.

(— Wash. —, 83 Pac. 113.)

Accident insurance—exceptions in policy—burden of proof.

1. One seeking to recover upon an accident insurance policy for the death of the insured is not bound to show that the death did

Case Note.—Duty of insured to negative death or accident from excepted cause.—If any proposition of law can be said to be settled it is the one that, in actions on policies of life or accident insurance, the person seeking to recover need not allege that the death or injury of the insured did not result from any of the causes which, by the terms of the policy, would relieve the insurer from liability thereunder. The fact that the death or injury did result from such a cause is a matter of affirmative defense, and must be averred by the insurer in its plea or answer. The cases to this effect are numerous, and, in addition to those cited in the opinion above, attention may be called to the following: Travelers' Protective Asso. v. Gilbert, 55 L.R.A. 538, 49 C. C. A. 309, 111 Fed. 269; Dennis v. Union Mut. L. Ins. Co. 84 Cal. 570, 24 Pac. 120; Metropolitan L. Ins. Co. v. McKenna, 73 Ill. App. 283; National Ben. Asso. v. Bowman, 110 Ind. 355, 11 N. E. 316; Freeman v. Travelers' Ins. Co. 144 Mass. 572, 12 N. E. 372; Hester v. Fidelity & C. Co. 69 Mo. App. 186; Germain v. Brooklyn L. Ins. Co. 30 Hun, 535; Latimer v. Sovereign Camp, W. W. 62 S. C. 145, 40 S. E. 155; Employer's Liability Assur. Corp. v. Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869.

In accordance with the general rule of evidence making it incumbent upon a party to prove the substantive facts that he is required to aver in his pleading, it follows that, in actions on policies of life or accident insurance, the burden of proof is on the insurer to show by a fair preponderance of the evidence that the death or injury for which recovery is sought; resulted from a cause which, by the terms of the policy,

bility for which the policy relieves the insurer.
not result from one of the causes from lia-
Same—railroad right of way.

2. A provision in an accident insurance policy that it does not cover being on any railroad right of way means on the track.

Evidence—declarations—res gestæ.

3. Declarations of a man crushed by cars, after he has reached the station and assistance has been summoned, as to how the accident happened, is admissible as part of the *res gestæ*, if his friends are not present, and he is so badly hurt that he dies within thirty-six hours after the accident, so that the presumption would be violent that the statement was made for self-serving purposes.

(December 27, 1905.)

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County in defendant's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. James A. Williams and Denton M. Crow, for appellant:

Exceptions in an accident insurance policy are construed strongly against the insurer.

Meadows v. Pacific Mut. L. Ins. Co. 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578; Standard Life & Acci. Ins. Co. v. Thornton, 49 L.R.A. 116, 40 C. C. A. 564, 100 Fed. 582; DeLoy v. Travelers' Ins. Co. 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108; Railway Officials & E. Acci. Asso. v. Drummond, 56 Neb. 235, 76 N. W. 562; Ætna L. Ins. Co. v.

would avoid the insurance. All the decisions are in harmony with STARR v. ÆTNA L. INS. CO. on this proposition. Somerville v. Knights Templars & M. Life Indemnity Asso. 11 App. D. C. 417; Supreme Tent K. of M. v. Stensland, 206 Ill. 124, 99 Am. St. Rep. 137, 68 N. E. 1098; Coburn v. Travelers' Ins. Co. 145 Mass. 226, 13 N. E. 604; John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. 41; Stevens v. Continental Casualty Co. 12 N. D. 463, 97 N. W. 862; Interstate Casualty Co. v. Bird, 18 Ohio C. C. 488.

In such cases the burden of proof is not put upon the plaintiff, even though his petition negatives the excepted causes of the death or accident stated in the policy, as such an allegation is unnecessary on his part, and he is under no duty to establish it by evidence. Jones v. United States Mut. Acci. Asso. 92 Iowa, 652, 61 N. W. 485; Mulville v. Pacific Mut. L. Ins. Co. 19 Mont. 95, 47 Pac. 650.

In a very large number of cases where this rule of law is applied, the defense upon which the insurer relies to avoid the policy is suicide. And, whether the policy sued on is one of life or accident insurance, the authorities are agreed that it is the insurer's duty to prove that the assured took his own life. Self-destruction, the courts say, is contrary to the general conduct of mankind. The love of existence is so firmly implanted in the human breast, men cling to life with such intensity, that the presumption of suicide is utterly abhorrent to the law, and cannot be indulged in. Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; Fidelity & C. Co. v. Love, 49 C. C. A. 602, 111 Fed. 773; National Union v. Thomas, 10 App. D. C. 277; Travelers' Ins. Co. v. Nitterhouse, 11 Ind. App. 155, 38 N. E. 1110; Equitable L. Ins. Co. v. Hebert (Ind. App.) 76 N. E. 1023; Mutual L. Ins. Co. v. Wiswell, 56 Kan. 765, 35 L.R.A. 258, 44 Pac. 996; Leman v. Manhattan L. Ins. Co. 46 La. Ann. 1189, 24 L.R.A. 589, 49 Am. St. Rep. 348, 15 So. 388; Supreme Council R. A. v. Brashears, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866; Cox v. Royal Tribe, 42 Or. 365, 60 L.R.A. 620, 95 Am. St. Rep. 752, 71 Pac. 73; Continental Ins. Co. v. Delpeuch, 82 Pa. 225; Fisher v. Fidelity Mut. Life Asso. 188 Pa. 1, 41 Atl. 467; Brown v. Sun Life Ins. Co. (Tenn. Ch. App.) 51 L.R.A. 252, 57 S. W. 415; Mutual L. Ins. Co. v. Simpson (Tex. Civ. App.) 28 S. W. 837; Walcott v. Metropolitan L. Ins. Co. 64 Vt. 221, 33 Am. St. Rep. 923, 24 Atl. 992.

In some jurisdictions where suicide is relied on as a defense it seems that the burden of proof is not shifted by the fact that the verdict of a coroner's jury and the proofs of loss furnished by the beneficiary to the insurance company stated that the assured committed suicide. Knights Templars & M. Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066; Sartell v. Royal Neighbors, 85 Minn. 369, 88 N. W. 985; Mutual L. Ins. Co. v. Hayward (Tex. Civ. App.) 27 S. W. 36. This has been said by high authority to be the law even where the proofs of loss were introduced in evidence by the plaintiff. Supreme Lodge K. of P. v. Beck, 36 C. C. A. 467, 94 Fed. 751. Affirmed in 181 U. S. 49, 45 L. ed. 741, 21 Sup. Ct. Rep. 532. In North Carolina, however, it is said that the statement that the assured died by his own hand, in the proofs of loss furnished the insurance company by the plaintiff, was, if unexplained, an admission of suicide, and, when introduced in evidence in an action on a policy of life insurance, "at once shifted the burden of proof upon the plaintiff." Spruill v. Northwestern Mut. L. Ins. Co. 120 N. C. 146, 27 S. E. 39.

The application of the same legal principles is illustrated in another numerous class of cases, where, in actions on accident policies, the defense relied upon by the insurer is that clause which, though its language may differ in different instruments, is in fact essentially the same, and which prevents recovery on the part of assured or his beneficiary if the death or injuries resulted from the insured's lack of due diligence, from his negligence, or voluntary exposure to unnecessary danger. Cotten v. Fidelity & C. Co. 41 Fed. 506; Fidelity & C. Co. v. Sittig, 181 Ill. 111, 48 L.R.A. 359, 54 N. E. 903; Conboy v. Railway Officials & E. Acci. Asso. 17 Ind. App. 62, 60 Am. St. Rep. 154,

Hicks, 23 Tex. Civ. App. 74, 56 S. W. 87; Lowenstein v. Fidelity & C. Co. 88 Fed. 474; Equitable Acci. Ins. Co. v. Osborn, 90 Ala. 201, 13 L.R.A. 267, 9 So. 869.

Appellant was not required to negative any of the exceptions.

Meadows v. Pacific Mut. L. Ins. Co. and Standard Life & Acci. Ins. Co. v. Thornton, *supra;* Payne v. Fraternal Acci. Asso. 119 Iowa, 342, 93 N. W. 361; Dougherty v. Pacific Mut. L. Ins. Co. 154 Pa. 385, 25 Atl. 739; Smith v. Ætna L. Ins. Co. 115 Iowa, 217, 56 L.R.A. 271, 91 Am. St. Rep. 153, 88 N. W. 368; Standard Life & Acci. Ins. Co. v. Langston, 60 Ark. 381, 30 S. W. 427; Fetter v. Fidelity & C. Co. 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592; Hill v. Central Acci. Ins. Co. 209 Pa. 632, 59 Atl. 262.

Appellant having established a prima facie case of external, violent, and accidental injuries, the judgment should be in her favor, unless the respondent establishes that the injuries were received by reason of the violation of some exception in the policy.

Traders' & T. Acci. Co. v. Wagley, 20 C. C. A. 588, 45 U. S. App. 39, 74 Fed. 457; Payne v. Fraternal Acci. Asso. *supra;* Richards v. Travelers' Ins. Co. 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762.

The statement should have been received as part of the *res gestæ.*

1 Cyc. Law & Proc. p. 295; Travelers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 437; Leahey v. Cass Ave. & F. G. R. Co. 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. 58; International & G. N. R. Co. v. Smith (Tex.) 14 S. W. 642; Delaware, L. & W. R. Co. v. Ashley, 14 C. C. A. 368, 28 U. S. App. 375, 67 Fed. 210; Waldele v. New York C. & H. R. R. Co. 29 Hun, 35; Augusta Factory v. Barnes, 72 Ga. 217, 53 Am. Rep. 838.

Messrs. Post, Avery, & Higgins, for respondent:

Assured was on what he knew to be, and what the ordinary mind would know to be, the right of way of this railroad company, when he got hurt.

Day v. Atlantic & G. W. R. Co. 41 Ohio St. 392; Chicago & A. R. Co. v. People, 98 Ill. 350; Chicago, M. & St. P. R. Co. v. Cass County, 8 N. D. 18, 76 N. W. 239; Central

46 N. E. 363; Follis v. United States Mut. Acci. Asso. 94 Iowa, 435, 28 L.R.A. 78, 58 Am. St. Rep. 408, 62 N. W. 807; Payne v. Fraternal Acci. Asso. 119 Iowa, 342, 93 N. W. 361; Badenfeld v. Massachusetts Mut. Acci. Asso. 154 Mass. 77, 13 L.R.A. 263, 27 N. E. 769; Keene v. New England Mut. Acci. Asso. 161 Mass. 150, 36 N. E. 891; Hess v. Preferred Masonic Mut. Acci. Asso. 112 Mich. 196, 40 L.R.A. 444, 70 N. W. 460; Jamison v. Continental Casualty Co. 104 Mo. App. 306, 78 S. W. 812; Williams v. United States Mut. Acci. Asso. 82 Hun, 268, 31 N. Y. Supp. 343; North American Acci. Ins. Co. v. Gulick, 25 Ohio C. C. 395.

In still other cases is found the application of the same doctrine to the various other causes of death or injury, such as are quoted from the policy in STARR v. ÆTNA L. INS. Co., and which would forfeit the insurance under the terms of the instrument sued on: Disease: McCarthy v. Travelers' Ins. Co. 8 Biss. 362, Fed. Cas. No. 8,682; Thornton v. Travelers' Ins. Co. 116 Ga. 121, 94 Am. St. Rep. 99, 42 S. E. 287; Fetter v. Fidelity & C. Co. 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592; drugs: Woodmen of the World v. Gilliland, 11 Okla. 384, 67 Pac. 485; drunkenness: Newman v. Covenant Mut. Ins. Asso. 76 Iowa, 56, 1 L. R.A. 659, 14 Am. St. Rep. 196, 40 N. W. 87; Sutherland v. Standard Life & Acci. Ins. Co. 87 Iowa, 505, 54 N. W. 453; Van Valkenburgh v. American Popular L. Ins. Co. 70 N. Y. 605; New York L. Ins. Co. v. La Boiteaux, 5 Ohio Dec. Reprint, 242; intentional injuries by self or another: Lampkin v. Travelers' Ins. Co. 11 Colo. App. 249, 52 Pac. 1040; Travelers' Ins. Co. v. Wyness, 107 Ga. 584, 34 S. E. 113; Guldenkirch v. United States Mut. Acci. Asso. 25 N. Y. S. R. 945, 5 N. Y. Supp. 428; violation of law: Cluff v. Mutual Ben. L. Ins. Co. 13 Allen, 308; violating rule of corporation: Standard Life & Acci. Ins. Co. v. Jones, 94 Ala. 434, 10 So. 530; no visible mark on body, and expedition to wild and uncivilized country: United States Casualty Co. v. Hanson, 20 Colo. App. 393, 79 Pac. 176.

There are some cases which at first sight might seem to be in conflict with the rules of pleading and evidence here treated, but which are clearly distinguishable from STARR v. ÆTNA L. INS. Co. and decisions in harmony therewith. At the outset a distinction must be made between what may, for the want of better terms, be technically called "provisos" and "exceptions." Provisos, in a policy of insurance, are stipulations added to the principal contract to avoid the promise of the insurer by way of defeasance or excuse; and in an action thereon it is incumbent on the insurer to plead them in defense and support them by evidence. Exceptions are clauses taking something out of the general operation of the contract so that the promise is to perform only what remains after the part excepted is taken away; and in actions on policies of insurance containing such clauses it is the plaintiff's duty to negative them, and show by evidence that his course of action does not come within the exception. Sohier v. Norwich F. Ins. Co. 11 Allen, 336. This rule of pleading is stated in different language in another Massachusetts case as follows: If the contract sued on "contain in it, first, a general clause, and afterwards a separate and distinct clause which has the effect of taking out of the general clause something that would otherwise be included in it, a party, relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and dis-

Trust Co. v. Wabash, St. L. & P. R. Co. 29 Fed. 555; Keener v. Union P. R. Co. 31 Fed. 126.

There is no insurance when the insured is at a place excluded by the policy.

Sohier v. Norwich F. Ins. Co. 11 Allen, 336.

The burden is upon the plaintiff to negative the existence of the condition stated in the policy.

American Acci. Co. v. Carson, 99 Ky. 441, 34 L.R.A. 301, 59 Am. St. Rep. 473, 36 S. W. 169; Lilly v. Preferred Acci. Ins. Co. 41 Misc. 8, 83 N. Y. Supp. 585.

The declaration was not admissible.

Waldele v. New York C. & H. R. R. Co. 95 N. Y. 274, 47 Am. Rep. 41; Savannah, F. & W. R. Co. v. Holland, 82 Ga. 257, 14 Am. St. Rep. 158, 10 S. E. 200; 2 Jones, Ev. § 348.

Dunbar, J., delivered the opinion of the court:

The appellant is the beneficiary named in a certain accident insurance policy issued to her husband, Martin Luther Starr. This action was brought by appellant, as such beneficiary, to recover the principal sum of $5,000, by reason of the loss of the life of said Martin Luther Starr as the proximate result of external, violent, and accidental means. Some of the facts were stipulated between appellant and respondent, and appear as follows: On December 6, 1903, the insured, Martin Luther Starr, was at Hatton, Adams County, Washington. At about 4 o'clock in the morning of said day said Starr, with some companions, started from the hotel for the Northern Pacific Railway Depot. The train for Spokane was then due, and came in shortly after said Starr and his companions arrived at the depot. It was then still dark. Starr left his companions before the arrival of the train, and when the train arrived he could not be found by his companions, who made some search for him. Shortly after the train pulled out for Spokane some men at the depot heard Starr calling from a direction opposite to that in which the train had gone, and in a few moments said Starr came to the depot from the direction opposite to that the train had

tinct clause which operates as an exception; but, if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it together with the exception." Com. v. Hart, 11 Cush. 130. For example, where the policy of insurance provides that, if the assured is killed while pursuing a calling classed by the insurance company as more hazardous than that recited as his in his application, his beneficiary is to receive a smaller sum than otherwise, the plaintiff in an action on such policy must allege that the assured was not killed in a more hazardous occupation (American Acci. Co. v. Carson, 99 Ky. 441, 34 L.R.A. 301, 59 Am. St. Rep. 473, 36 S. W. 169), and, of course, establish his allegation by evidence. Again, where an insurance company agreed to indemnify contractors against liability for any damages on account of injuries to third persons caused by the assured or their workmen, but not when the injuries were caused by a subcontractor of the assured or a subcontractor's workmen, it was the assured's duty, in an action on the policy, to prove that the injury for which he sought to have the insurance company respond in damages was not caused by a subcontractor or a subcontractor's workmen (Tolmie v. Fidelity & C. Co. 95 App. Div. 352, 88 N. Y. Supp. 717, Affirmed in 183 N. Y. 581, 76 N. E. 1110), and, of course, allege the same. And where a policy of accident insurance did not cover "injuries, fatal or otherwise, resulting from poison, or anything accidental, or otherwise taken, administered, absorbed, or inhaled (anesthetics administered by a regular physician excepted);" and the assured died under the influence of chloroform administered to him by a regular physician while undergoing an operation for appendicitis,—the burden is upon the plaintiff, in an action on the policy, to show that the death of the assured resulted from the chloroform independent of all other causes. Maryland Casualty Co. v. Glass, 29 Tex. Civ. App. 159, 67 S. W. 1062.

Another distinction to be borne in mind by the pleader is the difference in the amount of proof required in actions on policies of ordinary life insurance and on those of accident insurance. In the former all that it is necessary for the plaintiff to show in order to make a prima facie case is the contract and death. But in the latter, in addition to this, it is incumbent upon the plaintiff to prove that the injury was accidental. It is true that when the injury is shown it is presumed not to be self-inflicted, and to defeat recovery the defendant must, by averment and proof, negative this presumption; but the injury is not, therefore, presumed to be accidental. Where the very foundation of the action is accidental injury, the presumption of law is only an aid to the other evidence on the subject, and does not shift the burden on the entire issue to the defendant; and, after all the evidence is before the jury, the burden on the whole case rests where it did in the beginning,—that is, it is the duty of the plaintiff to establish all the necessary allegations of his declaration by a fair preponderance of the evidence. Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; Taylor v. Pacific Mut. L. Ins. Co. 110 Iowa, 621, 82 N. W. 326; Merrett v. Preferred Masonic Mut. Acci. Asso. 98 Mich. 338, 57 N. W. 169; Whitlatch v. Fidelity & C. Co. 149 N. Y. 45, 43 N. E. 405. No presumption of law arises that, because the death of the insured was not due to suicide, it was accidental. It

gone,—that is, from down the track towards Tacoma—with both arms hanging limp and in a crushed condition. Within two days after said Starr was discovered as aforesaid he died from the effect of such injuries. Before his death his arms were amputated for the purpose of saving his life. Said Starr had not received said injuries before leaving his companions at the depot. The evidence shows that prompt notice was given the respondent of said injuries and the subsequent death of the insured, and that within the time limited by the policy proper proofs of death were furnished. Respondent denied any liability under the policy of insurance, and thereafter this action was brought.

The complaint set up the death by accident, the provisions of the policy, etc., and all the allegations usual in such a case. The answer admitted the issuance of the policy by the defendant, but alleged that there were other conditions and requirements in the policy, not mentioned in the complaint, wherein it was provided that the failure to comply with such provisions would work a forfeiture and loss of all rights under the policy; affirmatively alleged that the policy of insurance, described in the complaint and sued upon, contained the following provision: "This insurance does not cover disappearance nor suicide, sane or insane, nor the result, fatal or otherwise, of injuries of which there is no physical mark upon the body (except as hereinbefore provided); nor in event of accident or death, loss of limb or sight, or disability resulting, wholly or partly, directly or indirectly, from bodily or mental infirmity, or disease in any form, nor from sleepwalking, medical or surgical treatment, war, or violating the law; nor for injuries intentionally inflicted upon the insured by himself; nor does it cover (except as incident to the occupation of railway employees) entering or trying to enter or leave a moving conveyance, using steam or electricity as a motive power (except cable and electric street cars) being in any place in or on any such conveyance which has not been provided for the occupation of passengers during transit, or being on any railroad bridge or right of way, except at established crossings of such roads with public highways." The answer further averred that the insured was, at the time of said injury, trying to board a moving railroad train at a place other than a station, or trying to commit suicide, and at said time was on, and said injury occurred on, the right of way of the Northern Pacific Railway Company's railroad, and at a place that was not then an established, or any, crossing of such railroad with a public highway; that said railroad right of way at the place that such injury occurred was at the time 400 feet wide, and that the said railway company's railway tracks ran approximately in the center of said right of way. The reply admitted the exceptions specified in the answer in the affirmative defense, but denied the other allegations. At the conclusion of the plaintiff's testimony, upon motion of defendant, the case was taken from the jury on the ground that there was not sufficient testimony to sustain a verdict, and an order of dismissal was made. From the judgment following this order, this appeal is prosecuted.

It is alleged that the court erred in sustaining respondent's challenge to the sufficiency of the evidence, and in refusing to

might be neither self-inflicted nor accidental; it might be due to natural causes. The plaintiff, therefore, must prove the accident no matter what plea is made in defense. Laessig v. Travelers' Protective Asso. 169 Mo. 212, 69 S. W. 469. Hence, it was held in Fidelity & C. Co. v. Weise, 182 Ill. 496, 55 N. E. 540, where the facts, if they can be said to prove any theory of the cause of death, rather militated against that of accident, that it was error for the trial court to charge that the insurer's claim that the assured had committed suicide was an affirmative defense, and that the law cast upon the company the burden of proving it by evidence, facts, and circumstances outweighing the plaintiff's evidence upon that point. Had the plaintiff in fact proved that the death was accidental, and had the trial court modified its charge by making it clear to the jury that the burden in the whole case was on the plaintiff to allege and prove all the facts necessary to establish her cause of action, doubtless the supreme court would have found no error, in harmony with its views as expressed in other cases before and since this one. See the Illinois cases cited, *supra*.

It would seem, however, that, where the death of the assured must have resulted from murder, suicide, or accident, the evidence excluding any other hypothesis, the death would be presumed to be accidental; neither the presumption that it was self-inflicted, nor that it was intentionally caused by another, can be indulged in. Indeed, the presumption is that it was not. "Hence," says the Wisconsin supreme court, "had the plaintiff proved only that the insured, at a certain time, had upon his person bruises and wounds, evidencing that he had been recently injured by external violence; and, further, that such injuries caused his death,—she would have made out a prima facie case of death resulting from bodily injuries, 'through external, violent, and accidental means.'" Cronkhite v. Travelers' Ins. Co. 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731. To the same effect, Jenkin v. Pacific Mut. L. Ins. Co. 131 Cal. 121, 63 Pac. 180; Burnham v. Interstate Casualty Co. 117 Mich. 142, 75 N. W. 445.

permit certain testimony which we will hereafter refer to. It appears from the record and the statements made by the court that the court was of the opinion that the burden of proof was upon the appellant to show that the death of the insured did not occur by reason of some of the exceptions incorporated in the policy. From an examination of all available authority on that subject we are forced to the conclusion that the court erred in this particular. It is the established and universal law that insurance polices are to be construed in favor of the insured, and most strongly against insurance companies. This is a reasonable rule, considering the fact that these policies are prepared by men who are learned in the law and trained in preparing contracts of this kind, and who have studied the legal effects of all the multifarious provisions in the ordinary insurance policies, whether accident or life; while the insured are frequently men and women of limited understanding, of simple methods of thought, and who, as a rule, would not be capable of technically construing doubtful provisions in a contract. Speaking of this proposition, it was said by the supreme court of Alabama, in Equitable Acci. Ins. Co. v. Osborn, 90 Ala. 201, 13 L.R.A. 267, 269, 9 So. 869: "Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of the insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy." In conformity with this rule, an examination of the subject shows that almost universal authority imposes upon the insurance company the burden of establishing the fact, in an action on an accident insurance policy, that the accident happened by reason of something that was excepted from the provisions of the policy, and that the burden is not imposed upon the insured to affirmatively show that the accident did not occur by reason of any or all of the exceptions incorporated in the policy. The rule is thus announced in 1 Cyc. Law & Proc. p. 289: "As to Accidental Character of Injury. On an issue as to whether the injury to, or death of, insured was caused by accidental means, or by some cause excepted by the policy, the legal presumption is against the insanity of insured, intentional injuries by third persons, lack of due care and diligence, self-inflicted injuries, and suicide. These presumptions may be overcome, however, by facts and circumstances establishing the contrary." Further, under the head of "Burden of Proof:" "The burden of proof is on plaintiff to show that the injury or death was due to accidental or other means specified in the policy. . . . (b) The burden rests on the defendant to show that the policy has been avoided by reason of a breach of some condition precedent, or that the injury or death was caused by some act which is made an exception to the risk in the policy, or that the action was not brought within the time required by the policy."

Meadows v. Pacific Mut. L. Ins. Co. 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578, is a case almost identical in circumstances and in principle with the one at bar. There it was shown that the deceased left the depot for the purpose of boarding a freight train standing at the station, and was soon after found mangled on the railroad track; and it was held that under such proof, in the absence of other evidence, the death was accidental. From a long and carefully considered opinion, in which many cases are reviewed, we quote the following excerpt: "The plaintiff showed, beyond controversy, that Daniel Meadows died by violent injuries, which were plainly visible upon his body; that the nature of these injuries left no doubt that they were the sole cause of his death; and proper proofs were made. Here he rested. He had made a prima facie case, unless we are required to presume that, because he was killed by being run over by cars on a railroad track, he was voluntarily exposing himself to unnecessary dangers, and was violating his agreement in regard to being upon a roadbed of a railroad, within the meaning of the policy. Such a presumption would destroy the presumption indulged by the law that Meadows was at the time exercising proper care for his safety. In the absence of all evidence to the contrary, the law presumes that he was exercising due care for his protection,"—quoting from Allen v. Willard, 57 Pa. 374, where the court said: "The natural instinct which leads men in their sober senses to avoid injury and preserve life is an element of evidence. In all questions touching the conduct of men, motives, feelings, and natural instincts are allowed to have their weight." The court then quoted from Parsons v. Missouri P. R. Co. 94 Mo. 286, 6 S. W. 464, where it was said: "There is no contributory negligence in the case, so far as the evidence in the record goes. It can only be found by indulging in unwarranted presumptions. The only presumption the law indulges in respect thereto is that the deceased was in the exercise of ordinary care and diligence at all times, in the discharge of his duties, until the contrary appeared," —citing Buesching v. St. Louis Gaslight Co. 73 Mo. 219, 30 Am. Rep. 503; Huckshold v. St. Louis, I. M. & S. R. Co. 90 Mo. 548, 2 S.

W. 794; and Crumpley v. Hannibal & St. J. R. Co. 111 Mo. 152, 19 S. W. 820, to the effect that it was not incumbent upon plaintiff in the first place to prove that the deceased was in the exercise of ordinary care and prudence, and Mallory v. Travelers' Ins. Co. 47 N. Y. 52, 7 Am. Rep. 410, and Lancaster v. Washington L. Ins. Co. 62 Mo. 121, to the effect that, in the absence of all evidence as to how the insured came to be thrown under the train which killed him, the presumption was that it was the result of accident.

Another carefully prepared opinion is that of Judge Day, of the United States circuit court, in the case of Standard Life & Acci. Ins. Co. v. Thornton, 49 L.R.A. 116, 40 C. C. A. 564, 100 Fed. 582, where, after an analysis and review of the authorities, it was said: "This presumption must stand in the case and be decisive of it, until overcome by testimony which shall outweigh the presumption. It casts upon the defendant, who claims that the death was intentional, the burden of establishing it by a preponderance of testimony." Where, in an action on a contract of insurance, it is claimed that death resulted from one of the excepted causes enumerated on the back of the policy, it was held in Railway Officials & E. Acci. Asso. v. Drummond, 56 Neb. 235, 76 N. W. 562, that "the plaintiff was only required to bring her case within the terms of the policy appearing on its face. She was not required to negative the conditions or exceptions indorsed thereon. In declaring on a contract which contains exceptions, conditions, or provisos it is not necessary for the pleader to do more than to allege the general clause under which his cause of action has arisen. He is not obliged to set out and negative a distinct clause which operates as an exception to the general clause, but which is not incorporated in it. . . . That condition afforded the basis for an affirmative defense, which would defeat a recovery if sustained by adequate proof. The burden of proving that death resulted from any of the causes enumerated on the back of the policy was on the defendant,"—citing Anthony v. Mercantile Mut. Acci. Asso. 162 Mass. 354, 26 L.R.A. 406, 44 Am. St. Rep. 367, 38 N. E. 973; Grangers' L. Ins. Co. v Brown, 57 Miss. 308, 34 Am. Rep. 446; Home Ben. Asso. v. Sargent, 142 U. S. 692, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332. But it is needless to quote authority, for the overwhelming weight of judicial opinion sustains this rule. In fact this is not denied by the learned counsel for respondent, but he asserts that good law is not made of numbers of authorities, and that logic alone is weight. Outside of the presumption which ordinarily attaches, that the numerical weight of authority correctly expresses the law, an examination of the authorities on this proposition, together with the reasoning advanced to sustain the decisions, convinces us that the appellant's contention must be sustained, not only by the numerical strength of decision, but by the weight of logic.

If it be true, then, that the burden was upon the respondent to show that the death of the insured was caused by an infraction of some of the provisions which were exceptions to the provisions of the policy, the cases relied upon by the lower court and decided by this court, *viz.*, Armstrong v. Cosmopolis, 32 Wash. 110, 72 Pac. 1038, and Reidhead v. Skagit County, 33 Wash. 174, 73 Pac. 1118, would sustain the appellant's contention instead of the decision of the court. Those were personal damage cases, where a recovery could be based only upon the negligence of the defendant; and the announcement by this court that jurors should not be allowed to guess at how an accident occurred, but that there must be some proof on that subject before a recovery could be had, would apply here to the proof which must be demanded of the respondent. A prima facie case having been made out by the appellant, the negligence of the insured in violating any of the excepted causes in the contract must be proved by the respondent.

On the proposition, which might arise on a retrial of the cause in relation to the meaning, within the contemplation of the parties to the contract, of the phrase "right of way," there seem to be no direct adjudications. It is not contended by the respondent that the expression "right of way," as used in the policy, contemplates the full 400 feet right of way that this company has where the accident happened, but that it means something more than the mere roadbed. Contracts of this kind, like other contracts, must be construed with reference to what was the probable intention of the parties. What interest was to be protected; what danger guarded against? Construing this contract in the light of these queries, and not being bound by its pure literalism, we must conclude that the object of the precautionary provision was to prevent recovery for accidents by cars. Such accidents must of necessity happen on the roadbed. It is plain that the occupancy of the right of way outside of the roadbed would not increase the hazard, and we are inclined to construe the expression "right of way" as meaning the way that the train has a right to travel, and can travel, *viz.*, on the track, which designates the only ground over which the train can travel, and the only place at which it can do any injury to anyone trespassing on its right of way.

After the court had indicated its view as to where the burden of proof rested in this

case the appellant asked to have the case opened for the purpose of introducing testimony in relation to the circumstances under which the accident happened. Leave was granted, and witness Munger was called to testify in that particular. Mr. Munger testified that he was called immediately after Starr was discovered, that he was at his home about three blocks from the depot, that he at once dressed and went to the depot, and found Starr lying on the floor with his arms crushed, and within ten or fifteen minutes thereafter the statement was made to Mr. Munger and Dr. Marion which the appellant offered in evidence. The witness stated that he thought it was about an hour after the accident when this statement was made by Starr. His only way of estimating the time, however, was by the fact that he had been sent for and had had time to dress, and that it was a few minutes after he arrived at the depot when Starr made the statement. This testimony was objected to by counsel for respondent, and the objection sustained on the ground that the testimony was not a part of the *res gestæ;* too long a time having elapsed after the accident before the statement was made by Starr to the witness. The offer was as follows: "Mr. Williams: I offer to show by this witness that the deceased and insured, Martin Luther Starr, just after the accident, at the time that the witness talked to him, as has already been stated, stated to the witness that he had reached the depot before the train arrived, and that he left the depot for the purpose of attending to a call of nature, and crossed the track, went over back of the warehouse, and will show by evidence, if I can, that the warehouse was in the direction of Tacoma from this road, this highway crossing, and that, while he was there, the train came in sooner than he expected, and stopped, and that he found the train a vestibuled train, and he could not board the train from the side on which he was then, and that the only way that he could get aboard the train was to go around the rear of the train, and that he started to run around the rear of the train, that he stumbled and fell, and struck his head against a railroad tie or some other obstruction, and was rendered unconscious, and in that condition he remained until after the train pulled out, and that, when the train pulled out, he discovered then that he had sustained these injuries which he had at the time he was found by these persons; and intend to show by other evidence than this witness to make the connection, after I have introduced this evidence, that at the time of the injury he was on this highway that was crossing the track." It may be that, under the rule which we have announced in relation to the burden of proof, appellant, upon a retrial of this case, may not find it necessary to again offer this testimony; or it may be that testimony may be offered by the respondent in relation to the matter in which this accident occurred which will necessitate the offer of this proof. So that, in view of a contingency of that kind, we think it best to pass upon the admissibility of the testimony offered. The ordinary rule is that a statement of this kind must have been made so recently that it would leave no room for collusion or premeditated self-serving. But no time can be arbitrarily fixed; it depending so largely upon the circumstances of each individual case. In Dixon v. Northern P. R. Co. 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 712, 79 Pac. 943, we held that fifteen minutes was not so long a time as would exclude the testimony, and in Roberts v. Port Blakely Mill Co. 30 Wash. 25, 70 Pac. 111, that testimony given within three hours after a railroad accident had occurred could be admitted as *res gestæ*. In this case, considering the facts that the man's associates had left him, that he was so mangled and crushed that an amputation of his arms was necessary, and that he died within thirty-six hours of the accident, it would be a violent presumption to indulge that the statement was made for a self-serving purpose; and we think that the refusal of testimony under such circumstances would tend to work an injustice by excluding testimony which would have a tendency to throw light on a transaction which would otherwise be obscure for want of evidence.

Under all the circumstances of the case, we think the judgment must be reversed, and a new trial granted; and it is so ordered.

Mount, Ch. J., and Hadley, Fullerton, Rudkin, and Root, JJ., concur.

Crow, J., having been of counsel, took no part.

Petition for rehearing denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ANNA NOLIN, Appt.,
v.
MARION PEARSON.

(— Mass. —, 77 N. E. 890.)

Husband and wife—alienation of affections.

Under a statute permitting a married woman to maintain actions for injuries in

Case Note.—Right of wife, under modern married women's acts, to sue for alienation

the same manner as if sole, she may maintain an action for the alienation from her of the affections of her husband.

(April 3, 1906.)

APPEAL by plaintiff from an order of the Superior Court for Essex County sustaining a demurrer to the declaration in an action to recover damages for alienation from plaintiff of the affections of her husband. Reversed.

The facts are stated in the opinion.

Mr. Essex S. Abbott, for appellant:

A wife can maintain an action against another woman for loss of *consortium* occasioned by her husband leaving her, if the loss of *consortium* is properly pleaded.

Neville v. Gile, 174 Mass. 305, 54 N. E. 841; Houghton v. Rice, 174 Mass. 366, 47 L.R.A. 310, 75 Am. St. Rep. 351, 54 N. E. 843; Evans v. O'Connor, 174 Mass. 291, 75 Am. St. Rep. 316, 54 N. E. 557; Bigaouette v. Paulet, 134 Mass. 124, 45 Am. Rep. 307.

It was so held in—

Seaver v. Adams, 66 N. H. 142, 49 Am. St. Rep. 597, 19 Atl. 776; Foot v. Card, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; Bennett v. Bennett, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; Gernerd v. Gernerd, 185 Pa. 233, 40 L.R.A. 549, 64 Am. St. Rep. 646, 39 Atl. 884; Wolf v. Frank, 92 Md. 138, 52 L.R.A. 102, 48 Atl. 132; Brown v. Brown, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320; Tucker v. Tucker, 74 Miss. 93, 32 L.R.A. 623, 19 So. 955; Smith v. Smith, 98 Tenn. 101, 60 Am. St. Rep. 838, 38 S. W. 439; Deitzman v. Mullin, 108 Ky. 610, 50 L.R.A. 808, 94 Am. St. Rep. 390, 57 S. W. 247; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Haynes v. Nowlin, 129 Ind. 581, 14 L.R.A. 787, 28 Am. St. Rep. 213, 29 N. E. 389; Betser v. Betser, 87 Ill. App. 399, 186 Ill. 537, 52 L.R.A. 630, 78 Am. St. Rep. 303, 58 N. E. 249; Rice v. Rice, 104 Mich. 371, 62 N. W. 833; Clow v. Chapman, 125 Mo. 101, 26 L.R.

of the affections of her husband.—Whether or not a wife had at common law any cause of action for the alienation of her husband's affections and depriving her of his support seems to be a disputed question, there being no conclusive authority either in England or in this country. The question was raised in Lynch v. Knight, 9 H. L. Cas. 577, 5 L. T. N. S. 291, where the judges differed widely in their discussions, but nothing was decided, as the decision of the case was placed on another ground. Since, under the common law, the wife's identity was deemed to be merged in that of her husband, and she could bring no action without joining him, and any damages recovered by her would belong to him, it is not strange that there are no common-law precedents on this question. Even if it were admitted that the wife had a legal right to her husband's society, and a cause of action against one who deprived her thereof, not being able to sue alone, she had no remedy for enforcing the right. But, considering the general attitude toward married women of the common law, which placed the wife in such abject subjection to the husband, and stripped her of most of the rights which belong in natural justice to a rational human being, it is doubtful if the early common-law courts would have recognized that she possessed even an abstract legal right to the *consortium* of her husband. But, whatever the position of the early common law may have been, it would seem that, under modern statutes, which have destroyed the fiction of the unity of husband and wife, and have relieved her of so many of her disabilities, giving her the control of her property and the right to sue in her own name, there can be no longer any excuse for permitting the husband to maintain an action for alienation of affections and loss of *consortium*, and denying the same right to the wife.

And the courts of most of the states of the Union hold that, under the modern statutes, the wife is entitled to maintain such an action in her own name. In addition to the cases cited in the opinion in NOLIN v. PEARSON, the right of the wife to maintain such an action is sustained in Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847 (Cal. App.) 82 Pac. 223; Noxon v. Remington, 78 Conn. 296, 61 Atl. 963; Bassett v. Bassett, 20 Ill. App. 543; Huling v. Huling, 32 Ill. App. 522; Wolf v. Wolf, 130 Ind. 599, 30 N. E. 308; Holmes v. Holmes, 133 Ind. 386, 32 N. E. 932; Reed v. Reed, 6 Ind. App. 317, 51 Am. St. Rep. 310, 33 N. E. 638; Railsback v. Railsback, 12 Ind. App. 659, 40 N. E. 276, 1119; Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 484; Love v. Love, 98 Mo. App. 562, 73 S. W. 255; Jaynes v. Jaynes, 39 Hun, 40; Manwarren v. Mason, 79 Hun, 592, 29 N. Y. Supp. 915; Van Olinda v. Hall, 88 Hun, 452, 34 N. Y. Supp. 777; Romaine v. Decker, 11 App. Div. 20, 43 N. Y. Supp. 79; Kuhn v. Hemmann, 43 App. Div. 108, 59 N. Y. Supp. 341; Breiman v. Paasch, 7 Abb. N. C. 249; Baker v. Baker, 16 Abb. N. C. 293; Warner v. Miller, 17 Abb. N. C. 221; Churchill v. Lewis, 17 Abb. N. C. 226; Brown v. Brown, 121 N. C. 8, 38 L.R.A. 242, 27 S. E. 998; Clark v. Harlan, 1 Cin. Sup. Ct. Rep. 418; Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075.

And in the following cases an action of this kind by a wife was entertained by the courts without any discussion of her right to maintain it: Bailey v. Bailey, 94 Iowa, 598, 63 N. W. 341; Hardwick v. Hardwick (Iowa) 106 N. W. 639; Harvey v. Harvey (Neb.) 106 N. W. 660; Nevins v. Nevins, 68 Kan. 410, 75 Pac. 492; Bowersox v. Bowersox, 115 Mich. 24, 72 N. W. 986; Leavell v. Leavell, 114 Mo. App. 24, 89 S. W. 55; Rath v. Rath, 2 Neb. (Unof.)

A. 412, 46 Am. St. Rep. 468, 28 S. W. 328; Nichols v. Nichols, 134 Mo. 187, 35 S. W. 577, 147 Mo. 387, 48 S. W. 947; Mehrhoff v. Mehrhoff, 26 Fed. 13; Eagon v. Eagon, 60 Kan. 697, 57 Pac. 942; Price v. Price, 91 Iowa, 693, 29 L.R.A. 150, 51 Am. St. Rep. 360, 60 N. W. 202; King v. Hanson (N. D.) 99 N. W. 1085; Williams v. Williams, 20 Colo. 51, 37 Pac. 614; Hodgkinson v. Hodgkinson, 43 Neb. 269, 27 L.R.A. 120, 47 Am. St. Rep. 759, 61 N. W. 577; Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847; Beach v. Brown, 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. Rep. 98, 55 Pac. 46.

Messrs. **Casey & Jones** and **Ernest Foss**, for appellee:

Alienation of affections is not a cause of action, but is mere matter of aggravation, the gist of the action being adultery.

Bigaouette v. Paulet, 134 Mass. 126, 45 Am. Rep. 307; Evans v. O'Connor, 174 Mass. 291, 75 Am. St. Rep. 316, 54 N. E. 557; Houghton v. Rice, 174 Mass. 368, 47 L.R.A. 310, 75 Am. St. Rep. 351, 54 N. E. 843.

At common law a wife had no property right in her husband, and no right of action, separately,—even after divorce or his death, —or jointly with her husband, for his seduction, enticement, or the loss of his *consortium*.

3 Bl. Com. pp. 142, 143; 1 Chitty, Pl. 72; Lynch v. Knight, 9 H. L. Cas. 577; Phillips v. Barnet, L. R. 1 Q. B. Div. 436; Lellis v. Lambert, 24 Ont. App. Rep. 665; Kelley v. New York, N. H. & H. R. Co. 168 Mass. 312, 38 L.R.A. 631, 60 Am. St. Rep. 397, 46 N. E. 1063; Schouler, Husb. & W. § 143.

No statute in this commonwealth gives a wife a right of action against another woman for criminal conversation with her husband.

Lellis v. Lambert, *supra*.

In other courts of eminent standing it has been held that the action will not lie.

Duffies v. Duffies, 76 Wis. 374, 8 L.R.A. 600, 89 N. W. 612; Buchanan v. Foster, 23 App. Div. 542, 48 N. Y. Supp. 732; Whitman v. Egbert, 27 App. Div. 374, 50 N. Y. Supp. 3; Wilson v. Coulter, 29 App. Div. 85, 51 N. Y. Supp. 804; Pollock v. Pollock, 9 Misc. 82, 29 N. Y. Supp. 37; Young v. Young, 8 Wash. 81, 35 Pac. 592; Ash v. Prunier, 44 C. C. A. 675, 105 Fed. 722.

A number of these cases place their decision on the ground that, even at common law, the wife had a legal right to the husband's *consortium*, and that her right of action for the loss thereof simply remained in abeyance because of her disability to sue without joining her husband, and that, this disability having been removed by statute, no obstacle remained to the enforcement of her right.

The right of a divorced woman to maintain an action for the alienation of the affections of her former husband was sustained in Postlewaite v. Postlewaite, 1 Ind. App. 473, 28 N. E. 99.

In the United States, Wisconsin, Maine, and New Jersey seem to stand alone in denying to a wife the right to sue for the alienation of her husband's affections and enticing him away from her, thus depriving her of his support, under statutes giving her the right to sue and be sued in her own name. Doe v. Roe, 82 Me. 503, 8 L.R.A. 833, 17 Am. St. Rep. 499, 20 Atl. 83; Morgan v. Martin, 92 Me. 190, 42 Atl. 354; Hodge v. Wetzler, 69 N. J. L. 490, 55 Atl. 49; Duffies v. Duffies, 76 Wis. 374, 8 L.R.A. 420, 20 Am. St. Rep. 79, 45 N. W. 522; Lonstorf v. Lonstorf, 118 Wis. 159, 95 N. W. 961.

The right is also denied in Lellis v. Lambert, 24 Ont. App. Rep. 653, Overruling Quick v. Church, 23 Ont. Rep. 262, and Lawry v. Tuckett-Lawry, 2 Ont. L. Rep. 162.

These cases deny that a wife has, in the absence of an express statute, any legal right to her husband's *consortium*, and hold that to deprive her thereof is no wrong to her, and therefore she can maintain no action against the guilty person.

That a married woman cannot maintain an action simply in the nature of crim. con. against another woman is declared in Kroessin v. Keller, 60 Minn. 372, 27 L.R.A. 685, 51 Am. St. Rep. 533, 62 N. W. 438. But the court here expressly distinguishes the cases giving a wife a right of action against one who has enticed her husband away from her, causing him to withdraw his support and to abandon her, saying that this is an entirely distinct cause of action from that of crim. con. It was not alleged in this case that the defendant was the seducer of the husband, or that the plaintiff had been deprived of her support.

So, in Houghton v. Rice, 174 Mass. 366, 47 L.R.A. 310, 75 Am. St. Rep. 351, 54 N. E. 843, it was held that a wife has no right of action against another woman for the alienation of her husband's affections, unaccompanied by adultery. In this case the court said that the declaration did not set forth any cause of action at common law if the husband had been the plaintiff instead of the wife, and that no statute of the commonwealth gave the wife any greater right than the husband in cases of this nature.

And the right of a wife, in Massachusetts, to maintain an action against a third person for merely alienating the affections of her husband was denied in Crocker v. Crocker (C. C. D. Mass.) 98 Fed. 702. In this case, also, there was no charge in the declaration of criminal conversation.

420, 20 Am. St. Rep. 79, 45 N. W. 522; Doe v. Roe, 82 Me. 503, 8 L.R.A. 833, 17 Am. St. Rep. 499, 20 Atl. 83; Morgan v. Martin, 92 Me. 190, 42 Atl. 354; Kroessin v. Keller, 60 Minn. 372, 27 L.R.A. 685, 51 Am. St. Rep. 533, 62 N. W. 438; Lellis v. Lambert, 24 Ont. App. Rep. 653; Hodge v. Wetzler, 69 N. J. L. 490, 55 Atl. 49.

The intention of this court to follow the above cases seems to be pretty clearly intimated.

Neville v. Gile, 174 Mass. 305, 54 N. E. 841; Houghton v. Rice, *supra;* Dixon v. Amerman, 181 Mass. 430, 63 N. E. 1057.

Braley, J., delivered the opinion of the court:

The early common law recognized and upheld the doctrine that for most purposes husband and wife formed a single person, represented by the husband, and, as a consequence of this legal merger, it has been said: "That is, the very being or legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband. . . . Upon this principle of the union of person in husband and wife depend almost all of the legal rights, duties, and disabilities that either of them acquire by the marriage;" and, "the wife . . . hath no separate interest in anything during coverture." 1 Sharswood's Bl. Com. ** 442, 445; 3 Sharswood's Bl. Com. *143. Or, as pointedly and accurately stated in Dixon v. Amerman, 181 Mass. 430, 431, 63 N. E. 1057, with a reference to the early English authorities, the wife was considered the husband's chattel. Personal property in her possession upon marriage passed to him, and could be levied upon for his debts, or bequeathed by him to strangers, and he also took, during coverture, a sole estate in her lands which she could not alien unless he joined or devise even with his assent, unless when exercising a power granted to her at the creating of the estate, nor derive any benefit or income therefrom by any contract which she could separately make. Hanlon v. Thayer, Quincy (Mass.) 99, 1 Am. Dec. 1; Fowler v. Shearer, 7 Mass. 14; Legg v. Legg, 8 Mass. 99; Osgood v. Breed, 12 Mass. 525; Lowell v. Daniels, 2 Gray, 161, 168. 61 Am. Dec. 448; Hawkins v. Providence & W. R. Co. 119 Mass. 596, 20 Am. Rep. 353; Washburn v. Hale, 10 Pick. 429; Clapp v. Stoughton, 10 Pick. 463, 468, 469; Ames v. Chew, 5 Met. 320; Gerry v. Gerry, 11 Gray, 381; Bartlett v. Cowles, 15 Gray, 445, 446. Without her consent damages for injury to her person or reputation also might be released by him; or, if collected in her lifetime, they became his separate property; and, although as a husband he had the right to moderately chastise his wife, it was declared by the colony in 1641 that she should be free from corporal correction by him. Southworth v. Packard, 7 Mass. 95; Kelley v. New York, N. H. & H. R. Co. 168 Mass. 308, 311, 38 L.R.A. 631, 60 Am. St. Rep. 397, 46 N. E. 1063, and cases there cited; Phillips v. Barnet, L. R. 1 Q. B. Div. 437, 438; Bacon, Abr. B. & F. (B) Colonial Laws of Mass. Whitmore's ed. p. 51. See Com. v. McAfee, 108 Mass. 458, 11 Am. Rep. 383.

While the common law prevails in this state, except so far as it may have been modified by statute, it is obvious from this brief reference to some of its provisions that the development of modern society would imperatively call from time to time for the modification or abrogation of many, if not all, of these archaic conditions. Dunn v. Sargent, 101 Mass. 336, 338; Cooley, Const. Lim. 7th ed. 484, 485. Beginning with Stat. 1842, chap. 74, p. 527, and by subsequent statutory enactments the separate legal existence of a married woman as to her right to hold and dispose of property, both real and personal, as well as the right to her person, has been gradually recognized and established. Stat. 1845, chap. 208, p. 531; Stat. 1846, chap. 209, p. 139; Stat. 1855, chap. 304, p. 710; Stat. 1857, chap. 249, p. 598; Gen. Stat. 1860, chap. 108; Stat. 1864, chap. 276, p. 255; Stat. 1868, chap. 95, p. 82; Stat. 1869, chap. 409, p. 703; Stat. 1871, chap. 312, p. 655; Stat. 1874, chap. 184, p. 117; Pub. Stat. 1882, chap. 147; Rev. Laws, chaps. 153, 140. This remedial legislation has resulted in very largely impairing the unity of husband and wife as it existed at the common law. Butler v. Ives, 139 Mass. 202, 203, 29 N. E. 654; Bradford v. Worcester, 184 Mass. 557, 561, 69 N. E. 310. It must also be taken as settled that, for the purposes of divorce or of separate maintenance, or of public charitable relief, she may have a separate domicil, and is absolutely entitled to her personal liberty, and earnings, with a corresponding liability for her debts and contracts, or for torts committed by her, or by her husband under her direction. Osgood v. Osgood, 153 Mass. 38, 26 N. E. 413, Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740; Bradford v. Worcester, *ubi supra;* McCarty v. DeBest, 120 Mass. 89; Shane v. Lyons, 172 Mass. 199, 200, 70 Am. St. Rep. 261, 51 N. E. 976. If the husband still is recognized as nominally the head of the family, and as such may determine their common residence, for the proper conduct of which he may be responsible under the criminal law, his control over the person or property of his wife has been reduced to a minimum, if it has not entirely disappeared. Harmon v. Old Colony R. Co. 165 Mass. 100, 30 L.R.A. 658, 52 Am. St. Rep. 499, 42 N. E. 505; Kerslake v. Cum-

mings, 180 Mass. 65, 68, 61 N. E. 760; Bradford v. Worcester, *ubi supra*. But he retains the unmodified right to her conjugal society, even if her refusal to recognize this right affords him no ground for an absolute divorce; and he may recover damages for loss of *consortium* when caused by injuries to her person through the wrongs of others, as well as for criminal conversation with her. Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; Bigaouette v. Paulet, 134 Mass. 123, 126, 45 Am. Rep. 307; Kelley v. New York, N. H. & H. R. Co. *ubi supra*. In Kelley v. New York, N. H. & H. R. Co., while recognizing this right in the husband, it was stated in the closing paragraph of the opinion that the wife had no corresponding right which she could enforce at common law; but whether she had by statute was left undecided. The question then left open is now presented for our decision.

When approached in the light of an abstract right arising from and incidental to the civil institution known as marriage, but which, as between the parties, is treated as a contract, and the consequent conjugal relation, there is great inherent difficulty in sustaining the proposition that, while the husband can demand the right of exclusive marital aid and affection, she has no equivalent right, or that a sound public policy requires that she shall remain faithful to her marriage obligations, although he is at liberty to enter upon a course of conduct which may render further marital relations on her part impossible. By the contract each spouse is entitled to the conjugal society and comfort of the other, and this association is one of the mutual obligations growing out of the union of husband and wife. The affection and comfort which each is supposed to derive from the society of the other springs from the joint relation, and is as valuable and important to her as to him. The case of Lynch v. Knight, 9 H. L. Cas. 577, is not an authority to the contrary, as that was a suit for slander, brought by the wife, who joined the husband for conformity; and, the words spoken of her not being actionable in themselves, the special damage alleged was that, in consequence of the slander, she had been compelled by her husband to leave his house, with the consequent loss of his conjugal society. While the decision was placed upon the ground that the act of the husband was not such a natural and probable result of the words spoken as would make the defendant liable in damages, the question whether the right of *consortium* was confined to the husband alone, although discussed, was left undecided. In the judgments of Lord Chancellor Campbell and Lord Cranworth both were inclined to the view that this right was not limited to the husband, but extended to the wife, while Lord Wensleydale was of opinion that such a right on her part did not exist. Its existence, however, has always been recognized and enforced by the ecclesiastical courts in a suit by her for the restitution of conjugal rights, where in defense nothing less than conduct which would be sufficient to entitle the respondent to a judicial separation was a bar to the relief sought. Orme v. Orme, 2 Addams, Eccl. Rep. 382; 1 Bishop, Mar., Div. & Sep. §§ 69, 1357; Burroughs v. Burroughs, 2 Swabey & T. 303.

The absolute privilege of each to the conjugal society of the other must be considered as embracing the persons of both, with no distinction in favor of one as against the other, and this equal companionship and aid in the founding and maintenance of the home, and in the rearing of offspring, is the foundation upon which this most important of all the domestic relations rests. Bennett v. Bennett, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; Warren v. Warren, 89 Mich. 123, 14 L.R.A. 545, 50 N. W. 842; Smith v. Smith, 98 Tenn. 101, 105, 60 Am. St. Rep. 838, 38 S. W. 439. At common law, because the debauching or seduction of the wife was an "invasion of his exclusive right to marital intercourse . . . and the right to beget his own children," the husband was allowed to maintain an action for the loss of such aid, comfort, and society as she would be expected to bestow upon him, although there might be no impairment of her services or assistance in the sense that she performed labor in the management or supervision of the household. Hadley v. Heywood, 121 Mass. 236; Bigaouette v. Paulet, *ubi supra*; Neville v. Gile, 174 Mass. 305, 54 N. E. 841; Evans v. O'Connor, 174 Mass. 287, 291, 75 Am. St. Rep. 316, 54 N. E. 557; Houghton v. Rice, 174 Mass. 366, 47 L.R.A. 310, 75 Am. St. Rep. 351, 54 N. E. 843. But it was early recognized that, if the wife was enticed away, and abandoned her husband, or was subjected to physical violence whereby she became disabled, he could sue for damages suffered by him from the wrongdoer, and either action could be maintained independently of proof of her adultery. 3 Sharswood's Bl. Com. *139; Hyde v. Scyssor, Cro. Jac. 538; Winsmore v. Greenbank, Willes, Rep. 577; Tasker v. Stanley, 153 Mass. 148, 10 L.R.A. 468, 26 N. E. 417; Crocker v. Crocker, 98 Fed. 702.

In England, by the "matrimonial causes act," 20 & 21 Viet. chap. 85, § 59, the common-law action for criminal conversation has been abolished; yet, by §§ 28 and 33, the husband may, on a petition against the adulterer alone, or upon joining him as corespondent, in a petition against his wife for dissolution of the marriage, recover dam-

ages to be assessed by a jury as in an action at law. Comyn v. Comyn, 32 L. J. Prob. N. S. 210; Bernstein v. Bernstein, 69 L. T. N. S. 513. Under this act, there has been no abrogation of the husband's right of action against the adulterer, but only a change as to the form of remedy. Pomero v. Pomero, L. R. 10 C. P. Div. 174; Eversley, Dom. Rel. 2d ed. 170, 171. It also leaves unaffected his cause of action for enticing his wife to abandon him, or to recover for loss of *consortium* when caused by physical injury to her person. By Stat. 1874, chap. 184, § 3, p. 117, now Rev. Laws, chap. 153, § 6, the disability of coverture, exclusive of suits between husband and wife, has been removed, and since the first enactment she has been liable to be sued, and might bring suit in the same manner as if sole. In consequence of this broad and comprehensive language she became, so far as civil procedure is concerned, discovert as to all persons except her husband; and, whenever injured in her person or estate, a married woman may bring suit in her own name against the wrongdoer for damages suffered, which upon recovery become her exclusive property. Jordan v. Middlesex R. Co. 138 Mass. 425; Lombard v. Morse, 155 Mass. 136, 140, 14 L.R.A. 273, 29 N. E. 205; Harmon v. Old Colony R. Co. *ubi supra*. The loss of the essential element of matrimonial fellowship afforded by the husband's society and exclusively given to her by the contract of marriage, when accomplished by his seduction at the inducement of another woman, is an injury as tangible, and from which she may suffer as acutely, and with more disastrous consequences to herself, than from loss of reputation caused by libel or slander in which compensatory damages for mental suffering may be assessed; or from the injury, if, under Rev. Laws, chap. 153, § 10, she is engaged in business on her separate account, that may follow from malevolently depriving her of possible custom, when such a result is accomplished otherwise than by fair competition; or from the wrong caused by the violation of contracts of service between her and those she employs, where a breach by the servant is induced without justifiable cause by the intentional acts of strangers,—although in all of these instances the law gives to her an ample remedy Hastings v. Stetson, 130 Mass. 76; Walker v. Cronin, 107 Mass. 555; May v. Wood, 172 Mass. 11, 15, 51 N. E. 191; Moran v. Dunphy, 177 Mass. 485, 487, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; Temperton v. Russell [1893] 1 Q. B. 715.

Our statute, as we have said, is expressed in the broadest terms. It permits a recovery by a married woman, not only for injury in any form done to her person or property, but for damages which flow from a wrong suffered from a violation of personal rights. The allegations of the declaration disclose not only the commission of a felony, but all the elements of a wrongful act deliberately done for the purpose of working an injury to the plaintiff, and which actually has been accomplished. Rev. Laws, chap. 212, § 10; chap. 215, § 1; Morasse v. Brochu, 151 Mass. 567, 574, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N. E. 74. If the duty of keeping his marital covenant rested on the husband, who has failed to perform it, none the less the plaintiff had a right to be protected from the intended unlawful acts, and wilful interference of the defendant. Winsmore v. Greenbank, *ubi supra;* Plant v. Woods, 176 Mass. 492, 498, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Tasker v. Stanley, *ubi supra*. See Moran v. Dunphy, *ubi supra;* Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, L. R. 6 Q. B. Div. 333. The defendant admits by her demurrer that she purposely persuaded and enticed the plaintiff's husband to commit adultery, and to refuse performance of his marital obligations, and also induced him to abandon his home, and his wife; and by these means the possession of his companionship conferred upon her by their marriage has been lost and destroyed. This is distinctly a wrong because depriving her of the *consortium* of her husband, for which she can, by force of our laws, maintain an action, without joining him as a party plaintiff, and the damages suffered, when recovered, are her separate property. That no precedent of this court is found for the present action, which is of first impression, is not conclusive against the plaintiff, and is of little weight. If she has suffered an injury intentionally inflicted, followed by damage, she ought not to be remediless unless relief is refused by reason of an absolute legal prohibition, which we do not find. Hastings v. Livermore, 7 Gray, 194, 197; Rice v. Coolidge, 121 Mass. 393, 397, 23 Am. Rep. 279.

We are aware that in a few jurisdictions either from the construction of enabling statutes, which are held to confer upon a married woman only the right to sue for injuries to her person or for damages to her property, or for reasons of public policy, a cause of action for criminal conversation with her husband has been denied. See Duffies v. Duffies, 76 Wis. 374, 8 L.R.A. 420, 20 Am. St. Rep. 79, 45 N. W. 522; Hodge v. Wetzler, 69 N. J. L. 490, 55 Atl. 49; Lellis v. Lambert, 24 Ont. App. Rep. 653; Doe v. Roe, 82 Me. 503, 8 L.R.A. 833, 17 Am. St. Rep. 499, 20 Atl. 83; Morgan v. Martin, 92 Me. 190, 42 Atl. 354. But the conclusion to which we have come is supported by the great weight of American authority. Seaver v. Adams,

66 N. H. 142, 49 Am. St. Rep. 597, 19 Atl. 776; Foot v. Card, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; Hart v. Knapp, 76 Conn. 135, 100 Am. St. Rep. 989, 55 Atl. 1021; Bennett v. Bennett, *ubi supra;* Gernerd v. Gernerd, 185 Pa. 233, 40 L.R.A. 549, 64 Am. St. Rep. 646, 39 Atl. 884; Warren v. Warren, *ubi supra;* Wolf v. Frank, 92 Md. 138, 52 L.R.A. 102, 48 Atl. 132; Brown v. Brown, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320; Tucker v. Tucker, 74 Miss. 93, 32 L.R.A. 623, 19 So. 955; Smith v. Smith, *ubi supra;* Deitzman v. Mullin, 108 Ky. 610, 50 L.R.A. 808, 94 Am. St. Rep. 390, 57 S. W. 247; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Haynes v. Nowlin, 129 Ind. 581, 14 L.R.A. 787, 28 Am. St. Rep. 213, 29 N. E. 389; Betser v. Betser, 186 Ill. 537, 52 L. R.A. 630, 78 Am. St. Rep. 303, 58 N. E. 249; Rice v. Rice, 104 Mich. 371, 62 N. W. 833; Clow v. Chapman, 125 Mo. 101, 26 L.R.A. 412, 46 Am. St. Rep. 468, 28 S. W. 328; Nichols v. Nichols, 134 Mo. 187, 35 S. W. 577, 147 Mo. 387, 48 S. W. 947; Mehrhoff v. Mehrhoff, 26 Fed. 13; Waldron v. Waldron, 45 Fed. 315; Eagon v. Eagon, 60 Kan. 697, 57 Pac. 942; Price v. Price, 91 Iowa, 693, 29 L.R.A. 150, 51 Am. St. Rep. 360, 60 N. W. 202; King v. Hanson (N. D.) 99 N. W. 1085; Williams v. Williams, 20 Colo. 51, 37 Pac. 614; Hodgkinson v. Hodgkinson, 43 Neb. 269, 27 L.R.A. 120, 47 Am. St. Rep. 759, 61 N. W. 577; Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847; Beach v. Brown, 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. Rep. 98, 55 Pac. 46.

Judgment reversed. Demurrer overruled.

ARKANSAS SUPREME COURT.

PETER ANDERSON & COMPANY, Appt.,
v.
MARCUS DIAZ.

(— Ark. —, 92 S. W. 861.)

Saloon keeper—injury to patron—liability.

1. A saloon keeper is not liable for the act of his bartender in aiding in saturating the foot of a patron with alcohol and setting fire to it.

Same—measure of duty.

2. The duty toward patrons of an innkeeper or passenger carrier does not rest upon a saloon keeper.

(February 10, 1906.)

APPEAL by defendant from a judgment of the Circuit Court for Independence County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

Statement by **Wood, J.:**

Appellant was a corporation carrying on a retail liquor business in Batesville, Arkansas. Arthur Anderson was in his employ, as bartender. The appellee for his cause of action alleges: "That on the 12th day of January, 1903, the plaintiff was an occupant and patron of the defendant corporation's place of business in its saloon at Batesville, Arkansas, and that while in the said house he became somewhat intoxicated, and had lain down and was asleep in said defendant's house. That while so asleep he was assaulted by one A. Ramsey Weaver, who was a patron of the said company, and Arthur Anderson, who was at the time in the service of the said saloon company as bartender, in a most brutal, wanton, malicious, and cruel manner, by pouring alcohol on the plaintiff's foot and setting fire to the same, by reason of which the plaintiff's foot was severely burned before he could extinguish the fire. That the said Arthur Anderson furnished the alcohol to the said Ramsey Weaver from defendant company's saloon, and aided, assisted, and abetted the said Ramsey Weaver in putting the same upon the foot of the plaintiff, and also himself poured some of the alcohol on plaintiff's foot. That by reason of said assault this plaintiff was severely burned and suffered, and has suffered since said time, and continues to suffer, the most excruciating and painful agony to which human beings are subjected." The damages were laid at $5,000 for which judgment was asked. The answer denied the allegations of the complaint. There was proof to support the allegations of the complaint. There was no proof and no claim that appellant was negligent in employing or retaining its bartender, Arthur Anderson. The cause was submitted to the jury upon the proof and instructions, and they returned a verdict for $1,000, and judgment was entered accordingly, which this appeal seeks to reverse.

Messrs. **J. H. Harrod and W. A. Oldfield** for appellant.

Messrs. **Lyman F. Reeder and Yancey & Casey**, for appellee:

Case Note.—Liability, at common law, of a saloon keeper for personal injury to patron.—Upon identically the same facts as those in the case of PETER ANDERSON & Co. v. DIAZ, a contrary decision was reached in Curran v. Olson, 88 Minn. 307, 60 L.R.A. 733, 97 Am. St. Rep. 517, 92 N. W. 1124, where it was held that the keepers of a saloon are bound to use reasonable care to protect a guest from injury at the hands of vicious and lawless persons whom they permit to be in the saloon, and that, if they delegate this duty to their barkeeper, they are responsible for his negligence. And the

Proprietors of saloons are liable for injuries sustained by one who enters therein and becomes intoxicated, by reason of another, who also becomes intoxicated there.

Rommel v. Schambacher, 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779; Mastad v. Swedish Brethren, 83 Minn. 40, 53 L.R.A. 803, 85 Am. St. Rep. 446, 85 N. W. 913.

Anderson being in full charge of the saloon, anything that he may have done in furnishing and using the liquor under his control, to wit, alcohol, to or on his patrons, was clearly within the scope of his employment.

Mulvehill v. Bates, 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959.

There is no distinction between the duty that the proprietors of a saloon owe to its patrons and that of the common carrier.

Com. v. Power, 7 Met. 596, 41 Am. Dec. 465; Bass v. Chicago & N. W. R. Co. 36 Wis. 459, 17 Am. Rep. 495; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; Norcross v. Norcross, 53 Me. 163; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657.

Being wholly responsible for the condition of appellee, the law imposes the duty upon the bartender to protect him and take care of him.

Stewart v. Brooklyn & C. T. R. Co. 90 N. Y. 588, 43 Am. Rep. 185; Goddard v. Grand Trunk R. Co. 57 Me. 202, 2 Am. Rep. 39, and cases cited; Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33.

Every person is bound to use due care in the conduct of his business. If his business is committed to an agent or servant, the obligation is not changed.

Higgins v. Watervliet Turnp. & R. Co. 46 N. Y. 27, 7 Am. Rep. 293; New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039; Stewart v. Brooklyn & C. T. R. Co. *supra*.

Plaintiff was entitled to recover exemplary damages.

6 Sutherland, Damages, 727; St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 519, 40 Am. Rep. 105; Ward v. Blackwood, 48 Ark. 396, 3 S. W. 624.

Mr. Ernest Neill also for appellee.

Wood, J., delivered the opinion of the court:

Was appellant liable? The decision in Gage v. Harvey, 66 Ark. 68, 43 L.R.A. 143, 74 Am. St. Rep. 70, 48 S. W. 898, shows that there is no statutory liability. The sale of liquor at appellant's place of business was not the proximate cause of the injury. Nor was appellant liable according to any of the rules of the common law. Black, Intoxicating Liquors, § 281; Curse v. Aden, 127 Ill. 231, 3 L.R.A. 327, 20 N. E. 73; Struble v. Nodwift, 11 Ind. 64. The cruel act of its

evidence, which showed that the bartender had given alcohol to a person, who poured it upon the foot of a patron while the latter was asleep and set it on fire, was held to be amply sufficient to sustain the finding that the defendants were guilty of negligence, which was the proximate cause of the plaintiff's injury. This case cites Mastad v. Swedish Brethren, 83 Minn. 40, 53 L.R.A. 803, 85 Am. St. Rep. 446, 85 N. W. 913, where it was held that a person managing and controlling a public place of amusement, to which he invites the public on payment of an admission fee, and at which he sells to his customers and patrons intoxicating liquors, who sells such liquor to one in attendance at such place, thereby rendering him drunk and disorderly, well knowing that when in that condition he is likely to commit assaults upon others without cause or provocation, is bound to exercise reasonable care to protect his other customers and patrons from such assaults and insults, and for a failure to do so is liable for damages at the suit of a patron who is assaulted and injured. In this case the defendant was not keeping a saloon, but was a corporation giving a picnic to which the general public were invited and at which the liquors were sold, and the assault was committed on the picnic grounds.

So, in Rommel v. Schambacher, 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779, it was held that where one enters a saloon or tavern open for the entertainment of the public the proprietor is bound to see that he is properly protected from the assaults and insults, as well of those who are in his employ as of the drunken and vicious men whom he may choose to harbor; and that, where a person who had entered a saloon and become intoxicated there was injured by the act of another intoxicated person in attaching a piece of paper to the former and setting it on fire in the presence of the proprietor of the saloon, the latter was liable for the injury sustained.

But where a bartender sold liquor to a patron, whereby he became intoxicated, and, by reason thereof, entered into an altercation with the bartender, who, during such altercation, threw a glass tumbler at him, which missed him and struck another patron, by which he was injured, it was held, in Lueken v. People, 3 Ill. App. 375, that the injury was not in a legal sense the natural and proximate consequence of selling the liquor; that a new force or power had intervened of itself sufficient to stand for the cause of the mischief; that the proprietor could hardly be presumed to have foreseen that his act of selling the liquor would have produced or been followed by the altercation in which a stroke aimed at one person would fall upon another; and that therefore he could not be held responsible.

agent, Arthur Anderson, was clearly beyond the line of his employment. The master is not liable for the acts of his servant that are beyond the scope of his employment. Cooley, Torts, p. 627. "When a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests," the master will not be liable for his acts. M'Manus v. Crickett, 1 East, 106. The "test," says the supreme court of Nebraska, of the master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business. Davis v. Houghtellin, 33 Neb. 582, 14 L.R.A. 737, 50 N. W. 765.

Appellee mistakes the law in saying "that there is no distinction between the duty that the proprietors of a saloon owe their patrons," and that which a common carrier owes its passengers, or an innkeeper his guests. There is a difference as wide as the poles. The saloon keeper does not hold himself out to the public as the protector of those who may be patrons of his saloon. His business the rather advertises him the other way. But the common carrier and the innkeeper hold themselves forth as providing for the comfort and safety of all who may seek their services, a "refuge through their portals." It is strictly their duty and their business to exercise the proper care to look after, and to protect their passengers and guests from insult and injury. Britton v. Atlanta & C. Air-Line R. Co. 88 N. C. 536, 43 Am. Rep. 749. Not so with the saloon keeper. The doctrine announced above is supported by the cases cited in appellant's brief, and by the following: Storey v. Ashton, L. R. 4 Q. B. 476; Stone v. Hills, 45 Conn. 47, 29 Am. Rep. 635; Wood, Mast. & S. 546; Whittaker's Smith, Neg. p. 199; Wharton, Neg. § 168; Thompson on Negligence; numerous cases cited in notes to these.

The judgment is reversed, and the cause is dismissed.

DISTRICT OF COLUMBIA COURT OF APPEALS.

LAWRENCE W. SHERWOOD, Appt.,
v.
BRAINARD H. WARNER.

(27 App. D. C. 64.)

Master's liability for servant's act.

The owner of a building is not liable for the negligent act of his janitor, who, at the request of persons sent to repair the elevator, undertakes to aid in releasing one of them, who has been caught in the machinery.

(February 6, 1906.)

APPEAL by plaintiff from a judgment of the Supreme Court of the District of Columbia in defendant's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. **Michael J. Colbert** and **Charles J. Murphy**, for appellant:

Where the owner of an apartment house operates an elevator for the benefit of his tenants, he owes to them and others rightfully there the duty of keeping that part of the building to which they have access safe for travel.

Fisher v. Cook, 23 Ill. App. 621; Olson v. Schultz, 67 Minn. 494, 36 L.R.A. 790, 64 Am. St. Rep. 437, 70 N. W. 779; Dashiell v. Washington Market Co. 10 App. D. C. 81; 10 Am. & Eng. Enc. Law, 2d ed. p. 960; Marker v. Mitchell. 54 Fed. 637; Treadwell v. Whittier, 80 Cal. 574, 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 266; Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 178; Kentucky Hotel Co. v. Camp, 97 Ky. 424. 30 S. W. 1010; Goodsell v. Taylor, 41 Minn. 207, 4 L.R.A. 673, 16 Am. St. Rep. 700, 42 N. W. 873; Southern Bldg. & L. Asso. v. Lawson, 97 Tenn. 367, 56 Am. St. Rep. 804, 37 S. W. 86.

Where the owner of a building, at the request of a contractor who is at work thereon, furnishes a man to run the elevator for the use of the contractor, the elevator man is still a servant of the owner; and he is therefore liable for injuries to a servant of the contractor, caused by the negligence of the elevator man.

Higgins v. Western U. Teleg. Co. 8 Misc. 433, 28 N. Y. Supp. 676; Coyle v. Pierrepont, 37 Hun. 379; Currier v. Henderson, 85 Hun, 300, 32 N. Y. Supp. 608, 955; Sherman v. Delaware & H. Canal Co. 71 Vt. 325, 45 Atl. 227; Stewart v. California Improv. Co. 131 Cal. 125, 52 L.R.A. 205, 63 Pac. 177, 724; Stajakowski v. New York C. & H. R. R. Co. 63 App. Div. 532, 71 N. Y. Supp. 710; Diehl v. Robinson, 72 App. Div. 19, 76 N. Y. Supp. 252; Garven v. Chicago. R. I. & P. R. Co. 100 Mo. App. 617, 75 S. W. 193.

Messrs. **J. J. Darlington** and **W. C. Sullivan**, for appellee:

The janitor, *pro hac vice*, was not the servant of the appellee.

Case Note.—Liability of general employer for negligence of employee while assisting a third person without the former's knowledge or consent.—The general subject, 4 L.R.A. (N.S.) Which of two or more persons is the master of another, who is conceded to be the servant of one of them? is treated in a note in 37 L.R.A. 33. In the majority of the cases

Satterlee v. Groat, 1 Wend. 272; Lygo v. Newbold, 9 Exch. 302; Wood, Mast. & S. 546, 547; Stevens v. Armstrong, 6 N. Y. 435; Brown v. Purviance, 2 Harr. & G. 316; Wood v. Cobb, 13 Allen, 58; Kimball v. Cushman, 103 Mass. 194, 4 Am. Rep. 528; Barrett v. Singer Mfg. Co. 1 Sweeny, 545; Olive v. Whitney Marble Co. 103 N. Y. 292, 8 N. E. 552; Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 205; Donovan v. Laing, W. & D. Constr. Syndicate [1893] 1 Q. B. 629; Little v. Hackett, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; Byrne v. Kansas City, Ft. S. & M. R. Co. 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 610; Atwood v. Chicago, R. I. & P. R. Co. 72 Fed. 455; Miller v. Minnesota & N. W. R. Co. 76 Iowa, 655, 14 Am. St. Rep. 258, 39 N. W. 188; Powell v. Virginia Constr. Co. 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; Missouri, K. & T. R. Co. v. McGlamory (Tex. Civ. App.) 34 S. W. 359; Clark v. Geer, 32 C. C. A. 295, 57 U. S. App. 473, 86 Fed. 451.

Duell, J., delivered the opinion of the court:

This is an appeal taken from a judgment of the supreme court of the District of Columbia, entered by direction of the trial court at the close of the plaintiff's evidence, in favor of the defendant.

The appellant, a machinist in the employ of a firm engaged in the elevator and machine business, was sent by his employers to the "Leamington flats" to repair the elevator therein. This building was owned by appellee. Appellant took with him as assistants a helper and an apprentice boy. The elevator was so disabled that it was out of service, and they worked until evening, when they were ready to lift up the piston, which they considered had traveled too far down and was stuck in the rust and corro-

on that subject it appears that the servant whose negligence caused the injury was at the time thereof, with the knowledge or consent of the general employer, engaged in assisting another; but in SHERWOOD v. WARNER it appears that the negligent act of the servant was committed while he was voluntarily rendering service for another without the general employer's knowledge or consent. Other illustrative cases in which this fact appears are as follows:

In Stone v. Hills, 45 Conn. 44, 29 Am. Rep. 635, the driver of a team was directed by his employers to deliver a load of paper to one Taylor, at a point 4½ miles distant, and to return from thence with a load of wood. On reaching Taylor's place the latter requested the driver to deliver the paper at a warehouse 4½ miles further on, and to go from thence to a railway freight depot and get some freight belonging to Taylor, and transport the same to his place, to which request the driver acceded, and while at the railway station the horses, negligently left unhitched by the driver, became frightened by a passing train, ran away, and injured plaintiff's wagon. The court said: "The servant left the employers' premises under precise instructions as to the place to which their team was to be driven, and as to the merchandise to be transported, and under instructions equally precise as to the route to be taken in returning and as to what he should bring home. . . . When, therefore, the servant accepted instructions from Taylor, and became a carrier of merchandise for him to and from a railroad station in an adjoining town, he temporarily threw off his employers' authority, abandoned their business, and left their service. They are not responsible for his negligence on this occasion."

In Atherton v. Kansas City Coal & Coke Co. 106 Mo. App. 591, 81 S. W. 223, plaintiff ordered coal delivered to her house, and upon its arrival she entered the coal house and asked the driver to throw in a number of large lumps to her in order that she might pile the same in the doorway. While she was thus engaged, the driver threw in some coal which injured her. The court said: "For the purposes of this case, it may be assumed that he [the teamster] was negligent; yet, notwithstanding this, the defendant [the teamster's employer] was not liable, as the teamster was not acting within the scope of his duty. In such cases the servant, and not the master, is liable. . . . The teamster, at the time, was under the direction of the plaintiff, and not that of his employer."

In Olive v. Whitney Marble Co. 103 N. Y. 292, 8 N. E. 552, the deceased was killed by the explosion of a boiler which he was repairing under instructions from the vendor "to fire the boilers up and test them before he came home;" the explosion following the putting of fire under the boiler by the vendee's engineer, but at whose request this was done does not appear. It was held that it must be presumed that the engineer either did it voluntarily or at the request of the boiler makers, and that in either event he was not the servant of the vendee in what he did. and, therefore, the vendee was not rsponsible for his acts.

In Cunningham v. Grand Trunk R. Co. 31 U. C. Q. B. 350, a fence contractor for defendant, a railroad company, was permitted to carry his tools on its trains, and it was his business to take them off. A baggage master, who had no right to meddle with the tools, and was not asked to put them out, negligently threw off a crowbar and injured the plaintiff, an employee of the contractor. It was held that the only inference to be drawn from the act of the baggage master was that he was acting for the contractor, gratuitously assisting him in putting out his tools, and not in pursuance of his employment as a servant of defendant; and for this defendant incurred no liability.

sion at the bottom of the cylinder. Not being able to move it, the apprentice was directed by appellant to get further help. He went out to a neighboring apartment house and brought back with him some men. The apprentice and three others pulled on the fall, with the result that the piston came up and appellant's arm was caught between the sheave, or wheel, and the ropes. Appellant tried in various ways to release his arm. Failing to do so, the apprentice was sent by appellant to go down and get some one to put the pressure on. The witnesses differ as to whether any particular person was designated. He found the janitor, Conn, and the elevator boy in the basement. Conn and the apprentice went upstairs, the elevator being about one landing from the top floor. He told the janitor that he wanted the car run up to relieve appellant. Finally he went up above the elevator and leaned over and caught hold of the top of the car. The witness further says: "I wanted to help him by pulling up on the roof of the car, and told him to get in the car and run the car up the hole. . . .

"Mr. Conn got in the car and I laid down on the floor on my stomach and leaned over the well, and caught hold of the grill work in the car. I tried to surge it with my weight on it. Conn moved the wheel, and I said, 'Jump now.' He jumped, but the car would not move after he had turned the wheel, and before I thought anything else the car went down the other way, and was pulled out of my hand and went down the hole. I went out in the hallway and saw Sherwood coming out with his arm torn off."

Appellant, who had been working in the elevator business for thirteen years, testified that he knew he was doing a dangerous thing when he got in the cylinder shaft, and that there was danger of his getting hurt, and that he took the risk. Conn, the janitor, testified that he was the superintendent of the building and that he ran the elevator in the absence of the regular operator, although he was not instructed to do so. The testimony further discloses that the elevator could not be, and was not while they were working on the repairs, operated for the carriage of passengers. There was no testimony offered that appellee was to furnish any help, or to have any control over the force engaged in making the repairs. It is not disputed that Conn was in the general employ of appellee. The testimony clearly discloses that the repairs were made under the direction of the appellant, and that everything done to release him was directed by him or by his fellow workman, the apprentice. The appellee is not shown to have had any personal knowledge of how the repairs were being made, nor of what Conn did in trying to release appellant.

The case under the evidence presents but one question necessary for determination: Was Conn, the janitor, the servant of the appellee, in endeavoring to release the appellant, so as to make appellee liable for his negligence? That he was in the general employ of the appellee is admitted; yet such a service does not make the master liable except for acts done for the master. While rendering such general service he may be the servant of another. As the New York court of appeals said, in Wyllie v. Palmer, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381: "Servants who are employed and paid by one person may, nevertheless, be *ad hoc* the servants of another in a particular transaction, and that, too, where their general employer is interested in the work."

We think the proposition founded on reason and well established, that, to make a master liable for an injury caused by his servant's negligence, the servant must either have done the act causing the injury in the service of the master, and in doing an act which the master was bound to perform, or which was done by his direction.

The evidence in this case fails to show that the act done by appellee's servant was done in appellee's service, and was either one which appellee was bound to perform or directed by him to be performed. Conn was not employed by appellee to assist in repairing the elevator, or, while the elevator was out of service, to operate it, or try to operate it. On the other hand, it is clear that he was acting under the direction of appellant, or appellant's assistant. His movements were directed by them. In Higgins v. Western U. Teleg. Co. 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500, it was said, in speaking of a case very similar to this: "The true test in such cases is to ascertain who directs the movements of the person committing the injury. It seems to me that the conductor in this case, whose negligence caused the injury, was not, at the time, engaged in the defendant's work, but in the work of the contractor, under the direction of the plaintiff." The facts in that case, so far as the relations of the parties are in question, were very similar to the facts in this case. The Western Union Company had employed a contractor to make repairs to its building, including the putting in of elevators. These had been put in, but not turned over by the contractor, although the company used them in carrying passengers, and employed and paid the conductors. The plaintiff, a plasterer, in the employ of the contractor, was directed to plaster an elevator shaft, and the conductor moved the car up and down the shaft carry-

ing the plaintiff on top of it so that he could use the car as a platform. By the negligence of the conductor the plaintiff was injured. The trial court held the company liable. On appeal the court of last resort held that the conductor, in performing the service which resulted in the accident, was not acting as the servant of the company which employed and paid him, but was doing the work of the contractor, under the direction of the plaintiff. We cannot distinguish any material difference between the two cases. At the most the general employers did no more than loan their servants to others. "When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 205. If Conn was not loaned to appellant, he, so far as the appellee is concerned, acted as a volunteer in coming to appellant's assistance, and at appellant's request. Appellee was under no obligation to furnish his servants as assistants to those engaged in making the repairs. There is no evidence to warrant such a conclusion. In Murray v. Dwight, 161 N. Y. 301-308, 48 L.R.A. 673, 55 N. E. 901, the court, in referring to Higgins, v. Western U. Teleg. Co. *supra*, said: "It is apparent, I think, that the plaintiff in that case occupied a different relation to the person moving the elevator than he would had the injury occurred while being conveyed as a passenger in the elevator to his place of duty on an upper floor, and while the elevator was being used as a passenger elevator, and while it was in law the defendant's elevator and in charge and control of its servants."

In the case at bar appellant was not being carried as a passenger when the accident occurred, and the elevator was not being used by appellee for any purpose whatever. The facts are not such as require us to determine the measure of the liability of the owner of a passenger elevator to the passengers carried therein. The elevator was in the hands of appellant, or his employers, for repairs, and, so far as shown, appellee had no control over it, and his servants were not engaged in operating it for him or in their regular line of employment. Owners of buildings are daily engaging parties to make repairs to the apparatus and fixtures in them, and, in the absence of any agreement to furnish their servants as assistants to the parties making repairs, it would be carrying the rule applicable to the liability of masters for the negligence of their servants altogether too far to extend their liability to cases where the repairers solicit such servants to aid them in their work. If my servant who takes charge of my furnace happens to be around when repairs are being made to it by a contractor employed for that purpose, and, at the request of the contractor, assists him in the repairs, without my agreement to furnish his aid, it would be unjust to hold me responsible for his negligence. In rendering such assistance he becomes the servant of the contractor. Olive v. Whiting Marble Co. 103 N. Y. 292, 8 N. E. 552.

In Murray v. Dwight, *supra*, the court well said: "The question when and under what circumstances the servant of a general master becomes the servant of another is often difficult of solution. There is some apparent conflict in the authorities, due more to the difficulty of applying the legal principle to ever-varying facts than to any discord with respect to the principle itself. Moreover, the rule is subject to some distinctions that are not always easy to state in such a way as to render the result in every case so plain as to command acquiescence, or to give to the decision the character of a conclusive authority."

The facts in the present case make it comparatively easy to apply the legal principle to them. As we have said, the elevator was incapable of use as a passenger elevator when the accident occurred and was not in use. The appellee was under no agreement to furnish any assistance in making the repairs. The janitor acted solely upon the request of appellant or his representative, and appellee's servant was not in the regular line of his employment when he rendered the service which resulted in the injury. Under this state of facts the rule is that the general employer is not liable. However much we may deplore the distressing accident, it would be unjust to hold appellee legally responsible for it, and require him to respond in damages.

It follows that the action of the court below in directing a verdict in favor of the defendant was correct, and the judgment is therefore affirmed, with costs.

KANSAS SUPREME COURT.

T. F. GARNER, Plff. in Err.,

v.

MILWAUKEE MECHANICS' INSURANCE COMPANY.

(— Kan. —, 84 Pac. 717.)

Insurance—change of interest—forfeiture.

1. The word "interest," in a forfeiture clause of an insurance policy, which provides that the policy shall become void "if any

Headnotes by GREENE, J.

change shall take place in the interest, title, or possession of the subject of insurance," has application only where the insured owns and insures an interest less than title, and has no application where the insured owns the title

Same—contract to convey.

2. Where the insured owns the title of the subject of insurance, and afterwards makes an executory contract to convey the property, and the consideration has been fully paid, but no transfer either of title or possession has been actually made, no change has taken place in interest, title, or possession, within the meaning of the forfeiture clause quoted.

(February 10, 1906.)

ERROR to the District Court for Ford County to review a judgment in defendant's favor in an action brought to recover the amount alleged to be due on a fire-insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Sutton & Scates and F. Dumont Smith, for plaintiff in error:

The word "interest" means the same as "title."

Tiemann v. Citizens' Ins. Co. 76 App. Div. 5, 78 N. Y. Supp. 620; 13 Am. & Eng. Enc. Law, p. 252.

An executory contract, possession not having been given, was not a change of interest that would avoid the policy.

Erb v. German-American Ins. Co. 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583; Browning v. Home Ins. Co. 71 N. Y. 509, 27 Am. Rep. 86; Arkansas F. Ins. Co. v. Wilson, 67 Ark. 553, 48 L.R.A. 510, 77 Am. St. Rep. 584, 55 S. W. 933; Moseley v. Northwestern Nat. Ins. Co. 109 Mo. App. 464, 84 S. W. 1000; Whitney v. American Ins. Co. 127 Cal. 464, 59 Pac. 897; Home Mut. Ins. Co. v. Tompkies, 30 Tex. Civ. App. 404, 71 S. W. 812; Franklin Ins. Co. v. Feist, 31 Ind. App. 390, 68 N. E. 188; Russell v. Cedar Rapids Ins. Co. 78 Iowa, 216, 4 L.R.A. 538, 42 N. W. 654; Tiemann v. Citizens' Ins. Co. *supra;* Loeb v. Firemen's Ins. Co. 38 Misc. 107, 77 N. Y. Supp. 106; Stetson v. Massachusetts Mut. F. Ins. Co. 4 Mass. 330, 3 Am. Dec. 217; Phenix Ins. Co. v. Lorenz, 7 Ind. App. 266, 33 N. E. 444, 34 N. E. 495; Bailey v. Homestead F. Ins. Co. 16 Hun, 503; Omaha F. Ins. Co. v. Thompson, 50 Neb. 580, 70 N. W. 30; Haight v. Continental Ins. Co. 92 N. Y. 55; Cone v. Niagara F. Ins. Co. 60 N. Y. 623; Washington F. Ins. Co. v. Kelly, 32 Md. 421, 3 Am. Rep. 149; Greenlee v. North British & M. Ins. Co. 102 Iowa, 427, 63 Am. St. Rep. 455, 71 N. W. 534; Phenix Ins. Co. v. Holcombe, 57 Neb. 622, 73 Am. St. Rep. 532, 78 N. W. 300; Pringle v. Des Moines Ins. Co. 107 Iowa, 742, 77 N. W. 521; Phenix Ins. Co. v. Caldwell, 187 Ill. 73, 58 N. E. 314; Magoun v. Fireman's Fund Ins. Co. 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5.

Messrs. F. J. Oyler and Fike & Snider for defendant in error.

Greene, J., delivered the opinion of the court:

The plaintiff was defeated in an action on an insurance policy, and to reverse the judgment he prosecutes this proceeding.

The policy contained the provision that it shall become void "if any change other than by the death of the insured takes place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by the voluntary act of the insured, or otherwise." When the insurance was obtained the insured was the owner of the title to the property. Subsequently he entered into the following contract:

This contract and agreement made and entered into this 16th day of June, 1903, between Joseph W. Baker, of Bates county, Missouri, party of the first part, and T. F. Garner, of Ford county, Kansas, party of the second part, witnesseth: That the party of the first part has this day sold to the party of the second part all his land situated in sections 4 and 5, township 39, range 30, Bates county, Missouri, consisting of 364 acres, in consideration of which the party of the second part agrees to pay to the said party of the first part the sum of $10,920 to be paid as follows: To assume the present mortgage on the land to the amount of $4,800, and one half of the interest on the same from March 1, 1903, to date, and one livery stable in Dodge City, Kansas, with the lots comprising the site of said lots 1, 2, 3, and 4, and block ———, to be valued at $6,000, and 13 head of horses, two surreys, one spring wagon, one cart, seven buggies, one farm single harness, one sidesaddle, one man saddle, and all other fixtures now a part of said stable; said chattel property to be valued at $1,500. It is further agreed that the said second party is to loan the first party the sum of $3,800 at 8 per cent per annum, to be secured by said above livery barn and chattels. The party of the first part agrees to give a clear and perfect abstract to his land with a warranty deed to

Note.—The effect of the execution of an executory contract to convey, as a breach of a condition in an insurance policy against change of title or interest, is discussed in a note to Grunauer v. Westchester F. Ins. Co. 3 L.R.A. (N.S.) 107.

same, subject to the above-mentioned encumbrance. The party of the second part agrees to give to the first party a good bond for a deed, said deed to be made when said above-mentioned loan shall be repaid; also a good and perfect abstract to same; each party to be given immediate possession to property. Witness our hands and seals this day and year above written.

[Signed] Joseph W. Baker.
T. F. Garner.
Witness: G. G. Cook.
U. S. G. Powell.

Baker deeded to plaintiff the Missouri lands, which was the full consideration to be paid by him for the insured property. The plaintiff made no conveyance, nor had he delivered possession at the time the property was destroyed by fire, July 29, 1903. The defense was that by this contract a change had taken place in plaintiff's interest in the subject of insurance, which, under the condition quoted, forfeited the policy. Forfeitures are not favored, and will never be enforced if, by a reasonable interpretation of the agreement and contract of the parties, they can be avoided. The provision was intended to protect the company against any increased hazard resulting from a change of interest, title, or possession of the insured. An insurance company may contract against such contingency, and, if such provision of the contract is violated, it would have the right to insist upon being released from liability. The company contracted for the care, supervision, and vigilance of the assured in protecting the property from fire. This is largely its security against loss, and a disposition by the assured of all his interest, title, or possession in the property, or of such a substantial part thereof as would entirely or partially abate this diligence would be a violation of the contract.

The word "interest," as used in the policy, is not synonymous with title; it means some right different from title; it cannot mean a greater estate than title, since title as there used was intended to mean the entire estate. It must therefore have been used with the meaning generally attached to it, when used in contradistinction to title, as, "any right, in the nature of property, less than title." Anderson's Law Dict. 562. "In the narrower sense it was used in the English common law of real property, to designate a right less than an estate." Century Dict. vol. 4, p. 3142. This we think is the sense in which it was used in the policy. In the interpretation of the policy this word is important. The form of the policy was intended to cover two classes of risks. There are large interests in real estate owned by persons who have neither title nor possession. The form of this policy is adapted to the insurance of such interests, as well as to the insurance of property where the insured is the owner of the title. Where the insured is the owner of only an interest in the estate, the word "interest," used in the forfeiture clause, has force, and any change in such interest would forfeit the policy; but where the insured is the owner of the title the word "interest" has no application. In the latter case, if any change takes place in the title the policy is forfeited.

The insurance in the present case was procured by one owning the title; as to him only a change in the title would forfeit the policy. We do not feel inclined to follow the decision of Gibb v. Philadelphia F. Ins. Co. 59 Minn. 267, 50 Am. St. Rep. 405, 61 N. W. 137, because we do not believe that the word "interest," as used in the policy in that case, which was the same as the one we are considering, is broader and inclusive of title; and because in that case it was wholly unnecessary to define "interest." After Gibb had procured the insurance he sold the insured property by a written contract, and gave the purchaser possession, and he remained in possession until the property was destroyed. This of itself was such a violation of the express terms of the policy against change of title, or possession, as would render the policy void.

The main contention of defendant in error is that the contract between Davis and Garner for the sale of the insured property, having been fully performed by Davis, is enforceable in equity against Garner; therefore it operated as a present change of interest in the property, within the forfeiture clause of the contract. A party pleading a forfeiture must make it clear that a forfeiture has taken place; he cannot speculate upon what a court of equity would do in a given case, or anticipate its decrees, and, upon an assumption that his forecast is correct, ask a court to declare a forfeiture. For the purpose of finding grounds for a forfeiture, courts of law will not go so far afield as to determine the enforceability of a contract in equity between parties not before it. If, however, this court should believe that specific performance of that contract could be decreed, the relief asked for by defendant would not be granted. It is held that an executory contract to convey insured real estate does not operate as a forfeiture of the policy under a provision that "it should be void if the interest of the insured were otherwise than unconditional and sole ownership" (Arkansas F. Ins. Co. v. Wilson, 67 Ark. 553, 48 L.R.A. 510, 77 Am. St. Rep. 129, 55 S. W. 933; Franklin Ins. Co. v. Feist, 31 Ind. App. 390, 68 N. E. 188); or where

the condition of the policy is that it shall be void, "in case of any sale or transfer, or any change in title or possession" (Browning v. Home Ins. Co. 71 N. Y. 508, 27 Am. Rep. 86); or "if any change . . . take place in the interest, title, or possession of the subject of the insurance" (Erb v. German-American Ins. Co. 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583; Home Mut. Ins. Co. v. Tompkies, 30 Tex. Civ. App. 404, 71 S. W. 814).

The judgment is reversed, and the cause remanded.

All the Justices concur.

Petition for rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

MARY LEAHY, Appt.,
v.
JESSE HAWORTH, Exr., etc., of Walter Haworth, Deceased.

(141 Fed. 850.)

Limitations of actions—amendment.

1. An amendment of a bill to foreclose a mortgage so that plaintiff may maintain the suit as executor of the deceased mortgagee, rather than in his individual capacity, the cause of action, breach, and action itself remaining the same, relates back to the beginning of the action, so far as the running of the statute of limitations is concerned.

Executor—suit by.

2. That a foreign executor has not secured an appointment from the local courts at the time he files a bill to foreclose a mortgage belonging to the estate is not fatal to the action, if he secures such appointment before trial.

Same—qualification—oath.

3. An oath faithfully to perform his duties is not necessary to the qualification of an executor, unless made so by statute.

Mortgage—negotiation—payment to mortgagee.

4. Payment to the mortgagee of the amount of the negotiable note secured by the mortgage is at the risk of the mortgagor, unless he requires a surrender of note and mortgage; so that in case the note has been negotiated, and the money does not reach the true owner, the mortgagor will be required to make a second payment.

Note—assignment—right of assignee.

5. An indorsement of the name of the payee on the back of a promissory note under the words "assign and transfer" vests title in the assignee free from the equities existing between the parties to the instrument.

(November 7, 1905.)

APPEAL by defendant from a decree of the Circuit Court of the United States for the District of Nebraska in plaintiff's favor in a suit to foreclose a mortgage. Affirmed.

Case Note.—Effect of ancillary appointment after commencement of action by foreign executor or administrator.—As a general rule, the disability of a foreign executor or administrator to bring an action without first procuring ancillary letters in the jurisdiction in which the action is brought is merely personal, and may be cured by procuring such letters after the commencement of the action.

Thus, in Smith v. Peckham, 39 Wis. 414, it was held that the failure of a foreign executor to file a copy of his appointment in Wisconsin before bringing an action on a promissory note is not fatal to the action if he qualifies before trial, because, as the court said, a mere disability to sue, not going to the right of action, may be cured *pendente lite*.

So, one who sues on a promissory note as executrix, by appointment made in another state, may continue the action, although she failed to file the will and procure letters of administration from the Texas courts, as the statute requires, until after the suit had begun. Henry v. Roe, 83 Tex. 446, 18 S. W. 806.

The filing of an exemplified copy of foreign letters of administration after the commencement, but before the final hearing, of an action brought in New Jersey by a foreign administrator to determine the ownership of a bond and mortgage sought to be foreclosed on land in that state, was held to be sufficient under P. L. 1896, p. 173, § 1, the provisions of which were not set out by the court. Buecker v. Carr, 60 N. J. Eq. 300, 47 Atl. 34.

In an action brought by a foreign administrator in Georgia to recover the amount due on a promissory note, if a properly authenticated exemplification of his letters of administration is filed with the clerk of the court pending the action, it is in time, under a section of the Georgia Code providing that, "pending the action, a properly authenticated exemplification of the letters testamentary, or of administration, shall be filed with the clerk of the court, to become a part of the record: Provided, the cause is pending in a court of record." Taylor v. McKee, 121 Ga. 223, 48 S. E. 943.

And an action brought in Michigan by a foreign executor to foreclose a mortgage on land in that state before the will was proved there is made good by its subsequent probate before hearing. Gray v. Franks, 86 Mich. 382, 49 N. W. 130.

Domiciliary administrators, who began a suit in a Federal court in another state without first taking out ancillary letters of administration, should be allowed, after the

Statement by **Adams**, Circuit Judge:

On July 12, 1887, the appellants borrowed $3,000 from a Massachusetts corporation, called the Dakota Mortgage Loan Corporation, and executed their note or bond for that sum, payable to the order of the corporation, maturing July 1, 1892. This note was negotiable on its face. To secure its due payment, appellants, hereinafter called defendants, executed and delivered to the corporation, a mortgage conveying real estate owned by them and situated in the state of Nebraska. Soon after receiving the note the corporation sold it, together with the mortgage, to John Stuart & Company, brokers, of Manchester, England, and placed on the back of the note the following indorsements:

(1) "For value received the Dakota Mortgage Loan Corporation hereby assigns and transfers the within note and coupons, together with all its right, title, and interest under the real-estate mortgage securing the same, without recourse, to ———. The Dakota Mortgage Loan Corporation, by Allison Z. Mason, Treasurer."

(2) "The Dakota Mortgage Loan Corporation, in consideration of value received, hereby guarantees the payment of each coupon at maturity and collection of the within bond: provided, however, that the said corporation reserves the right to repurchase this bond at any time, at its face and accrued interest to the time of repurchase; and a refusal to legally convey the bonds and mortgage deed shall release said corporation from further liability. In witness whereof the Dakota Mortgage Loan Corporation has signed and delivered these presents by its treasurer, this 13th day of August, 1887. By Allison Z. Mason, Treas."

Subsequently, and before maturity of the note, John Stuart & Company sold the note and mortgage for value to Walter Haworth, a citizen of Great Britain and resident of Manchester, England, who died before the maturity of the note. Jesse Haworth and Isaac H. Morris became executors of his will by appointment of an English tribunal. Morris died, and Jesse Haworth, the appellee, was left the sole surviving executor under the English appointment. Prior to the maturity of the note the name of the Dakota Mortgage Loan Corporation was, by an act of the legislature of Massachusetts, changed to Globe Investment Company. Shortly after the maturity of the note the defendants Mary, Richard, and Joseph Leahy borrowed

defendant has appeared and pleaded the general issue without raising any objection as to the disability of the plaintiffs to sue, and after the lapse of such a time that a new action would be barred by the statute of limitations, to amend the declaration by showing that they had taken out ancillary letters and so were qualified to maintain the action. Hodges v. Kimball, 34 C. C. A. 103, 63 U. S. App. 688, 91 Fed. 845, Reversing Lusk v. Kimball, 87 Fed. 545.

An allegation in an amended petition in an action instituted in Iowa by a foreign administrator, that since the bringing of the action the plaintiffs have had issued to them auxiliary letters of administration by the proper probate court of Iowa, cannot be stricken out as irrelevant on the ground that foreign executors and administrators must procure ancillary letters before bringing an action in Iowa. The court, however, said that whether the action as now pending can be sustained, having been brought before the issuance of these letters, is a question that may not arise in the case. McAleer v. Clay County, 38 Fed. 707.

But the rule that the subsequent qualification of a foreign executor or administrator relates back does not apply so as to give validity to an execution issued on a judgment obtained by testatrix in Mississippi; for, as the court said, it is settled that the facts which constitute the ground of a suit must exist at the time the suit is instituted, and it cannot be maintained by supplementing it with matter occurring after its institution. Jackson v. Scanland, 65 Miss. 481, 4 So. 552.

In Wright v. Gilbert, 51 Md. 146, the executors under the will of a resident of Pennsylvania brought an action of debt in Maryland without procuring ancillary letters in that state; afterward the declaration was amended so that one of the executors appeared as plaintiff, as administrator of the estate of testator, and later another amendment was allowed, showing that such plaintiff had procured letters of administration in Maryland. The court held that by such amendments the plaintiff sought to maintain the suit in a new and different character and capacity, and hence they were not authorized by a statute providing that, in amendments for nonjoinder or misjoinder, entire new parties, either plaintiffs or defendants, cannot be introduced, but some one of the original plaintiffs and some one of the original defendants must remain parties to the action; and in no case of amendment can entire new parties be made.

In Dearborn v. Mathes, 128 Mass. 194, it was held that an objection that an action instituted by a foreign administrator could not be maintained for want of issue of letters of administration in Massachusetts before the action was brought was not available unless pleaded, since it affected only the capacity of the plaintiff to sue, and not the jurisdiction of the court; and therefore that the ruling of the trial court, upon a motion for a new trial after verdict, that the defect was remedied by the issuance of ancillary letters to plaintiff after verdict and before judgment, was within its discretion, and not reviewable on a bill of exceptions.

from their codefendant, William Eugene Hayward, $3,000, executing to him as security therefor a mortgage on the same premises which they had before conveyed to secure the loan to the Dakota Mortgage Loan Corporation, and with this money paid the Globe Investment Company the entire amount of principal and interest then due and owing on the first-mentioned loan. At the time of making this payment defendants had no actual knowledge that the Globe Investment Company was not the owner of the note and mortgage. The Globe Investment Company, instead of remitting the money to England and actually paying the note in question, appropriated the same to its own use, and continued to report to John Stuart & Company that the debt remained unpaid and that the borrowers were paying interest semiannually. The Globe company for some time remitted to John Stuart & Company the semiannual instalments of interest as they were supposed to accrue. These remittances were received by the last-named company, for itself or its transferee, with no knowledge of the payment made to the Globe Investment Company. Subsequently the Globe company failed, the remittances to England ceased, and shortly thereafter, on September 23, 1896, this suit, a bill in equity to foreclose the mortgage, was instituted in the circuit court for the district of Nebraska, by Jesse Haworth and Isaac H. Morris, the English executors, not in their capacity as executors, but as owners and holders of the note and mortgage in question. Subsequently, and after the death of Isaac H. Morris, Jesse Haworth, hereinafter called complainant, filed an amended bill disclosing the death of his cocomplainant, but still seeking to recover in his individual capacity. The suit came on for trial, and, after an intimation by the trial judge that complainant could not maintain the action, he took leave to file an amended bill. This last amended bill was filed June 28, 1902. It was a suit to foreclose the mortgage first mentioned, given to secure the note for $3,000 held by Walter Haworth at the time of his death. It differs in no respect from the former bills, except that the complainant styles himself "sole executor of estate of Walter Haworth, deceased." He sets forth his own and Isaac H. Morris's appointment as executors of the estate of Walter Haworth in England, their due qualification, the death of Isaas H. Morris, and his sole survivorship in the trust. He further alleges that afterwards he applied to the probate court in Harlan county, in the state of Nebraska, having jurisdiction over such matters, and was on September 20, 1902, duly appointed executor of the last will and testament of Walter Haworth, deceased; that he still is the acting and qualified sole executor of such estate. Issues were properly joined and on the trial a decree of foreclosure was rendered. To reverse this decree an appeal was duly prosecuted to this court. There are 14 assignments of error, but counsel for defendants in their brief reduce them, for the purpose of our consideration, to the following 3: "(1) That the court erred in assuming that the complainant had qualified as executor under the laws of Nebraska, and had thereby qualified himself to sue in his representative capacity. (2) That the court erred in holding that, although the proceedings in the probate court in Nebraska were not commenced until more than ten years after the maturity of the debt, still that those proceedings might relate back to the date of the filing of the last amended bill, not only for the purpose of qualifying the plaintiff to sue, but also for the purpose of bringing the suit within the period of the statute of limitations. (3) That the court erred in holding that the assignment placed upon the back of the note had the same legal effect as an indorsement."

Argued before Sanborn, Hook, and Adams, Circuit Judges.

Messrs. **T. J. Mahoney** and **J. A. C. Kennedy**, for appellant:

This was not a commercial indorsement.

Omaha Nat. Bank v. Walker, 5 Fed. 399; DeHass v. Roberts, 59 Fed. 853; Aniba v. Yeomans, 39 Mich. 171; Hatch v. Barrett, 34 Kan. 223, 8 Pac. 129; Central Trust Co. v. First Nat. Bank, 101 U. S. 68, 25 L. ed. 876; Slacum v. Pomery, 6 Cranch, 222, 3 L. ed. 205; Hale v. Hitchcock, 3 Kan. App. 23, 44 Pac. 446; Haydon v. Nicoletti, 18 Nev. 290, 3 Pac. 473; 2 Parsons, Notes & Bills, 64; Randolph, Neg. Inst. §§ 786–989.

Messrs. **Flansburg & Williams**, for appellee:

The taking out of letters of administration before the hearing cured the defect or want of capacity in the executor, and related back, so as to make the bill good from the beginning.

Doolittle v. Lewis, 7 Johns. Ch. 45, 11 Am. Dec. 389; Hodges v. Kimball, 34 C. C. A. 103, 63 U. S. App. 688, 91 Fed. 845; Alvord v. Marsh, 12 Allen, 603; Hatch v. Proctor, 102 Mass. 351; Vroom v. Van Horne, 10 Paige, 549, 42 Am. Dec. 94; Rattoon v. Overacker, 8 Johns. 126.

A guaranty of payment written upon the back of a promissory note, by the payee thereof, is, in Nebraska, in and of itself, an indorsement by which the legal title is devested from the payee and invested in the transferee upon delivery of the note.

Heard v. Dubuque County Bank, 8 Neb.

10, 30 Am. Rep. 811; State Nat. Bank v. Haylen, 14 Neb. 480, 16 N. W. 754; Weitz v. Wolfe, 28 Neb. 500, 44 N. W. 485; Buck v. Davenport Sav. Bank, 29 Neb. 407, 26 Am. St. Rep. 392, 45 N. W. 776; Pollard v. Huff, 44 Neb. 892, 63 N. W. 58; Partridge v. Davis, 20 Vt. 499; Robinson v. Lair, 31 Iowa, 9; Judson v. Gookwin, 37 Ill. 286; Childs v. Davidson, 38 Ill. 437; Benton v. Fletcher, 31 Vt. 418; Bondurant v. Bladen, 19 Ind. 160; Donnerberg v. Oppenheimer, 15 Wash. 290, 46 Pac. 254; 2 Dan. Neg. Inst. § 1781.

Words or terms of negotiability are not essential to devest the title of the payee to the note and invest it in the transferee; but the legal title is transferred by any indorsement upon the note itself with an intent to transfer the title, although the language employed may be in terms a mere assignment.

Markey v. Corey, 108 Mich. 184, 36 L.R.A. 117, 62 Am. St. Rep. 698, 66 N. W. 493; Adams v. Blethen, 66 Me. 19, 22 Am. Rep. 547; Davidson v. Powell, 114 N. C. 575, 19 S. E. 601; Sears v. Lantz, 47 Iowa, 658; Sands v. Wood, 1 Iowa, 263; Merrill v. Hurley, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958; Bisbing v. Graham, 14 Pa. 14, 53 Am. Dec. 510; Hailey v. Falconer, 32 Ala. 536; Duffy v. O'Conner, 7 Baxt. 498; Shelby v. Judd, 24 Kan. 166; Brotherton v. Street, 124 Ind. 599, 24 N. E. 1068; Crosby v. Roub, 16 Wis. 617, 84 Am. Dec. 720.

Where a party brings a suit in his individual capacity, and afterwards amends his bill so as to make the suit stand in a representative capacity, it is not the statement of a new cause of action, or a departure from the original suit.

McDonald v. Nebraska, 41 C. C. A. 278, 101 Fed. 171; Murphy v. Stewart, 2 How. 263, 11 L. ed. 261.

Where an executor who has not proved the will in the proper court of a state, and received letters therefrom, brings suit upon a cause of action, in which he has an interest in the subject-matter, although he has no standing in court, he may, by reason of such interest, institute the suit, in order to defend his right, and afterwards acquire the full authority.

1 Dan. Ch. Pl. & Pr. 318; Swatzel v. Arnold, Woolw. 383, Fed. Cas. No. 13,682; Giddings v. Green, 48 Fed. 491; Bradford v. Felder, 2 M'Cord, Eq. 168; Blackwell v. Blackwell, 33 Ala. 57, 70 Am. Dec. 556; Black v. Henry G. Allen Co. 9 L.R.A. 433, 42 Fed. 624.

Adams, Circuit Judge, delivered the opinion of the court:

The first and second assignments of error arise from facts so interwoven that they may well be considered together. By the statutes of Nebraska in force at the time the transactions now under consideration were had the statute of limitations barred complainants' right to foreclose the mortgage in question in ten years after the maturity of the note. Section 5596, Nebraska Comp. Stat. 1901. The note was executed in 1887, payable July 1, 1892. On June 30, 1902, therefore, the right to foreclose the mortgage given to secure the payment of the note was barred. The suit instituted in 1896 by the English executors in their individual capacity was on the theory that, inasmuch as Walter Haworth died before the note matured, he having at the time of his death no cause of action against the defendants, no such cause of action descended to or was vested in his executors; that what was vested in them was the legal title to all chattels of the testator in trust for the purpose of administration under the law; and that as such legal owners they might, in their own names, sue to recover the same or to enforce any right, like that of foreclosure, incidental to the ownership of the chattels. This seems to have been a recognized theory of the common law. See Griffith v. Frazier, 8 Cranch, 9, 3 L. ed. 471; Kane v. Paul, 14 Pet. 33, 10 L. ed. 311; Giddings v. Green, 48 Fed. 489, and cases cited. But the learned trial judge ruled that this common-law right was superseded by §§ 5618 and 5621 of the Compiled Statutes of Nebraska of 1901 relating to civil actions. He made this ruling on June 13, 1902, and gave complainant fifteen days within which to amend his bill. Complainant, instead of standing on his right to sue in his individual capacity, acquiesced in the ruling and availed himself of the leave to amend, and on June 28, 1902, two days before the statute of limitations had run, filed his last amended bill. In this he made substantially the same averments as were made in the prior original and amended bills concerning the execution of the note and mortgage and the breach of the condition of the mortgage; and further, made allegations showing the original appointment in Great Britain of himself and Isaac H. Morris, the death of Morris, and that he afterwards, on September 20, 1902, was duly appointed executor by the probate court of Harlan county, in Nebraska.

In this last-mentioned bill Haworth remained complainant as before, but in a new capacity; then as an individual, now as sole excutor of the estate of Walter Haworth, deceased. The cause of action remained as it was from the beginning,—a breach of condition in the mortgage, entitling complainant to foreclose the same; and the action remained the same as at the beginning,—an

action to foreclose the mortgage given to secure payment of a note for $3,000 held at all times by himself. Such being the case, the amendment, as we have heretofore held, was permissible practice, and related back to the commencement of the suit. McDonald v. Nebraska, 41 C. C. A. 278, 101 Fed. 171, and cases cited. See also Herron v. Cole Bros. 25 Neb. 692, 41 N. W. 765, and Hines v. Rutherford, 67 Ga. 606.

The next question for consideration is whether the filing of the last amended bill by complainant without having secured his appointment as executor in Nebraska until after the filing thereof is fatal to his right of recovery. In considering this question, it should be borne in mind that complainant had an interest in the subject-matter of foreclosing the mortgage in question, even though he did not have a standing in court to do so. He was, by virtue of his appointment in Great Britain, the holder and owner of the note secured by the mortgage, and had a duty imposed upon him by law to collect it. No appointment as ancillary executor in Nebraska could add anything to his legal title, or to his right to collect the same. Such ancillary administration is required as a matter of public policy to insure the satisfaction of local creditors out of local assets before they are withdrawn from the state or turned over to the domiciliary administrator for that purpose. This policy is equally subserved, whether the appointment as executor actually occurs before or after the institution of the suit, provided, only, that it shall be made before trial. From these considerations it is obvious that whether the appointment of an ancillary executor be made before the bringing of a suit or afterwards, but before the trial, is purely formal and technical.

In the case of Swatzel v. Arnold, Woolw. 383, Fed. Cas. No. 13,682, Mr. Justice Miller, when presiding in this circuit, had before him a question similar to that which now confronts us. In his case the plaintiff brought in Nebraska his suit as administrator to foreclose a mortgage. His only right to sue as administrator rested upon his appointment by the probate court of a county in the state of Kansas in which decedent was domiciled at the time of his death. He held that the Kansas administrator might institute suit in the courts of Nebraska before taking out ancillary letters of administration in that state, and upon taking out such letters might, by amendment, show the fact. In that case he gives forcible reasons for the conclusion reached by him. He says: "The present plaintiff, as administrator of the domicil, had a right to receive for final distribution the sum due on the mortgage. He had an inchoate right to be appointed administrator here, and, if anyone else had been appointed, that person would have been liable to account to him for what was in hand after paying the debts in this jurisdiction. . . . The incapacity of the foreign administrator not being radical so as to entirely deprive him of power to proceed with his cause, the fact of his taking out letters in this state was matter which he might aver by amendment and maintain his suit thereon. . . . The impediment to the exercise of the full powers of an administrator in a jurisdiction foreign to that granting his letters is essentially technical and formal and should not be strained beyond its necessary application,"—citing Yeaton v. Lynn, 5 Pet. 224, 8 L. ed. 105.

Judge Shipman, in Black v. Henry G. Allen Co. 9 L.R.A. 433, 437, 42 Fed. 618, 624, after quoting with approval some of Mr. Justice Miller's remarks in Swatzel v. Arnold, *supra*, says: "The courts early found relief in cases of equity from too strict adherence to technicality upon the ground that 'in equity a plaintiff may file a bill as administrator before he has taken out letters of administration; and it will be sufficient to have them at the hearing, which is not the case at law.' . . . Therefore, in Humphreys v. Humphreys, 3 P. Wms. 349, where the next of kin had brought a bill without administering, and the defendant demurred, the lord chancellor allowed the demurrer and then permitted the complainants to take out letters of administration, which, when granted, he said, related to the time of the death of the intestate, and to allege the same by way of amendment or by supplemental bill."

In the case of Humphreys v. Humphreys, *supra*, a bill was filed by an administratrix as such. To this a plea was filed alleging that the taking of administration was subsequent to the filing of the bill.

"The lord chancellor [according to the report] with great clearness, and not without some warmth in respect of the delay, overruled the plea, observing that the mere right to have an account of the personal estate was in the plaintiff, . . . as she was the next of kin . . . and it was sufficient that she had now taken out letters of administration, which, when granted, related to the time of the death of the intestate, like the case where an executor, before his proving the will, brings a bill, yet his subsequent proving the will makes such bill a good one, though the probate be after the filing thereof."

In 1 Daniell's Chancery Pleading & Practice, p. 318, it is said: "If an executor, before probate, files a bill, alleging that he has proved the will, such allegation will

obviate a demurrer. . . . He must, however, prove the will before the hearing of the cause, and then the probate will be sufficient to support the bill, although it bears date subsequently to the filing of it. In like manner, a plaintiff may file a bill as administrator before he has taken out letters of administration, and it will be sufficient to have them at the hearing."

Chancellor Kent, in Doolittle v. Lewis, 7 Johns. Ch. 45, 11 Am. Dec. 389, in discussing a kindred subject, says: "If the party sues as executor or administrator, without probate, or taking out letters of administration, the taking them out, at any time before the hearing, will cure the defect, and relate back so as to make the bill good from the beginning. . . . In a light so merely formal is that omission viewed."

Bates, in his work on Federal Equity Procedure (vol. 1, § 52), says: "In equity a plaintiff may file his bill as administrator before he has taken out letters of administration, and it will be sufficient to have the letters at the hearing; which is not the case at law. It is a general rule in equity pleading and procedure that facts which have occurred after the filing of the bill must be brought before the court by supplemental bill, and not by way of amendment; but, as an exception to that rule, an executor or administrator appointed in one state may sue as such in another state, and subsequently take out letters testamentary or of administration in the latter state, and set up that fact by way of amendment."

In the case of Hodges v. Kimball, 34 C. C. A. 103, 63 U. S. App. 688, 91 Fed. 845, the circuit court of appeals for the fourth circuit had before it the same question we are now considering, and, after an exhaustive examination and citation of authorities, announced the rule in harmony with that already stated, to the effect that domiciliary administrators might institute a suit at law in a foreign state without having first taken out letters of administration, and might afterwards secure letters of administration in that state and, by amendment to their original cause of action, make the same appear and proceed as if letters had been granted prior to the institution of the suit. The court, in its opinion, says: "It was virtually conceded in argument that in an equity suit an amendment showing the subseqeuent taking out of letters of administration could be made and the suit maintained; but it was strenuously insisted that a different rule existed in the courts of law."

To the same effect are the cases of Henry v. Roe, 83 Tex. 446, 18 S. W. 806; Hatch v. Proctor, 102 Mass. 351; Goodrich v. Pendleton, 4 Johns. Ch. 549; Osgood v. Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513.

From the foregoing authorities, and many others cited and referred to in them, we think the rule is well settled in equity practice, however it may be at law, that an executor named in a will may file a bill in his capacity as executor before probate of the will, and maintain an action as such executor, provided he secures probate of the will before the hearing of the cause. Learned counsel for appellant have favored us with no authorities sustaining the opposite view; neither have we, in our examination, found such. Accordingly, we are constrained to hold that the fact that Haworth had not qualified as executor in Nebraska on June 28, 1902, the time he filed his last amended bill (he having so qualified later, on September 20, 1902) is not a defense to the present action. The qualification related back at least to the date of filing the amended bill. The amended bill was filed two days before the statute of limitations would have barred the action. Whether, therefore, the amended bill related back to the commencement of the action, which the authorities already cited indicate, is quite immaterial. The action in any event was not barred by the statute of limitations.

A point is made in appellant's brief that, because complainant failed to take an oath to faithfully discharge his duties as executor, he was never qualified as such, and accordingly was not entitled to recover in this action. An examination of the statutes of Nebraska discloses that no such oath is required in that state. Sections 2677 and 2678 of the Compiled Statutes of 1901, alone, relate to the qualification of executors. They read as follows:

"Sec. 2677. When a will shall have been duly proved and allowed, the probate court shall issue letters testamentary thereon to the person named executor therein if he is legally competent, and he shall accept the trust and give bond as required by law.

"Sec. 2678. Every executor, before he shall enter upon the execution of his trust and before letters testamentary shall issue, shall give bond to the judge of probate in such reasonable sum as he may direct, with one or more sufficient sureties with conditions as follows: . . . "

No provision is, here or elsewhere in the statutes, found for the taking of an oath to faithfully discharge the duties of the office. The matter of qualification is purely statutory. The statutes of Nebraska require the executor to give bond, and that is the only act of qualification contemplated by the statutes.

The remaining assignment of error relied

on by defendants' counsel relates to the transfer on the back of the note. It is claimed that it is not an indorsement within the meaning of the law merchant, and that it did not pass the legal title to subsequent holders free from equities existing between the makers and payee. The facts of the case show that soon after the maturity of the note the makers paid the payee the full amount of the note. This note was payable "to the order of the Dakota Mortgage Loan Corporation," and is conceded to be a negotiable instrument. At the time the makers paid it to that corporation under its new name of Globe Investment Company they necessarily knew the negotiable character of the note and the possibility of its having been negotiated. They nevertheless paid it without requiring the surrender of the note or the mortgage given to secure its payment. In these circumstances the payment was at their own risk. If the money found its way to the owner and holder of the note, if negotiated, it amounted to payment: otherwise not. Weldon v. Tollman, 15 C. C. A. 138, 32 U. S. App. 265, 67 Fed. 986; Swift v. Bank of Washington, 52 C. C. A. 339, 114 Fed. 643.

No legal justification of this payment is attempted in argument or brief by defendants' counsel. Their reliance is upon the proposition, involved in this assignment of error, that the note was not so indorsed as to vest title in the indorsee so as to cut off the equities existing between the makers and payee. The note and mortgage, by express stipulation of the parties, is to be construed according to laws of the state of Nebraska. We must therefore examine the transactions in the light of those laws.

Section 3380, Compiled Statutes of Nebraska of 1901, is as follows: "All bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or assigns, shall be negotiable by indorsement thereon, so as absolutely to transfer and vest the property thereof in each and every indorsee successively; but nothing in this section shall be construed to make negotiable any such bond, note, or bill of exchange, drawn payable to any person or persons alone, and not drawn payable to order, bearer, or assigns: Provided, that all such bonds, promissory notes, and bills of exchange, made payable to bearer shall be transferable by delivery without indorsement thereon. . . ."

From this statute it appears that promissory notes, payable "to any person or order," or "to any person or assigns," are made negotiable by indorsement. This statute impresses us with a twofold meaning: First, as a modification of the law merchant concerning what is a negotiable instrument. By the law merchant, in order to be negotiable, a note must be payable to the order of some person, or to bearer. By the statute of Nebraska negotiability is extended to a note payable to some person or his assigns. And, second, in the event a note be payable as last stated, the assignment may be made by a blank indorsement. In other words, the indorsement of the name of the person to whose assigns the note is payable, on the back of the note, operates to perform the function of the usual written assignment. It is apparent from these considerations that we are now dealing with a subject somewhat different from the accepted inland bill of exchange, or (since the statute of Anne) promissory note known in commerce or by the law merchant; so different, indeed, that the parties to the original transaction out of which the present suit arose saw fit to stipulate for the supposed different, if not greater, advantage found in the application of the laws of the state of Nebraska.

Tested, now, by these laws, as interpreted by the supreme court of Nebraska, how does the case stand? It is first strongly urged by counsel for complainant that the guaranty clause on the back of the note is in and of itself an indorsement by which the legal title of the note is devested from the payee and invested in the transferee upon delivery of the note to him. The payee's contract of guaranty as found on the note is perfect of its kind. It acknowledges receipt of the necessary consideration, and (referring to the "note" and "interest" as "bond" and "coupons") guarantees the payment of each coupon as it should mature, and finally the collection of the bond itself. The fact that the payee reserved the right to repurchase the bond at any time, providing for a release from its guaranty in case of refusal to sell the same to it, on demand, in no manner affects its primary obligation to guarantee the payment of the interest and the collection of the principal. It was on a contingency, which, in this case, never happened, that the guaranty became subject to defeasance. By this contract the payee for an acknowledged consideration obligated itself absolutely to pay the principal of the note, if payment could not be obtained from the maker by the exercise of due and reasonable care. Such is the accepted definition of a contract of guaranty. Brackett v. Rich, 23 Minn. 485, 23 Am. Rep. 703, and cases cited. This contract is more comprehensive and unconditional than the contract of indorsement. By the latter the failure to present a note to a maker at its maturity, and to demand payment thereof and notify the indorser of

nonpayment, are essential and necessary conditions to the creation of any liability against him by reason of his indorsement.

But we need not dwell on these elementary thoughts. The supreme court of Nebraska has frequently considered this question, and pronounced upon it in no uncertain voice. Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811, was a suit upon a promissory note payable to the order of V. J. Williams & Company, and indorsed only as follows: "For value received I hereby guarantee payment of the within note and waive presentation, protest, and notice. [Signed] V. P. Williams & Co." The suit was in favor of the transferee of the note. Defendant's counsel contended that the note never was, in fact, negotiated, because the guaranty written upon the back did not amount to an indorsement so as to transfer title. The court, speaking on this point, says as follows: "We find some conflict of authorities, but we adopt the law and the language of Day, Ch. J., in Robinson v. Lair, 31 Iowa, 9: 'We confess ourselves unable to give effect to the contract of guaranty of payment and waiver of demand and notice, if the payees still intend to retain the title. The writing simply constitutes an indorsement with an enlarged liability,' "—citing many cases.

State Nat. Bank v. Haylen, 14 Neb. 480, 16 N. W. 754, was an action for the foreclosure of a mortgage given to secure a negotiable promissory note signed by defendants, payable to the order of Thomas P. Kennard, and by him indorsed as follows: "Collection guaranteed and notice of protest waived this 26th day of April, 1880. [Signed] Thomas P. Kennard." Defendants set up as their defense usury, fraud, etc., practised upon them by the original payee. Plaintiff replies, alleging purchase in good faith, before maturity, for value and without notice of any equity. The court, in disposing of the case, uses the following language: "There is no question made in the evidence of the plaintiff bank being the bona fide owner and holder of the note and mortgage, nor that it received the same before maturity in the ordinary course of business and without notice of any infirmity. . . . But the district court let in the defense of usury for the reason, as is stated in the judgment, 'it [the plaintiff] holds the same [the note] as assignee, and not as indorsee.' . . . This is exactly the form of indorsement which in Heard v. Dubuque County Bank, *supra*, we held, following Robinson v. Lair, *supra*, to constitute an indorsement with an enlarged liability. . . . It will be admitted that the possession of the note, with the payee's name written across the back, is evidence of ownership in the plaintiff. Yet it is claimed that, while this would be the case if the payee's name stood alone on the back of the note, that here there are other words over the payee's signature to which it applies and upon which it has spent its force. Let us admit this, and then see whether the words taken together, including the signature, do not furnish still stronger evidence of a transfer of title in the note from the payee to the holder. By virtue of these words the payee agrees that he will pay the note in case of the holders using due diligence and being unable to collect it from the makers. He furthermore agrees that his ultimate liability to pay the note shall not be affected by reason of the neglect or failure of the holder to present it to the maker at maturity for payment, or to notify him, the payee, in case of its nonpayment. Now, what meaning could any of these words have, except upon the proposition understood, that the payee had disposed of the note, and parted with the title to it to some other person, to whom he guaranteed the payment, and in whose favor he waived the duty of presentation and notice? . . . I therefore see no reason for departing from the doctrine of Heard v. Dubuque County Bank, and it will be adhered to. The note and mortgage having been indorsed and delivered to the plaintiff before maturity and received by it for value in the ordinary course of business, without notice of any infirmity, it holds the same free from the taint of usury."

Weitz v. Wolfe, 28 Neb. 500, 44 N. W. 485, was a suit to recover the amount due on a promissory note made by one Jennings, and payable to the order of Weitz. Before maturity Weitz sold and transferred the note to Wolfe, making only the following indorsement upon the same: "I guarantee the payment of within note, waiving demand and protest. [Signed] T. T. Weitz." Jennings and Weitz were both made defendants. The court says: "The indorsement in this case, being signed by the payee, operated as a transfer of the note. . . . The liability of Weitz was not lessened because the indorsement contained the word 'guarantee.' He is an indorser and was properly sued with the maker in the same action."

Buck v. Davenport Sav. Bank, 29 Neb. 407, 26 Am. St. Rep. 392, 45 N. W. 776, was a suit in replevin for cattle mortgaged to secure the payment of a note payable to the order of one Mowry. He sold the note, placing on the back thereof, the following words only: "Demand, notice, and protest waived, and payment guaranteed. [Signed] Welcome Mowry." The court says two questions are presented by record: First,

is the writing on the back of the note an indorsement or merely a guaranty?

In Heard v. Dubuque County Bank, *supra*, the writing on the back of the note was as follows: "For value received I hereby guarantee payment of the within note, and waive presentation, protest, and notice."

This was held to be an indorsement with an enlarged liability. State Nat. Bank v. Haylen, *supra*. The writing on the back of the note in question, therefore, was a valid indorsement with an enlarged liability. To the same effect, also, is the case of Pollard v. Huff, 44 Neb. 892, 63 N. W. 58.

From the foregoing it appears that, under the laws of Nebraska, as interpreted by its highest judicial tribunal, the guaranty written on the back of the note before maturity and at the time of its sale to John Stuart & Company constitutes in and of itself a transfer of the legal title, equivalent to a blank indorsement,—such a transfer as entitles the transferee or subsequent holder to maintain an action for its collection free from equities existing between the makers and payee. Possibly we might here appropriately end our consideration of this case; but, as we find in the assignment, so called, written on the back of the note, a very satisfactory solution of the question before us, we proceed to its consideration.

It is conceded, of course, that the mere indorsement of the name of a payee on the back of a negotiable note, commonly called a "blank indorsement," evidences a complete transfer of title, one recognized by the law merchant, and certainly good under the laws of Nebraska. Daniel on Negotiable Instruments, vol. 1, § 688c, says: "The mere signature of the payee, indorsed on the paper, imports an executed contract of assignment with its implications, and also an executory contract of conditional liability, with its implications. The assignment would be as complete by the mere signature, as with the words of assignment written over it."

By this standard let us test the so-called assignment. It reads as follows: "For value received the Dakota Mortgage Loan Corporation hereby assigns and transfers the within note and coupons, *together with all its right, title, and interest under the real-estate mortgage securing the same, without recourse*, to ———. [Signed] The Dakota Mortgage Loan Corporation, by Allison Z. Mason, Treasurer." Eliminating the words italicized, which relate to the transfer of the mortgage security and which were doubtless employed *ex industria* to expressly do what the law by necessary implication does, there remains the bare statement that the payee of the note, for value received, assigns and transfers it to ———. This statement contains all the elements of a blank indorsement. It is merely the writing out of the implications of such indorsement; it is written on the back of the note; it acknowledges the receipt of a consideration; it employs apt words to transfer the full and complete title to the note, and actually purports to make such transfer. Anyone receiving it with such a transfer in blank may treat it as a blank indorsement and transfer it by delivery, or may so fill it up as to make it a special indorsement. Evans v. Gee, 11 Pet. 80, 9 L. ed. 639; Lovell v. Evertson, 11 Johns. 52; Everett v. Tidball, 34 Neb. 803, 52 N. W. 816.

In the case of Maine Trust & Bkg. Co. v. Butler, 45 Minn. 506, 12 L.R.A. 370, 48 N. W. 333, the supreme court of Minnesota, considering a question similar to that now before us, makes use of the following language: "It would seem obvious that, when writing out upon the back of the paper just what would have been inferred from his signature, the indorser has incurred no greater liability,—has done no more than he would, had he simply placed his signature there. How can it be said, then, that he has done less, in the absence of that clear declaration of his intent to exempt himself, mentioned in all of the authorities as necessary in the case of a qualified indorsement?"

There is abundant authority for the effect which we give to the indorsement in question. In Markey v. Corey, 108 Mich. 184, 36 L.R.A. 117, 62 Am. St. Rep. 698, 66 N. W. 493, the court, after reviewing and citing many sustaining authorities, held that the following indorsement on the back of a note, namely: "I hereby assign the within note to Matthew M. Markey and Catherine Sunders,"—was a good commercial indorsement, subjecting the payee who signed the same to the liability of indorser under the law merchant. In Adams v. Blethen, 66 Me. 19, 22 Am. Rep. 547, it is held that a defendant, the payee of a negotiable note, who signed his name on the back of the note under these words, "I this day sold and delivered to Catharine M. Adams the *with not*," thereby assumed all the liabilities of an indorser. The court there says: "The defendant declares that he sold and delivered the note. Every indorser of a bill or note impliedly says the same thing by his indorsement. The defendant did sell and deliver the note, and by making that declaration over his name on the back of it, he also agreed to pay the note to the plaintiff according to its tenor, upon seasonable notice, if the maker did not pay it."

In Davidson v. Powell, 114 N. C. 575, 19

S. E. 601, it was held that the indorsement of a negotiable note in these words, "I assign over the within note to S. M. Powell," does not limit the indorser's liability. In Sears v. Lantz, 47 Iowa, 658, it is held that where the payee of a note wrote on the back thereof the following words: "I hereby assign all my right and title to Louis Meckley," and signed his name thereto, he thereby subjected himself to all the liabilities of an indorser. In Merrill v. Hurley, 6 S. D. 593, 55 Am. St. Rep. 859, 62 N. W. 958, it is held that when the president of a corporation to which negotiable interest-bearing bonds are payable, places upon the back thereof the words, "For value received I hereby assign the within bond, together with all our interest in, and all our right under, the mortgage securing the same, to Mary E. Merrill without recourse;" and signs the same as such president,—the same constitutes a contract of indorsement, and is not a mere assignment of the instrument. Bisbing v. Graham, 14 Pa. 14, 53 Am. Dec. 510, was a suit on a note by the indorsee against the maker. The note was payable to the order of David Paynter. He indorsed it as follows: "For value received I assign to William Graham, or order, all my right, title, and interest in the within note, without recourse,"—and signed his name thereto. The court held this to be an indorsement, protecting the indorsee from equities existing between the maker and payee, making use of these words: "Nor is the fact that the transfer of the note assumes the form of an ordinary assignment such a departure from the usual course of business as to put the indorsee on his guard against the indorser. Although a blank indorsement in our commercial towns is the usual mode, yet in the country it is so frequently otherwise that it seldom, if ever, provokes inquiry or observation."

In the light thrown upon this so-called assignment by the authorities cited we are unable to treat it merely as an assignment of a chose in action, subjecting the assignee to such defenses as might be made against the assignor. In our opinion it is, in all essential respects, the equivalent of a blank indorsement, and relieves an innocent holder from equities existing between the makers and payee. This, we think, would be true under a proper application of the principles of the law merchant; but we are especially satisfied of it in view of the provisions of the statute of Nebraska. By that statute a note, whether payable to a person or his assigns, or to a person or his order, is equally negotiable. Whether payable one way or the other, the statute, treating them practically alike, for the purpose, doubtless, of facilitating the transaction of business, sanctions the transfer of title by mere indorsement. If the note is payable to a person or assigns, an assignment by the payee using the words employed in this case, "hereby assigns and transfers," would be the technically correct method of transferring the legal title of such a note. Again, treating them *in pari materia*, the technical assignment, like that above indicated, when containing no words of a restrictive or conditional character from which an intent not to transfer the legal title could be reasonably drawn, should transfer the legal title as effectually as the mere indorsement. The statute discloses a general policy in the state of Nebraska, and from it we are at liberty to draw all reasonable deductions.

The decree below was for the right party, and is accordingly affirmed.

WISCONSIN SUPREME COURT.

W. R. FANNING, Respt.,
v.
J. T. MURPHY, Impleaded, etc., Appt.

(126 Wis. 538, 105 N. W. 1056.)

Contract—benefit of third person.

1. If a person, for a consideration moving to him from another, agrees to pay that or any other's debt to a third person, the law, at once, operating upon the acts of the immediate parties to the transaction, supplies the essentials of privity between

Headnotes by MARSHALL, J.

Case Note.—Effect upon mortgagor's obligation of modification between mortgagee and subsequent grantee.—The weight of authority is with FANNING v. MURPHY, upon the proposition that, where the grantee of mortgaged premises assumes the mortgage and expressly agrees to pay the debt, he becomes the principal debtor of the mortgagee, and the mortgagor a surety only,—at least as between themselves; and if the mortgagee, with knowledge of these facts, extends the time of payment by a valid agreement between him and the grantee, the mortgagor will be discharged from personal liability. Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139; Wyatt v. Dufrene, 106 Ill. App. 214; Union Stove & Mach. Works v. Caswell, 48 Kan. 689, 16 L.R.A. 85, 29 Pac. 1072; Franklin Sav. Bank v. Cochrane, 182 Mass. 586, 61 L.R.A. 760, 66 N. E. 200; Pratt v. Conway, 148 Mo. 291, 71 Am. St. Rep. 602, 49 S. W. 1028; Regan v. Williams, 185 Mo. 620, 105 Am. St. Rep. 600, 84 S. W. 959; Miller v. Kennedy, 12 S. D. 478, 81 N. W. 906; Iowa Loan & T. Co. v. Schnose (S. D.) 103 N. W. 22.

It may not be out of place, in this connection, to call attention to a decision of the

such person and such third person, establishing binding contractual relations between them, even though such third party was a stranger to, and had no knowledge of, the transaction.

Same—variation.

2. In case of the establishment of contractual relations in the manner indicated in the foregoing rule, they cannot be subsequently varied by any agreement between the immediate parties to the transaction, not consented to by the third party.

Same—consideration for sale.

3. The rule last above stated applies to a case where one takes a conveyance of real estate, agreeing as part consideration therefor to pay the debt of his grantor, or that of some other person, to a third party.

Same—discharge of surety.

4. In case of such an agreement as is indicated in the last foregoing rule, the new promisor is the principal debtor as regards both his immediate promisee and the third party as well, so that any agreement made between the second promisor and the original promisee, prejudicial to the original promisor, operates to discharge the latter the same as in any case of an agreement between the principal debtor and the creditor where there is a surety.

Trial—findings.

5. Findings of fact and conclusions of law should be confined strictly to performance of the duty imposed by § 2863, Rev. Stat. 1898. Such findings should cover singly and in concise language the pleaded facts without any addition by way of argument or recitation of evidence.

Surety—right against cosurety.

6. It is essential to the preservation of

St. Louis court of appeals which seems opposed to the rule adopted by the Missouri supreme court in the cases above cited from that jurisdiction.

In Connecticut Mut. L. Ins. Co. v. Mayer, 8 Mo. App. 18, where the grantees, who had assumed the payment of a mortgage debt, were permitted by the mortgagee to remove certain chattels included in the mortgage without the knowledge or consent of the mortgagor, this was held not to discharge the mortgagor. The court said that there was a clear distinction between express contracts of suretyship and a suretyship arising by operation of law. The creditor in the latter kind may continue to hold his original debtor as principal as well as the new debtor, and "while he so holds him there can be no discharge of liability on the ground of indulgence to one who, for certain purposes not affecting the creditor, stands toward the original debtor in the relation of a principal to his surety."

In Merriam v. Miles, 54 Neb. 566, 69 Am. St. Rep. 731, 74 N. W. 861, it is said that no change in the original contract without the knowledge and consent of the mortgagee can affect his rights. "He need not look at all to the vendee unless he so elects. He need surrender no rights against the vendor unless he so elects; but it by no means follows that, because he is not contractually bound by the contract between them, he may, after learning thereof, enter into new relations with one of the parties, in disregard of the rights of the other. He may enforce his rights as they before existed; but if he undertakes, after notice of the changed relationship between the other parties, to deal with one of them by changing his own contractual obligations with him, he must regard the rights which he knows the third person has acquired."

And in Travers v. Dorr, 60 Minn. 173, 62 N. W. 269, it is stated that no contract to which the mortgagee is not a party, and to which he has not consented, can change his contract rights as to the mortgagor; but when he has notice that, as between the mortgagor and the latter's grantee of the mortgaged land, the relation of suretyship with respect to the mortgaged debt has been created, he must at all times act with due regard to the rights of the surety.

As is aptly said in George v. Andrews, 60 Md. 26, 45 Am. Rep. 706, when a mortgagor sells the mortgaged property to one who agrees to pay the debt for which the security was given, he has a right, upon any default by his grantee in the payment of principal or interest, to have the property immediately sold, and this right can be exercised by a demand upon the mortgagee to pursue his remedy against the property, a demand which the latter cannot disregard; and when, by a valid agreement between himself and the grantee for an extension of the time of payment, the mortgagee deprives himself of the ability to meet such demand from the mortgagor, the latter is released from all personal liability.

This rule holds good, no matter how many transfers there may be of the mortgaged land, if each grantee personally assumes the mortgage debt, or how many assignments of the mortgage. Nelson v. Brown, 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960; Merriam v. Miles, *supra*; Schroeder v. Kinney, 15 Utah, 462, 49 Pac. 894.

This principle was also applied where one of the original mortgagors became the sole owner of the mortgaged land; and a valid agreement between him and the mortgagee for an extension of the time of payment was held to discharge his comortgagors. Dillaway v. Peterson, 11 S. D. 210, 76 N. W. 925.

It follows that any agreement between the original debtor's grantee and the mortgagee, whereby the rights of such debtor were jeopardized, would discharge him from all personal liability; and it was so held where a clause in the mortgage gave the mortgagor the right to require from the mortgagee a release of any part of the mortoriginal mortgagor, is the surety to the specified payments, and the mortgagor sold the land, and his grantee assumed the mortgage and expressly agreed to pay it, an arrangement between him and the assignee of

a surety's rights against his cosurety that he should pay the indebtedness under compulsion.

Same—compulsory payment.

7. In case of a principal debtor, a surety, the debt being in default, and of the latter paying the same for his protection, without being coerced into doing so, such payment is compulsory within the rule last aforesaid.

Same—assignment of securities.

8. If a surety, for his protection, pays off the debt for which he is liable, but does so in the form of a purchase, taking an assignment of the securities to himself, or to some third person for his use, having in mind, however, only the better protection of his rights of subrogation and contribution, the transaction amounts to a payment as to such rights.

Same—duty of creditor.

9. A creditor entitled to resort to a principal debtor and a surety for the discharge of his claim owes no duty to the latter of active vigilance to collect the debt of the principal. The law imposes the duty of activity in such circumstances on the surety, rather than on the creditor.

Same—payment after maturity.

10. At all times after the maturity of an indebtedness, for the payment of which there is a principal and sureties, any one of the latter may pay off the same for his protection, and enforce his rights of subrogation and contribution.

Same—extension of payment.

11. In case of a principal debtor and surety, any valid extension of the time of payment of the debt at the request of the former, without the consent of the latter, discharges the surety.

Same—validity of extension.

12. It is essential to a valid extension of the time of payment of an indebtedness under the foregoing rule, that the transaction should involve all the essentials of a binding contract, effectually tying the hands of the creditor as regards enforcing payment

the mortgage by which such clause was abrogated. Paine v. Jones, 76 N. Y. 274, Affirming 14 Hun, 577.

Upon the same principle, where the vendors received in payment for the land sold promissory notes made by third persons, and the vendees mortgaged the land as security for the payment of the notes, and were not to be looked to for such payment except upon the mortgage and according to its conditions, the mortgagors, though not at any time personally liable as sureties, as owners of the land, occupied that position; and an extension of the time of payment of one of the notes, granted to the maker by the mortgagees for a consideration and without the consent of the mortgagors, discharged the land from the mortgage lien. Metz v. Todd, 36 Mich. 473.

An interesting application of the same legal principle to cases where the grantee takes the mortgaged land subject to the mortgage, but without personally assuming its payment, is found in Murray v. Marshall, 94 N. Y. 611, and Spencer v. Spencer, 95 N. Y. 353. Here the courts reasoned that, though no strict and technical relation of suretyship arises in such cases between the parties to the conveyance, an equity does arise in favor of the mortgagor, which cannot be taken from him without his consent; and this equity very closely resembles the rights of a surety the original terms of whose contract have been modified without his consent; and, as the land is the primary fund for the payment of the debt, to the extent of its value, at least, the grantee is the principal debtor and his grantor, the original mortgagor, is the surety to the same extent; and if the mortgagee, by a valid agreement with the grantee, extends the time of payment, the mortgagor is discharged from personal liability to the extent of the value of the land.

And it has been held in a like case that, if the value of the land at the time of the maturity of the debt was more than sufficient to pay the mortgage, its depreciation in value during the time of such extension of payment will not make the mortgagor liable for the deficiency. Bunnell v. Carter, 14 Utah, 100, 46 Pac. 755.

But in Maryland, where the courts, on the general proposition, are in harmony with FANNING V. MURPHY, it was held in Chilton v. Brooks, 72 Md. 554, 20 Atl. 125, that where the terms of the deed merely recite the existence of a mortgage, but do not create any personal obligation on the grantee to pay the mortgage debt, no relation of principal and surety arises between the parties to the deed; and an extension of the time of payment by the mortgagee to the grantee does not in any wise affect the liability of the mortgagor.

There are some cases in direct opposition to FANNING V. MURPHY, of which the leading one is, perhaps, Denison University v. Manning, 65 Ohio St. 138, 61 N. E. 706, which was an action by the payee of a note against its maker to recover a balance due after applying the proceeds of the sale of the premises mortgaged to secure the note, and in which it was held that a demurrer should have been sustained to the answer, alleging that, after the execution of the note and mortgage, a sale of the mortgaged premises was made to a purchaser, who assumed the payment of the mortgage, and that the payee of the note was fully informed of this fact and consented thereto, and received interest on the note from the grantee, and, without the knowledge or consent of the mortgagors, the mortgagee agreed with such purchaser to extend the time of payment of the note after maturity, and did so extend it. In this opinion the relation of principal and surety is conceded to arise as between the grantor and grantee themselves, but not as to the mortgagee. The sale is looked upon as being solely for the advantage of the parties thereto, and in no sense

of the debt until the expiration of the agreed time. There must be a reasonably definite time agreed upon and an agreed equivalent rendered for the extension, and that equivalent must be a real consideration,—something more than the payee would be entitled to in case of a mere indulgence of the payor by allowing the debt to run past due.

Same—extension of due date.

13. A mere request for the extension of the due date of a debt at the contract rate of interest, and consent thereto, do not satisfy the essentials of a binding contract for an extension within the rules above indicated.

(January 9, 1906.)

APPEAL by defendant, J. T. Murphy, from a judgment of the Circuit Court for Douglas County in favor of plaintiff in an action brought to foreclose a mortgage and enforce a personal liability of one alleged to be liable for the debt. Affirmed.

Statement by **Marshall, J.**:

A consolidated action to foreclose a mortgage and obtain a judgment enforcing the personal liability of one claimed to be liable for the mortgage indebtedness to the plaintiff as a copromisor upon the note secured by the mortgage and in the mortgage as well.

April 15, 1890, J. T. Murphy, D. C. Sullivan, M. Murphy, and W. R. Fanning mortgaged lands owned by them to the Superior & Duluth Loan & Debenture Company to secure the payment, three years after the date of such mortgage, of a $5,000 note of the mortgagees with interest thereon at the rate of 8 per cent per annum, payable semi-annually. The mortgage contained all the provisions common to such instruments, and also this: "And the said parties of the first part, for themselves and their heirs, execu-

for the benefit of the mortgagee, who, even if he knows it is in progress, cannot prevent it; nor has he any power in shaping it. He cannot be compelled, therefore, to recognize the sale and look to the grantee for the payment of his debt. The proposition that a valid agreement to extend the time of payment releases the mortgagor is without support in law, says this opinion. The allegation of such an agreement in pleading does not of itself imply in law a previous agreement to accept such purchaser as the principal debtor. The mortgagee, being under no obligation so to accept him, or even as a debtor of any kind, had a legal right altogether to exonerate him from any direct obligation to himself, and *a fortiori* could consent to relieve him for a time. The mortgagors cannot complain of an agreement to that effect between the mortgagee and the purchaser of the mortgaged land, unless they were thereby deprived of some existing right. Though as between themselves and their grantee they were sureties, they would not, by such agreement, be deprived of their right to pay all the debt at any time, and proceed against their grantee upon his agreement with them to pay the mortgage debt; not being parties to the arrangement between the grantee and mortgagee, they would not be bound by it, and all the remedies they possessed before it was made would remain to them afterwards.

To the same effect is Waters v. Hubbard, 44 Conn. 340, in which it was held that where a grantee of a part of the mortgaged land agrees to assume the whole of the mortgage, and pay all the mortgagor's notes secured thereby, and afterwards the mortgagee requests said grantee to mortgage the property purchased by him as security for the notes assumed by him, and this is done, and there is no showing that the mortgagee intends to release the mortgagor from the payment of any part of the indebtedness, or to surrender any part of his security, but obtains the mortgage from the grantee as additional security, the relation of the mortgagor to the mortgagee is not changed; he still remains the principal debtor, and he is not discharged from personal liability by the new mortgage of his grantee.

In a later case in the same jurisdiction, Boardman v. Larrabee, 51 Conn. 39, there is a *dictum* to the same effect, though the record disclosed no contract of extension of the time of payment "upon good consideration susceptible of enforcement."

In Iowa the same rule is also enforced; and, while the grantee and grantor of mortgaged premises become principal and surety as between themselves, the mortgagee's relation remains unchanged as to his original debtor, and he may treat them both as his principal debtors, and have a personal decree against either or both. And this remains so until he recognizes in some way the grantor as a surety merely. Hence, an agreement between the grantee and the mortgagee extending the time of payment will not, alone, in the absence of fraud or collusion, have the effect of making the grantee the principal debtor and the grantor the surety, in reference to the mortgagee, where there is nothing in the language of the agreement from which the mortgagor can be led to infer that he is to be so treated, or by which he is likely to be misled. Corbett v. Waterman, 11 Iowa, 86; Iowa Loan & T. Co. v. Haller, 119 Iowa, 645, 93 N. W. 636.

Upon this question there are three cases in the United States Supreme Court which seem to be at variance with one another. Shepherd v. May, 115 U. S. 505, 29 L. ed. 456, 6 Sup. Ct. Rep. 119, is frequently cited to sustain the proposition that, where a grantee of mortgaged land expressly assumes the mortgage debt, no relation of suretyship is thereby created between such grantee and his grantor, the mortgagor; and that, therefore, an agreement between

tors, administrators, and assigns, hereby covenant and agree to and with the said party of the second part, its successors and assigns, as follows, to wit: That they will pay to the said party of the second part, its successors and assigns, the sum of money above specified, with interest accruing thereon, at the times and in the manner stated in said note and coupons, together with all costs and expenses, if any there be." September 18, 1893, the mortgage and note were, for value, assigned to the Northern Trust Company. October 14, 1896, such company, for value paid by the plaintiff and at his request, assigned the note and mortgage to Mary A. McNealy, and on October 19th she assigned the same to him. The assignments were recorded, except the last. The one to Mary A. McNealy was made solely for the benefit of plaintiff. She was used as a convenient instrument to better preserve, as he supposed, his rights as against his cosureties. April 16, 1890, the mortgagors conveyed the mortgaged premises to W. R. O'Hearn, he assuming and agreeing to pay as part consideration for the property the mortgage indebtedness. April 18, 1890, he conveyed a two-thirds interest in the premises to R. C. Jones and Edgar A. Le Clair, they as part consideration therefor assuming and agreeing to pay a corresponding proportion of the mortgage indebtedness. June 5, 1890, said Le Clair conveyed his interest in the premises to said O'Hearn and Jones, they assuming and agreeing as a part consideration therefor to pay one third of said indebtedness. Subsequent to O'Hearn's taking an interest in the property he, acting for himself and Jones, April 16, 1890, paid and took up some past-due interest coupons. April 11, 1893, O'Hearn, on behalf of himself and Jones, they being then sole owners of the mortgaged premises, applied to the holder of the note and mortgage for an extension of the time of payment for one year, which application was granted. The transaction in respect thereto consisted of a mere request for an extension and consent thereto, the agent of the holder of the note, assuming to act pursuant to such request and consent, indorsing on the back of the note these words: "This note, by mutual agreement, is extended for one year from April 15th, 1893, at 8 per cent, payable semi-annual. Interest having been paid to April 15th, 1893, and all coupons surrendered." Later, after the Northern Trust Company became the owner of the securities, default was made in respect to both principal and interest, whereupon, under threat of collection thereof against the property of the plaintiff being forced, and upon the promise of J. T. Murphy to pay his proper proportion as soon as he was able to do so, plaintiff paid the amount due on the note and caused the securities to be assigned to Mary A. McNealy, he being advised by counsel to that course as the one best calculated to protect his rights against other parties liable upon the paper. On May 28, 1902, he commenced an action against J. T. Murphy to recover the proportion it was supposed he should bear of the burden of discharging the mortgage indebtedness, alleging that plaintiff's other comakers on the note were nonresidents or insolvent. July 28, 1902, plaintiff commenced an action against all persons interested in the real estate and all those who were supposed by the plaintiff to be personally liable for the mortgage indebtedness or any part thereof, to foreclose the mortgage and enforce such personal liability. The two actions were consolidated and tried as one. The court, upon the evidence, found facts as above indicated, and also all facts necessary to a judgment of foreclosure in the action, and the following: The only party appearing and defending in the action was J. T. Murphy. Interest was paid upon the note to September 1, 1895. After plaintiff pur-

the mortgagee and the grantee to extend the time of payment will not discharge the original debtor from his personal liability. It is true that such is the language of that opinion; but it is entirely unnecessary to the decision of the case, as there is no assumption of the mortgage debt by the grantee.

Again, in Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494, it is said that an agreement by the grantee of mortgaged land to assume the mortgage and pay the debt "does not, without the mortgagee's assent, put the grantor and the mortgagor in the relation of principal and surety toward the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor,"—citing Shepherd v. May, *supra*. But this is clearly *obiter*, no such question arising in this case, as it was an action against the grantee after the sale of the land under the principal mortgage, which left nothing to be applied on the plaintiff's mortgage, and the plaintiff had exhausted her remedy against the original mortgagor by recovering judgment against him upon which an execution was returned unsatisfied.

The same court, in Union Mut. L. Ins. Co. v. Hanford, cited in FANNING v. MURPHY, was applying the law of the state of Illinois, where the action was brought; and it is expressly stated in that opinion that, in jurisdictions where it is held that the relation of suretyship in such cases arises not only between the parties themselves, but also with respect to the mortgagee, it must follow that any subsequent agreement of the mortgagee with the grantee to extend the time of payment discharges the mortgagor from all personal liability.

chased the note and mortgage J. T. Murphy on several occasions promised to pay his proper proportion, but neglected to do so. That resulted in the commencement of the two actions. The parties liable, or that were liable, for the payment of the mortgage indebtedness in addition to the plaintiff are J. T. Murphy, D. C. Sullivan, M. Murphy, W. R. O'Hearn, R. C. Jones, and Edward Le Clair. D. C. Sullivan and M. Murphy are nonresidents of the state and have been for five or six years. Defendants O'Hearn and Le Clair are insolvent and have been since 1893. Said Jones was insolvent from the year 1893 to the time of his death, which occurred prior to the commencement of this action. On April 18, 1904, there was due on the note and mortgage, including back taxes, $9,272.07. The amount which plaintiff paid for the note and mortgage, with interest thereon from the time of such payment to the filing of the finding, less $100, paid to him for interest, was $7,571.17. O'Hearn and Jones gave no consideration for the extension of the note granted at their request. The summons and complaint against J. T. Murphy, in the action for contribution, was served upon him within six years after Fanning paid or purchased the note. The summons and complaint in the foreclosure action was served upon said Murphy more than six years after such payment. The two actions were consolidated at Murphy's request without prejudice to the date of the commencement of the action as regards his personal liability being considered to be May 28, 1902. On such findings the court found, as matters of law, that, by reason of the provisions of the deeds to which O'Hearn, Jones, and Le Clair were parties, they became principal debtors, and J. T. Murphy, M. Murphy, Sullivan, and Fanning sureties upon the note as between the makers thereof and themselves; that there was no binding contract extending the time for the payment of the note; that Fanning was entitled to a foreclosure judgment, as prayed for in the complaint, to reimburse him for the amount which he paid for the note and mortgage, and 6 per cent interest thereon from the time of such payment, and all sums paid by him for taxes, with interest thereon, and solicitor's fees and costs and disbursements in the action, and further entitled to a judgment for deficiency against defendant Murphy for one half of the amount of whatever deficiency there might be. Judgment was entered accordingly, from which defendant Murphy appealed.

Mr. **Louis Hanitch**, with Mr. **John Brennan**, for appellant:

When the mortgagors sold the property, and the grantees assumed and agreed to pay the note and mortgage, the latter became the principal debtors and the former sureties.

Stites v. Thompson, 98 Wis. 329, 73 N. W. 774; Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437; Johns v. Wilson, 180 U. S. 440, 45 L. ed. 613, 21 Sup. Ct. Rep. 445.

O'Hearn and Jones's agreement to extend was a new promise made directly to the mortgagee, and released the surety.

American Button-Hole, Overseaming & S. Mach. Co. v. Gurnee, 44 Wis. 62; Bishop v. Douglass, 25 Wis. 696; McClellan v. Sanford, 26 Wis. 609; Omaha Nat. Bank v. Johnson, 111 Wis. 372, 87 N. W. 237.

An agreement to extend the time of the payment of the note and mortgage would release a surety who was such on the same instrument with the principal, leaving out of consideration the element present in this case, the new, direct, and valid promise of the principals to pay the mortgage.

Simpson v. Evans, 44 Minn. 419, 46 N. W. 908; Dillaway v. Peterson, 11 S. D. 210, 76 N. W. 925; Shuler v. Hummel, 1 Neb. (Unof.) 204, 95 N. W. 350; Brandt, Suretyship, § 354; McComb v. Kittridge, 14 Ohio, 348; Fawcett v. Freshwater, 31 Ohio St. 637; Moulton v. Posten, 52 Wis. 169, 8 N. W. 621; Nelson v. Flagg, 18 Wash. 39, 50 Pac. 571; Benson v. Phipps, 87 Tex. 578, 47 Am. St. Rep. 128, 29 S. W. 1061; Dodgson v. Henderson, 113 Ill. 360; Royal v. Lindsay, 15 Kan. 591; Eaton v. Whitmore, 3 Kan. App. 760, 45 Pac. 450; Alley v. Hopkins, 98 Ky. 668, 56 Am. St. Rep. 382, 34 S. W. 13; Shaw v. Nolan, 8 La. Ann. 25; Keirn v. Andrews, 59 Miss. 39; Hale v. Forbis, 3 Mont. 395; Kittle v. Wilson, 7 Neb. 76; Fowler v. Brooks, 13 N. H. 240.

One is not entitled to contribution if a payment of the debt is voluntary; that is, if there is no liability on the part of one of the sureties, one of them cannot pay the debt of the principal and enforce contribution from his cosurety.

7 Am. & Eng. Enc. Law, 2d ed. p. 336; 2 Sutherland, Damages, § 759, p. 1729.

If payment were made by a stranger he would not be subrogated to the rights of the mortgagee.

Watson v. Wilcox, 39 Wis. 643, 20 Am. Rep. 63; 2 Dan. Neg. Inst. § 1224.

Plaintiff cannot recover if he paid the note and mortgage.

7 Am. & Eng. Enc. Law, p. 326; Boughton v. Bank of Orleans, 2 Barb. Ch. 458; Ladd v. Chamber of Commerce, 37 Or. 49, 60 Pac. 713, 61 Pac. 1127, 62 Pac. 208; Owens v. Tague, 3 Ind. App. 245, 29 N. E. 784; Davezac v. Seiler, 93 Ky. 418, 20 S. W. 375.

Nor if he bought the note and mortgage.

Bishop v. Douglass and McClellan v. San-

ford, *supra*; Hutchinson v. Chicago & N. W. R. Co. 37 Wis. 601; First Nat. Bank v. Jones, 92 Wis. 36, 65 N. W. 861; Ellis v. Bibb, 2 Stew. (Ala.) 63; Cottrell v. Shepherd, 86 Wis. 649, 39 Am. St. Rep. 919, 57 N. W. 983; Coleman v. Ward, 85 Wis. 328, 55 N. W. 695.

Mr. H. H. Grace, for respondent:

An extension of time to the principal in order to constitute a discharge of the surety must be founded upon a consideration which is sufficient in law.

Randolph, Com. Paper, § 964; Dan. Neg. Inst. 5th ed. § 1315.

It must suspend the right of bringing an action until the expiration of the extended term.

American Button-Hole Overseaming & S. Mach. Co. v. Gurnee, 44 Wis. 61; Paine v. Voorhees, 26 Wis. 522; Harris v. Newell, 42 Wis. 687; Irvine v. Adams, 48 Wis. 468, 33 Am. Rep. 817, 4 N. W. 573; Meiswinkle v. Jung, 30 Wis. 361, 11 Am. Rep. 572; Riley v. Gregg, 16 Wis. 667; Hamilton v. Prouty, 50 Wis. 592, 36 Am. Rep. 866, 7 N. W. 659; Moulton v. Posten, 52 Wis. 169, 8 N. W. 621; Fay v. Tower, 58 Wis. 286, 16 N. W. 558; St. Maries v. Polleys, 47 Wis. 67, 1 N. W. 389; Jaffray v. Crane, 50 Wis. 349, 7 N. W. 300; Grace v. Lynch, 80 Wis. 166, 49 N. W. 751; Batavian Bank v. McDonald, 77 Wis. 486, 46 N. W. 902; Ready v. Sommer, 37 Wis. 265; Hallock v. Yankey, 102 Wis. 41, 72 Am. St. Rep. 861, 78 N. W. 156; Omaha Nat. Bank v. Johnson, 111 Wis. 372, 87 N. W. 237; Donkle v. Milem, 88 Wis. 33, 59 N. W. 586; Plankinton v. Gorman, 93 Wis. 560, 67 N. W. 1128.

An extension of time for the payment of a bond and mortgage, for no consideration except an agreement to pay at the expiration of the time, is void for want of consideration.

Olmstead v. Latimer, 158 N. Y. 313, 43 L.R.A. 685, 53 N. W. 5; Wilson v. Powers, 130 Mass. 127; Haydenville Sav. Bank v. Parsons, 138 Mass. 53; Abel v. Alexander, 45 Ind. 523, 15 Am. Rep. 270; Dare v. Hall, 70 Ind. 545; Tatum v. Morgan, 108 Ga. 336, 33 S. E. 940; Travis v. Watson, 134 Mich. 249, 96 N. W. 28; Shayler v. Giddins, 122 Mich. 659, 81 N. W. 552; Potter v. Detroit, G. H. & M. R. Co. 122 Mich. 179, 81 N. W. 80, 82 N. W. 245; Byers v. Harris, 67 Iowa, 685, 25 N. W. 879; Hunt v. Postlewait, 28 Iowa, 427; O. S. Kelley Co. v. Chinn (Iowa) 75 N. W. 315; Davis v. Graham, 29 Iowa, 514; Hensler v. Watts, 113 Iowa, 741, 84 N. W. 666; Coster v. Mesner, 58 Mo. 549; Agricultural Bank v. Bishop, 6 Gray, 317; Harnsbarger v. Kinney, 13 Gratt. 511; Freeman's Bank v. Rollins, 13 Me. 202; Hosea v. Rowley, 57 Mo. 357; Ross v. Jones, 22 Wall. 688, 22 L. ed. 734; Dan. Neg. Inst. 5th ed. § 1316.

Marshall, J., delivered the opinion of the court:

There are many decisions of this court as regards the status of one who has for a consideration moving to him from another agreed to pay the latter's debt to a third person, such third person being a stranger to the transaction, such as the agreement involved here where the grantee of realty assumed and agreed to pay the indebtedness of his grantor or some other party secured upon such property as consideration in whole or in part for the conveyance. The subject was last fully discussed by this court in Tweeddale v. Tweeddale, 116 Wis. 517, 61 L.R.A. 509, 96 Am. St. Rep. 1003, 93 N. W. 440, the most significant of the previous decisions of the court being referred to. It was there said that, upon the transaction being completed between the parties thereto, the promisor becomes absolutely bound to the third person regardless of whether he has any knowledge of the matter or renders any consideration for his new security; that no privity between the promisor and the third party is essential to the liability, except that which the law operating upon the acts of the parties creates. The idea that the law so operating will create such privity, enabling the third person to enforce by action at law the promise made for his benefit, and that nevertheless his status as regards the promisor may, after the happening of the transaction creating it, be changed without his consent, was rejected. The relations existing between the promisor and the promisee in such circumstances, it has been said, are those of principal and surety,—that the promisor takes the place of his promisee, the latter becoming surety for him; so that, in the event of such promisee paying the debt he has his remedy over against his promisor. Stites v. Thompson, 98 Wis. 329, 73 N. W. 774. Whether, in such circumstances, as regards the creditor the status of the original debtor is changed to that of a surety, does not seem to have been heretofore decided by this court.

In those jurisdictions where the nature of the relations between the promisor and a third person is held to be the same as it is here, in respect to the former being equitably and legally liable to the latter, it has been held that a variance of the original contract between a third person and the debtor, without the consent of the original debtor, discharges the latter from all liability, where a similar variance by agreement between any principal obligor and obligee would discharge the surety: it being said in terms or in effect that the third person, upon being informed of the relations between the parties to the transaction, affording him the additional security, becomes in duty bound to

protect the interest of the original debtor to the extent of dealing with the person who has agreed to take his place as the one primarily liable for the debt as if the sole liability of the original debtor were that of a mere surety. Home Nat. Bank v. Waterman, 134 Ill. 461, 25 N. E. 648, 29 N. E. 503; Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Palmer v. Purdy, 83 N. Y. 144; Grow v. Garlock, 97 N. Y. 81; Guild v. Butler, 127 Mass. 386; Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437; Wayman v. Jones, 58 Mo. App. 313; Spencer v. Spencer, 95 N. Y. 353; George v. Andrews, 60 Md. 26, 45 Am. Rep. 706; Metz v. Todd, 36 Mich. 473; Commercial Bank v. Wood, 56 Mo. App. 214. The Federal Supreme Court, in the case cited, speaking of the doctrine which obtains here, that one who is the beneficiary of a promise made by the grantor of mortgaged premises to pay the mortgage indebtedness, that one being a stranger to the transaction, may enforce the promise at law, and that the promise is irrevocable without his consent, said: "Where such is held to be the relation of the parties the consequence must follow that any subsequent agreement of the mortgagee with the grantee, without the consent of the grantor, extending the time of payment of the mortgage debt, discharges the grantor from all personal liability for that debt." In Wayman v. Jones, *supra*, it was said that "there is no distinction between a suretyship created with the consent of the creditor and that which arises by operation of law. The principle is applicable alike in both classes, as is abundantly shown by the authorities."

The learned counsel for appellant, as a basis for their claim that appellant was discharged from all liability for the payment of the mortgage indebtedness by the transaction mentioned in the statement between O'Hearn and the owner of such indebtedness, contend that the law is as above stated; and to that extent it seems that counsel's position is sound. Therefore, at the time of the alleged extension of the time for payment of the mortgage indebtedness, as regards all parties to the litigation, W. R. O'Hearn, R. C. Jones, and Edgar A. Le Clair were principal debtors, and J. T. Murphy, D. C. Sullivan, M. Murphy, and W. R. Fanning were sureties. However, if the agreement for the extension was not binding for want of a consideration to support it, if, notwithstanding such agreement, such owner was left free to enforce payment of such indebtedness after the due date thereof, according to the conditions of the note, and the sureties were free to take up the same and protect themselves from loss in the ordinary way in such cases, the entire groundwork of appellant's position fails, leaving nothing in the record affecting, prejudicially, his liability to respondent as a cosurety, except some minor matters which are inefficient to affect the situation, as we shall see.

We do not overlook the criticism of counsel upon the failure of the trial court to find distinctly as to whether respondent bought the note, leaving no enforceable claim against appellant, except upon the note itself, and the importance of the statute of limitations, if such were the fact; or whether he paid it under compulsion, creating a liability upon the part of appellant to contribute his proportionate share as cosurety. The findings in this respect, and in general, as regards the judicial duty under § 2863, Rev. Stat. 1898, as explained in Farmer v. St. Croix Power Co. 117 Wis. 76, 98 Am. St. Rep. 914, 93 N. W. 830, are deficient. They are considerably encumbered with mere evidentiary matters, instead of such matters being entirely omitted, as they should be, and only facts in issue and pleaded facts and the resulting conclusions of law, being included. Findings should never be put in the form of a *résumé* of the evidence, as they often are; nor should they include matters of argument in support of the conclusions. Mischief in that regard, in the opinion of the writer, is the natural result of permitting counsel for the prevailing party to formulate the manner in which the court shall pronounce its decision. Counsel, however able and however appreciative of the duty of the court to speak judicially in rendering its decision, and as the statute commands, are counsel still, and the product of their efforts to present to the court a form for its decision is very likely to partake, significantly, of partisan features; to be in the nature of findings of fact supported by evidence and argument, with such findings so obscured by, or involved in, other matters as to require diligent search therefor in order to enable one to discover the same. It is a mistake, as it seems, to suppose that such features add to the stability of the judgment. Findings, covering in logical order the pleadable and pleaded facts, in concise and strictly judicial language, as the law requires, are by far the safest basis for a judgment to rest upon.

On the point raised by counsel as to whether respondent came by the note and mortgage by purchase with the idea of making an investment, it seems from the evidence and findings that his whole purpose was to protect himself against loss, so far as practicable, by taking up the securities and resorting to the mortgaged property and the liability of his cosureties for reimbursement. He did not act in the matter until the per-

sons primarily liable were in default, nor until he was pressed for payment by the holder of the note and menaced with the probability of his property being taken in some way to discharge the debt, if he did not provide for it. True, the transaction was in the form of a bargain and sale, and respondent testified repeatedly that he bought the securities; but he also said over and over again, in terms or in effect, that he acted under advice of counsel, and had only in mind protection of himself against loss. There is nothing to indicate that he bought the paper as an investment, or paid it voluntarily. It seems very clear that, as regards the liability of his cosureties as contributors, his act in taking up the note and mortgage extinguished the original debt.

True, it was not permissible for respondent to voluntarily pay the note and then hold his cosureties liable. Compulsory payment was essential to their liability; but the surety, in order to satisfy that, is not required to wait until the creditor extorts payment from him. As soon as the principal debtor makes default the surety may pay the indebtedness and seek contribution of his cosureties, if there be such. Payment under those circumstances is, in legal effect, compulsory. In contemplation of law, the act is characterized by a request from the cosurety, if there be such, to the one acting in the matter, to pay the debt, and a promise on the part of the former to contribute his proper proportion. Thus, a cosurety is liable to contribute to the one making the payment, both upon the ground of equitable and legal obligation. 1 Brandt, Suretyship, 3d ed. § 319; 27 Am. & Eng. Enc. Law, 2d ed. p. 485, and cases cited. The idea is that whenever a surety pays a debt because his liability has become fixed to do so by his principal's default, it is not voluntary; and when, in such circumstances, he takes up the note for the sole purpose of discharging his obligation as surety and preserving his rights of subrogation and contribution, the mere fact that he does so in the form of a purchase of the securities does not militate against its being in fact a payment for the purposes mentioned.

The learned counsel for respondent fails to make clear in his brief the theory, as he views the matter, upon which the liability of appellant was adjudged, respecting whether the learned trial court held that respondent paid the note or bought it as an investment relying upon the verbal promise of appellant to pay his due proportion. The findings are very indefinite in respect to the matter. We agree with the learned counsel for appellant as to its being very difficult to see clearly from the decision the supposed underlying principles of it. The recovery cannot be sustained upon the mere obligation of appellant to respondent as cosurety, without there was, in effect at least, a payment of the indebtedness by respondent under compulsion, as before indicated. As it seems to us, however, the essential facts in that regard are established by the evidence.

It is suggested by counsel that appellant was released by laches of the holder of the note and mortgage, in that he did not proceed with diligence to collect the indebtedness after the same became due. The conclusive answer to that is, as counsel for respondent suggests, the payee of an instrument having a principal obligor and surety owes no duty of active vigilance to the latter to enforce collection of the indebtedness. The way is open to the surety at any time after default of his principal to pay the debt and reimburse himself by enforcing the obligation of such principal and the cosureties, if there be such. Harris v. Newell, 42 Wis. 687; Updike v. Lane, 78 Va. 132; Alexander v. Byrd, 85 Va. 690, 8 S. E. 577. "The surety has no right to say that he is discharged from the debt . . . if all that he rests upon is the passive conduct of the creditor in not suing. He must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue, or to give him, the surety, the means of suing." Lord Eldon in Eyre v. Everett, 2 Russ. Ch. 381. So, as it is said, the duty of activity is imposed by law on the surety to protect himself, rather than on the creditor to protect him.

The foregoing covers all the matters discussed in the briefs of counsel, which are considered of sufficient importance to warrant special mention in this opinion, except the question of whether there was a valid extension of the note, in view of the conclusion we have reached in respect to that matter. It is conceded that, waiving other questions which have been decided adverse to appellant, he cannot recover unless his obligation of suretyship was discharged by a valid extension of the time for payment of the note by the agreement between O'Hearn and the Superior Duluth Loan & Debenture Company.

As indicated in the statement, the transaction as to the extension consisted of a request by O'Hearn on behalf of himself and Jones, who were the principal debtors, made before the note was due, for an extension of the time of payment thereof, and the granting of such request. Some significance is claimed for the circumstance that the holder of the note, after such request and consent, entered the result upon the loan register as a renewal of the loan; but we are unable to perceive how the mere bookkeeping feature of the matter, with which O'Hearn

was in no way concerned, cuts any figure whatever. Further significance is claimed for the fact that after the extension agreement, so-called, was made, respondent paid an instalment of interest, which fell due three days after such extension. The payment of interest was not a condition of the extension, and, if it were otherwise, such payment was only in compliance with the obligation of the payor independently of any extension. It cannot be properly referred to as a consideration supporting a new contract. The law is well settled, as will be hereafter more fully seen, that neither payment of the principal of a debt, nor any part thereof, nor payment of interest thereon according to contract, constitutes a consideration for an extension. Stroud v. Thomas, 139 Cal. 274, 96 Am. St. Rep. 111, 72 Pac. 1008; Woolford v. Dow, 34 Ill. 424; Davis v. Stout, 126 Ind. 12, 22 Am. St. Rep. 565, 25 N. E. 862; Wilson v. Powers, 130 Mass. 127; Mathewson v. Strafford Bank, 45 N. H. 104; Wheeler v. Washburn, 24 Vt. 293.

Reference is made to the fact, that some days after the transaction, as regards the extension, was concluded between the parties, without the knowledge and in the absence of O'Hearn, and without any subsequent notice to him thereof, an indorsement was placed on the back of the note in these words: "This note, by mutual agreement, is extended for one year from April 15th, 1893, at 8 per cent payable semi-annual, interest having been paid to April 15th, 1893, and all coupons surrendered;" and that subsequently interest was paid by O'Hearn in accordance therewith, instead of 10 per cent, which was the contract rate in case of the debt not being paid at maturity. It is claimed that such indorsement and payment evidence a binding contract. We cannot view the matter that way. The rights of the parties, whatever they were, became fixed when the request of April 11, 1893, for the extension of the note for one year, was granted on April 12th thereafter. If, notwithstanding those circumstances, the holder of the note could have enforced payment at any time after the due date thereof according to contract as to time, the mere unilateral memorandum on the back of the same, made four days after the mutual transaction was completed, did not change the situation; neither did the receipt of money paid as interest, and the indorsement thereof on the back of the paper. The consent of the holder of the note to receive $200, October 15, 1893, as payment in full for interest to that time, when he could have demanded $250, did not constitute a consideration for the extension. The rebate was a mere gratuity allowed pursuant to a mere moral obligation, not affecting the relations between the parties in any respect whatever.

The point is made that the transaction was, in effect, an exchange of promises, the one being the consideration for the other,—a promise, on the one hand, to keep the money for an additional year at the same rate of interest, as before indicated, and a promise, on the other, to loan the money for such additional year at such rate; Nelson v. Flagg, 18 Wash. 39, 50 Pac. 571, and Benson v. Phipps, 87 Tex. 579, 47 Am. St. Rep. 128, 29 S. W. 1061, being referred to in support thereof. There are many such authorities. A pretty full discussion of them is to be found in Reed v. Tierney, 12 App. D. C. 165. There are still more authorities to the contrary, which, according to substantially the universal judgment of text-book writers, establish the better rule.

The reasoning in support of the first theory, as above indicated, is that consent to an obligation for an extension involves an exchange of benefits, which satisfies to the fullest extent all of the essentials of a consideration. The reasoning in support of the other theory is that such a transaction does not add anything to the obligation of the debtor: that, in the absence of it, he would be bound to pay the debt and interest any way as a condition of retaining the money until such time as it should please the creditor to insist upon payment. It does not appear that this court has passed upon that precise question.

On a matter where there is such a direct and irreconcilable conflict as we find on the one under discussion there is very little to be gained by a lengthy review and analysis of authorities. There is not much that can well be done but to take a position on one side of the conflict or the other, being guided by what appears to be the weight of authority. It seems that such weight is significantly against the proposition contended for by appellant. The following distinctly hold that a request for an extension of the time of payment of a note at the contract rate of interest, and consent thereto, is not binding because not supported by a new and independent consideration. Hughes v. Southern Warehouse Co. 94 Ala. 613, 10 So. 133. "It requires an additional valuable consideration . . . to bind the promisee to an observance of even an express promise to indulge." Woolford v. Dow, 34 Ill. 428. It was mutually agreed to extend the time of payment of the note at 10 per cent interest. That involved no new consideration. "The note by its terms drew 10 per cent interest, and this agreement made no change in its terms as to rate of interest. . . . The agreement to extend the time of payment . . . was

a mere *nudum pactum*." Crossman v. Wohlleben, 90 Ill. 537. "A mere promise made by a creditor to indulge the debtor for a given length of time upon the payment of interest does not bind him to such extension, because the payment of interest is already secured by the terms of the original note for any delay that may occur from any indulgence that might be given." English v. Landon, 181 Ill. 621, 54 N. E. 912. "At about the time of the maturity of the note in suit the principal maker notified the payee that he would like the same to run another year at the same rate of interest. The payee only desired interest on his note, and so notified the principal maker. . . . There is no evidence in this record showing such an extension of time for a specified period and for a specified consideration as was mutually binding on both parties." Kerns v. Ryan, 26 Ill. App. 177; Edmonds v. Thomas, 41 Ill. App. 505; Heenan v. Howard, 81 Ill. App. 629; Dare v. Hall, 70 Ind. 545. An agreement to continue payment of interest at the same rate as that specified in the note, or at a reduced rate, does not constitute a new consideration. Hume v. Mazelin, 84 Ind. 574; Davis v. Stout, 126 Ind. 12, 22 Am. St. Rep. 565, 25 N. E. 862; Wayman v. Jones, 58 Mo. App. 313; Wilson v. Powers, *supra;* Roberts v. Stewart, 31 Miss. 664; Reynolds v. Ward, 5 Wend. 501. A debtor's promise to pay interest on an existing contract and according to its terms during a period of delay in the enforcement thereof, is a promise to do precisely what he is bound to do without a promise. "If the debtor's promise to pay interest creates no additional obligation, it is no consideration for a contract to delay." Sully v. Childress, 106 Tenn. 109, 82 Am. St. Rep. 875, 60 S. W. 499; Howell v. Sevier, 1 Lea, 360, 27 Am. Rep. 771; Tatum v. Morgan, 108 Ga. 336, 33 S. E. 940; Harburg v. Kumpf, 151 Mo. 16, 52 S. W. 19; La Belle Sav. Bank v. Taylor, 69 Mo. App. 99. All elementary writers, as before stated, so far as we can discover, are in harmony with these authorities. 1 Brandt, Suretyship, 3d ed. § 388; 2 Randolph, Com. Paper, 2d ed. § 768; Daniel Neg. Inst. 5th ed. § 1317a.

We are not unmindful of the fact that there are instances where it has been said in legal opinions that the weight of authority is contrary to what we assert. Reed v. Tierney, *supra*, is one of such instances. But to our minds the writers must have reached a conclusion from a very imperfect examination of the matter.

While, as before indicated, there is no decision of this court precisely on the point, so none interfering with the judicial policy here being established in harmony with the views pressed upon our attention by the learned counsel for appellant, it is believed that the contrary one has been, generally, in business transactions, accepted as correct in this state. No good reason is perceived why what seems to be the decided weight of authority in respect to the matter should not be followed. The decisions here, so far as they go, are in harmony therewith. They are to the effect that a valid agreement for the extension of the time of payment of a note must have all the essentials of a binding contract; that it must be reasonably definite as to time, and there must be an agreed equivalent for the extension,—such a consideration as will so tie the hands of the obligee as to disable him from enforcing the obligation until the expiration of the time agreed upon. Riley v. Gregg, 16 Wis. 666; Ready v. Sommer, 37 Wis. 265; Meiswinkle v. Jung, 30 Wis. 361, 11 Am. Rep. 572; Irvine v. Adams, 48 Wis. 468, 33 Am. Rep. 817, 4 N. W. 573; Hamilton v. Prouty, 50 Wis. 592, 36 Am. Rep. 866, 7 N. W. 659; Fay v. Tower, 58 Wis. 286, 16 N. W. 558. That equivalent must be something other than what the law would award to the obligee in case of a mere extension of the time of performance, regardless of any pretense of a contract to do so. It must be something separate from, and entirely additional to, what would accrue in favor of the obligee if he merely allowed the note to run from day to day.

Testing the transaction respecting the alleged extension in question by the foregoing, it was not binding on the holder of the note. There was never a moment of time after it fell due in which such holder was not perfectly free to enforce payment; nor in which the appellant and his cosureties, or either of them, or the parties primarily liable for the debt, or either of them, could not have discharged the debt by payment of it. Neither was there a moment of time after respondent took up the note and mortgage for his protection, in which appellant could not have made contribution and put himself in a position to protect himself from loss, so far as practicable, by resorting to the mortgage security and the liability of his cosureties as freely as respondent could. If there were any loss which accrued to him by delay in working out the ultimate rights of the parties, the fault was as much his as of anyone else. So there is no ground for exempting him from liability to respondent on the ground of laches. We see no escape from the conclusion that the rights of respondent were fairly vindicated by the judgment appealed from.

The judgment is affirmed.

Dodge, J., concurring (filed January 16, 1906):

While I agree with the judgment of af-

firmance in this case, I do so on the ground that, in the dealings between the principal debtor and the mortgage resulting in the so-called extension of time, I can find no agreement on the part of the debtor to refrain from payment during the term of such extension. To my mind the whole transaction is consistent with mere indulgence on the part of the creditor, and in no wise inconsistent with a continuation of the privilege, always resting in a debtor, to pay an overdue debt. The proposition declared in the court's opinion as a basis for the conclusion reached, that, even if such a promise on the part of the debtor were in fact made, it would not constitute such consideration for the promise of the creditor to extend as to give it validity, is, however, in my view, so opposed both to reason and authority that I cannot yield it my assent. I agree fully with the rule laid down, and the authorities cited in support of it, that a mere promise by a creditor to grant extension of time, however definite, is of no validity unless there be some new consideration therefor, either a benefit to the creditor, or a detriment to the debtor. I also agree that the mere payment or promise of payment of any part of the money, principal or interest, which the debtor is already bound to pay by the terms of the existing note, is not such consideration. But when a debtor, having the right, at his pleasure, to pay a debt, and thus to terminate his liability for interest, and to deprive the creditor of an interest-bearing investment for his money, agrees to forego such right for a definite period, I can see no escape from the view that such agreement on his part is both a benefit to the creditor and a detriment to himself such as, according to legal definitions, constitutes a valid consideration for the creditor's promise to forego his right to insist on payment during the same period. We all know that, in ordinary business affairs, investors of money are ready to make various concessions in the way of lower rates of interest and the like in consideration of receiving a permanent investment in lieu of one which may be terminated at the option of the debtor. Such distinction is considered valuable and worth paying for. It also disables the debtor from paying up and thus saving interest; a valuable right. I am amazed to find in the opinion filed a statement that the weight of authority is against this proposition. I find in its support numerous decisions, among which are the following: Crossman v. Wohlleben, 90 Ill. 537; Dodgson v. Henderson, 113 Ill. 364; English v. Landon, 181 Ill. 614, 54 N. E. 911; Bailey v. Adams, 10 N. H. 162; Fowler v. Brooks, 13 N. H. 240; McComb v. Kittridge, 14 Ohio, 348; Wood v. Newkirk, 15 Ohio St. 295; Fawcett v. Freshwater, 31 Ohio St. 637; Chute v. Pattee, 37 Me. 102; Brown v. Prophit, 53 Miss. 649; Simpson v. Evans, 44 Minn. 419, 46 N. W. 908; Dillaway v. Peterson, 11 S. D. 210, 76 N. W. 925; Shuler v. Hummel, 1 Neb. (Unof.) 204, 95 N. W. 350; Eaton v. Whitmore, 3 Kan. App. 760, 45 Pac. 451; Green v. Lake, 2 Mackey, 162; 2 Am. Lead. Cas. (Hare & W.) 5th ed. 469; Reed v. Tierney, 12 App. D. C. 165; Nelson v. Flagg, 18 Wash. 39, 50 Pac. 571. I find it assumed, as unquestionable, by our own court in Templeton v. Butler, 117 Wis. 455, 94 N. W. 306, and when I turn to the authorities cited in the opinion as in conflict therewith, I find none of them to so conflict. Of the text writers said to oppose it, I find in 1 Brandt on Suretyship, 3d ed. § 388, the declaration that the better opinion is that the surety is discharged in such case, and that the reason upon which the rule is founded is invincible; while I find that neither of the other text writers cited refers to the subject at all either in approbation or disapproval in the treatises cited, but that Mr. Randolph declares it to be supported by the weight of authority in his article on Commercial Paper. 7 Cyc. Law & Proc. p. 902.

Examining the cases cited in the opinion as conflicting with the rule that a definite promise to retain the money at interest during a specified term is sufficient consideration to support an agreement by the creditor to extend, for which I contend, I find them to go no further than to declare the proposition that a mere promise to pay interest at the rate fixed by the former contract so long as the creditor forbears collection, is no consideration, because it is the legal obligation already resting on the debtor and his promise, therefore adds nothing of detriment to him or benefit to his creditor; with which I fully agree. True, some of these cases are based upon agreements which might be construed to include agreement of the debtor that he would retain the money, but in none of these is any such construction declared, nor its effect to validate the extension at all discussed. In Illinois, however, whence are taken most of the citations, the distinction is clearly drawn. Thus, in Crossman v. Wohlleben, *supra*, in dealing with a promise to extend upon a promise to pay interest at the old rate, it is said: "It is essential . . . that both parties should be bound by the agreement. . . . In the case at bar there is no consideration shown either *by a promise on the part of the debtor to keep the money for any given time and pay interest for that time*, or by paying the interest in advance." (Italics mine.) Heenan v. Howard, 81 Ill. App. 629, 634, is entirely similar. But in Dodgson v. Hender-

son, 113 Ill. 360, 364, where the debtor did expressly agree to keep the money, the court held: "The agreement to keep the money another year and pay the interest thereon was a sufficient consideration for the promise of the payee to extend the time of payment." Approved in English v. Landon, 181 Ill. 614, 54 N. E. 911. In Mississippi, too, whence is cited Roberts v. Stewart, 31 Miss. 664, which fully adopted the rule of Reynolds v. Ward, 5 Wend. 501, and of the Indiana cases, the distinction for which I contend was at once recognized as nowise inconsistent in Brown v. Prophit, 53 Miss. 649. The Wisconsin cases go no further than to demand generally that an agreement for an extension, like any other contract, must have a consideration either of benefit to the creditor or disadvantage to the debtor. That a promise waiving the debtor's option to pay at will, when evidenced by a new promissory note, is such a consideration, is expressly held in Omaha Nat. Bank v. Johnson, 111 Wis. 372, 87 N. W. 237, and that a verbal promise to forego payment is also, was assumed, as already stated, in Templeton v. Butler, *supra*.

When a proposition is supported by unassailable reasons and by all the authority speaking expressly on the subject, I think it should not be repudiated, but adhered to.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

WESTERN UNION TELEGRAPH COMPANY, Plff. in Err.,
v.
C. E. SCHRIVER et al.

(141 Fed. 538.)

Telegraph — unauthorized message — undisclosed principal.

1. A telegraph company owes no duty to the undisclosed principal of the addressee of a telegram to exercise reasonable care to receive and transmit authorized messages only, because injury to him cannot be reasonably anticipated as the consequence of the lack of such care, and because such injury is the effect of an independent, intervening cause,—the act of the addressee.

Same—form of action.

2. The action for damages for such an injury is an action of tort for a false representation in the the nature of a false warranty, caused by the breach of the duty to exercise reasonable care to receive and transmit authorized messages only. It is not an action on a contract.

Same—care—undisclosed principal.

3. The telegraph company owes the duty to exercise ordinary care to receive and transmit genuine messages correctly to senders, to addressees, and to those who appear in the telegrams to be beneficiaries thereof, because injury to them may be reasonably anticipated as the probable consequence of negligence. It owes a like duty to the undisclosed principals of senders, because the law charges it with knowledge that these principals are in privity with it, through contracts made by the senders, and injury to them from its negligence may be reasonably anticipated.

Negligence—proximate cause.

4. An injury that could not have been foreseen or reasonably anticipated as the probable consequence of negligence is not actionable.

An injury that is not the natural consequence of an act of negligence, and that would not have resulted from it but for the interposition of some new, independent cause that could not have been anticipated, is not actionable.

Same—duty of care.

5. A duty of care, owing by the party who occasions the loss to him who suffers it, is an indispensable element of actionable negligence. The breach of such a duty, owing to others, is immaterial.

Same—duty of care.

6. One who makes a false representation owes no duty of care to tell the truth to those to whom he does not communicate it, and to whom he does not anticipate that it will be conveyed, and a person of ordinary prudence and intelligence would not anticipate that it would be conveyed; and such

Headnotes by SANBORN, Circuit Judge.

Case Note.—Liability of telegraph company to undisclosed principal of sendee.—In Lee v. Western U. Teleg. Co. 51 Mo. App. 375, it was said that an action could not be sustained by the employer of the addressee for an error in transmission of the telegram, there being nothing on the face of it, and no outside notice to the agents of the company, to indicate that it related to the business of the employer; and it was therefore held that the action was properly brought by the addressee.

In Western U. Teleg. Co. v. Kirkpatrick, 76 Tex. 217, 18 Am. St. Rep. 37, 13 S. W. 70, a telegram intended for the wife's benefit was addressed to her husband. There was nothing in the message to indicate that it was intended for her, and no extrinsic notice was given to the agent who received the message for transmission. And, although mental suffering is generally held in Texas to be a proper element of damages for delay in delivering telegrams, it was held that the wife could not recover such damages in this case, because she had failed to show a state of facts from which it could be legally inferred that damages to her feelings were in contemplation of the parties at the time the contract was made.

In Western U. Teleg. Co. v. Motley (Tex.

parties have no cause of action against him for injuries they sustain in reliance upon it.

Fraud—innocent parties—opportunity.

7. The rule that, where one of two innocent parties must suffer from the fraud of a third, he who furnishes the means to commit it must bear the loss, is limited in its application to cases in which the party chargeable makes the third party his real or apparent agent, cases in which he provides the means intentionally, or for a dishonest purpose, or negligently, and cases in which he derives a benefit from the fraud of the third party. It does not govern the great majority of cases where one innocently, for an honest purpose and with reasonable care, furnishes to a third party the means by which he perpetrates a fraud from which he who provides the means derives no benefit.

Precedents—absence of.

8. The absence of reported judgments and decisions sustaining an alleged liability under a given state of facts raises a strong presumption that no such liability exists.

(November 16, 1905.)

ERROR to the Circuit Court of the United States for the Northern District of Iowa to review a judgment in favor of plaintiffs in an action brought to secure reimbursement for losses alleged to have resulted from defendant's delivery of a false telegram. Reversed.

The facts are stated in the opinion.

Argued before Sanborn, Circuit Judge, and Philips and Carland, District Judges.

Messrs. **Craig L. Wright and Asa F. Call,** for plaintiff in error:

The telegraph company is not responsible to defendants in error as undisclosed principals for the damage sustained by them through their reliance on the telegram.

Western U. Teleg. Co. v. Schriver, 64 C. C. A. 96, 129 Fed. 344; McCornick v. Western U. Teleg. Co. 38 L.R.A. 684, 25 C. C. A. 35, 49 U. S. App. 116, 79 Fed. 449; Slade v. Little, 20 Ga. 371; Henry v. Dennis, 95 Me. 24, 85 Am. St. Rep. 365, 49 Atl. 58; Lee v. Western U. Teleg. Co. 51 Mo. App. 375; Western U. Teleg. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826, 22 S. W. 961; Western U. Teleg. Co. v. Kirkpatrick, 76 Tex. 217, 18 Am. St. Rep. 37, 13 S. W. 70; Western U. Teleg. Co. v. Kerr, 4 Tex. Civ. App. 280, 23 S. W. 564; Pacific Exp. Co. v. Redman (Tex. Civ. App.) 60 S. W. 677; Bigelow, Fr. § 2, p. 336; 14 Am. & Eng. Enc. Law, 2d ed. p. 148; Ashuelot Sav. Bank v. Albee, 63 N. H. 152, 56 Am. Rep. 501; Carter v. Harden, 78 Me. 528, 7 Atl. 392; Nash v. Minnesota Title Ins. & T. Co. 159 Mass. 437, 34 N. E. 625; Eaton, C. & B. Co. v. Avery, 83 N. Y. 31, 38 Am. Rep. 389; Friedlander v. Texas & P. R. Co. 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570; May v. Western U. Teleg. Co. 112 Mass. 90; Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140.

Messrs. **H. D. Estabrook, Rush Taggart, George H. Fearons, and John F. Dillon** also for plaintiff in error.

Messrs. **John A. Senneff, M. F. Healy, Thomas D. Healy, Robert Healy, and D. M. Kelleher,** for defendants in error:

A recovery is permitted in cases of this sort by action in tort for breach of the public duty of the telegraph company.

McCord v. Western U. Teleg. Co. 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 N. W. 315; Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140; Francis v. Western U. Teleg. Co. 58 Minn. 252, 25 L.R.A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078; Milliken v. Western U. Teleg. Co. 110 N. Y. 403, 1 L.R.A. 281, 18 N. E. 251.

Responsibility for the damages "should fall upon the company which, through its agent, has enabled a third person to commit a fraud, rather than upon the innocent party who has been imposed upon by it."

Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto, 54 L.R.A. 711, 48 C. C. A. 413, 109 Fed. 369; Western U. Teleg. Co. v. Uvalde Nat. Bank (Tex. Civ. App.) 72 S. W. 232, 97 Tex. 219, 65 L.R.A. 805, 77 S. W. 603; Bank of California v. Western U. Teleg. Co. 52 Cal. 280; Strause v. Western U. Teleg. Co. 8 Biss. 104, Fed. Cas. No. 13,531.

One who supplies another with the means of perpetrating a fraud against one person,

Civ. App.) 27 S. W. 51, the wife of the addressee was allowed to recover for delay in delivering a telegram announcing the serious illness of her father, the relationship of all the parties having been made known to the operator at the time the message was sent. The court, however, said that a different rule would apply where the beneficiary is not disclosed in the making of the contract.

In Leonard v. New York, A. & B. Electro Magnetic Teleg. Co. 41 N. Y. 544, 1 Am. Rep. 446, plaintiffs were allowed to recover for damages sustained by acting on a mistake in a telegram sent by their agent, addressed to another of their agents; and in Harkness v. Western U. Teleg. Co. 73 Iowa. 190, 5 Am. St. Rep. 672, 34 N. W. 811, it was held that the undisclosed principal of the parties by and to whom the telegram was sent was entitled to recover for damages caused by delay in delivery. It does not appear, however, in either of these cases, whether the right to maintain the action was based upon the fact that the message was sent by an agent of an undisclosed principal, or upon the fact that the addressee was his agent.

which is perpetrated against another, is liable to the latter.

Wilson v. Green, 25 Vt. 450, 60 Am. Dec. 279; Culliford v. Gadd, 28 Jones & S. 343, 17 N. Y. Supp. 457, Affirmed in 139 N. Y. 618, 35 N. E. 205; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Friedlander v. Texas & P. R. Co. 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570; Walters v. Western & A. R. Co. 56 Fed. 369.

The telegraph company owed a public duty to the person to be served in the transaction, and its liability is not limited to those who sustained contract relations with it.

Thomp. Neg. § 2487; Herron v. Western U. Teleg. Co. 90 Iowa, 129, 57 N. W. 696; Mentzer v. Western U. Teleg. Co. 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1; McPeek v. Western U. Teleg. Co. 107 Iowa, 356, 43 L.R.A. 214, 70 Am. St. Rep. 205, 78 N. W. 63; Cowan v. Western U. Teleg. Co. 122 Iowa, 379, 64 L.R.A. 545, 101 Am. St. Rep. 268, 98 N. W. 281; Western U. Teleg. Co. v. Reynolds Bros. 77 Va. 173, 46 Am. Rep. 715; Western U. Teleg. Co. v. Fenton, 52 Ind. 1; Western U. Teleg. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; Western U. Teleg. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894.

The undisclosed principal of the addressee, where the latter is an agent, has a right of action against telegraph companies for damages for misfeasance.

Milliken v. Western U. Teleg. Co. *supra*; Leonard v. New York, A. & B. Electro Magnetic Teleg. Co. 41 N. Y. 544, 1 Am. Rep. 446; Cashion v. Western U. Teleg. Co. 124 N. C. 459, 45 L.R.A. 160, 32 S. E. 746; Western U. Teleg. Co. v. Morris, 28 C. C. A. 56, 55 U. S. App. 211, 83 Fed. 992; Western U. Teleg. Co. v. Simpson, 10 Kan. App. 473, 62 Pac. 901; Harkness v. Western U. Teleg. Co. 73 Iowa, 191, 5 Am. St. Rep. 672, 34 N. W. 811; Western U. Teleg. Co. v. Broesche, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734; Thompson, Electricity, §§ 427, 435; Western U. Teleg. Co. v. Mellon, *supra*.

Fraud committed on the agent is fraud on the principal; and it is not material that the defendant should know for whom the agent is acting, or that the agent is not acting for himself.

Culliford v. Gadd, 28 Jones & S. 343, 17 N. Y. Supp. 457, Affirmed in 139 N. Y. 618, 35 N. E. 205; Henry v. Dennis, 95 Me. 24, 85 Am. St. Rep. 365, 49 Atl. 58; Tuckwell v. Lambert, 5 Cush. 23; Perkins v. Evans, 61 Iowa, 35, 15 N. W. 584; Cushing v. Rice, 46 Me. 303, 71 Am. Dec. 579; Com. v. Call, 21 Pick. 515, 32 Am. Dec. 284.

The telegraph company held itself out as the agent of the Bank of Denison, authorized by said bank to deliver the genuine acceptance of the draft then owned by Schriver Brothers, and so became liable because of such false warranty of authority to so act in the name of the Bank of Denison.

May v. Western U. Teleg. Co. 112 Mass. 90; Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. Rep. 718; Culver v. Avery, 7 Wend. 380, 22 Am. Dec. 586; Campbell v. Hillman, 15 B. Mon. 508, 61 Am. Dec. 195; Jefts v. York, 10 Cush. 392; Bank of Hamburg v. Wray, 4 Strobh. L. 87, 51 Am. Dec. 659; Polhill v. Walter, 3 Barn. & Ad. 114; Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572, 12 N. E. 247; Riley v. Bell, 120 Iowa, 618, 95 N. W. 170.

The status of a telegraph company is like that of a carrier in respect to the liability for negligence to the person to be served in the transaction, and is not controlled by privity of relationship.

United States Teleg. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; DeRutte v. New York, A. & B. Electro Magnetic Teleg. Co. 30 How. Pr. 403; Butler v. Western U. Teleg. Co. 62 S. C. 222, 89 Am. St. Rep. 893, 40 S. E. 162.

Notice to the telegraph company requires only that it be put on inquiry as to the importance, to someone, of the transaction.

Harkness v. Western U. Teleg. Co. 73 Iowa, 190, 5 Am. St. Rep. 672, 34 N. W. 811; Western U. Teleg. Co. v. Broesche, and Cashion v. Western U. Teleg. Co.,—*supra*: Dodd Grocery Co. v. Postal Teleg. Cable Co. 112 Ga. 685, 37 S. E. 981; Bennett v. Western U. Teleg. Co. 128 N. C. 103, 38 S. E. 294; Western U. Teleg. Co. v. Church, 3 Neb. (Unof.) 22, 57 L.R.A. 905, 90 N. W. 878.

The rule as to necessity of notice does not require that the telegraph company shall be advised as to what particular action is expected, or notice of details and particulars, but it is sufficient if it be put upon inquiry, so that it can have details if it sees fit to ask for them.

2 Thomp. Neg. § 351; Western U. Teleg. Co. v. Adams, 75 Tex. 531, 6 L.R.A. 844, 16 Am. St. Rep. 920, 12 S. W. 857; Fererro v. Western U. Teleg. Co. 9 App. D. C. 455, 35 L.R.A. 548; Western U. Teleg. Co. v. Griswold, 37 Ohio St. 302, 41 Am. Rep. 500; Postal Teleg. Cable Co. v. Lathrop, 131 Ill. 575, 7 L.R.A. 474, 19 Am. St. Rep. 55, 23 N. E. 583; Pepper v. Western U. Teleg. Co. 87 Tenn. 554, 4 L.R.A. 660, 10 Am. St. Rep. 699, 11 S. W. 783.

Sanborn, Circuit Judge, delivered the opinion of the court:

This is an action against the Western Union Telegraph Company for damages caused by its receipt and delivery of an unauthorized message. There was substantial

evidence at the trial of these facts: Schriver Brothers, the plaintiffs below, sold cattle to one Barnes for $8,972, and took his check for the purchase price upon the Bank of Denison for that amount. They refused to surrender the cattle without some assurance that the check would be paid. Barnes promised that he would have the Bank of Denison send a guaranty of payment of the check by telegraph. The plaintiffs directed him to have the message sent to the Commercial Bank of Britt. Barnes went to Denison, and, without authority from the bank, telephoned to the defendant's operator in that town this message:

Denison, Ia., March 14, 1902.
To Commercial Bank, Britt, Iowa:—
We will honor Barnes' draft for eighty-nine hundred seventy-two dollars.
Bank of Denison.

The operator at Denison ordinarily received by telephone messages to be sent by telegraph. Both the Bank of Denison and Barnes had sent messages in that way concerning the business of Barnes, and had arranged with the operator that such telegrams should be charged to Barnes. Sometimes the bank had telephoned messages of this nature in its own name, and sometimes Barnes had telephoned them in the name of the bank, and there had been no repudiation of them, or objection to them by the bank, although many such messages had been sent before that of March 14, 1902, was received. This message was sent to Britt and delivered to the Commercial Bank. One of the plaintiffs saw it, and, in reliance upon it, delivered the cattle to Barnes. Neither the check which they took from Barnes, nor the purchase price of the cattle, was ever paid. The court charged the jury, over the objection and subject to the exception of the defendant, that, if the Commercial Bank of Britt was the agent of the plaintiffs to receive the message, they might recover of the telegraph company the loss which they had sustained by their reliance upon the telegram; and there was a verdict and judgment in their favor.

May the undisclosed principal of the addressee of a message recover of the telegraph company the damages he sustains from the failure of its operator to exercise reasonable care to receive and transmit authorized messages only? A telegraph company is not liable for the lack of such care to one of whose interest in the telegram it has no notice, and who is neither the principal of the sender nor of the addressee. McCornick v. Western U. Teleg. Co. 38 L.R.A. 684, 25 C. C. A. 35, 49 U. S. App. 116, 79 Fed. 449; Morrow v. Western U. Teleg. Co. 107 Ky. 517, 54 S. W. 853; Western U. Teleg. Co. v. Kirkpatrick, 76 Tex. 217, 218, 18 Am. St. Rep. 37, 13 S. W. 70; Western U. Teleg. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826, 22 S. W. 961.

The undisclosed principal of the sender of a message may recover for negligence in its transmission or delivery, because the company makes a contract with the sender which that knowledge of the law it may not deny notifies it inures to the benefit of any undisclosed principal whom the sender may have. But neither the sender nor his principal can recover for negligence of the company in the receipt or transmission of a message which the sender forges or fraudulently signs without authority, because the contract of transmission is voidable for the fraud of the sender, and neither he nor his principal can take advantage of his wrong. A telegraph company owes the duty to exercise reasonable care to receive and transmit authorized messages only to the addressees of messages, and to those persons who, the telegrams inform it, have a beneficial interest in the despatches it transmits. It owes this duty to these parties because injury to them is the natural and probable consequence of its want of care; an effect which it may reasonably anticipate from its notice of the fact that they are interested in the messages. But does it owe this duty to the undisclosed principal of an addressee or a message of whose interest it has no notice?

Reference has been made to the statutes of Iowa (Iowa Code 1897, §§ 2161–2164); but they give no direct or inferential reply to this question (Bank of Havelock v. Western U. Teleg. Co. 141 Fed. 522), and it must be answered by a consideration and application of the general principles and rules of the law. The arguments at the bar and in the briefs have traversed a wide field, and it is indispensable to a judicious consideration and a just decision of the issue in hand that, before entering upon its discussion, the true foundation and the real nature of the cause of action presented and the rules of law which must govern it shall be clearly in mind. The cause of action is for the false representation that the Bank of Denison signed the message. It is not an action for deceit because the intent to deceive, or knowledge of the falsehood, or a reckless misrepresentation in ignorance of the fact, is indispensable to an action of deceit. Union P. R. Co. v. Barnes, 12 C. C. A. 48, 51, 27 U. S. App. 421, 64 Fed. 80, 83; Kahl v. Love, 37 N. J. L. 5, 7; Polhill v. Walter, 3 Barn. & Ad. 114, 124. There was no such intent, knowledge, or recklessness in this case. The operator did not intend to

deceive anyone. He did not know that Barnes was not authorized to send the message in the name of the bank. He undoubtedly believed that he had this authority and not without some reason; for he had repeatedly sent messages in its name and no repudiation by the bank or other objection had been made. His only fault was his failure to make inquiry or to notify the addressee regarding the questionable authority of Barnes in the light of facts and circumstances which might naturally have aroused the suspicion of a person of ordinary prudence and intelligence in a like situation, and have suggested an investigation of that authority. Western U. Teleg. Co. v. Totten, 141 Fed. 533. The action is not founded upon a false warranty, or upon any contract. Conceding, without deciding, that the addressee and the apparent beneficiary of a genuine message honestly sent may recover in an action upon the contract for a failure to transmit or to deliver it speedily and correctly, the only basis of such a recovery is that the telegraph company and the sender have made the contract for the transmission for the benefit of the addressee, or of the apparent beneficiary. But the only contract which the telegraph company made in this case was with Barnes. He induced the agreement by the fraudulent representation that he was authorized to send the message in the name of the Bank of Denison. If the plaintiffs, or the Bank of Denison, have any contract rights here, they derive them from Barnes as the beneficiary of his agreement. But neither they nor he can enforce that contract because it is voidable by the company for the fraud of Barnes, and because neither they nor he can take advantage of his wrong.

There remains but one ground upon which this action may stand, and that is the breach of the duty which the telegraph company, in common with every other party, owes to those to whom it makes representations, which it may reasonably anticipate that they may rely and act upon, to exercise reasonable care to make those statements true. This is an action for the breach of this duty. It is an action of tort for a false representation in the nature of a false warranty caused by failure to exercise reasonable care to receive and transmit authorized messages only. Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240; May v. Western U. Teleg. Co. 112 Mass. 90, 95. But a duty of care owing by the party who occasions the loss to him who sustains it is an indispensable element of actionable negligence. "If the defendant owed a duty, but did not owe it to the plaintiff, the action will not lie." 1 Shearm. & Redf. Neg. § 8; Bishop, Non-Contract Law, § 446; National Sav. Bank v. Ward, 100 U. S. 195, 202, 25 L. ed. 621, 623; Slade v. Little, 20 Ga. 371, 374; Kahl v. Love, 37 N. J. L. 5, 8; Winterbottom v. Wright, 10 Mees. & W. 109; Longmeid v. Holliday, 6 Exch. 764, 765; Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 240, 120 Fed. 865, 868; McCornick v. Western U. Teleg. Co. 38 L.R.A. 684, 25 C. C. A. 35, 39, 49 U. S. App. 116, 79 Fed. 449; Western U. Teleg. Co. v. Schriver, 64 C. C. A. 96, 98, 129 Fed. 344, 346. One who makes a representation owes no duty of care to tell the truth to those to whom he does not communicate it and to whom he does not anticipate that it will be conveyed, and a person of ordinary prudence and intelligence in his situation would not anticipate that it would be conveyed; and such parties have no cause of action against him for injuries they sustain by reason of the falsity of the representation. "Courts will give appropriate redress or relief for actionable misrepresentation to anyone to whom the same was made or for whom it was intended, and only to such." 1 Bigelow, Fr. § 2, p. 197; Slade v. Little, *supra;* Henry v. Dennis, 95 Me. 25, 86 Am. St. Rep. 365, 49 Atl. 58; Carter v. Harden, 78 Me. 528, 7 Atl. 392. The reason is that the loss to him to whom the party who makes the misrepresentation does not communicate it, and cannot reasonably anticipate that it will be communicated, is not the natural or probable consequence of his act. It is the effect of an independent cause,—of the unexpected conveyance of the misrepresentation to the third party by the person to whom it was originally made. Without this new cause, the injury to the third person would not occur, and the intervention of this new agency, as Wharton felicitously expresses it, "insulates" the original act of negligence from the injury. Wharton, Neg. 2d ed. § 134; Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 239, 120 Fed. 865, 867.

Let us now turn to the consideration of the immediate question in the light of these indisputable rules of law. There is a sentence in § 427 of Thompson on Electricity, where he is discussing the liability of a telegraph company to the addressee of a message, in which it is written that "the true view . . . is one which elevates the question above the plane of mere privity of contract and places it where it belongs,—upon the public duty which the telegraph company owes to any person beneficially interested in the message, whether the sender, or his principal, where he is agent, or the receiver, or his principal where he is agent."

This sentence is quoted with apparent ap-

proval in Western U. Teleg. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725, 726, a case in which one who appeared on the face of a message to be its beneficiary secured damages for delay in its delivery; and it is urged upon our attention with much force by counsel for the plaintiffs. But the law is settled beyond dispute that one who has a beneficial interest in a telegram of which the company has no notice has no cause of action for the loss he sustains by the negligence of the company in its receipt or transmission, because the company cannot anticipate his injury, and owes him no duty. McCornick v. Western U. Teleg. Co. *supra*, and other cases cited under it. No authority is cited by Mr. Thompson, the diligence of counsel has presented, and our research has discovered, no decision of any court, except the judgment of the court now under review, which has ever sustained an action or a judgment against a telegraph company for loss inflicted upon the undisclosed principal of an addressee by reason of the negligence of the telegraph company in handling the message. This pregnant fact raises a strong presumption that, when this message was received and transmitted, it was not the law that the company was liable for negligence to the undisclosed principal of the addressee. If it had been, judgments founded upon it would probably not have been lacking. Moreover, in an action wherein an addressee, who was the agent of the undisclosed principal, was the plaintiff, he was met by the defense that the right of action was in the principal, and the St. Louis court of appeals sustained his action and said: "We rest our conclusion upon the ground that the telegram in which the mistake occurred was not directed to the J. I. Case Threshing Machine Company; . . . that there was nothing on the face of it which apprised the defendant that it related to the business of the J. I. Case Threshing Machine Company; that it therefore does not appear that, in transmitting it, the defendant undertook any duty in behalf of the J. I. Case Threshing Machine Company. The mere fact that it was addressed to the plaintiff in care of the J. I. Case Threshing Machine Company does not raise any duty on the part of the defendant in behalf of that company." Lee v. Western U. Teleg. Co. 51 Mo. App. 375, 382.

In this way it appears that at the time the telegram was sent the declared law upon this subject had been for ten years that a telegraph company was not liable for negligence to the undisclosed principal of the addressee. The contention now is that this declaration and the practice in accordance with it are erroneous, and analogous cases, maxims, and general rules of law are brought to our attention to sustain this position. Counsel say that the defendant made its representation and owed its duty to a class of persons, that this class included all who might take the check or draft described in the message in reliance upon the telegram, and that the defendant is a member of this class. They cite in support of this contention these cases: Swift v. Winterbotham, L. R. 8 Q. B. 244, 253; Bedford v. Bagshaw, 29 L. J. Exch. N. S. 65; Polhill v. Walter, 3 Barn. & Ad. 114; North Atchison Bank v. Garrettson, 2 C. C. A. 145, 4 U. S. App. 557, 51 Fed. 168, 47 Fed. 867, 871; Tyler v. Savage, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; and Bank of Montreal v. Thayer, 2 McCrary, 1, 7 Fed. 622. But the class, if any, to which a telegraph company owes this duty in regard to the transmission of messages concerning commercial paper, does not include all who may see the messages and take the paper in reliance upon them. McCornick v. Western U. Teleg. Co. *supra*. If the concession were made that the representation here was made, and that the duty was owing to a class, that class would necessarily be limited by the general rule that it was those only to whom the company might reasonably have anticipated that the representation would be conveyed that its duty was owing. Concede that the company might have reasonably anticipated that the addressee would purchase or discount the draft, and that it would thereafter in the ordinary course of business indorse and transfer it with the telegram to a purchaser for value, and that in this way the draft and the message might pass to remote indorsees or purchasers; the addressee and the indorsees or purchasers under the addressee might then constitute a class to which the company might owe the duty of truthful representation. But the plaintiffs are not of this class, and it could not include them or others than those who purchased the draft directly or remotely from the addressee, because a person of ordinary prudence and diligence in the situation of the company could not have reasonably anticipated that any but the addressee and its immediate and remote indorsees and purchasers would see or act upon the telegram. In the ordinary course of commercial business no others would become aware of or act upon it. Much less could such a person have anticipated that the plaintiffs, without the purchase of any draft from the addressee, would take an original draft from Barnes to themselves, would go to the addressee and read a telegram which disclosed no interest in them, and then, in reliance

upon it, would deliver cattle and lose their price. The remarks of Judge Van Devanter in the opinion of this court upon the former hearing of this case are pertinent here. He said: "It is true that checks and drafts are, for purposes of collection, frequently committed by the payee or holder to a bank under circumstances where the bank does not become the owner, risks nothing upon the probability of payment by the drawee, and is not influenced by information upon that subject; but this telegram contains nothing which suggests that it relates to such a transaction. In the absence of anything to the contrary, the influence to be properly drawn from the face of a telegram or other communication of this nature is that it relates to a matter which concerns the one addressed, and that it is his action, and not that of another, which is to be influenced. That no inference of its relation to a transaction like that between plaintiffs and Barnes properly or reasonably arises from the face of this telegram is quite manifest when it is considered that the telegram does not make the slightest reference to any past or prospective sale of cattle or other property, or to any person other than the addressee, the sender, and Barnes, or to an absence of interest on the part of any one of them in the information given." Western U. Teleg. Co. v. Schriver, 64 C. C. A. 96, 98, 129 Fed. 344, 346.

The authorities cited are not inconsistent with this view. They are cases in which indorsees or purchasers of notes or bills in the ordinary course of business from those to whom the representations were made, or persons to whom such representations were directly made, had lost in reliance upon them, or cases in which the communication of the representations to third parties and the loss upon it were its natural and probable effect. Polhill v. Walter, 3 Barn. & Ad. 114, 123, and Lobdell v. Baker, 3 Met. 469, are typical and perhaps the strongest authorities in support of the contention of the plaintiffs. In the former the remote indorsee of the payee of a draft recovered from one who accepted it in the name of the drawee without authority. In the latter the remote indorsee of a note from one to whom the owner had sold it under a representation that a prior indorsement was valid, which had been made by a minor and which he knew to be void, obtained a judgment against the original owner. The case of Swift v. Winterbotham, L. R. 8 Q. B. 244, 253, is of a different character, but it is wide of the mark in this action. In that case one bank inquired of another the financial standing of Sir W. Russell, and received an answer that it was good, when the second bank knew that it was bad. The inquiry had been made for a customer of the first bank to whom the latter communicated the answer upon which he relied to his injury. He recovered of the second bank because a custom of the banks in England was proved to make such inquiries for their customers, and it was held that the second bank might have reasonably anticipated, in view of this custom, that its answer would be conveyed to, and acted upon by, such a customer. The evidence discloses no custom in this country that the telegraphic acceptance of a draft that is directed by one bank to another which has not requested it, or inquired for it, is communicated to, and acted upon by, a customer of the addressee, to his injury. The telegraph company could not have reasonably anticipated such a result as the probable effect of the delivery of a telegram to the Bank of Britt. It is not here decided that the immediate and remote purchasers of commercial paper in the ordinary course of business from the addressee of a telegram, which contains a misrepresentation relative to the paper, may recover of the telegraph company any losses they sustain thereby. If they may, the plaintiffs do not belong to that class. The conclusion here is that a telegraph company does not owe the duty to exercise ordinary care to make truthful representations only in the transmission of telegrams concerning commercial paper to those who acquire the paper, but who are neither addressees of the telegrams nor the immediate or remote indorsers or purchasers of it from the addressees, in the absence of any notice that they have an interest in such messages.

Counsel invoke the rules that where one supplies another with the means of perpetrating a fraud against one person, and it is inflicted upon another by the use of those means, he is liable for the loss, and that, where one of two innocent persons must suffer from the fraud of a third, that one should bear the loss who enabled the third party to inflict the injury. They argue that, because the telegraph company furnished the telegraph and the operator by means of which Barnes was enabled to defraud the plaintiffs, the company is liable to the latter, although it acted without fault or negligence. But the rules upon which reliance is here placed are not of universal, or even of general, application. Their effect is limited to cases in which the party charged has by fraud or through negligence, or by his actual or apparent authority to an agent, provided the third party with the opportunity to commit the wrong, and to cases in which he has derived benefit from the loss inflicted upon an-

other by the fraud of the third. Cases of the first class are Wilson v. Green, 25 Vt. 450, 60 Am. Dec. 279; Bauman v. Bowles, 51 Ill. 380; Walters v. Western & A. R. Co. 56 Fed. 369, 371. Cases of the second class are Bridgeman v. Green, Wilmot's Notes, 64; Huguenin v. Baseley, 14 Ves. Jr. 288, 289; Gordon v. McCarty, 3 Whart. 407, 411; Com. v. Call, 21 Pick. 515, 32 Am. Dec. 284; Tuckwell v. Lambert, 5 Cush. 23. Wilson v. Green is typical of its class. A creditor who held the unpaid note of his debtor, signed by two sureties, delivered it to the debtor to enable him to defeat a trustee process by producing the note in support of his testimony that it was paid. While the debtor had the note for this purpose, he exhibited it to the sureties and led them to believe that he had paid it, to their injury. The court held that the creditor was chargeable with the loss sustained by the sureties, because he delivered the note to the debtor for a dishonest purpose. But it expressly decided that, if he had intrusted it to his debtor for an honest purpose, he would not have been liable for the loss. The rules have no application to the vast majority of cases in which one of two innocent parties suffers from the fraud of a third. One furnishes writing materials to another, who forges a note and defrauds an innocent third party; one delivers a check to another in the ordinary course of business in the payment of a debt, the payee raises it and sells it to an innocent purchaser; one purchases transportation of a railroad company, and travels to a distant city and defrauds a stranger; one personates another, and, by means of the telegraph and operator, sends a forged telegram. Western U. Teleg. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1. But in these cases, and in the vast majority of cases in which an innocent party furnishes to a third person the means to commit a fraud, he incurs no liability to the victim. Real or apparent agency, fraud, negligence, or the derivation of benefit from the fraud, are indispensable conditions of a liability under the rules invoked here. Friedlander v. Texas & P. R. Co. 130 U. S. 416, 424, 32 L. ed. 991, 994, 9 Sup. Ct. Rep. 570, is an illustration of the limitation of these rules. A station agent fraudulently made a bill of lading in favor of one Lahnstein when the railway company had received none of the merchandise described therein. Lahnstein attached the bill to a draft, and obtained $8,000 from Friedlander and Company upon it. The railway company had provided the railroad, the station agent, and the blank bill of lading, by means of which Lahnstein was enabled to perpetrate the fraud. But the Supreme Court denied a recovery because the station agent was without authority to issue the bill in the absence of the goods, although the railway company had furnished him with the means which he and his confederates used to commit the fraud.

Cases of the second class rest upon the proposition that whoever receives money, property, or benefit from another through the fraud of a third person should make restitution. "Let the hand receiving it be ever so chaste, yet, if it comes through a corrupt, polluted channel, the obligation of restitution will follow it." Bridgeman v. Green, Wilmot's Notes, 64. "The damage which grounds the action follows the property." 1 Am. Lead. Cas. 643. The case in hand comes within neither class, but falls beyond the limitation of liability under these rules. Barnes was neither the real, nor the apparent, agent of the defendant. It supplied its telegraph and operator without negligence, for an honest purpose, and it derived no benefit from the loss of the plaintiffs. It is not liable to them under the rules cited.

It is contended that, because the telgraph company owes the duty of care to receive and transmit messages correctly to the addressees, to the senders, and to the undisclosed principals of the senders, it therefore owes it to the undisclosed principals of addressees. But the duty to the undisclosed principals of senders rests on the fact that contracts have been made between the senders and the telegraph company, and that in the negotiation and enforcement of contracts the law places undisclosed principals in the shoes of their agents, so that the telegraph company, which must know the law, is charged with notice, and may reasonably anticipate that its misrepresentations may affect them. It has no contracts with addressees, and hence it is not charged by the law with notice that their undisclosed principals, or others to whom they may display the messages, will probably be affected by them. For the same reason, the case of Culliford v. Gadd, 28 Jones & S. 343, 17 N. Y. Supp. 457, and others of like character, which are pressed upon our attention with great force, are neither controlling nor persuasive. In that case an agent of an undisclosed principal was induced by misrepresentations made to him to purchase an interest in a syndicate, and to pay for it with money of his principal. The latter was permitted to recover. The duty to the undisclosed principal in that and other cases of like character is founded on the contracts. As there are no such contracts with addressees, no such duty to their unknown principals arises. Nor is the case of Perkins v. Evans, 61 Iowa, 35, 36, 15 N. W. 584, more pertinent. In that case the undisclosed

principal of an agent who had been induced to purchase property, to his injury, by a false entry knowingly made by the auditor on the books of the county, was permitted to recover his damages in an action on the bond of the auditor. The books were public records. The entries on them were representations to all who might lawfully examine and rely upon them, and the natural and probable effect of false entries in them was the deceit and injury, not only of those who personally examined them, but also of their undisclosed principals as well, because it is common knowledge that those who make such examinations are generally the agents of others. The message in this case was a private communication. It was directed to a single addressee. The company was forbidden by law to disclose it to others (Iowa Code 1897, § 2162), and such messages are generally intended for and acted upon by those to whom they are directed, and not by others. There is no persuasive analogy between these cases.

An argument by analogy is drawn from actions against transporation companies. It is said that the duties and liabilities of telegraph companies are like those of common carriers, and that, as owners of property who are neither consignors nor consignees, and whose interest is unknown to a carrier, may recover for an injury or loss to their property during its transportation, anyone interested in a telegram should be permitted to recover for negligence in its receipt or transmission. The argument proves too much. It proves that telegraph companies are liable for injuries to strangers to the telegrams, their senders, and addressees, while the undisputable law is the contrary. Moreover, carriers are insurers of the safe transportation of goods. Telegraph companies are not guarantors of the correct receipt and transmission of messages. Actions for loss or injury to property in transportation rest upon the ownership and loss or injury, actions for misrepresentations of messages through negligence, upon the duty to exercise care to tell the truth, upon the breach of that duty, upon reliance upon the misrepresentation, and upon resulting injury. The bases of the actions and the rules of law which govern them differ so widely that this argument by analogy fails to convince.

The telegraph cases are cited and exhaustively reviewed. But, when the opinions in them are carefully read and analyzed, they recognize and affirm the rule that a company owes a duty and incurs a liability to those parties only of whose interest it has notice and for those injuries only which it might reasonably anticipate. The pertinent cases fall into four classes: (1) Those which assert a duty and liability to the undisclosed principal of the sender. Milliken v. Western U. Teleg. Co. 110 N. Y. 403, 1 L.R.A. 281, 18 N. E. 251; Harkness v. Western U. Teleg. Co. 73 Iowa, 190, 5 Am. St. Rep. 672, 34 N. W. 811; Leonard v. New York, A. & B. Electro Magnetic Teleg. Co. 41 N. Y. 544, 1 Am. Rep. 446; Cashion v. Western U. Teleg. Co. 124 N. C. 459, 45 L.R.A. 160, 32 S. E. 746; Western U. Teleg. Co. v. Morris, 28 C. C. A. 56, 55 U. S. App. 211, 83 Fed. 992; Western U. Teleg. Co. v. Adams, 75 Tex. 531, 6 L.R.A. 844, 16 Am. St. Rep. 920, 12 S. W. 857; Western U. Teleg. Co. v. Broesche, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734; Western U. Teleg. Co. v. Church, 3 Nebr. (Unof.) 22, 57 L.R.A. 905, 90 N. W. 878. (2) Those which recognize a duty and liability to a person who appears on the face of the telegram to be its beneficiary although neither the sender nor the addressee. Western U. Teleg. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; Western U. Teleg. Co. v. Adams, *supra*; Western U. Teleg. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894. (3) Those which deny any duty or liability to those who do not appear from the message to have any interest in it. McCornick v. Western U. Teleg. Co. 38 L.R.A. 684, 25 C. C. A. 35, 49 U. S. App. 116, 79 Fed. 449; Western U. Teleg. Co. v. Kirkpatrick, 76 Tex. 217, 218, 18 Am. St. Rep. 37, 13 S. W. 70; Western U. Teleg. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826, 22 S. W. 961; Morrow v. Western U. Teleg. Co. 107 Ky. 517, 54 S. W. 853. (4) The decision which denies any liability to the undisclosed principal of the addressee. Lee v. Western U. Teleg. Co. 51 Mo. App. 375. In the cases of the two latter classes the duty and liability are denied on the ground that the company received no notice from the telegrams of their probable existence, and hence could not have anticipated injuries to those who did not appear to be beneficiaries of the messages or to be likely to incur the damages which were sought. In Western U. Teleg. Co. v. Kerr, 4 Tex. Civ. App. 280, 23 S. W. 564, 565, the court refused to permit the undisclosed principal of a sender to recover damages for mental anguish on the ground that such damages could not have been reasonably anticipated and were not the natural consequence of the negligence, although the right of such a principal to maintain the action for such damages as appeared from the telegram to be likely to result to her was conceded. The same ruling may be found in Pacific Exp. Co. v. Redman (Tex. Civ. App.) 60 S. W. 677. In Cashion v. Western U. Teleg. Co.; Western U. Teleg. Co. v. Broesche; and Western U. Teleg. Co. v. Church,—*supra*, all the damages which the undisclosed principal of a sender may

suffer are held to have been reasonably anticipated by the telegraph company, and recoverable. In Western U. Teleg. Co. v. Wood, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471, the addressee of a telegram was denied damages for mental suffering and for failure to attend to business before a person named in the message died, because the telegram did not indicate any relationship or business between the addressee and the deceased. A more extended review of cases would be futile. Suffice it to say that through them all the line of demarcation between legal injury and that *damnum absque injuria* for which courts may not grant relief is the answer to the question whether the message gave such notice of the interest and probable injury of the plaintiff that the company might reasonably have anticipated the latter as the natural and probable effect of its negligence.

The arguments and briefs in this case seem to have invoked with rare ability and persuasive power every reason and decision that makes for the contention of either of the parties. An endeavor has been made to consider them with patience and deliberation, but nothing has been presented which conclusively answers the question whether a telegraph company is liable to the undisclosed principal of an addressee in favor of the plaintiffs. That answer must therefore be deduced from the general rules of law which govern actions for negligence and misrepresentation to which reference was made in the earlier part of this opinion. One who makes a false representation owes no duty of care to tell the truth to those to whom he does not communicate it, to whom he does not anticipate that it will be communicated, and to whom a person of ordinary prudence in his situation would not have anticipated that it would be conveyed. The message was directed to the Commercial Bank of Britt. It was a private communication. The company was prohibited from disclosing it to others than the addressee. The presumption was that it was intended for and would be permitted to affect the addressee only. The plaintiffs were not mentioned in it, and it contained nothing from which a person of reasonable prudence could have anticipated that it would be communicated to them. When, therefore, the telegraph company delivered it to the Bank of Britt, it made no representation to the plaintiffs, it intended to make none, and it could not have anticipated that any would be made. A person of ordinary prudence and intelligence in its situation would not have anticipated that this telegram would be conveyed to them. Witness the fact that no report of final judgment for the breach of this duty of truthful representation to the undisclosed principal of an addressee of a telegram has been found in the books, and that the decision of the Missouri court in 1892, that such an action may not be maintained, still stands unchallenged by the decision of any appellate tribunal. In Slade v. Little, 20 Ga. 371, the undisclosed principal of an agent sued the defendant for damages which resulted to him from a misrepresentation regarding the solvency of a third party which the defendant had made to the agent. The court denied the recovery, and said, speaking of the plaintiff: "And, lastly, how can Little say that this representation was made to him? The proof is that it was made to McCoy. It is true that the proof also is that McCoy was his agent; but there is no proof that Slade knew this. And it is simply impossible that Slade could have intended to deceive Little, if he did not know that McCoy was representing Little."

Again, the limitation upon actions for damages for negligence, which has been adopted by the Supreme Court, and generally approved and quoted throughout the land, was expressed by Chief Justice Beasley in these words: "It is not every one who suffers a loss from the negligence of another that can maintain a suit on such ground. The limit of the doctrine relating to actionable negligence is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies, if the ill effects of the negligences of men could be followed down the chain of results to the final effect." Kahl v. Love, 37 N. J. L. 8.

An injury that is the natural and probable consequence of an act of negligence is actionable. One that could not have been foreseen or reasonably anticipated as the probable effect of such an act will not sustain an action. An injury is not actionable which would not have resulted from the act of negligence except for the interposition of an independent cause. The injury to the plaintiffs in this case could not have been reasonably anticipated as the probable consequence of the defendant's negligence. It was not the natural or probable effect of that negligence. It would not have resulted without the intervention of an independent cause, without the communication of the telegram to the plaintiffs by the responsible human agency of the Commercial Bank of Britt, an intervention which could not have been reasonably anticipated and which interrupted and turned aside the natural se-

quence of causation and relieved the defendant from the subsequent results of its act. Wharton, Neg. § 134; Bishop, Non-Contract Law, § 42; Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 239, 120 Fed. 865, 867.

For these reasons, the conclusion is that a telegraph company does not owe the duty to exercise reasonable care to receive and transmit authorized messages only to the undisclosed principal of an addressee of a message, and the judgment below is reversed, and the cause is remanded to the Circuit Court, with instructions to grant a new trial.

MISSOURI SUPREME COURT.

(Division No. 1.)

TRI-STATE AMUSEMENT COMPANY, Appt.,
v.
FOREST PARK HIGHLANDS AMUSEMENT COMPANY et al.

(192 Mo. 404, 90 S. W. 1020.)

Foreign corporation—noncompliance with statute—validity of contract.

A contract entered into by a foreign corporation within the state before complying with the statute forbidding it to transact business in the state without establishing a local office, an agent to receive service of process, and paying taxes, is void; and subsequent compliance with the terms of the statute will not enable the corporation to maintain an action on the contract, although the statute provides a penalty for failure to comply with it, and declares that no corporation failing to do so "can maintain any suit or action" in any of the courts of the state.

(December 21, 1905.)

APPEAL by plaintiff from a judgment of the St. Louis Circuit Court in defendants' favor in an action brought to recover compensation for alleged breach of contract by defendants. Affirmed.

The facts are stated in the opinion.

Messrs. Virgil Rule and John D. Johnson for appellant.

Messrs. E. C. Crow and Rassieur, Schnurmacher, & Rassieur for respondents.

Marshall, J., delivered the opinion of the court:

It is not altogether clear whether this action is intended as a proceeding in equity for an accounting and to recover the amount found to be due, or whether it is an action at law for damages; and it is not necessary to determine the character of the action, for the result must be the same whichever view be taken of the case. The trial court sustained a demurrer to the petition, and the plaintiff appealed.

The material allegations of the petition

Case Note.—Imposition of penalty as affecting validity of a contract made by a foreign corporation without complying with the statutory conditions of doing business.—The general question whether noncompliance by a foreign corporation with the statutory conditions of its right to do business within the state will invalidate a contract so as to prevent its enforcement by the corporation is discussed in the opinion in State v. American Book Co. 1 L.R.A.(N.S.) 1041, and the case note appended thereto. The present note is concerned only with the bearing and effect upon that general question of the imposition, by the statute, prescribing the conditions, of a penalty for noncompliance therewith, and, except by way of distinction, deals only with the cases affecting the validity of the contract as creating a cause of action available to, or enforceable by, the corporation against the other party. The apparent conflict of authority upon this phase of the question is due, in part at least, to differences in the context of the various statutes by which the penalties are prescribed. It is clear, of course, that, if a statute expressly provides that a contract executed before compliance with its terms shall be invalid or void, the imposition of a penalty for noncompliance cannot operate to save the contract. At the other extreme, there can be no doubt as to the validity of the contract, so far as it is affected by the statute, when, as in Massachusetts, the statute, besides imposing a penalty for failure to observe its terms, expressly declares that such failure shall not affect the validity of any contract by or with the corporation. It is held in Rogers v. Simmons, 155 Mass. 259, 29 N. E. 580, that the latter provision applies to contracts which arise by implication of law as well as express contracts. Between these two extremes, there is some opportunity for difference of opinion, though even within these limits the apparent conflict among the decisions is to some extent explainable by variations in the terms of the statutes.

It will be observed that, by the terms of the statute involved in TRI-STATE AMUSEMENT CO. V. FOREST PARK HIGHLANDS AMUSEMENT CO., the foreign corporation, "before it shall be authorized or permitted to transact business in the state," is required to comply with the conditions prescribed by the statute. The Colorado statute which was involved in Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93, contained an almost identical provision. It also contained a further provision, which, as construed by the court, declared that a foreign corporation should not be permitted to mortgage its property within the state until it had acquired, in the mode prescribed by the statute, the right to do business in the state. By a still further provision, the failure to comply with the requirements of the act

are that the plaintiff company is a corporation organized under the laws of the state of Illinois; that on the 5th of April, 1898, the defendant company had a leasehold interest in and to certain real estate situated in the city of St. Louis, and lying just south of Forest Park, on which it maintained a pleasure resort, with pavilion, theater, stage, and other buildings, used for giving theatrical performances; that the stage faced the pavilion, and the latter was surrounded by a railing, in which were more than 1,000 seats for persons attending the performance, and which are hereafter referred to as "reserved seats;" that back of the reserved seats there was an open space for chairs for like purposes, but without being inclosed with a railing; that on the 5th of April, 1898, the plaintiff entered into a written contract with the defendant company and one John D. Hopkins, by which the defendant company agreed to furnish to the plaintiff the pavilion, theater, and reserved seats for the purpose of giving theatrical performances therein, beginning on the 2d of May, 1898, and expiring fifteen weeks thereafter, the performances to be daily performances, with Wednesday, Saturday and Sunday matinees; that the plaintiff was to furnish the performances, do certain advertising, and to receive the 25 cents per person paid for admission to the reserved seats, and one half of the 10 cents per person charged for admission to the unreserved seats, and, if the amount so received by plaintiff did not equal $1,200 per week, the defendant was to make

rendered the officers, agents, and stockholders personally liable on the contract, of the corporation. The court held that the fair implication was that, in the judgment of the legislature, the latter penalty was ample to effect the object of the statute prescribing the conditions on which foreign corporations might do business within the state; and that the additional penalty of the forfeiture to the grantor, or those claiming under him, of lands in the state, conveyed to such a foreign corporation before it had acquired the right to do business in the state, was not imposed.

Though the decision had reference to an executed conveyance, the reasoning of the opinion seems to be equally applicable to an executory contract. And it expressly held in Rockford Ins. Co. v. Rogers, 9 Colo. App. 121, 47 Pac. 848, and Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co. 11 Colo. App. 264, 53 Pac. 242, upon the same reasoning that noncompliance with the conditions of the Colorado statute does not render an executory contract void or unenforceable by the foreign corporation.

And, upon similar reasoning, it was held in Northwestern Mut. L. Ins. Co. v. Overholt, 4 Dill. 287, Fed. Cas. No. 10,338, that noncompliance by a foreign corporation with the statute of the late territory of Colorado requiring foreign corporations to comply with certain conditions within thirty days after commencing business within the territory and prescribing a penalty for failure to do so, did not render a contract void or unenforceable by the corporation.

So, a provision of a statute imposing a penalty "for every day that business is done by a foreign corporation without registering" as required by law does not of itself render void contracts made by such corporation while unregistered. Edison General Electric Co. v. Canadian Pacific Nav. Co. 8 Wash. 370, 24 L.R.A. 315, 40 Am. St. Rep. 910, 36 Pac. 260.

In Dearborn Foundry Co. v. Augustine, 5 Wash. 69, 31 Pac. 327, and La France Fire Engine Co. v. Mount Vernon, 9 Wash. 142, 43 Am. St. Rep. 827, 37 Pac. 287, 38 Pac. 80, also, it was held that the noncompliance with the Washington statute did not render the contract void or unenforceable by the corporation.

Under the West Virginia statute, which declares that a foreign corporation, unless otherwise provided, may hold property and transact business in the state upon complying with the requirements of the statute, and not otherwise; and declares that any foreign corporation which shall do business in the state without having complied with the provisions of the statute shall be guilty of a misdemeanor, and subject to a certain penalty for each month its failure so to comply shall continue,—it is held that failure to comply with the conditions of the statute does not render the contract void so as to preclude an action thereon by the corporation. Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37; Thompson v. National Mut. Bldg. & L. Asso. 57 W. Va. 556, 50 S. E. 756.

Largely upon the authority of Toledo Tie & Lumber Co. v. Thomas, *supra*, it was held in State Mut. F. Ins. Asso. v. Brinkley Stave & Heading Co. 61 Ark. 1, 29 L.R.A. 712, 54 Am. St. Rep. 191, 31 S. W. 157, that the failure of a foreign insurance company to comply with the conditions prescribed by the Arkansas statute declaring that no foreign corporation shall do business in the State until such compliance, and declaring that the violation of the statute shall render the corporation guilty of a misdemeanor and subject to a penalty,—did not prevent the company from enforcing a claim for premiums due for insurance.

So, Garratt Ford Co. v. Vermont Mfg. Co. 20 R. I. 187, 38 L.R.A. 545, 78 Am. St. Rep. 852, 37 Atl. 948, holds that a contract is not rendered void by noncompliance with a statute providing that a foreign corporation shall not carry on business within the state until it shall have complied with certain conditions, and that no person shall act as agent or officer for such a corporation unless such conditions are complied with, and that every person so acting shall be fined.

And noncompliance with the conditions prescribed by the Indiana act of 1852 (1 Rev. Stat. 1876, p. 373), requiring agents of for-

up the deficit; that settlements on account of the 25 cents admission should be made each Tuesday, and the settlements for the one half of the 10-cent admissions were to be made daily; that the defendant Hopkins was to act as manager of the theatrical performances, and that the defendant company was to have the right to sell wines, liquors, and other refreshments anywhere on the grounds, including the space set apart for reserved seats; that, pursuant to the contract, plaintiff company entered upon the performance thereof, and gave theatrical performances at the times specified until on or about the 10th of September, 1898, when the defendant company refused to allow the plaintiff company to further perform the conditions of the agreement, and has ever since so refused; that the defendant company knew when it entered into the contract, that the agreement between plaintiff and said Hopkins was that the plaintiff was to pay all the expenses incident to the contract on its part, and be entitled to all the profits realized therefrom, and that thereafter, to wit, on August 29, 1898, for a valuable consideration, Hopkins sold and assigned to the plaintiff all of his interest in said contract. The petition then charges that the defendant company was guilty of a breach of its contract on the 10th of September, 1898, by refusing to allow the plaintiff to carry out the contract, and by entering into an agreement with the defendant Hopkins for the purpose of collusively and fraudulently ousting and excluding plaintiff from the prem-

eign corporations, before entering upon the duties of their agency in the state, to comply with certain conditions, and declaring that any such agent neglecting or refusing to comply with such conditions shall be fined in a specified sum, and that foreign corporations shall not enforce in any courts of the state any contracts made by their agents before compliance with such conditions,—is held not to render the contract void, but merely to suspend an action thereon by the corporation until the conditions have been complied with. Walter A. Wood Mowing & Reaping Mach. Co. v. Caldwell, 54 Ind. 270, 23 Am. Rep. 641; Smith v. Little, 67 Ind. 549; Domestic Sewing Mach. Co. v. Hatfield, 58 Ind. 187; Security Sav. & L. Asso. v. Elbert, 153 Ind. 198, 54 N. E. 753.

The effect upon the question under discussion of variations in the context of the statutes by which the penalty is imposed is apparent when the Indiana cases last cited are compared with other Indiana cases holding that noncompliance with the conditions prescribed by the act of December 21, 1865, providing "that it shall not be lawful" for any agent of a foreign insurance company to take risks or to transact business in the state without complying with certain prescribed conditions; and declaring that any person violating the provisions of the act shall be fined in a sum not exceeding $1 000,—renders the contracts of insurance illegal and void, and, in consequence, prevents the enforcement by the corporation of premium notes. Hoffman v. Banks, 41 Ind. 1; Cassaday v. American Ins. Co. 72 Ind. 95.

Under the provision of the Alabama Constitution declaring that no foreign corporation "shall do any business in this state without having at least one known place of business and an authorized agent or agents therein;" and the statute, passed to give effect to that constitutional provision, imposing penalties on foreign corporations and their agents for engaging in business without complying with the statute,—it was formerly held that the noncompliance with the conditions did not render a contract void; and that the other party to the contract, having received the benefits therefrom, could not be heard to question the capacity of the corporation to make it because of noncompliance with such conditions. Sherwood v. Alvis, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307.

In subsequent cases, however, the court receded from this position, and held that noncompliance with the contract rendered the contract void as to the corporation, and unenforceable by it. Dudley v. Collier, 87 Ala. 431, 13 Am. St. Rep. 55, 6 So. 304; Farrior v. New England Mortg. Secur. Co. 88 Ala. 275, 7 So. 200; Christian v. American Freehold Land Mortg. Co. 89 Ala. 198, 7 So. 427.

In A. Booth & Co. v. Weigand, 28 Utah, 372, 79 Pac. 570, also, it is held that noncompliance with the Utah statute, which contains a provision practically identical with that in the Alabama Constitution, and a further provision declaring that any person acting as agent of a foreign corporation which shall neglect or refuse to comply with the conditions of the act shall be deemed guilty of a misdemeanor, and be personally liable on the contract of the corporation,—renders the contract void and unenforceable by the corporation.

In Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743, the Tennessee supreme court said that all contracts made by a foreign corporation before compliance with the conditions prescribed by the Tennessee acts of 1877 and 1891, which provide, *inter alia*, that it shall be unlawful for any corporation to do business within the state without having complied with the conditions, under a penalty of a fine of not less than $100 nor more than $500, were illegal; and that no rights of action in behalf of the corporation could arise out of the same.

In Chattanooga, R. & C. R. Co. v. Evans, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809, it was held that the provisions of the Tennessee act of 1891, providing that it should be unlawful for any foreign corporation to acquire property in the state without first complying with certain conditions, and declaring a penalty against anyone violating the act, did not invalidate a purchase

ises, and preventing it thereafter from giving theatrical performances; and further agreed with Hopkins to give such performances itself under the directions and management of Hopkins. It is further stated that the plaintiff is unable to state the profits realized by the defendants from the performances given after the 10th of September, 1898; but it is averred on information and belief that the profits amounted to $30,000, and that the plaintiff has been denied that sum. The prayer of the petition is that an accounting be taken, and that plaintiff have judgment against the defendants for the damages so ascertained. The petition further alleges that the contract was to last during the whole term of the lease that the defendant company had on the premises, which would expire on the 4th day of March, 1903. The suit was instituted on the 16th day of August, 1899. The petition further alleges that on the 14th of April, 1899, it complied with the laws of this state governing foreign corporations, and was duly authorized by the laws of this state to do business in this state. The defendants demurred to the petition on three grounds, to wit: (1) Because the petition does not state facts sufficient to constitute a cause of action. (2) Because the petition does not state facts sufficient to entitle plaintiff to any equitable relief. (3) Because there is a defect of parties plaintiff, in this,—that Hopkins was not made a plaintiff in the action.

The decisive question in this case for de-

made by such a corporation without compliance with the act, but merely subjected the corporation to the penalty prescribed. The court distinguished the Cary Case, above cited, by reason of the difference between executory and executed agreements.

In Jarvis-Conklin Mortg. Trust Co. v. Willhoit, 84 Fed. 514, it was held that the Tennessee statute did not invalidate mortgages executed to a foreign corporation before compliance with its terms, nor prevent their enforcement by the corporation; but the judge who wrote the opinion apparently overlooked the decision in the Cary Case as he stated that, if there had been an express decision of the supreme court of Tennessee upon the point, he would have felt concluded thereby.

It may be noted, in connection with the Tennessee cases, that by the curative act of 1895, the constitutionality of which was upheld in Illinois Bldg. & L. Asso. v. Walker (Tenn. Ch. App.) 42 S. W. 191, it was declared that contracts of foreign corporations, made after the passage of the Acts of 1891 without compliance with the conditions there prescribed, should be valid and binding in favor of corporations which had, previously to the curative act, complied with such conditions.

In Cæsar v. Capell, 83 Fed. 403, the United States circuit court judge held that the only infirmity in a contract executed by a foreign corporation before complying with the Tennessee act of 1891 was that the courts of Tennessee, state and Federal, would not enforce the contract and that that infirmity was, irrespective of the curative act of 1895, removed as soon as the corporation had complied with such conditions. He seems to have thought, without very much justification from the opinion in that case, that this was the effect of the decision in the Cary Case; but said that, even if the Tennessee supreme court, by that decision, intended to construe the legislation as invalidating the contract, it was not binding on the Federal courts, since that decision was rendered after the execution of the contract at bar and invoked the rule of the Federal court that, where a contract has been entered into before there has been any judicial construction of a state statute by the courts of the state, a subsequent judicial construction of the statute by the state court is not binding on the Federal courts.

Where the statute expressly declares that it shall not be lawful, or that it shall be unlawful, to transact business within the state until the conditions have been complied with, it is generally held that noncompliance with such conditions renders the contract void and unenforceable by the corporation, notwithstanding that a penalty is imposed for noncompliance with such conditions. Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Thorne v. Travellers' Ins. Co. 80 Pa. 1, 21 Am. Rep. 89; McCanna v. Citizens' Trust & Surety Co. 35 L.R.A. 236, 24 C. C. A. 11, 39 U. S. App. 332, 76 Fed. 420 (adopting the construction placed upon the Pennsylvania act by the preceding case); Ætna Ins. Co. v. Harvey, 11 Wis. 394; Webb v. Alexander, 7 Wend. 281; Allegheny Co. v. Allen, 69 N. J. L. 270, 55 Atl. 724 (approving the construction placed upon the Pennsylvania statute by the Pennsylvania decisions).

The case of Pennypacker v. Capital Ins. Co. 80 Iowa, 56, 8 L.R.A. 236, 20 Am. St. Rep. 395, 45 N. W. 408, which also passes upon the effect of noncompliance with the Pennsylvania statute, is not opposed to the foregoing cases, as it merely held that noncompliance by a foreign insurance company did not render the policy void as to insured, and expressly distinguished such a case from one where the contract is sought to be enforced by the corporation.

In The Manistee, 5 Biss. 381, Fed. Cas. No. 9,027, it was held that noncompliance by a foreign insurance company with the conditions prescribed by the Illinois statutes, which declare that until such compliance it shall be unlawful for any agent of a foreign corporation to do business within the state, and provide a penalty for a violation, did not render a policy void; and that, the property insured having been lost by the negligence of a carrier, and the loss paid by the insurance company, the carrier

termination is as to the validity of the contract upon which the action is based. The plaintiff is a nonresident corporation. At the date of the contract it had not complied with the laws of this state regulating the right of foreign corporations to do business in this state. It transacted business in this state under the contract from the 22d of May until the 10th of September, 1898. During that time it never complied with the laws of this state relating to foreign corporations. Before the institution of this suit, to wit, the 14th of April, 1899, the plaintiff complied with the laws of this state. The question, therefore, is whether such compliance before suit brought, but after the contract was entered into and after the plaintiff had transacted all of the business under the contract until prevented from further doing so by the defendant, affects the validity of the contract as to the business done and to be done, or whether it only affects the remedy. The question under consideration must be determined upon a construction of the act of 1891 (Acts 1891, p. 75), now §§ 1024, 1025, and 1026, Rev. Stat. 1899. Section 1024 provides, in substance, that every corporation for pecuniary profit, formed in any other state, territory, or country, "before it shall be authorized or permitted to transact business in this state, or to continue business therein if already established, shall have and maintain a public office or place in this state for the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation; and such corporation shall be subjected to all the liabilities, restrictions, and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers," etc. Section 1025 provides that "every company incorporated for purposes of gain under the laws of any other state, territory, or country, now or hereafter doing business within this state, shall file in the office of the secretary of state a copy of its charter or articles of incorporation, or, in case such com-

could not defeat a recovery by the insurance company over against it, because of noncompliance with such conditions.

The case of Union Mut. L. Ins. Co. v. McMillen, 24 Ohio St. 67, did not pass upon the question whether a contract by a foreign insurance company, made in violation of the statute declaring that it shall not be lawful for any agent to transact the business of life insurance in the state, except upon compliance with certain conditions, would render the contract void and unenforceable by the corporation; but merely held that it would not render the policy void as to the beneficiary, nor relieve him of the necessity of complying with its terms by the payment of premiums, as a condition of maintaining an action thereon against the company.

In Union Ins. Co. v. Smart, 60 N. H. 458, the right of a foreign insurance association to maintain an action on a premium note given as consideration for a contract of insurance made in New Hampshire was upheld, although the company had not complied with the conditions of the right to do business within the state; but the decision is upon the ground that the statute expressly declares that any insurance made by a foreign insurance company shall be valid against the company, notwithstanding noncompliance with such conditions; and that, to give the policy holder the protection intended by statute, it is necessary to hold the premium note valid, otherwise there would be no consideration for the policy. To the same effect is Connecticut River Mut. F. Ins. Co. v. Whipple, 61 N. H. 61.

In Bank of British Columbia v. Page, 6 Or. 431, a contract made by a foreign corporation in Oregon before complying with the conditions of the right to do business within the state was held void; but the court emphasized the fact that the legislature had not provided a penalty for the violation of the statute, and expressly recognized the exception to general rule that a contract in violation of law is void in case the law imposes a penalty for the prohibited act, and it clearly appears that the legislature intended no more than to impose the penalty for the violation of the law.

The case of Neuchatel Asphalte Co. v. New York, 155 N. Y. 373, 49 N. E. 1043, holding that the absolute nature of the prohibition of the earlier clause of § 15 of the general corporation law of 1892, declaring that "no foreign stock corporation . . . shall do business in this state without having first procured . . . a certificate . . . " is qualified by the concluding clause declaring that no foreign corporation doing business in the state without such certificate shall maintain any action in the state upon any contract made by it in the state until it shall have procured such certificate; and that, consequently, the inability to sue until compliance is the only consequence of the violation of the statute,—is not directly in point on the subject discussed in this note, but is cited by way of analogy as illustrating a different application of the reasoning adopted by the courts which hold that the express imposition of a penalty prevents what would otherwise be the effect of noncompliance with the statutory conditions to render the contract invalid or void. The decision has been followed in Simplex Dairy Co. v. Coal, 86 Fed. 739, and Allegheny Co. v. Allen, 69 N. J. L. 270, 55 Atl. 724, involving the construction and effect of the New York statute.

pany is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly certified and authenticated by the proper authority; and the principal officer or agent in Missouri of the said corporation shall make and forward to the secretary of state with the articles or certificate above provided for, a statement, duly sworn to, of the proportion of the capital stock of the said corporation which is represented by its property located and business transacted in the state of Missouri, and such corporation shall be required to pay into the treasury of this state upon the proportion of its capital stock represented by its property and business in Missouri, incorporating taxes and fees equal to those required of similar corporations formed within and under the laws of this state." It further provides that, "upon compliance with the above provisions by said corporation, the secretary of state shall give a certificate that said corporation has duly complied with the laws of this state, and is authorized to do business therein, stating the amount of its entire capital and of the proportion thereof which is represented in Missouri," etc. The section contains other provisions not necessary to be referred to here. Section 1026 provides that every such corporation for pecuniary profit, organized under the laws of another state, now doing business in, or which may hereafter do business in, this state, which shall neglect or fail to comply with the conditions of this law, shall be subject to a fine of not less than $1,000, to be recovered before any court of competent jurisdiction; and it is made the duty of the secretary of state to report such failure to the prosecuting attorney of the county, who is required to institute proceedings to recover the fine. The section further provides: "In addition to which penalty, on and after the going into effect of this act, no foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort: Provided, that the provisions of this section shall not apply to railroad companies which have heretofore built their lines of railway into or through this state; nor to 'drummers' or traveling salesmen, soliciting business in this state for foreign corporations which are entirely nonresident." Section 1027 exempts insurance companies from the operation of this statute, for the reason, manifestly, that such companies are controlled and regulated by other provisions of the statutes.

These statutory provisions have undergone judicial determination in this state. In Williams v. Scullin, 59 Mo. App. 30, the St. Louis court of appeals, speaking through Rombauer, J., held that a contract made and to be performed in this state by a foreign corporation which had failed to comply with the act was invalid. The argument was made in that case that the statute was not intended to affect the validity of the contract, but only the remedy for the enforcement thereof; but the court refused to so construe the statute, and held that the statute struck at both the validity of the contract and the remedy for the enforcement thereof. The question came again before the St. Louis court of appeals in Pierce Steam Heating Co. v. A. Siegel Gas Fixture Co. 60 Mo. App. 148, and that court, speaking through Biggs, J., again held that the statute affected both the contract and the remedy, and that the purpose of the statute was to prevent such foreign corporations from enjoying equal advantages of trade with domestic corporations without bearing any of the public burdens imposed on the latter. In that case the goods were ordered by mail from St. Louis, and shipped by the plaintiff from its place of business in New York; and it was held that the statute did not apply because the plaintiff had not become "permanently located in this state for the purpose of prosecuting its business." The question came before the Kansas City court of appeals in Blevins v. Fairley, 71 Mo. App. 259, and that court, speaking through Ellison, J., followed the decisions of the St. Louis court of appeals above referred to, and further held that a subsequent compliance by such corporations with the statute did not relate back and validate a transaction which was invalid when it took place. The goods in that case were ordered, from a traveling salesman, and the corporation had not established itself here as a "resident foreign corporation," and therefore the statute was held not to apply. The question came before this court in Carson-Rand Co. v. Stern, 129 Mo. 381, 32 L.R.A. 420, 31 S. W. 772. That was an action by attachment upon notes executed by the defendant to the plaintiff for goods sold and delivered. The opinion in the case does not show whether the contract was entered into in this state or in a foreign state. Presumably, from what is stated in the opinion, the contract was made in another state; and, as no objection was made to the validity of the contract under our statute, the contract was a valid contract according to the laws of the state in which it was made. No point was made, and therefore no adjudication was had, as to the validity of the contract. The only point urged and decided in that case was whether or not a foreign corporation could "maintain" an action in this state without having complied with the laws of this state

until after the action was instituted, but did so comply before the motion to dismiss the suit was filed. The question considered and adjudicated in that case was the effect and meaning of the provision of § 1026, which, in addition to other penalties, provided that no such foreign corporation "can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out word "maintain" meant literally "to hold by of contract or tort." It was held that the the hand," and in its ordinary use, "to uphold; to sustain; to keep up," while in pleading the law dictionaries define it to mean "to support what has already been brought into existence;" and, under that construction, it was held that the word "maintain," as used in the statute, was broad enough to authorize a compliance with the statute after suit had been instituted. The question of whether or not the corporation had become permanently located in this state was not raised or passed upon. It is to be observed, however, that it was said in that case that the paramount object of the statute was "to place foreign and domestic corporations on a footing of equality in the field of commerce."

The decision in that case has led to a diversity of ruling between the Kansas City and St. Louis courts of appeals. The Kansas City court of appeals, speaking through Ellison, J., in Ehrhardt v. Robertson Bros. 78 Mo. App. 404, held that the Carson-Rand Case did not have the effect of overruling the prior adjudications of the courts of appeals in this state, which held that the act struck at both the validity of the contract and the right to maintain an action for the enforcement thereof, but that it simply construed the provision of § 1026 affecting the remedy, and did not touch upon or decide the question of the validity of the contract under §§ 1024 and 1025. The court further pointed out that ever since the decisions of this court in Downing v. Ringer, 7 Mo. 586, the courts of this state had adhered to the doctrine laid down by all text writers, that, where an act is prohibited by statute, it is void, although not declared in the statute to be void, that an unlawful act, or a prohibited act, is a void act, and that no rights could arise out of it. The court also pointed out that there was but one exception to that general rule of law to be found in the decisions of this court, and that was in reference to revenue laws. Columbus Ins. Co. v. Walsh, 18 Mo. 229. The learned judge who wrote the opinion in that case cited the prior adjudications, which held that a contract entered into by a foreign corporation that had not complied with our statutes was void; and cited cases from Pennsylvania, Alabama, Oregon, Tennessee, Illinois, and Wisconsin which so construed similar statutes of those states, and called attention to the fact that the courts of Massachusetts held to the contrary, because the statutes of that state provided expressly that such contracts should be valid and affected only the remedy. For the foregoing reasons, the Kansas City court of appeals held that the Carson-Rand Case only decided that an after-compliance with the statute would authorize the foreign company to maintain a suit, but that it did not decide that an after-compliance with the statute would relate back and make valid a contract which was prohibited by the statute. On the other hand, the St. Louis court of appeals, in the case of Chicago Mill & Lumber Co. v. Sims, 101 Mo. App. 569, 74 S. W. 128, speaking through Goode, J., construed the Carson-Rand Case as overruling the prior decisions of the two courts of appeals; and, upon the faith of that construction, and of cases decided in other jurisdictions, notably Washington, West Virginia, Indiana, Massachusetts, Colorado, South Dakota, and by the Federal courts, and from a consideration of the purposes and spirit of the statute itself, held that an after-compliance with the statute rendered the contract valid, as well as authorized the foreign corporation to maintain an action for the enforcement thereof. But one of the judges of that court deemed the opinion in that case to be in conflict with the decision of the Kansas City court of appeals in Ehrhardt v. Robertson Bros. *supra*, and accordingly that case was certified to this court, and that case is now pending in this court.

It is proper at this stage to note that the statute under consideration came before this court for adjudication in Hogan v. St. Louis, 176 Mo. 149, 75 S. W. 604. That was a case wherein a resident taxpayer sought to enjoin the city from entering into a contract with a foreign corporation to light the city. The city had advertised for bids to do the work of lighting it. The foreign corporation had submitted a bid and a contract had been entered into, but no business had been transacted in this state. The contention of the plaintiff was that, before a foreign corporation could submit a bid or enter into a contract in such a case, it was required to comply with the statutes; and that, if it had not so complied when it submitted its bid and entered into the contract, they were void. This court, speaking through Valliant, J., drew a distinction between submitting a bid and entering into a contract, and transacting business in this state, saying: "Of course, a contract cannot be lawfully made to do an unlawful act; but a contract may be lawfully made to do an act which

the contracting party can lawfully do only when he shall have complied with conditions or satisfied other demands; and his unconditional contract to do it carries with it the obligation to comply with those conditions or satisfy those demands. He assumes the risk of being able to do so. Therefore, when the Kern company entered into this contract, although it could not lawfully perform it without conforming to the conditions of the Missouri statutes, yet the contract carried by implication the obligation on the part of the company that it would conform to those conditions, and a neglect to do so, resulting in a failure to perform, would have been a breach of the contract." It was further held that entering into a contract to transact business was, in the unlimited meaning of the term, "transacting business," but that such was not the meaning of the term "transacting business," used in the statute. Accordingly it was held that the contract entered into by the city with the foreign corporation pursuant to the bid of that corporation, and under which no other business had been transacted by the foreign corporation, was not within the prohibition of the statute.

The consideration of the statute again came before the Kansas City court of appeals in Henderson Woolen Mills v. Edwards, 84 Mo. App. 448. There the plaintiff was a nonresident corporation and had sold goods to the defendant; the contract, so far as appears from the opinion, being made in the state in which the plaintiff was authorized to do business, and therefore was a lawful contract under the laws of that state. The point in that case was as to the validity of the contract, and no point seems to have been made, and none was decided, upon the question of remedy. It was contended by the defendant that the decision in Ehrhardt v. Robertson Bros. 78 Mo. App. 406, controlled the case; but the Kansas City court of appeals, speaking through Ellison, J., held that the Ehrhardt Case was inapplicable to the case undergoing adjudication. And further held that the contract involved in that case was a valid contract under the laws of the state where the contract was made, and was therefore valid under the laws of this state; and, as no point was made as to the right to maintain the action, the judgment in favor of the plaintiff was affirmed. The question came before this court again in Trower Bros. Co. v. Hamilton, 179 Mo. 205, 77 S. W. 1081. In that case the contract was made and to be performed in Kansas. The money loaned was secured by a mortgage on cattle in this state. The suit was an action in replevin for the cattle, after condition broken. The plaintiff had never complied with the statute, and the defense was that the contract was void. No question as to the right to maintain the action was raised by the pleadings. The contract was also charged to be usurious under the laws of Kansas. It was held that, as the note and mortgage were "valid under the laws of the state where executed, there is no obstacle in the way to their enforcement under the laws of this state, unless it be because of plaintiff's failure to comply with §§ 1025 and 1026, Rev. Stat. 1899, before bringing suit, as § 3710, Rev. Stat. 1899, has no application to such mortgages. But, if it has, its effect is to invalidate a mortgage given as security to a Kansas contract, and it is as to such contract invalid under the 14th Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597." Thus it will be observed that the validity of the contract, and not the right to maintain the action, was the point decided in that case. But a foreign corporation that had never complied with the laws of the state was permitted to invoke the aid of the courts of this state to enforce a contract that was valid according to the laws of the state of its domicil. It will be noted, however, that the corporation had not "permanently located" in this state, nor become a "resident foreign corporation."

The foregoing is the state of prior adjudication in this state concerning the subject in hand. It will serve no useful purpose to analyze the decisions of sister states upon similar, or somewhat similar, statutes. Each of the courts of appeals has decided that the weight of authority in other states sustains their respective decisions. That there is a conflict of authority must be conceded; and it therefore remains for this court to construe the statutes in its own way. At the outset it will be observed that the decision of this court in Carson-Rand Co. v. Stern, 129 Mo. 381, 32 L.R.A. 420, 31 S. W. 772, did not decide the question here involved; nor did it in any manner discuss, much less decide, the effect of the statutes (Rev. Stat. 1899, §§ 1024, 1025) upon the validity of contracts made and to be performed in this state by foreign corporations that had not before entering upon the performance thereof complied with the provisions of those statutes. Inferentially such contracts were treated as void in Hogan v. St. Louis, 176 Mo. 149, 75 S. W. 604. It is manifest from the language of the statute itself that it was the intention of the legislature to place foreign corporations doing business in this state and deriving profit from business done in this state with the citizens of this state upon an equality with domestic corporations authorized by the laws

of this state; and likewise to require such foreign corporations to bear the same burdens that domestic corporations have to bear. To accomplish this purpose, the statute (§ 1024) prohibits any foreign corporation organized for pecuniary profit "to transact business in this state, or to continue business therein if already established," until it shall have established, and shall maintain, a public office in this state where legal service may be had upon it, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporations, and makes such foreign corporations subject to all the liabilities, restrictions, and duties which are or may be imposed upon corporations of like character organized under the laws of this state; and further provides that they shall have no other or greater powers than domestic corporations. And § 1025 further provides that every such foreign corporation so organized, now or hereafter doing business within this state, shall file with the secretary of state a copy of its articles or certificates of incorporation, with the sworn statement of its principal officer or agent in Missouri, showing the proportion of its capital stock which is represented by its property located and business transacted in this state, and requires such corporation to pay incorporation taxes and fees equal to those required of similar corporations formed within and under the laws of this state. In this way the lawmakers intended to make foreign corporations become locally incorporated in like manner and with like obligations and liabilities as are required of domestic corporations, and prohibits such foreign corporations from transacting business in this state until they have become so locally incorporated. Thus the statute strikes at the validity of business transacted or contracts entered into in this state prior to the foreign corporation becoming locally incorporated. If the statute had stopped here, and made no other provision, or provided no other penalty, there would be no room for cavil that it was the intention of the legislature to make contracts invalid that were entered into in this state by foreign corporations before complying with the statute; and such contracts would thus be void, and effective means of preventing foreign corporations from entering into such contracts with citizens of this state would have been afforded. But the legislature went further, and, by § 1026, provided a penalty or a fine of $1,000, to be recovered by the state's officers from corporations that failed to comply with the act; and went further still, and, in addition to the penalty, provided that no such corporation should be entitled to maintain any suit or action upon any demand, whether legal or equitable, where it had failed to comply with the statute. Thus it is clear that the statute strikes at not only the validity of the contract, but also the right of the company to do business in the state or maintain an action for the enforcement of a contract concerning business transacted in this state. The Carson-Rand Case only goes to the effect of holding that an after-compliance with the statutes will enable such foreign corporation to maintain the action; but it does not hold that such after-compliance will relieve such corporation from the penalty or fine prescribed; nor does it hold that the contract itself is a valid contract. The two latter features were not passed upon or decided in that case. Some of the cases decided by the courts of appeals have drawn a distinction between such foreign corporations as have "permanently located" in this state, or have become "resident foreign corporations," without complying with the laws, and foreign corporations that have made contracts in the state of their domicil with residents of this state, and where the foreign corporation simply seeks the aid of the courts of this state to enforce such contracts.

As to the contracts made by foreign corporations in the states of their domicil with citizens of this state, the contracts being valid according to the laws of the state where made, the *lex loci contractus* governs, and will be enforced in this state as a matter of comity, unless the contract is prohibited by the laws of this state. In other words, such cases present the feature of a valid contract which one of the contracting parties qualifies himself to enforce in the courts of this state; and therefore those cases relate to the remedy, and not to the right or validity of the contract. Of course, in every case there must be not only a legal subject-matter, but also a plaintiff competent to sue under the laws of this state. The Carson-Rand Case falls within the principle here announced, and the case at bar falls within a similar principle as far as relates to the remedy; and under that principle there is in this case a competent party plaintiff under the laws of this state. But there is also present in this case the other feature which was not present in the Carson-Rand Case, to wit. the question of the validity of the contract or subject-matter of the suit. In this case the plaintiff entered into a contract, and proceeded with the performance thereof for nearly four months, and seeks to recover for profits it would have earned under that contract for over four years thereafter, if it had not been prevented from carrying out the contract by the act of the defendant. So far, therefore, as this

case is concerned, the plaintiff has received the full benefits of its contract with a citizen of this state for four months without complying with any of the laws of this state relating to foreign corporations; and it now asks the aid of the court to enforce a contract that is executory and cannot be completed for four years after the suit was instituted. It has well been said that the purpose of the statute is to place foreign corporations upon an equality with domestic corporations and impose the same burdens upon them that domestic corporations have to bear; and to prevent foreign corporations from deriving benefits of business done with citizens of this state while bearing none of the burdens imposed upon like corporations organized under the laws of this state. To entitle domestic corporations to do business in this state, they must first become incorporated and pay to the state the incorporating taxes and fees required by the statute. To place foreign corporations upon an equality with domestic corporations, they should be, and are, required, also, to pay a similar amount to the state. Such foreign corporations, in order to be placed upon such an equality, must also put themselves in the same position that domestic corporations are required to be placed in with respect to the constitutional and statutory requirements of this state, among which is that there shall be some person in this state upon whom service can be had in the event they do not fulfil their contracts with residents of this state, if such residents desire to recover for a breach thereof.

It is too clear to admit of cavil that, if foreign corporations are allowed to come into this state and do business with its people, derive all the benefits of such business, and fail to comply with the requirements of the statutes, unless they need the aid of the courts to enforce the contracts against the citizens of the state, the door will be left wide open for them to do such business and never bear any of the burdens that domestic corporations have to bear, unless they need the aid of the courts; and that a construction of the statute which would enable foreign corporations to so do would not only fail to place such foreign corporations upon an equality with domestic corporations, and enable them to avoid payment of the incorporating taxes and fees, and thus defraud the state, but, if the corporation broke the contract and the citizen sought to enforce it, the foreign corporation would not then comply with the laws of the state, and the citizen would have to go to the domicil of the foreign corporation in order to sue it. It was to prevent the happening of such a contingency that the statute in question was, principally, enacted. The statute prohibits foreign corporations from doing business in this state without first having complied with the law. Such a prohibition is as effective to make a contract entered into by such foreign corporation in this state void as if the statute had in terms declared such contracts to be void. The general rule of law is that, where an act is prohibited or declared unlawful, it is not necessary for the law to declare the act or contract void. An unlawful act is itself void. This has been the rule of law in this state ever since the decision of this court in Downing v. Ringer, 7 Mo. 586. That was an action upon a note given for the purchase of a town lot. The plat laws of this state provided that, if any person sell or offer for sale any lot before the map or plat of the town, village, or addition be made out, acknowledged, and recorded, such person shall forfeit a sum not exceeding $300 for every lot he shall sell or offer to sell. The question of the validity of the note was the point at issue in that case; and this court, speaking through Napton, J., said: "It was formerly doubted in England whether an agreement was void which was not expressly made so by a statute which merely inflicted a penalty for doing the act; but in Bartlett v. Vinor, Carth. 252, Chitty, Contr. 230, Lord Holt said: 'Every contract made for or about any matter or thing which is prohibited, and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflict a penalty on the defaulter; because a penalty implies a prohibition, though there are no prohibiting words in the statute.' This is the established modern doctrine, and the distinction between *mala prohibita* and *mala in se* is discarded. Chitty, Contr. 232. The cases in this country are uniform in declaring the principle that, if a note or other contract be made in consideration of an act forbidden by law, it is absolutely void; and the illegality of the contract will constitute a good defense at law, as well as equity. 2 Kent, Com. 466. . . . The penalty inflicted by the act concerning plats of towns and villages implies a prohibition against the sale of lots before the requisitions of the act are complied with, and the courts will not enforce a contract entered into against the spirit and policy of the statute." Accordingly the note was declared absolutely void. This case was expressly cited and followed in Mason v. Pitt, 21 Mo., loc. cit. 393; State ex rel. Barlow v. Dallas County Court, 72 Mo., loc. cit. 331; Rollins v. McIntire, 87 Mo., loc. cit. 505; Cherokee Strip Live Stock Asso. v. Cass Land & Cattle Co. 138 Mo., loc. cit. 406, 40 S. W. 107 (in which it was further said: "The cases in this country are uniform in holding that a contract forbidden

by statute is void; and the general rule is that no action or suit can be maintained either at law or equity upon such a contract, even where the statute does not expressly declare them void"); and in St. Louis Fair Asso. v. Carmody, 151 Mo., loc. cit. 573, 74 Am. St. Rep. 571, 52 S. W. 365 (in which it was said: "It makes no difference how fair the contract may be on its face, or how innocent in its own isolated terms; if it is designed to encourage an object forbidden by law, the courts will have nothing to do with it").

These considerations necessarily lead to the conclusion that foreign corporations doing business in this state must comply with the laws of this state; and that contracts entered into by such corporations in this state, before complying with the laws of this state, are void and cannot be enforced in the courts of this state. Contracts entered into by foreign corporations in the states of their domicil, with citizens of this state where valid according to the law of the state of their domicil, and not prohibited by the laws of this state, are valid contracts, and will be enforced in this state as a matter of comity; and such corporations are not required to comply with the statutes cited in order to maintain such actions. In other words, the statute was not intended to affect such cases, nor to change the rules of comity that have always been observed by the courts of the several states. The statute is leveled at and confined to foreign corporations that transact business in this state; and the asking the aid of the courts to enforce contracts that relate to legitimate business done in other states, and that is not prohibited by the laws of this state, does not constitute doing or transacting business in this state within the meaning of the statute. This conclusion is accentuated by the language of the statute itself, for § 1026, Rev. Stat. 1899, exempts "drummers or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident." It would be a solecism to construe the statute so as to allow such contracts to be made in this state by drummers for corporations that had never complied with the statute, but to require them to comply with the statute if they had to ask the aid of the courts to enforce them. The case of Trower Bros. Co. v. Hamilton, 179 Mo. 205, 77 S. W. 1081, comes within the rule of comity spoken of. And the case of Carson-Rand Co. v. Stern, 129 Mo. 381, 32 L.R.A. 420, 31 S. W. 772, so far as the facts in judgment are shown by the opinion, also falls within the same rule. But the case at bar is very different, for here the foreign corporation was unquestionably transacting business in this state within the meaning of the statute. This is the only construction of the statute which will give full force to all the provisions of the statute; and it is likewise the only construction of the statutes which will place such foreign corporations that do business in this state or make contracts in this state on an equality with domestic corporations, and which will enable the people of this state to secure the aid of the courts of this state when such foreign corporations are guilty of a breach of such contracts.

These principles applied to the case at bar necessarily lead to the conclusion that the judgment of the Circuit Court is right, and it is therefore affirmed.

All concur, except Brace, P. J., absent.

ARKANSAS SUPREME COURT.

S. H. BOURLAND AND WIFE, Appts.,
v.
McKNIGHT & BROTHER.

(— Ark. —, 96 S. W. 179.)

Cropper—tenant or employee.

1. Under a contract by which one undertakes to make a crop on the land of another, who is to have title to it and keep a

Subject Note.—Occupation of premises as a servant and as a tenant.

I. Generally, 698.
II. Service or tenancy, 699.
III. Character of occupation, whether as servant or tenant, 703.
IV. Character of occupation tested with reference to its being ancillary or not to the services performed, 707.
V. Cases illustrating the application of this test, 709.
VI. Character of occupation tested with reference to its beneficial or nonbeneficial quality, 718.
VII. Character of occupation to the effect of the arrangement as giving or not giving the servant an estate in the land, 720.
VIII. Character of occupation to the effect that the privilege of occupation represents a certain amount of pecuniary compensation, 722.
IX. Change in the character of the occupation, when inferred, 724.
X. Occupancy of a dwelling "by virtue of an office, service, or employment," 725.
XI. Character of occupation viewed as an element determining the correctness of the wording of indictments for burglary, 727.

I. Generally.

The cases which depend upon the charac-

portion for the use of land, team, and tools, and from the proceeds of the remainder deduct the amount due him for supplies and necessaries furnished the cropper and turn the balance over to him, the cropper is only an employee, and has no title to any portion of the crop which he can mortgage as against the claim of the landowner for the value of cattle and medicines and services of a physician furnished to him.

Same—needed supplies—question for the jury.

2. Under a contract by which one undertakes to make a crop on another's land for a certain portion of it after paying for supplies furnished to enable him to make it, it is a question for the jury whether or not supplies furnished were needed to make the crop.

Same.

3. A milch cow and medical supplies may be found to be needed by one who has undertaken to make a crop on another's land, to enable him to perform his contract, within a provision permitting the landowner to deduct from his share of the crop the value of supplies furnished by him and needed to make the crop.

Same—right to mortgage.

4. One who has undertaken to make a crop on another's land for a share of it may mortgage his interest in it.

(June 25, 1906.)

APPEAL by defendants from a judgment of the Circuit Court for Clark County in plaintiffs' favor in an action brought to enforce a lien on a crop. Reversed.

Statement by Riddick, J.:

S. H. Bourland and his wife, Carrie Bourland, let C. D. Reynolds have land to culti-

ter of the occupation of premises by a person who is residing thereon, while engaged in work which he has undertaken to perform for the owner of the premises, are divisible into two main classes: (1) Those in which the sole question to be determined is, whether the relation of master and servant, or the relation of landlord and tenant, was created by the contract between the owner of the premises occupied and the person performing the work; (2) those in which it is conceded, or established by satisfactory evidence, that the person performing the work was, in respect to such work, a servant of the owner of the premises occupied; and the question to be determined is whether he should be regarded as a servant or a tenant in respect to some matter extrinsic to the stipulated work.

There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years at will, or for any other estate or interest; and if he do so, the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration. Hughes v. Chatham, (1843) 5 Mann. & G. 78.

Both these questions are primarily for the consideration of the jury or other tribunal whose function it is in the given instance to determine issues of fact. Hughes v. Chatham (1843) 5 Mann. & G. 54, 7 Scott, N. R. 581; Clark v. St. Mary (1856) 1 C. B. N. S. 23, 26 L. J. C. P. N. S. 12; King v. Hurdis (1789) 3 T. R. 497.

In King v. Snape (1837) 6 Ad. & El. 278 (a settlement case), Williams, J., remarked that the court would not be critical in examining the grounds of the finding of the inferior tribunal.

In King v. Seacroft, 2 Maule & S. 472, it was declared that the court of sessions was the proper forum to determine the effect of the evidence, and the contention of counsel that a certain presumption might be drawn by the court of review from the facts stated was rejected.

The conclusion arrived at is, of course, subject to review in a higher court which has all the facts before it. King v. Field (1794) 5 T. R. 587 (ratability of occupier as determined by court of sessions).

If the action is being tried in a court consisting of a judge and jury, it is unnecessary to submit to the jury the character of the occupation, if that depends upon the significance of substantially undisputed facts. Kerrains v. People (1875) 60 N. Y. 221, 19 Am. Rep. 158.

But this question cannot be determined as one of law, if the evidence is conflicting, or diverse inferences may be drawn therefrom. Ibid.

The terms of the contract, so far as the parties differ, it is the duty of the jury to determine; but, the terms being fixed, their legal import is for the court to declare. This should be determined upon a consideration of the nature and purpose of the contract, and the character of the business to which it relates. Bowman v. Bradley (1892) 151 Pa. 351, 17 L.R.A. 213, 24 Atl. 1062.

In Kerrains v. People, *supra*, the effect of the arrangement was determined by the court as a question of law upon the contract and facts as stated; and the conclusion so arrived at was upheld by the court of review.

II. Service or tenancy.

The manner in which the former of the questions stated in the preceding subdivision has been answered by the courts with relation to various states of fact is shown by the following decisions:

(a) Occupancy as incident to contracts for cultivating land on shares.

The cases cited below not only disclose a considerable diversity of opinion as to the juridical standpoint which is appropriate in dealing with contracts of this type, but also indicate that, even where the standpoint has

vate during the year 1903. In the early part of that year Reynolds gave a mortgage or deed of trust to McKnight & Brother, merchants, to secure them for supplies to be furnished to him and for a debt which he owed them. During the year the Bourlands also furnished certain supplies to Reynolds, and at the end of the year he turned over the crop to them with directions that after paying what was due them they should pay the remainder of the proceeds of the crop to McKnight & Brother. Afterwards McKnight & Brother brought this action against the Bourlands to recover $146.12 as for money had and received for them. The Bourlands filed separate answers, in which they admitted that they had made a contract with Reynolds by which he had agreed to make a crop on the land of Mrs. Bourland. Mrs. Bourland alleged in her answer that the conditions of this contract were as follows: "She was to furnish the land, team, and tools to work the crop, and feed for the team, for which she was to receive one half of the crop; the remainder of the crop was to belong to said C. D. Reynolds after he had paid her for any supplies, money, or other necessaries that she might furnish him to make and gather said crop. She further alleged that after paying such debts only about $3 remained due Reynolds, which she was willing to turn over to plaintiffs.

On the trial the court gave the following instruction asked by plaintiffs: "The jury are instructed that the plaintiffs had a lien upon the crop made in the year 1903 by C.

been the same, the courts have not always arrived at identical conclusions with respect to essentially similar facts.

A "cropper," *i. e.*, a laborer who is paid for his labor by being given a proportion of the crop which he helps to harvest, is not a tenant, since he has no estate in the land, nor in the crop till the landlord assigns him his share. He is as much a servant as if his wages were fixed and payable in money. Haskins v. Royster (1874) 70 N. C. 601, 16 Am. Rep. 780 (action for enticement of cultivator held to be maintainable); Burgie v. Davis (1879) 34 Ark. 179 (holding that the law governing landlords' liens had no application to the case, but that the "cropper" was entitled to file a laborer's lien on the crop for whatever was due to him).

A contract between A and B that A may tend so much of B's land as he can cultivate with one horse during a certain year; and that A is to pay B as "rent" two bales of cotton out of the first picking, no part of the crop to belong to A until the rent is paid,—constitutes A a cropper, not a tenant. Haywood v. Rogers (1875) 73 N. C. 320. In Neal v. Bellamy (1875) 73 N. C. 384, the effect of this decision was thus stated: "When the crop is to be the property of the owner of the land, that fixes the character of cropper, and not of tenant, upon the man who is to do the work." In the latter case service was held to be inferable, where the agreement was that A was to pay B, the owner of the land, two bales of cotton, provided he also kept up the fences and cleaned the ditches properly, and three bales if this work was neglected, and that B was to make certain advances to A to assist him in making the crop.

Where A contracts to raise a crop on B's land, in consideration that B will furnish tools, teams, and feed for the team, and give him one half the crop raised; and out of A's half B is to retain sufficient to pay what A may owe for supplies,—the contract is one of service, the wages being half the crop minus the amount of the debt for supplies. Sentell v. Moore (1879) 34 Ark. 687 (landlord held not to be a mere tenant in common of the crop, so as to be obliged to file a copy of the contract in order to secure his lien for supplies, as is provided by Ark. act March 6, 1875).

One who takes charge of another's ranch, with the understanding that he is to receive for his services a certain sum per month, and that, after paying from the gross proceeds the operating expenses inclusive of his own salary, and deducting what is due for supplies and equipment furnished by him, he is to return the residue to the owner, is a servant, not a tenant. Todhunter v. Armstrong (1898; Cal.) 53 Pac. 446 (holding that, even if a lien were actually constituted by an oral agreement—which was denied—that the occupant was to remain in possession until he was fully settled with and paid, it would not be a defense to an action by the owner to recover possession).

The relation of employer and laborer, not that of landlord and tenant, is created by a contract which requires a laborer to take in charge, plant, and cultivate the several parcels of land designated by the landowner, according to the directions of such landowner; to house two crops, and see that no portion is removed until the owner has deducted for himself the amounts stated, and which binds him to be of good moral behavior, and respectful to the landowner, his family, and agent. McCutchen v. Crenshaw (1893) 40 S. C. 511, 19 S. E. 140. (held, that the laborer had no such interest in his share of the crop as would support a merchant's lien for advances to him).

The prosecutor contracted with defendant to employ him to labor on a certain tract of land, agreeing to furnish land, team, food for the team, tools, and seed, while the defendant was to furnish the labor and feed the team, and to be responsible for all implements used by him. The prosecutor was to have one half of the crop, and the defendant the other half, from which he was to pay all advances made him, and any help it might be necessary for him to hire. It was held that the relation was either that of master and servant or tenants in common, and that in either relation the prosecutor had a general ownership in the corps, and

D. Reynolds upon the place owned by the defendants, S. H. and Carrie Bourland, subject to the lien of said defendants for the rents and supplies furnished by them to make said crop. The jury are instructed that a cow and calf, and medicine and medical attendance, furnished by Dr. Bourland to said Reynolds family, do not constitute such supplies to make the crop with as will entitle the defendants to receive pay for the same before the plaintiffs' account furnished under their deed of trust, nor will the defendants be permitted to deduct the item of costs paid by Dr. Bourland on the security debt held by him against the said C. D. Reynolds as against the deed of trust held by McKnight & Brother." But the court refused to give the following instruction asked by defendant: "You are instructed that, if you find from the evidence that the defendants let C. D. Reynolds have land to cultivate and raise a crop of cotton and corn upon, and furnished tools, team, and provender necessary to make the crop, and that the said Reynolds was to have a portion of the crop so made for his services, but that the defendants were the owners of the crop, and were to reserve out of the said Reynolds's part of the crop such sums of money as would pay them for the supplies and advances made to the said Reynolds, and that the remainder was to be turned over to the said Reynolds, then, in that event, the said Reynolds had no such interest in said crop that he could mortgage, or sell, until the same had been set apart to

not a lien or claim, under Ala. Code 1876, § 4353, punishing the selling of crops on which another has a "lien or claim." This provision is not intended for the protection of tenants in common against fraudulent acts of cotenants, nor for the protection of masters against fraudulent acts of servants. Ellerson v. State (1881) 69 Ala. 1.

Under an Alabama statute enacted since this decision was rendered (Code 1896, § 2712 [Code 1886, § 3065]), it is provided as follows: "When one party furnishes the land and the team to cultivate it, and another party furnishes the labor, with stipulations, express or implied, to divide the crop between them in certain proportions, the contract of hire shall be held to exist."

Occupation of a separate and distinct house on a plantation, several hundred yards away from that of the owner of the plantation, under a contract by which the occupant is to have for his services as a laborer the use of the house and a monthly allowance of meal and meat, and a right to cultivate a small strip of land for his own benefit, constitutes him a lessee. State v. Smith (1888) 100 N. C. 466, 6 S. E. 84 (owner, who expelled occupant by threats and a display of deadly weapons, was held liable to be indicted for a forcible entry).

The relation of landlord and tenant is created by an agreement by a mortgagor to give a certain person all he can raise on a certain part of land in return for services. Calvin v. Shimer (1888; N. J. Eq.) 15 Atl. 255. The contention of the defendant was that the petitioner was a tenant, the rent being paid in labor instead of money, while the petitioner insisted that the agreement was one to take pay for services, in grain of his own raising. Bird, V. C., upheld the former view, and held that the crops raised on the land passed with the title on a sale under foreclosure.

The relation of landlord and tenant exists where one agrees to furnish another with a dwelling house, land, and a team and tools for working it, and the latter is properly to cultivate the soil and make payment of one half the crops gathered. Schlicht v. Callicott (1898) 76 Miss. 487, 24 So. 869 (landlord held to be entitled to a remedy by way of attachment under a statute relating specifically to landlords and tenants).

A tenancy was held to be inferable, where the contractor agreed to cultivate during one year, at his own cost, the land of the contractee, to gather the crops, and to keep the fences in repair, while the contractee stipulated that the contractor should occupy the premises during the year, Whaley v. Jacobson (1883) 21 S. C. 51 (question involved was the right of the occupant to encumber the crop with a lien).

Arrangements of this character have also been viewed from other standpoints, suggestive of other distinctions besides that which is emphasized in the foregoing cases. Thus, we find it laid down that a contract between a landowner and his laborers to cultivate a crop on shares creates a tenancy in common in the crop, and not the relation of landlord and tenant. Smith v. Rice (1876) 56 Ala. 417; Brown v. Coats (1876) 56 Ala. 439; Ragsdale v. Kinney (1898) 119 Ala. 454, 24 So. 443. But see Alabama cases and Code sections *supra*.

That a contract between landowner and laborer for raising a crop on shares creates the relation of landlord and tenant, unless the intention to make them partners or tenants in common with respect to the crop clearly appears, was held in Birmingham v. Rogers (1885) 46 Ark. 254.

An independent contract, and not service, is inferable where it is agreed that B shall furnish himself and two daughters and another person to work as laborers on A's land, the land and mules for its cultivation to be furnished by A, and that B is to receive a share of the crop. Barron v. Collins (1873) 49 Ga. 580 (action for enticement held not to be maintainable).

In Duncan v. Anderson (1876) 56 Ga. 398, it was assumed by the court that a "cropper," or person cultivating land on shares, was not a servant of the owner; the decision being that the owner was not liable for the tort of the cropper in hiring a laborer previously hired by and bound to work for the plaintiff.

In Ponder v. Rhea (1877) 32 Ark. 436, the

him; and your verdict will be for the defendant."

The jury returned a verdict in favor of plaintiffs for the sum of $61.60, and the defendants appealed.

Messrs. Hardage & Wilson for appellants.

Messrs. J. H. Crawford and D. Flanigan for appellees.

Riddick, J., delivered the opinion of the court:

The questions in this case relate to a contract made by Mrs. Bourland with Reynolds for the cultivation of land owned by her. The contract was not in writing, and the evidence as to the terms of the contract was somewhat conflicting. The testimony of S. H. Bourland, the husband of Mrs. Bourland, and who made the contract for her, tended to show that, by the terms of the contract, the title to the crop remained in his wife, the landowner, who was to receive one half of the crop for the use of the land, team, and tools, and that from the proceeds of the other half of the crop was to be deducted the sums due Mrs. Bourland for supplies and other necessaries furnished by her to Reynolds, and that, after paying such debts, Reynolds was to receive any balance left. The testimony of Reynolds as to the terms of the contract was somewhat different from Bourland's, but the defendants had the right to have their theory of the case submitted to the jury. If this testimony of Bourland was correct, then Rey-

relation of the cropper to the landowner seems to have been regarded as being rather that of an independent contractor than that of a servant; but the precise theory of the court is somewhat obscure.

In one case it was said that a contract to cultivate a piece of land and take one half of the produce as a compensation for the labor might be regarded either as a contract to perform labor on the land while it remained in the owner's possession, or as a hiring of the land for the rent payable in produce. Chandler v. Thurston (1830) 10 Pick. 205.

(b) Occupancy in relation to other contracts for the cultivation of land.

The relation of master and servant did not exist where one was under a contract to cultivate land for a certain rental, and, in addition, to work for the landlord, if called upon, whenever he was at leisure, for a certain price per day. The service provided for was a mere incident to the contract of rental. State v. Hoover (1890) 107 N. C. 795, 10 L.R.A. 726, 12 S. E. 451 (action for enticement of cultivator held not to be maintainable).

By an instrument in writing C., a landowner, specified certain services to be performed by H., who was "to have the house rent, use of garden, firewood, and pasturage for what cows you keep for family use," and it was also stipulated that H. was to have possession till a specified date. It was held that H. was not a mere agent of C., but took an interest in the premises as lessee, and was entitled to possession until the appointed term had expired. Colcord v. Hall (1859) 3 Head, 625.

(c) Occupancy in relation to contracts for the keeping of a hotel.

In State v. Page (1843; S. C. Ct. App.) 1 Speers, L. 408, 40 Am. Dec. 608, it was held that the following provisions, standing by themselves, did not make a lease of a hotel; *viz.*, that for seven years the person in question was to "reside with his family in the hotel (free of all charge for board or rent);" that he was to "conduct the same in the manner contemplated by the parties, and to have the whole and exclusive management thereof;" and that, at the end of the term, the furniture should be returned to the owners of the hotel. The conclusion that no lease was intended was held to be indicated by other stipulations; *viz.*, that the occupant was to keep the hotel for the term of seven continuous years; that as the landlord he should provide for the hotel; that he should contract no debts on account of the concern, without the consent of the directors; that he should keep constantly in his employment a bookkeeper, who was to be discharged if the directors disapproved of him; and that the books were to be open to the examination of the directors. It was accordingly held that the occupant of the hotel was in possession as the agent of the owners, and that he had no legal interest in the possession, which could be set up against an execution for a debt of the owners. In Charleston v. Page (1843) Speers, Eq. 177, Harper, Ch., considered that, under this instrument, the occupant was undoubtedly a lessee.

(d) Occupancy in relation to logging contracts.

The defendant made a contract with D., by which D. was to operate, during the milling season, a shingle mill then *in the control of the defendant*, and *manufacture certain brands of shingles from logs to be furnished by defendant*, and receive payment therefor from defendant at a fixed rate; and he was to hire and pay the men employed, furnish tools and implements, repair breaks in machinery not costing over $5 (larger breaks to be repaired at defendant's expense), and load the shingles at his own expense (the defendant, however, to pay such expense beyond a certain figure, until a side track to the mill was completed). Defendant was to put the mill in running order, furnish the logs, and remove surplus and refuse timber. It was held, in an action by a third person against defendant to recover damages for injuries caused by sparks emitted from the smokestack of the mill, that the contract was not a lease, but simply for performance of labor, and that defendant was liable for any defective condition of the mill. The court said that the

nolds was only an employee, and not a tenant, and the title to the crop remained in the landlord. Reynolds, under such a contract, had the right to demand of the landlord only the balance of the proceeds of the crop left after paying the debts due her. If she furnished the tenant a cow and a calf or medicines and services of a physician when needed by him, she would, under the terms of the contract as shown by Bourland's testimony, be entitled to hold the crop for the payment of such debts. Tinsley v. Craige, 54 Ark. 346, 16 S. W. 897, 16 S. W. 570; Hammock v. Creekmore, 48 Ark. 264, 3 S. W. 180; Parks v. Webb, 48 Ark. 293, 3 S. W. 521.

It follows from this that in our opinion the court erred in giving the instruction asked by the plaintiffs, and which is set out in the statement of facts, for that instruction told the jury, as a matter of law, that Mrs. Bourland had no right to hold the proceeds of the crop for the payment of the cow and calf sold by her, or for the medical supplies furnished. If the contract provided that the employee was to receive only what was left of the proceeds of one half of the crop after paying all debts due by him to the landlord, then Mrs. Bourland would have the right to hold the crop for any debt due from Reynolds to her. But if the contract provided that Reynolds was to get one half of the crop after paying for supplies furnished by Mrs. Bourland to him for the purpose of enabling him to make the crop, it would then be a question of fact whether

effective words of the contract were those italicized, and that it was clearly a hiring on the part of the defendant, accompanied on his part by an agreement that D., in the performance of the stipulated work, was to have the use of certain machinery of the defendant. The absence of any words giving possession of the mill to D. was also commented on. Whitney v. Clifford (1879) 46 Wis. 138, 32 Am. Rep. 703, 19 N. W. 835.

(e) Occupancy as incident to contracts for the boarding of the landowner's employees.

It was held that a woman who occupied a house belonging to a railway company and on its line, under an agreement with the company to board its employees, the price of board to be paid by them, and the company to aid her in collecting her pay for board by retaining the same for her out of the wages of such employees, was not a servant or employee of the company; but that the relation of the parties was that of landlord and tenant. Doyle v. Union P. R. Co. (1893) 147 U. S. 413, 37 L. ed. 223, 13 Sup. Ct. Rep. 333 (action for injuries caused by a snowslide held not to be maintainable; railway company not bound to provide a safe place in which to work). It was unsuccessfully contended that the circumstance of the woman being aided by the company in collecting her pay for the board changed her position from that of tenant at will to that of servant.

(f) Occupancy as incident to contracts for the operation of a factory.

In Fiske v. Framingham Mfg. Co. (1833) 14 Pick. 491, the construction of the contract in question was thus discussed: "Some of the provisions have a double aspect, and, consistently with them, he [Bird] might be either the agent or the lessee of the defendants; but there are others which admit of only one construction. He was to keep the factory in repair, except that the defendants were to repair the main gearing if it should be necessary; he was to have the possession for the purpose of doing what he had stipulated to perform; he had the control of the factory, and could employ what servants he would, and regulate their wages; he might determine how much water should be turned upon the mill; he was entitled to the use of the land about the factory and to the buildings thereon; and whether these buildings were let to laborers employed by him, or to others, rent would probably be paid to him, either in a diminution of wages or otherwise. These provisions are appropriate in the case of a lease. The words, 'that no rent is to be charged by the company,' also tend to prove that a letting was contemplated. It was argued that a reservation of rent was essential to a lease, but this point is immaterial, for, taking the whole agreement together, it was manifest that the defendants received rent in the price at which their goods were manufactured. We are therefore of opinion that Bird was not the servant of the defendants, but their lessee, having the control and possession of the premises mentioned in their agreement, and consequently that the defendants are not liable to the plaintiff in this action" (action for damages caused to a neighbor by the negligence of the occupant in letting off the water from the pond too rapidly).

Under an instrument in the form of a lease, a party named as lessee was to have control of a factory, and was to return to the company owning the plant the profits of the business over a fixed amount. The lessee was to have authority to employ and discharge servants to work in the factory, and no restrictions as to the management of the business were reserved by the lessor. It was held that the agreement was, in law, a lease. Ault Woodenware Co. v. Baker (1900) 26 Ind. App. 374, 58 N. E. 265 (lessor held not to be liable for an injury sustained by a servant of the lessee owing to the mismanagement of the latter).

III. Character of occupation, whether as servant or tenant.

In the reported cases belonging to the second of the two classes differentiated in I., *supra*, one or the other of the following points has been determined:

he needed the cow and the calf or the other supplies furnished to enable him to make a crop, and whether they were furnished for that purpose or not; for, under such a contract, the landlord could deduct only supplies furnished to enable the tenant to make his crop. But as milk is a common and useful article of diet, and as probably the cheapest way for a farmer to obtain it is to own a milch cow, such animals might be a part of the supplies needed by a tenant and his family to enable him to make a crop, just as other provisions would be needed; while, on the other hand, if he bought them for speculation only, they would not be supplies for making a crop. So medical supplies and attention, when furnished or paid for by the landlord, might be necessary supplies if needed to enable the tenant to go ahead with his work. But, under the evidence in this case, the questions arising concerning these matters were questions of fact which should have been submitted to the jury under proper instructions. The law relating to cases of this kind was very clearly stated in case of Tinsley v. Craige, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570, and in Hammock v. Creekmore

(a) The liability of the servant to certain taxes.

(b) The servant's acquisition of a settlement under the poor laws.

The rule uniformly adopted for construing the statute of 13 & 14 Car. II. chap. 12, was that the words "coming to settle in a place" meant by renting or holding in the character of tenant. Lord Ellenborough in King v. Bowness, 4 Maule & S. 212.

Speaking of the kind of settlement which is acquired by renting premises, Denman, Ch. J., said: "The kind of settlement relied upon in this case has grown out of the 13 & 14 Car. II. chap. 12, § 1, which confines the power of removal to cases where persons come to settle on any tenement under the yearly value of £10, and, by implication, has been held to confer a settlement on a person who comes to settle on a tenement of that value; and the lawful occupation of a tenement of that annual value by a party in his own right has been held to satisfy the words 'coming to settle.' The word 'renting' is not to be found in the statute." King v. St. Mary Newington (1833) 5 Barn. & Ad. 540.

"If the occupation was ancillary to the service [see IV., *infra*.] so as to make the occupation of the servant merely the occupation of the master, then no settlement was gained." Queen v. Bishopton (1839) 9 Ad. & El. 824.

"In order to confer a settlement by renting a tenement, the party must have a residence which might be called his own home, as tenant;" residence "in the character of servant merely" is not "sufficient to satisfy the words of the statute 'coming to settle.'" King v. Shipdham (1823) 3 Dowl. & R. 385, per Bayley, J.

(c) The exercise of the elective franchise by the servant.

As precedents bearing upon the right of voting, the English cases of which the effect will be stated in the ensuing subdivisions have been of much less importance in the United Kingdom itself, since the recent extension of the franchise (see X., *infra*), and are of no importance whatever in countries where manhood suffrage prevails. But they supply many useful analogies and statements of general principles which will serve as a guide to the practitioner in other connections. As, for example, where the question involved is whether the servant has a right to retain possession of the premises after he ceases to be a servant. See Kerrains v. People (1875) 60 N. Y. 221, 19 Am. Rep. 158, where the passage quoted from the judgment in the Hughes Case (1843) 5 Mann. & G. 54, was cited by the court as laying down concisely the correct rule for determining the question involved.

The cases, of which the effect is stated under various heads in V., *infra*, turn upon the construction of the electoral laws which were in force at different periods, and deal with the question whether the claimant was entitled to vote (1) as a "householder" under one or other of those laws; or (2) as one who "occupied as owner or tenant" (reform act 1832, chap. 45, § 27, and reform act 1867); or (3) as "occupier of a building of the value of £10 yearly," under the same act. The construction put upon the act of 1884, which introduced a "service franchise," is shown by the cases cited in X., *infra*.

(d) The right of the master to resume possession of the premises occupied.

A servant whose occupation is independent of, and not merely ancillary to, his employment, but which is liable to be determined by the dissolution of the contract, is a tenant at will. Rex v. Lakenheath (1823) 1 Barn. & C. 531; O'Connor v. Tyndall (1836) 2 Jones (Ir.) 20 (per Foster, B.).

On the other hand, where the occupation is merely in the character of a servant, no interest in the premises even to the extent of a tenancy at will, vests in the occupant.

Combating the contention that the servant, under such circumstances, took an estate in the premises, Willes, J., said: "I can see very weighty reasons why it should be intended not to vest. And I do not by any means agree that this is a dry and barren point; because, though, generally speaking, the relation of master and servant, or principal and agent, may, where the servant or agent has been guilty of misconduct, be terminated at a moment, if such an arrangement as this were held to vest in the servant or agent an interest in the employer's premises, the servant might set his employer at defiance; and, though the latter were perfectly justified in putting an end to the relation of master and servant between them, the former might insist upon holding on as a tenant until the expiration of a reg-

and Parks v. Webb, *supra*. We concur in the argument of counsel for appellant that the employee had the right to mortgage his interest in the crop; but, if his interest was only what was left after paying all debts due the landlord, the mortgagee can get no more than the employee could get. But, as the mortgage was valid to that extent, the instruction asked by the appellant was wrong and was properly refused.

Counsel for appellees contend that the bill of exceptions does not show that it contains all the instructions given, but there is nothing in it that indicates that other instructions were given, and it would be a violent presumption to suppose that the other instructions could cure the defect of the one given, for it definitely stated that certain claims of the landlord must not be considered by the jury, which instruction, we think, under the evidence here, was erroneous.

For the reasons stated, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

Hill, Ch. J., did not participate.

ular notice to quit." White v. Bayley (1861) 10 C. B. N. S. 227.

In Kerrains v. People, *supra*, the court expressed its disapproval of the doctrine laid down in People ex rel. Hubbard v. Annis (1866) 45 Barb. 304, to the effect that immediately upon the termination of the service a tenancy at will or by sufferance springs up, and laid down the law as follows: "In order to have that effect, the occupancy must be sufficiently long to warrant an inference of consent to a different holding. Any considerable delay would be sufficient; but I can see no principle which would change the occupant *eo instanti* from a mere licensee to a tenant. The employer should resume control of his property within a reasonable time, or consent would be inferred. Whether this time is a day, or a week, may depend upon circumstances." Doyle v. Gibbs (1871) 6 Lans. 180, was cited as a case in which the permission of the employer that the employed might remain until his wife recovered from an illness was held not to amount to a consent.

Many of the cases cited below expressly recognize, or take for granted, the same doctrine.

The statement made in McGee v. Gibson (1840) 1 B. Mon. 105, that a man occupying merely as a servant is a tenant at will, is clearly erroneous.

The legal consequences of determining the contract of employment of a servant whose occupation is of this description are as follows:

That the master becomes entitled to resume possession of the premises immediately.

In a case where a farm laborer was provided with a house to live in and cattle for the use of himself and family, the court said: "If it [*i. e.*, what was delivered into the possession of the servant when he began work] be regarded as part of the compensation for labor stipulated for, then the right to the compensation ceased when the labor was discontinued. Bowman had the same right to insist on the payment of the cash part of his wages as on that part which provided his family a place to live. His right under the contract of hiring was like that of the porter to the possession of the porter's lodge; like that of the coachman to his apartments over the stable; like that of the teacher to the rooms he or she may have occupied in the school buildings; like that of the domestic servants to the rooms in which they lodge in the house of their employers. In all these cases and others that might be enumerated the occupancy of the room or house is incidental to the employment. The employee has no distinct right of possession, for his possession is that of the employer: and it cannot survive the hiring to which it is incidental, or under which it is a part of the contract price for the services performed. So in this case, if the contract was simply a contract for labor at $1 per day and a house to live in, the plaintiff held the house by the same title and for the same purpose that he did the land or the cattle in the care of which his labor was to be performed. When his contract ended, his rights in the premises were extinguished, and it was his duty to give way to his successor." Bowman v. Bradley (1892) 151 Pa. 351, 17 L.R.A. 213, 24 Atl. 1062.

See also Hunt v. Colson (1833) 3 Moore & S. 790 (denying right of servant to maintain an action of trespass against his master's agent for pulling down the house occupied by him); Eichengreen v. Appel (1891) 44 Ill. App. 19, and the cases cited below.

That this right is enforceable irrespective of the question whether the servant was or was not justifiably discharged. Collison v. Warren (1898; C. A.) 17 Times L. R. 362 (where the plaintiff in a suit in which he was claiming to be entitled, under a certain contract, to be retained in the employment of the defendant as manager of a hotel, was enjoined from continuing to reside in the hotel); McAlister v. Ogle (1856) 1 Ir. Jur. N. S. 313; Scott v. M'Murdo (1869) 6 Scot. L. R. 301.

In Whyte v. Haddington School Board (1874) 1 Sc. Sess. Cas. 4th series, 1124, the employers were held entitled to a summary warrant to remove the servant.

These decisions, as well as those which are cited *supra* and *infra*, show that one of the judges of the supreme court of New South Wales was in error when he laid it down that the curator of a museum, to whom a portion of the building had been assigned as a residence, was entitled to remain in his apartments, a proceeding alleged by him to be wrongful, until he had at least

received a legal notice to quit; and that his official possession was sufficient to enable him to maintain an action of trespass against one of the board of trustees, who had entered on the premises occupied by him. Krefft v. Hill (1875) 13 New So. Wales S. C. R. (L.) 280.

The doctrine which prevails in Quebec seems to be different from that of the common-law courts. In Reid v. Smith (1872) Ct. of Review, 6 Quebec L. R. 367, 4 L. N. 157, an action of ejectment was brought to recover possession of a house which had been leased to the defendant under one of the stipulations of a contract which bound him to act as superintendent of the plaintiff's mill for a term of five years, and which was terminable by six months' notice on either side. The defendant was dismissed without any good cause, and without the stipulated notice. The position taken by the plaintiff was that, by the mere fact of his having been dismissed, the contract for his personal services was terminated, leaving only a claim for damages to the servant; and that the lease came to an end at the same time as the service. The court, however, was of the opinion that the plaintiff, in advancing this theory, had lost sight of the distinction between a contract for the construction of a building or other works (*louage d'ouvrage*), and a contract for personal service (*louage de services personnels*). The Code (art. 1691) provided for the rescission of the former kind of contract at the will of the employer, but was silent as to the power of rescission in the latter case. Accordingly, the conclusion was arrived at that, as the employer could not, merely by his own will, put an end to the contract of service, it was impossible to contend successfully that he could, merely by his own will, put an end to the lease which was one of the incidents of the contract of service.

That he may eject the servant without any process of law. McAlister v. Ogle (1856) 1 Ir. Jur. N. S. 313 (servant held not to be entitled to maintain an action against the master for assault in removing him by force from the premises); DeBriar v. Minturn (1851) 1 Cal. 450 (similar decision); Scott v. M'Murdo (1869) 6 Scot. L. R. 369; Fraser, Mast. & S. p. 8.

That he may eject him without giving him notice to quit. Mayhew v. Suttle (1854; Exch. Ch.) 4 El. & Bl. 347, 1 Jur. N. S. 303, 24 L. J. Q. B. N. S. 54; White v. Bayley (1861) 10 C. B. N. S. 234, per Willes, J.; Doe ex dem. Hughes v. Derry (1840) 9 Car. & P. 494; Young v. Paton (1808; Sc. Ct. of Sess.) Hume, 582; Bigelow v. Norton (1848) 3 N. S. 283; Fleming v. Hill (1876) 10 N. S. 268; Doyle v. Gibbs (1871) 6 Lans. 180; McGee v. Gibson (1840) 1 B. Mon. 105; Kerrains v. People (1875) 60 N. Y. 225, 19 Am. Rep. 158; Morris Canal & Bkg. Co. v. Mitchell (1864) 31 N. J. L. 99; McQuade v. Emmons (1876) 38 N. J. L. 397.

Or that he may obtain possession by means of an action of forcible entry and detainer after giving due notice to quit.

By Iowa Rev. Stat. § 2216, it is provided that any person in possession of real property with the assent of the owner is presumed to be a tenant at will, unless the contrary is shown. By § 2218 it is provided that thirty days' notice must be given by either party to terminate the tenancy; but that, when an express agreement is made, the tenancy shall cease at the time agreed, without notice. Construing these provisions, the court held that, where a tenant had taken possession of premises under an agreement that he was to occupy them only so long as he should continue in the employment of the owner, he would not be regarded as a tenant at will, but as a tenant for a definite term, who, if he remained in possession after quitting the employment, became a tenant holding over after the termination of his lease, and subject to an action of forcible entry and detainer on the part of his employer after due notice to quit had been given. Grosvenor v. Henry (1869) 27 Iowa, 269.

That an action of trespass will not lie against the master for breaking and entering the premises. White v. Bayley (1861) 10 C. B. N. S. 227, 7 Jur. N. S. 948, 30 L. J. C. P. N. S. 253; Allen v. England (1862) 3 Fost. & F. 49; Bowman v. Bradley (1892) 151 Pa. 351, 17 L.R.A. 213, 24 Atl. 1062.

That the servant is not entitled *de jure* to have a reasonable time allowed him for the removal of his household effects. Doe ex dem. Nicholl v. M'Kaeg (1830) 10 Barn. & C. 721.

That he cannot maintain an action of trespass against the master for removing them. Lake v. Campbell (1862) 5 L. T. N. S. 582; Mead v. Pollock (1901) 99 Ill. App. 151; Haywood v. Miller (1842) 3 Hill, 90.

That the master cannot obtain possession of the premises by means of statutory proceedings of a summary nature, which, under the express terms of the enactment, are specifically applicable to the relation of landlord and tenant. People ex rel. Hubbard v. Annis (1866) 45 Barb. 304; McQuade v. Emmons (1876) 38 N. J. L. 397.

It was held in Hart v. O'Brien (1866; Quebec Ct. of Review) 15 Lower Can. Jur. 42, that an employee who was allowed the use of a dwelling house as long as he remained in the employment, as part consideration for his services, was liable to ejectment under the lessors' and lessees' act, as soon as he ceased to be in the employ of the owner. But, as already observed *supra*, the doctrine prevailing in Quebec is not the same as in common-law jurisdiction.

But the owner may convert the occupation of the servant into that of a tenant at will, by allowing him to remain in possession a sufficient length of time to warrant the implication of intentional acquiescence in the continuance of the occupation. School Dist. No. 11 v. Batsche (1895) 106 Mich. 330, 29 L.R.A. 576, 64 N. W. 196 (servant held not to have become a tenant at will); Kerrains v. People (1875) 60 N. Y. 221, 19 Am. Rep. 158.

In Jennings v. McCarthy (1891) 40 N. Y.

S. R. 678, 16 N. Y. Supp. 161, this change in the character of the occupation was held to be inferable where the servant, after his employment was ended, was suffered to hold over for a longer period than was necessary to enable him to move conveniently.

See also Doyle v. Gibbs (1871) 6 Lans. 180, *supra*.

(e) The right of the master, or of a person authorized by him, to enter on the premises for the purpose of performing work in respect thereto.

(f) The right of the servant to assert an independent title to the premises.

The rule that a tenant is estopped from disputing the title of his landlord (Woodfall, Land. & T. 237; Taylor, Land. & T. § 629) is applicable, also, to the case of a person coming in, by permission, as a servant (Doe ex dem. Johnson v. Baytup [1835] 3 Ad. & El. 188; Doe ex dem. Willis v. Birhmore [1839] 9 Ad. & El. 662).

(g) The right to sublet or transfer the possession of the premises.

A person occupying as a tenant, and not as a servant, is entitled, with the permission of the landlord, to sublet the premises, and to collect from the sublessee the rent which accrues during the period covered by the sublease. Snedaker v. Powell (1884) 32 Kan. 396, 4 Pac. 869.

But a person placed in possession of premises as a mere caretaker has no interest which is capable of being assigned to another person. Reynolds v. Metcalf (1863) 13 U. C. C. P. 382.

(h) The right of the servant to be let into possession of the premises which he is to occupy.

(i) The liability of the servant to have his property distrained as being that of a servant.

(j) The question whether the master or the servant is the proper party to bring an action for trespass committed on the premises.

(k) Eligibility for office.

An employee occupying premises as a servant merely is not a "substantial householder" within the statute 43 Eliz. chap. 2, § 1, so as to be eligible for the office of overseer of the poor. Queen v. Spurrell (1865) L. R. 1 Q. B. 72, 35 L. J. Mag. C. N. S. 74.

(l) The requirements of stamp acts.

In England it has been held that a lease stamp is not necessary to validate an instrument which provided, among other things, for an employee's occupation of premises as a part of the compensation for his services. Doe ex dem. Hughes v. Derry (1840) 9 Car. & P. 494.

(m) The correct wording of indictments in prosecutions for the crime of embezzlement.

Whatever may be the character or duration of the title under which a servant occupied his employer's premises, he is entitled to the benefit of those rules of law which enable a rightful occupant or his licensees to recover damages for personal injuries caused by negligent acts committed on adjoining premises. The Defiance Water Co. v. Olinger (1896) 54 Ohio St. 532, 32 L. R.A. 736, 44 N. E. 238, holding that an action could be maintained by a guest of a servant, for injuries caused by the bursting of a large stand pipe on the land of a water company.

IV. Character of occupation tested with reference to its being ancillary or not to the services performed.

The doctrine upon which a large number of decisions is based is that an employee should be regarded as occupying the premises of his employer in the character of a servant, or in the character of a tenant, according as his occupation is or is not susceptible of being described by one of the following phrases: "Ancillary to the service,"—Queen v. Bishopton (1839) 9 Ad. & El. 824; "ancillary to the performance of the duties which the occupier has engaged to perform."—Smith v. Seghill (1875) L. R. 10 Q. B. 422; "auxiliary to the service,"—Queen v. Lynn (1838) 8 Ad. & El. 379; Petersfield Case (1874) 2 O'M. & H. 97; "connected with the service,"—Queen v. Bishopton, *supra;* King v. Cheshunt (1818) 1 Barn. & Ald. 473; King v. Minster (1814) 3 Maule & S. 278 (the phrase "necessarily connected with the service" was used by Bayley, J., in King v. Kelstern [1816] 5 Maule & S. 138); "referable to the service,"—King v. Iken (1834) 2 Ad. & El. 147; "incidental to and inseparable from the service," Queen v. Bishopton (1839) 9 Ad. & El. 824; "incidental to the employment,"—Bowman v. Bradley (1892) 151 Pa. 351, 17 L.R.A. 213, 24 Atl. 1062; a "privilege allowed in respect to the principal thing" (*viz.*, the hiring),—King v. Seacroft, 2 Maule & S. 472 (according to Taunton, J., in King v. Iken [1834] 2 Ad. & El. 147, where the above-cited case was distinguished, the rationale of the decision was that the cellar was "a privilege attached to the waiter in reference to the principal thing, that is, to his contract as a waiter;" "in aid of or necessary to the performance of his service,"—Snedaker v. Powell (1884) 32 Kan. 399, 4 Pac. 869; "necessary for the performance of the service."—King v. Kelstern (1816) 5 Maule & S. 136; Smith v. Seghill (1875) L. R. 10 Q. B. 422; "necessary to the service,"—Queen v. Spurrell (1865) L. R. 1 Q. B. 72; "connected with the service," or "required, expressly or impliedly, by the employer for the necessary or better performance of the service,"—Kerrains v. People (1873) 60 N. Y. 225, 19 Am. Rep. 158 (in another part of the opinion in this case it was remarked that the question, What is the character of the holding under the contract? depends upon "whether it is exclusive and independent of, and in no way connected with, the service; or whether it is so connected, or is necessary for its performance").

In a case where the question was whether certain workmen were ratable under the poor-rate law assessment act of 1869, Mellor, J., said: "Where the occupation is necessary for the performance of services, and the oc-

cupier is required to reside in the house in order to perform those services, the occupation being strictly ancillary to the performance of the duties which the occupier has to perform, the occupation is that of a servant. . . . It is quite true that the present appellants, in one sense, were required to reside in the houses of their employers, because the owners of the houses, engaging the appellants in their employment and paying them by piecework, desired them to reside in the houses while engaged in their service, and in that sense they were required to reside in the houses while engaged in their employers' service: but that is not the meaning of the words as used in Hughes v. Chatham (1843) 5 Mann. & G. 78 [see V., *infra*]. 'Required' means more than the master saying, 'You must reside in one of my houses if you come into my service.' The residence must be ancillary and necessary to the performance of the servant's duties; and, unless he is required for that purpose to reside in the house, and not merely as an arbitrary regulation on the part of the master, I do not think he is prevented from occupying as a tenant. Then it appears that the appellants and other workmen are only entitled to occupy the houses during the time of their service at the colliery; the occupation terminates at the time the service terminates. Still, the appellants are tenants, though not tenants for any fixed time. They occupy as tenants at will as long as they reside in the houses by the arrangement between themselves and their masters." Smith v. Seghill (1875) L. R. 10 Q. B. 428.

See also the extract quoted in V., *infra*, from the opinion of the same judge.

In Fox v. Dalby (1874) L. R. 10 C. P. 294, Lord Coleridge, Ch. J., expressed his approval of the doctrine enounced by Creswell, J., and Crowder, J., in Clark v. St. Mary (1856) 1 C. B. N. S. 31, 26 L. J. C. P. N. S. 12, that, "if either ingredient exists,—if the occupation be necessary for the better performance of the duties required to be performed by the party; or if, though it be not necessary for their performance he is required, by the authority by which he is appointed, to reside there in order to perform them,—the occupation is not an occupation as tenant." In the same case (p. 295) Brett, J., considered the effect of the authorities to be that the occupation is not that of tenant, where the employee "is required to occupy them for the better performance of his duties, though his residence there is not necessary for that purpose, or if his residence there be necessary for the performance of his duties though not specifically required." See also Head v. Pollock (1901) 99 Ill. App. 151, where the phraseology of Kerrains v. People (1875) 60 N. Y. 221, 19 Am. Rep. 158, is adopted.

So, the employee should be regarded as servant or tenant according as his occupation is or is not susceptible of being described by "incident to, and deemed essential for, the performance of the duties" of the servant,"—School Dist. No. 11 v. Batsche, (1895) 106 Mich. 330, 29 L.R.A. 576, 64 N. W. 196; "for the purpose of performing his duties,—Smith v. Seghill (1875) L. R. 10 Q. B. 428; "for the more convenient performance of the service;"—King v. Bardwell (1823) 2 Barn. & C. 161; King v. Minster (1814) 3 Maule & S. 278; King v. Cheshunt (1818) 1 Barn. & Ald. 473; "with a view, not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service required,"—Dobson v. Jones (1843) 5 Mann. & G. 112. In Smith v. Seghill (1875) L. R. 10 Q. B. 422, it was observed that the ground of the decision in this case was that the occupation was "for the purpose of thereby enabling him [the employee] the more readily to perform the services required of him."

The situation opposed to that which is expressed by the phrase in the text is indicated by the following remarks of Denman, Ch. J., in a poor-law case: "This settlement [*i. e.*, that based on 'coming to settle' in a tenement] is most generally acquired by renting, because the renting shows the occupation to be independent, and for the convenience of the occupier, and not for that of the landlord; and, on this principle, many of the cases where a distinction has been taken between an occupation as tenant and an occupation as servant proceed." King v. St. Mary Newington (1833) 5 Barn. & Ad. 544.

So, the rule as to relation of servant or tenant may be determined by the phrases "convenient for the purposes of the service," and "obtained by reason of the contract of hiring,"—Bowman v. Bradley (1892) 151 Pa. 361, 17 L.R.A. 213, 24 Atl. 1062, denying it to be indispensable "that occupation of a house or apartments should be a necessary incident to the service to be performed, in order that the right to continue in possession should end with the service. It is enough if such occupation is convenient for the purposes of the service, and was obtained by reason of the contract of hiring;" for the purpose of "facilitating the business" of the employer,—Morris Canal & Bkg. Co. v. Mitchell (1864) 31 N. J. L. 99.

As a matter of ultimate analysis, the test thus indicated may be regarded as the only appropriate one in most of the cases belonging to the class with which we are now concerned.

In one instance the real character of the occupation was held to be impossible to determine, for the reason that the statement of facts received from the trial court did not show whether or not the occupation was "necessary to the service." Queen v. Spurrell (1865) L. R. 1 Q. B. 72. See VIII., *infra*.

But it is apparent from VI.–VIII., *infra*, that, even where this test would, so far as the circumstances indicate, have been not only applicable, but sufficient, the courts have not infrequently preferred to rely, either partially or exclusively, upon other elements.

V. Cases illustrating the application of this test.

Below we have collected under convenient headings the cases in which the doctrine referred to in the preceding subdivision may be said to have furnished the actual *ratio decidendi*.

(a) Employees cultivating land or tending live stock.

A pauper, a married man, agreed to serve S. for a year as a laborer, and was to have £20 a year, a house and garden, a piece of land for potatoes, the milk of a cow, and the feeding of a pig, which were to run on a neighboring field; and, under this agreement, the pauper served, and had the exclusive occupation of the house for himself and family, the house being about 100 yards from the house of S., and being necessary for the performance of his service; and if he had not had it he would have had more wages. It was held that this was not such "a coming to settle" on a tenement as conferred a settlement. King v. Kelstern (1816) 5 Maule & S. 136. Lord Ellenborough, Ch. J., said: "I own I have no doubt in this case that the only occupation of this house was the occupation of the master, and not of the servant whom the master placed there for the mutual convenience of both parties. The master's house was about 100 yards distant from it, and the servant had it thrown into the bargain in cumulation of wages. This may be compared to rooms allotted to a coachman over the stables of his master, or to an outhouse, where, being a family man, it is more convenient that he should be out of the dwelling house; but that is nothing more than the occupation of the master. So here I cannot see that the occupation goes farther."

The owner of a mansion house and gardens agreed with a pauper to take care of the gardens, and for doing so he was to take the issues and profits of part thereof, and to live in a cottage contiguous thereto, belonging to his master; and he was to continue on the premises for a year, unless some other person before that time should occupy the mansion, in which case the gardens were to be delivered up. The pauper continued in the occupation of the gardens on these terms for more than a year, the produce being worth to him £70 per annum. It was held that, the pauper being only a servant, and the residence not being his own, he did not "come to settle" within the meaning of the statute. King v. Shipdham (1823) 3 Dowl. & R. 384.

A pauper was hired for a year as a shepherd. He was to have a house and garden, rent free, 7s. a week, and the going of thirty sheep with his master's flock, as wages. He served for two years at those wages in the parish of I., during all which time the sheep went on his master's farm, the whole of which was situated in that parish. The feed of the sheep was worth £16 per annum. It was held that this did not confer a settlement, it not being any part of the bargain that the sheep should be pasture-fed. King v. Bardwell (1823) 2 Barn. & C. 161. Bayley, J., said that "the house and garden, being merely for the more convenient performance of the pauper's service as shepherd, must be laid out of consideration; he did not occupy them as a tenant, but as a servant. . . . Here the pauper had no residence but in the character of a servant; the house continued the master's, and the pauper was, with respect to this point, in the same situation as if he had lived in a room in his master's house."

In King v. Snape (1837) 6 Ad. & El. 278, where a man was hired to take charge of stock, the agreement being that he should have 12s. a week wages, and the keep of a cow, and that he was to occupy a house on the marshes, rent free, the court refused to disturb a finding of the sessions that his occupation was in the character of servant, and connected with the hiring.

In the Petersfield Case (1874) 2 O'M. & H. 97, 1 Rogers on Elections, 74 (decided under the reform act of 1867; see III., *supra*), Mellor, J., held that the relation of landlord and tenant had been created, where the evidence was that the voter was paid 16s. a week wages, from which 1s. a week was deducted for rent of the house he lived in; that his duty was to look after the cattle on the farm; and that he could not do this unless he lived in the house. It is not surprising to read in the report that the learned judge afterwards admitted that he was a little hasty in rendering this decision. Nor do the authorities entirely bear him out in his general statement of the law, which was as follows: "If the bargain is this: 'You still have so much a week and the use of a house,'—it will be inferred that it is in the occupation of the employer, and that it is not an independent occupation. Such is the position of a gamekeeper. On the other hand, the occupation is not auxiliary to the service where an employer requires that all persons who get work from him shall occupy one of the houses attached to his establishment." This statement clashes with the language of Cresswell, J., and Crowder, J., in Clark v. St. Mary (1856) 1 C. B. N. S. 31, 26 L. J. C. P. N. S. 12, as quoted in IV., *supra*.

In Young v. Paton (1808; Sc. Ct. of Sess.) Hume, 582, a servant on monthly wages, who was allowed to occupy a house belonging to his master, the amount of the rent being deducted from his wages, was held not to be entitled to the notice required in the case of ordinary tenants.

In an action for trespass in forcibly removing the plaintiff and his household effects from his employer's premises, after he had been discharged from the service, a plea was held good on demurrer, where it alleged that the plaintiff was employed by defendant as a farm hand, and, as part of his compensation, was given the occu-

pancy of a house and garden; and that possession of the premises was held by the plaintiff as part of his employment, and was connected with his employment. Heffelfinger v. Fulton (1900) 25 Ind. App. 33, 56 N. E. 688.

In Bowman v. Bradley (1892) 151 Pa. 351, 17 L.R.A. 213, 24 Atl. 1062, where it was held that no trespass was committed by the employer in ejecting the employee, the facts were mainly undisputed, and showed that the defendant owned a farm of 29 acres, and that about 4 or 5 acres of this were occupied by a mill and pond operated by the owner. To care for the residue and the stock upon it he hired the plaintiff and his family. For the labor of himself, his wife, and his son, the plaintiff was to receive $1 per day and the use of a house upon the premises, to be occupied by himself and family. The only fact in dispute was the duration of the contract. The plaintiff alleged it was to continue for one year. The defendant asserted that it was terminable at his pleasure, and that he said to the plaintiff: "I will try you, and on your terms; and if you don't suit me I will discharge you and expect you to leave the premises on sight." The court, after remarking that the true version was a question of fact for the jury, and that the defendant or the plaintiff would be entitled to a verdict, according as they found that the contract could be terminated without notice, or was intended to subsist for a year, unless the defendant could show a sufficient reason for terminating it sooner, proceeded thus: "The first question . . . that presented itself on the trial was over the nature and extent of Bowman's right to the house from which he was ousted by the defendant. Was that right an incident of the hiring and dependent on the continuance of the relation of employer and employee, or had it an independent, separate existence, so that he was to be treated as a tenant for years, with a right to remain in possession for one whole year whether he remained in the employment of the owner or not? . . . The subject of this contract was labor. Labor was what Bradley needed and undertook to pay for. It was what Bowman offered to furnish him at an agreed price. The labor was to be performed upon the land in its cultivation, in the care of the cows, and the delivery of the milk. As Bowman was not a cropper, or a tenant paying rent, his possession of the land and the cows and the implements of farm labor was the possession of his employer. The barn was used to stable the cattle and store their feed. The house was a convenient place for the residence of the laborer. The house, the barn, the land, the cattle, the farming tools, were turned over into the custody of the man who had been hired to care for the property; but he had no hostile possession, no independent right to possession. His possession was that of the owner whom he represented, and for whom he labored for hire. This is not denied as to the farm, the barn, the stock, or the tools; but an attempt is made to distinguish between the house and everything else that came into the possession of the employee in pursuance of the contract of hiring. There is no solid ground on which such a distinction can rest. If the possession of the house be regarded as an incident of the hiring, the incident must fall with the principal."

A contract was entered into between H., the owner of a farm, and one M., by which the latter agreed that he and his wife should work for H. one year,—M. to labor on the farm, and his wife to perform the duties of housekeeper. M. with his wife accordingly moved into a house on the farm, carrying with them their household furniture, and entered upon the performance of the contract. Subsequently H., having become dissatisfied with M.'s conduct, ordered him to quit, and leave the house, which he declined to do; whereupon H. entered the house and put the furniture out of it. It was held, in trespass by M. against H., that the contract between them did not create the relation of landlord and tenant, but only that of master and servant; and that, consequently, the remedy, if any, was by an action of assumpsit for a breach of the contract. Haywood v. Miller (1842) 3 Hill, 90.

On the authority of this case, it was held that the plaintiff occupied as servant merely, where he had agreed with defendant to work for him as laborer, and he was to have, toward his wages, the use of a cow and pasture for her, the use of a house and other property and privileges, and $20 per month, as long as they could agree. Doyle v. Gibbs (1871) 6 Lans. 180 (replevin suit for goods removed by employer on resuming possession).

Where a farmer employs a laborer for a year, at a stipulated price per month, and agrees to furnish him a house at $2 per month, and keep his cow for $1 per month, payable monthly, the occupation of the laborer is merely incident to the contract of hiring, and, so soon as he fails to labor, his tenancy is determined. McGee v. Gibson (1840) 1 B. Mon. 105 (action of trespass not maintainable against landlord for entering without notice).

Where one person hired another to work for him one year on his farm, for the sum of $270, and agreed to furnish him houseroom for himself and family, and a garden and pasture for a cow, it was held that the relation created was simply that of master and servant, the houseroom, garden, and pasture being a portion of the consideration of the contract. People ex rel. Hubbard v. Annis (1866) 45 Barb. 304 (employer held not to be entitled to assert his right to possession by means of summary statutory proceedings applicable to landlords only).

On the ground that a contract under which one person agreed to do certain work on the vineyard of another, in the way of caring for, pruning, trellising, staking, and tying up the vines, receiving a reasonable

compensation therefor, in pursuance of which he was placed in possession, did not create the relation of landlord and tenant, but was one for employment, the court refused to grant an injunction restraining a contractor from entering the premises to perform certain work for the owner. Ferris v. Hoglan (1898) 121 Ala. 240, 25 So. 834.

A, being owner of a farm, let it for seven years to B; and by a written agreement of the same date it was agreed that A should manage the farm for B, B allowing A 12 s. a week, and "allowing him and his family to reside in, and have the use of, the dwelling house and furniture therein, free of rent;" and this agreement was to be put an end to by three months' notice or three months' wages. It was held that this agreement did not require a lease stamp, as it did not contain a demise of the house, the occupation of it being a mere remuneration for services. Doe ex dem. Hughes v. Derry (1840) 9 Car. & P. 494. Parke, B., was of opinion that the words "allowing," etc., might import a lease; but that, taking the whole of the instrument together, they must be taken to indicate a reward for services.

See also cases cited in VII., *infra*.

(b) Clerks.

R., a brewer, engaged L. as clerk, at a yearly salary, and agreed to permit him to occupy a certain house as his residence, free from rent, rates, and taxes, another clerk being also boarded and lodged in the same house if R. should require it, but paying for his board; and such salary and house accommodation were to be in full satisfaction to L. for all perquisities, and for his expenses in the service. Either party might give the other three months' notice of determining the service. L. occupied the house for some time, and then, his health being impaired, he removed to another. L. agreed with the landlord for this house, but the latter considered R. as his tenant. Queen v. Lynn (1838) 8 Ad. & El. 379 (liability to poor rates). Lord Denman, Ch. J., said: "I think that the appellant was an independent holder of the premises. He took them, and agreed to pay the rent; and, by the universal consent of those interested, was assessed to the rates and window duty. He was the party liable to a distress. The cases which have been cited do not come in question. It would be strong, however, to say that an allowance by the master, as in this case, in part payment for services, made the occupation of a house auxiliary to the service. Any house he might occupy while he was servant might be so in some sense: but the cases where a party has been held to occupy such premises as a butler's pantry or a coach house in the character of servant are very different from this."

In King v. Lower Heyford (1830) 1 Barn. & Ad. 75, where an attorney, having a cottage and land near his residence, allowed his clerk to occupy them, that he might the more conveniently attend to the business; and suffered him to hold them rent free, as an augmentation of his salary, it was observed by Bayley, J., in the course of his judgment, that, if it had been necessary to decide the point, there would have been no difficulty in holding that the occupation was that of a tenant, as it was unconnected with, and wholly independent of, the service. But the claim was founded on a statute (3 Wm. & Mary, chap. 11, § 6) under which a settlement could be gained by paying rates for a tenement worth £10 a year; and such a claim was not defeasible by proof that the person in question had occupied as a servant, and not as a tenant.

In an Irish case where a bookkeeper in a distillery, claiming the right to vote as a "householder" under the first English reform act (see III., *supra*), was shown to have been given the privilege of occupying an entire house in lieu of a part of his salary, eleven judges held that he was not qualified for the franchise, although it was admitted that the house was not essential to the discharge of his duties. But in this case there were the other significant elements, *viz.*, that the employer kept the house in repair, and paid the taxes; that the house communicated with the distillery yard; and that his possession was entirely dependent upon his remaining in the employment. Ferar's Case (1836) Alcock, R. C. R. 248; Rogers, Elections, 81.

(c) Managers of a business.

The provisions of an agreement with reference to which the defendant employer was held not to be guilty of trespass for entering without giving the plaintiff employee a month's notice were as follows: The plaintiff was to carry on the business of selling beer for the defendant, in the place and stead of one U., and in the same manner and with and upon the same privileges and terms as he had theretofore done, until the agreement should be determined by the notice provided for; that all the beer to be sold and consumed on the premises should be had and taken by the plaintiff from the defendant, and that the plaintiff should not part with the trade or the occupation of the premises without the license of the defendant; that, whenever either party should be desirous of determining the agreement, the plaintiff should, on receiving a month's notice in writing, without being paid any sum of money or consideration, quit and deliver up the trade and possession of the premises; and that the plaintiff should be at liberty to leave the trade and quit the occupation of the premises on giving one month's notice in writing. It was held that the agreement did not create any tenancy between the plaintiff and the defendant, and that the occupation of the plaintiff was as servant to the defendant. Mayhew v. Suttle (1854; Exch. Ch.) 4 El. & Bl. 347, 1 Jur. N. S. 303, 24 L. J. Q. B. N. S. 54. Wightman, J., said: "It was properly urged, in answer to this view of the case [*i. e.*, that no ten-

ancy was created], that the stipulations that the plaintiff should take beer from no one else, and that he should not part with the trade or business or occupation of the premises without license in writing, are more consistent with an independent occupation by the plaintiff and with his carrying on the business on his own account; but they are not inconsistent with the business being that of the defendant as expressly stated again and again in the agreement. And the defendant may well have chosen to make it a part of the agreement that the plaintiff should not sell other parties' beer there, and should not give up the actual occupation, which no doubt he had, although that occupation was a servant, and in law the possession was the master's. So, also, the fact of the plaintiff's having to pay the defendant for the beer, as stated in the replication, is not inconsistent with the fact that the possession was really that of the defendant as master. The beer is stated to be the defendant's; and it is quite consistent with the defendant's case that the plaintiff may have had to pay higher prices than what beer is sold for to be sold again at retail. No doubt the prices were to be paid over to the defendant; and the stipulation that he should receive more for the sale on his premises than the wholesale price seems as if he was to receive something as being himself the retailer on his premises, allowing the plaintiff for his services the rest of the excess of the retail over the wholesale price. At all events we must take the sale as stated in the agreement to be for and on account of the defendant." With regard to the effect of the provision with reference to the abandonment of the contract by mutual consent, the learned judge said: "This provision seems well applicable to, and at all events not inconsistent with, the relation of these parties being that of employer and employed. The giving up the occupation is treated as ancillary to and connected with the putting an end to the plaintiff's carrying on and conducting the trade. The notice may be given at any time, and not at the end of each month from the commencement, and it was only proper, where the relation was not that of menial servant, and where, therefore, there might be some doubt whether the employment might not be a yearly one, to engage that the relation of the parties may be put an end to by a month's notice. It was well remarked that, supposing there was misconduct on the part of the plaintiff, the defendant might have terminated the contract at once, and on such determination the plaintiff's occupation could not have been intended to be allowed to subsist. It should be observed that either party will have a remedy on the contract if it be broken by the other determining the engagement without a notice and without reasonable cause."

Where a fishmonger engaged a man to superintend his business in consideration of a salary, a percentage of the profits, and lodging on the premises where the business was carried on, the agreement being terminable on giving a certain specified notice, if the employee failed to give satisfaction, it was held that he had been duly discharged in accordance with the terms of the contract, and that, as he had no right to remain on the premises after being discharged, he could not maintain an action against the employer for removing him therefrom by force. McAlister v. Ogle (1856) 1 Ir. Jur. N. S. 313.

See also White v. Bayley (1861) 10 C. B. N. S. 227, 7 Jur. N. S. 948, 30 L. J. C. P. N. S. 253, VIII., *infra;* Collison v. Warren (1898; C. A.) 17 Times L. R. 362, III., *supra*, and VI., *infra*.

(d) Supervising and other employees on large estates.

A pauper was hired as bailiff to P., who held a farm, under an agreement that he was to have weekly wages, etc., and his master to find him a house, and either to furnish him with two cows, or the pauper was to be at liberty to hire two and feed them on the farm, and he served three years under the agreement, and lived with his family in his master's house, occupying the kitchen and two rooms, and hired two cows, which fed during the summer in the pastures of his master. It was held that, by the feeding of the cows, which was above the yearly value of £10, the pauper acquired a settlement. King v. Minster (1815) 3 Maule & S. 276. Lord Ellenborough distinguished the cases in which the apartments occupied by a servant in his master's house are only "an appendage to the service" allotted to him "for the more convenient performance of his service, which is the principal thing." Le Blanc, J., considered that the pauper had a "distinct interest in the pasturage of the two cows, unconnected with his service to the master's dairy." Bayley, J., thought the case was merely "that of a servant who stipulated for a profit out of land of more than that yearly value" which conferred a settlement. In King v. Cheshunt (1818) 1 Barn. & Ald. 473, Bayley, J., said that this case only decided that "the occupation of a tenement which was wholly unconnected with the service would confer a settlement; but that the occupation of one connected with the service would not."

A servant put into the occupation of a cottage, with less wages on that account, occupies it in the character of a servant, and his master may properly declare on such occupation as his own, in an action brought for a disturbance of a right of way to the cottage. The character of the occupation is not affected by the fact that the cottage is divided into two parts, only one of which is occupied by the servant, the other being in the possession of a tenant paying rent. Bertie v. Beaumont (1812) 16 East, 33.

Where a person is employed by the owner of land to superintend the land and look after the business of the owner, and while

in such employment he occupies a house situated upon said land, his occupancy of the house does not create the relation of landlord and tenant between him and the owner, so as to preclude him from acquiring an adverse title to the property. Davis v. Williams (1900) 130 Ala. 530, 54 L.R.A. 749, 89 Am. St. Rep. 55, 30 So. 488.

In Hector v. Martin (1866) 5 Sc. Sess. Cas. 3d series, 68, where it was held that the factor of a landed proprietor was entitled to the franchise, under the first English reform act (see III., *supra*), as tenant of a house which he had the right to occupy as a part of the remuneration for his services, and from which, as his hiring was a yearly one, he could not be removed except at the end of each year. The case was regarded as being distinguishable from those in which a servant holds house accommodation merely at the will of his employer, and can be turned out at any moment. It was considered that the court was not entitled to assume the defeasibility of the right of occupation with reference to the contingency of the factor's being guilty of misconduct which would warrant his dismissal in the middle of a term. But this decision is in conflict with those cited at the beginning of this subdivision, and inconsistent with the doctrine applied in Scotland itself, as well as in England and America (see III., *supra*), that the right of a servant to reside on premises occupied by him as a servant ceases when he is discharged, whether rightfully or wrongfully.

In view of this doctrine, there is no reason why the fact that a servant is engaged for a definite period should be treated as an element in determining the character of the occupancy.

A man who, while he was employed as a servant of a nobleman, received, as part of his salary, the privilege of occupying a house free of taxes, was held not to be qualified to vote as a "householder" in a borough. Cirencester's Case (1792) 2 Fraser, Election Cases, 453.

In State v. Curtis (1839) 20 N. C. 363 (4 Dev. & B. L. 222), it was declared by the court, *arguendo*, to be clear law and universally received, that a house on a plantation which is occupied by the overseer is as much in the possession of the owner as the plantation itself.

In King v. Stock (1810) 2 Taunt. 339. Mansfield, Ch. J., remarked *arguendo*: "Many servants have houses given them to live in as porters at park gates. If a master turns away his servant, does it follow that he cannot evict him till the end of the year?"

As to the occupation of a ranger of a royal park, see VI., *infra*.

(e) Ministers of religious bodies.

Where a rector appoints a curate, and agrees that, as a return for his services, and instead of a salary, the curate shall be put in possession of the glebe house and lands, to be used for his own benefit, the salary which would have been given to the curate if these privileges had not been conferred is in the nature of rent for the glebe, and the agreement creates a tenancy between the parties, the estate being one which is of an uncertain duration, and which may be determined at a time of which the curate has not had notice. Upon the death of his employer, therefore, the curate is, as against the incoming rector, entitled to the emblements. O'Connor v. Tyndall (1836) 2 Jones (Ir.) 20.

A curate licensed by the bishop at a yearly salary, according to the act of 57 Geo. III. chap. 99, resided in the rectory house, which was assigned to him pursuant to that act, and was above the value of £10 a year, for more than forty days before the passing of the act of 59 Geo. III. chap. 50. It was held that this was a coming to settle, within the statute 13 & 14 Car. II. chap. 12, and that a settlement was gained thereby. King v. St. Mary Newington (1833) 5 Barn. & Ad. 540. Parke, J., said: "It is not clear that the curate is not tenant to the rector; but it is not necessary for the purpose of gaining a settlement that he should be so. It is sufficient if he comes to occupy as having an interest of his own, and not as servant to another."

A Wesleyan minister was held not to be the tenant of a house assigned to him as a residence by the circuit stewards, part of whose duties consisted of hiring a house for the accommodation of the minister. Part of the evidence was to the effect that, if the rent and rates due for such a house were paid by the minister, the amount was refunded to him by the circuit stewards. He was deemed to be very much in the position of a servant to the stewards, who could remove him from the house at their pleasure. The legal relation of the parties was held not to be changed by the fact that it was the custom of the church to appoint their ministers to officiate in a given place for one year certain. Such a custom created no obligation. Queen v. Tiverton (1861) 30 L. J. Mag. Cas. N. S. 79.

A minister of a nonconformist congregation, placed in the possession of a chapel and dwelling house by certain persons, in whom the legal estate is vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those trustees; and his tenancy is determined *instanter* by a demand of possession. He is not entitled *de jure*, before the determination of his tenancy, to have a reasonable time allowed him for the removal of his furniture. Semble, that he will not be a trespasser if he enters afterwards to remove his goods, and continues a reasonable time for that purpose. Doe ex dem. Nicholl v. M'Kaeg (1830) 10 Barn. & C. 721.

Where a religious society employs a pastor under an agreement by which he is to receive for his services as such a certain cash salary and the use of a parsonage as a residence, the inference is that the occu-

pancy, being connected with his services as pastor, does not create the relation of landlord and tenant. East Norway Lake N. E. Lutheran Church v. Froislie (1887) 37 Minn. 447, 35 N. W. 260 (holding that the agreement was personal to himself, and that his personal representative had no right to the possession of the parsonage after his decease).

A minister who occupies a house merely by virtue of his office is not entitled, when he ceases to hold his position, to receive the statutory notice to quit, without which a landlord cannot resume possession of rented premises. Bigelow v. Norton (1848) 3 N. S. 283.

(f) Professors in colleges and masters in schools.

Where one who had leased certain college premises with the intention of conducting the institution as its president employed a person as one of the professors, under an agreement by which he was to have a fixed salary with the privilege of occupying such rooms in the college building as would accommodate himself and family, and there was evidence tending to show that the president retained a general control over the apartments so occupied, and had the right to enter them at any time for disciplinary purposes, a jury is warranted in finding that the professor was not a subtenant, and that his property was not liable to distress. Waller v. Morgan (1857) 18 B. Mon. 136, distinguishing McGee v. Gibson (1840) 1 B. Mon. 105, on the ground that no attempt was made to show that the plaintiff had reserved a right of general control over the house.

Where the schoolmaster of a burgh had been deposed for incompetency under a provision of the education act, it was held that the school board was entitled to have a summary warrant against him, to remove him from a dwelling house under the same roof as the class rooms. The court did not decide what would have been the rights of the board if the house had been quite separate from the class rooms. Whyte v. Haddington School Board (1874) 1 Sc. Sess. Cas. 4th series, 1124.

The occupancy of a part of a schoolhouse as a residence by a teacher, for the purpose of enabling him the better to perform his contract to teach, does not make him a tenant of the school district employing him; but his occupation is that of the district. School Dist. No. 11 v. Batsche (1895) 106 Mich. 330, 29 L.R.A. 576, 64 N. W. 196 (action to recover possession of the premises).

(g) Persons in naval and military establishments.

In a case involving the right of a claimant to vote under the reform act of 1867 (see III., *supra*), it appeared that he was a sergeant on the permanent staff of the militia, and as such occupied a house close to the premises in which the arms, accoutrements, etc., of the corps were stored, which was built expressly for the accommodation of the men employed in looking after the stores, under the provisions of the militia act of 1854. The house was assigned to him by the commanding officer as a place to live in; if he should leave it without the permission of his officer, he would be guilty of a breach of discipline for which he would probably be dismissed from the service; and he was liable to be turned out at any time He had 2s. 4d. per week deducted out of his pay, as occupier of the house, but he would not receive the 2s. 4d. extra if he resided elsewhere. He could perform the duties required of him equally well if he were living elsewhere, which he might do with his officer's permission. It was held that the sergeant did not occupy the premises as tenant, within the meaning of 30 & 31 Vict. chap. 102, § 3. Fox v. Dalby (1874) L. R. 10 C. P. 285, following Dobson v. Jones (1843) 5 Mann. & G. 113, *infra*. The ground of the decision was that, as the sergeant was required by his commanding officer to reside in the house, there was a compulsory occupation for the purpose of performing the duties assigned to him. See the extracts from the opinions of Coleridge, Ch. J., and Brett, J., in IV., *supra*.

A pauper employed as a laborer by the board of ordnance, having previously occupied a house at an annual rent of £7, which was then purchased by the board, still continued to reside in part of the premises at a weekly rent of 2s., which was deducted out of his wages. During such last occupation he also occupied a shop (the shop and house together being of the annual value of £10), and, upon his dismissal from his employment, he gave up possession of the house as required. It was held that his last occupation of the house was not as tenant, but as servant, and that no settlement was thereby gained. King v. Cheshunt (1818) 1 Barn. & Ald. 473, Lord Ellenborough, Ch. J., said: "In this case it seems to me that the party occupied this house as a servant only, and not in the character of a tenant. It is like the case of a coachman who frequently occupies a room over the stables; but such occupation is not within the meaning of 13 & 14 Car. II. The pauper here was devested of the tenement as soon as his services terminated. He quitted the possession reluctantly, and was succeeded by the person who succeeded him in his employment under the board of ordnance. All this clearly shows that he was only entitled to hold it during and for the more convenient performance of his service."

In a case where the question was whether the master rope maker in a royal dockyard "occupied as owner or tenant," so as to be entitled to a vote under the first reform act (see III., *supra*), it was proved that he had been assigned a house in the dockyard for his residence, of which he had the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes. The

house was stated in the case to belong to the lords of the admiralty. If A. had not had it, he would have had an allowance for a house in addition to his salary. It was held that A. occupied the house as tenant. A. was rated to the poor rate as occupier. The rates were paid by the paymaster general, also in part remuneration for A.'s services. If he had paid the rates the admiralty would have repaid him. It was held that, as the payment was of a rate for which A. was liable, and as it was made on his account, and he gave value for it, there was a sufficient payment of rates by him within the same subdivision. Hughes v. Chatham (1843) 5 Mann. & G. 54. Tindal, Ch. J., said: "It may be that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not permitted to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy in the performance of his contract to serve his master. The settlement cases, cited in argument, established and proceeded on this distinction. We think it applicable to the present question; and, as there is nothing in the facts stated to show that the claimant was required to occupy the house for the performance of his services, or did occupy it in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services; and, as the case expressly finds that he had the house as part remuneration for his services,—we cannot say that the conclusion at which the revising barrister has arrived is wrong. The case, indeed, stated that the claimant was master rope maker, and, as such, had the house as his residence; but that expression is equally applicable, whether he was made tenant of the house in payment of his services as master rope maker, or occupied it for the purpose of performing them."

In another case, "A., the surgeon of Greenwich hospital, occupied, as such, a house at the infirmary in the hospital, which was appropriated to the surgeon. Repairs were done by the commissioners of the hospital. The surgeons to the hospital, when not provided with a residence within the hospital, were allowed a weekly sum as lodging money. By the regulations of the commissioners of the hospital no officer of the hospital is allowed to make any exchange of apartments. Held, that A. did not occupy the house 'as tenant,' inasmuch as he was required to occupy the same with a view to the more efficient performance of his duties as surgeon." Dobson v. Jones (1843) 5 Mann. & G. 112. Referring to the judgment in the Hughes Case, *supra*, Tindal, Ch. J., said: "We stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made with a view, not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service required from such officer or servant, upon the same principle as the coachman who is placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at a park gate, cannot be considered to occupy as tenants, but as servants merely, whose possession and occupation is strictly and properly that of their masters."

See also VI., *infra*.

(h) Civil servants.

See cases cited in VI., *infra*.

(i) Employees in mills, factories, etc.

A pauper, whose children were engaged to work for three years at a mill, removed with his family to a cottage rented by the mill owner, C., for the convenience of families so employed. The bargain between him and C. was, that a stated weekly payment for the use of the cottage should be deducted from the children's wages. The pauper, who was not himself in the service of C., continued to occupy the cottage for sixteen years, during all which time, and after he quitted it, some one or more of his children continued to work at the mill. He quitted without regular notice, in consequence of the sale of the cottage. It was held that the pauper's occupation was as tenant, and not as servant, and was sufficient to gain a settlement. Queen v. Bishopton (1839) 9 Ad. & El. 824. Littledale, J., said: "I think the pauper gained a settlement in Bishopton. In the cases cited the other way there was the relation of master and servant between the owner of the tenement and the occupier. Here the pauper engages for the service of his children, and arranges with Mrs. Coat Coates, for the residence of himself and his family in the cottage. This is clearly a renting of the cottage by him. The renting was indeed connected with the service of the children; for the cottage would probably not have been let to the pauper, or hired by him, but for the service of the children; but he agrees to pay rent for it. This imports the relation of landlord and tenant, and there is nothing in the case to rebut the presumption." Williams, J., said: "In the cases referred to, in which the occupation has been held insufficient, the residence was identical with the service, or was incidental to and inseparable from it. Here there was a renting by one who was not servant; and the deduction from the wages of his children was only a mode of paying the rent."

In a case where the question was whether the voter was the "occupier of a building of the value of £10 yearly," within the meaning of the first reform act (see III., *supra*), it appeared that a factory, consisting of four stories, was let out in separate rooms to a number of persons for cotton spinning, at different rents, according to the size of each room. Each tenant had his own ma-

chine worked by steam power supplied by an engine which belonged to and was worked at the expense of the landlord; it being part of each contract that the landlord should supply such power. Each tenant had the exclusive use of his room and the key to the door thereof. The approach to the rooms was, in some cases, by a common staircase leading from the entrance to the factory (to which there was a door that was never fastened), in others by separate staircases outside of the building, and in others by doors opening into the yard. It was held that each of these rooms constituted a "building," and that there was sufficient occupation in each tenant. Wright v. Stockport (1843; C. P.) 1 Barr & Am. App. & El. Cas. 39; Queen v. South Kilvington (1842) 3 Gale & D. 161, note.

In Kerrains v. People (1875) 60 N. Y. 221, 19 Am. Rep. 558, Affirming (1873) 1 Thomp. & C. 333, so far as that decision related to the character of the occupation, but reversing it on another ground, the prisoner, a workman, was indicted for the use of a deadly weapon in resisting an ejectment by his employer, and the defense was that a tenancy was constituted by the parol contract between them, *viz.*, that the employer should pay the workman for his services 13s. a day, and give him the use of a house to live in throughout the year, or while they agreed; the consequence of this view of their relation being that the workman, in holding over, would be a tenant at will, and that the employer would not be justified in entering with strong hand. The court said: "Each party relied upon the terms of the contract, with only the additional facts that the house was a part of the mill property, and had been occupied for several years previously by the prisoner while engaged as a laborer in the mill. There was no request to submit the facts to the jury to determine whether the house was occupied to enable the prisoner the better to perform the service in which he was engaged,—or, in other words, whether it was not occupied as an appendage to the mill, and really for the benefit of the owner; nor was there any evidence of an allowance for rent; but it was left to the court, upon the contract and facts before stated, to be determined as a question of law, and, in my judgment, the court decided correctly, that the defendant occupied as a servant, and not as a tenant. The inference from these facts is reasonable, if not irresistible, in the absence of any provision for an allowance for rent, that the house was intended to be occupied by an employee for the benefit of the owner in carrying on the mill. The case thus presented is analogous to that of a person employing a coachman or gardener, and allowing or requiring him to reside in a house provided for that purpose on the premises; or a farmer who hires a laborer for wages, to work his farm and live in a house upon the same. In these cases the character of the holding is clearly indicated by the mere statement of facts. It is not impossible that other facts may exist to strengthen or weaken the inference that the prisoner occupied as a servant, and not as a tenant; but, from the facts proved, there was no error in holding that he occupied as a servant."

(j) Employees working in mines.

In a case involving liability under the English poor-rate assessment act of 1869. "S. was a collier, and resided in a house belonging to his employers, for which he paid no rent; he was not entitled to any notice to quit, and the occupation of the house would cease at the time when his service ceased. His employers had several houses, and they filled these up with their workmen in their discretion, giving preference to married men. A workman could not go into a house without the owner's concurrence. Some of the workmen were single men, and no house was given to them; these got the same wages as all other workmen, but no allowance for rent. If there were not sufficient houses an allowance was made to the married men to assist them in paying their rent. If a house was vacant the owner would call upon a married man to go into it; if he did not go his allowance would cease. It was not absolutely necessary for a workman to live in one of the houses to perform his work." Smith v. Seghill (1875) L. R. 10 Q. B. 422. Quain, J., said: "The governing facts of the case were these: The men were paid, not day wages, but by piecework, according to the quantity of coal hewn in a certain number of hours; therefore the occupation of the houses had nothing to do with their wages, nor was it in any way taken into consideration in determining the amount of wages they earned. But these houses were offered as an inducement to the married men to live near the works; and an important fact is that the men were not required to keep these houses as a condition of their service; they were permitted to occupy them as married men, but it was no necessary part of the service that they should live in the houses. That appears to me to be a material circumstance, and plainly distinguishes the case from that of the occupation by a gardener or a coachman, or the surgeon's residence in Greenwich hospital. Hughes v. Chatham (1843) 5 Mann. & G. 54." Mellor, J., said: "It appears that, if there was no house for a married workman, he had an allowance for house rent, but if there was a house empty, and the workman would not come into it, he had no allowance. An inference might possibly be drawn from this, that, as he was bound to reside if a house was offered him, upon pain of forfeiting his allowance, he resided in it upon compulsion, and therefore his occupation was that of a servant; but I cannot assent to this; and, in my opinion, those workmen who did reside in the houses resided in the character of tenants. The colliery owners desire that the married workmen should reside near the works, but

that does not change the relation between the parties; unless the men are required to live in the houses for the better performance of their duties, it does not convert the occupation of a tenant into that of a servant. The governing principle is that, in order to constitute an occupation as a servant, it must be an occupation ancillary to the performance of the duties which the occupier has engaged to perform. Here the occupation is not connected with the performance of the employment, and the appellants, therefore, occupy as tenants."

For other decisions with regard to similar facts, see VI. *infra*.

(k) Keepers of tollgates.

(l) Persons employed as tenders of canal and lived in the tollhouse, 1s. per week being deducted from his wages by way of rent. His employers having ceased to collect toll at the particular spot, the plaintiff was dismissed from their employ, and received a notice to leave the house, which he promised to do. It was held that the plaintiff was not a tenant of his employers, and therefore that he could not maintain trespass against their agent for pulling down the tollhouse. Hunt v. Colson (1833) 3 Moore & S. 790.

(l) Persons employed as tenders of canal locks.

A servant employed as a locktender, who, as part compensation for his services, is permitted to occupy a dwelling house belonging to his employers, and who, under one of their standing rules, is to leave the house immediately upon his being discharged, is not a tenant at will, and is therefore not entitled to the three months' notice to quit which is prescribed by a statute with regard to such tenants. Morris Canal & Bkg. Co. v. Mitchell (1864) 31 N. J. L. 99.

(m) Persons taking care of premises.

In a case involving the question whether a person occupied as owner or tenant so as to be entitled to vote under the first English reform act (see III., *supra*), A claimed to be registered as the occupier of a house of the requisite yearly value to confer a vote. The revising barrister found that A was the keeper of the guildhall at B; that the house in question was the residence assigned by the corporation to the hall keeper, and in which he was required to reside; and that it was necessary for the due performance of his duties as hall keeper that he should reside there. It was held that this was an occupation as servant to the corporation, and not an occupation as tenant. Clark v. St. Mary (1856) 1 C. B. N. S. 23, 26 L. J. C. P. N. S. 12. Willes, J., said: "I think the proper conclusion from the facts stated is that it was part of the terms of the hall keeper's employment that he should reside in the house in question, and that his occupation was not in the character of tenant."

A person put into a house to take care of it and of other adjoining houses belonging to his employer is deemed to occupy the premises as a servant. Yates v. Chorlton-upon-Medlock-Union (1883) 48 L. T. N. S. 872 (liability to poor rates).

Whether the occupancy was as servant or tenant was held to be a question for the jury where the agreement was that he should take care of certain houses, let, repair, and collect rent, and have the use of a floor in one of them. Jennings v. McCarthy (1891) 40 N. Y. S. R. 678, 16 N. Y. Supp. 161 (right of landlord to resume possession).

Where plaintiff was employed by defendant as a janitress, and received the use of certain rooms as part payment for her services, the relation of master and servant, and not of landlord and tenant, was held to have existed between the parties, and the occupation of the premises was the occupation of a servant. Anderson v. Steinreich (1900; Sup. Ct.) 32 Misc. 680, 66 N. Y. Supp. 498 (damages held to be recoverable for personal injuries caused by the fall of a ceiling in the servant's bedroom).

A person using land as a garden for more than twenty years, under permission from the owner to do so, in order to keep it from trespassers, the owner from time to time coming on the land and giving directions as to cutting of trees, was held not to have got a title, so as to enable him to sue a claimant under the owner for a forcible entry. Allen v. England (1862) 3 Fost. & F. 49 (action for forcible entry), upholding the contention of defendant's counsel that plaintiff's occupation was in fact as bailiff or agent for defendant.

The possession of a man placed on land for the purpose of holding it, and of preventing depredation, is deemed to be the possession of the owner, notwithstanding the fact that he is given the privilege of cultivating a part of the land for his own benefit. The owner, therefore, may maintain an action for trespass on the land. Davis v. Clancy (1826) 3 McCord, L. 422. It was intimated that the part actually cultivated by the caretaker may, under such circumstances, be considered as being in his exclusive possession. This qualification of the decision seems to be of very dubious correctness. It involves the corollary that the caretaker would have been, at the least, a tenant at will as to this portion of the land, a theory which it seems impossible to support by the authorities as they stand.

An action for forcible entry cannot be maintained by a person whom a sheriff, in pursuance of a writ of restitution, has placed in possession as the representative of the party declared to be entitled to restitution. Mitchell v. Davis (1862) 20 Cal. 45, denying that the action could be prosecuted on the theory that an agent or servant having the care of real estate might be considered as a tenant at will of his principal or master.

In a case where the defendant promised the plaintiff that, in consideration of his services as caretaker of a building, he should have the occupation of certain

rooms; and subsequently refused to let him into possession,—the court said that, if there was any contract for the letting of the rooms, the remedy for a breach of it was by an action on the contract, not on an account annexed. Bowen v. South Building (1884) 137 Mass. 274. See also VI., *infra*.

(n) Employees in hotels, etc.

A person engaged himself as waiter at an hotel and had the tap or privilege of selling malt liquors there, and the use of the cellar for holding the liquors, which had a separate entrance and of which he kept the key, and paid for his situation as waiter, and for the tap and cellar, the yearly sum of £60. It was held that this was not such an occupation of the cellar as to confer a settlement. King v. Seacroft (1814) 2 Maule & S. 472. In answer to the contention that the servant should be considered as having rented the cellar during the time he was engaged as waiter, the court said that there did not appear to be any taking of the cellar as a tenant, but that the use of it was only a privilege allowed him in respect of the principal thing, which was the hiring of himself as a waiter.

The employer of a barkeeper who has the privilege of occupying a room on the premises is not liable to an action for forcibly ejecting him after his discharge, if no unnecessary violence is used. DeBriar v. Minturn (1851) 1 Cal. 450.

(o) Stewards of clubs, etc.

In Williams v. Herrick (1849) 5 U. C. Q. B. 613, the court, without expressly deciding the point, inclined to the opinion that the agreement set out in the pleadings was a hiring of the plaintiff as a steward of a certain club, and that the permissive occupation of the rooms mentioned was not as under a demise thereof, but merely as an incident to the situation, the privilege depending upon the continuation of the service, and ceasing therewith.

Where one part of college buildings, the title of which is vested in the trustees, is partly occupied for the purposes of the institution by the students and teachers, and another part by a steward who is not given any lease, his occupation is merely that of a servant. Watson v. McEachin (1855) 47 N. C. (2 Jones, L.) 207 (holding that no indictment lay for expelling the steward).

(p) Domestic servants.

An action of trespass for the removal of goods after the termination of the employment will not lie, where the clear preponderance of the evidence is, that the plaintiff was employed by a number of students, sometimes spoken of as a club in the statement of facts, to act as housekeeper for them, they taking meals on the premises, she superintending the preparation of the same and receiving as her compensation board for herself and daughters, and, if anything was realized over and above the expense of running this boarding house, a small compensation. Mead v. Pollock (1901) 99 Ill. App. 152.

Where the jury found that there was no engagement of any sort for the servant's occupation of the house assigned to him, and that he "merely used the lodging room in his character as servant," the obvious inference was held to be that he was put to lodge in the room at the mere will of his master; that this was for the more convenient performance of the services to be rendered by him as a domestic; and for that reason his possession as servant was just as much the possession of his master as if they had occupied separate rooms under the same roof. State v. Curtis (1839) 20 N. C. 363 (4 Dev. & B. L. 222) (holding that no indictment for forcible entry would lie for excluding the servant from the house after he was dismissed).

(q) Servants of charitable institutions.

See VI., *infra*.

(r) Persons employed to effect sales.

The right to occupy a tenement under a contract by which the tenant is to deliver milk for the landlord at a certain price per week, and have the right "to live in the house," for which $1 a week is to be deducted for rent, terminates when the tenant leaves the landlord's service. Eichengreen v. Appel (1892) 44 Ill. App. 19 (action for trespass in ejecting plaintiff after he has voluntarily left the service held not to be maintainable).

VI. Character of occupation tested with reference to its beneficial or nonbeneficial quality.

The circumstance that the occupation of a servant is beneficial as regards him, or as regards the owner, is sometimes adverted to in cases where the actual ground of the decision that he holds as a servant is that his occupation is, or is not, ancillary to his service in the sense explained in IV. and V., *supra*.

In King v. St. Mary Newington (1833) 5 Barn. & Ad. 540, a case where a tenancy was inferred, it was remarked that the occupation was "independent and for the convenience of the occupier."

In Kerrains v. People (1875) 60 N. Y. 221, 19 Am. Rep. 158, the occupation was described as being "for the benefit of the owner."

In Dobson v. Jones (1843) 5 Mann. & G. 112, the occupation was held to be that of a servant, partly on the ground that it was not "with a view to the remuneration of the occupier."

Such language is readily accounted for by the fact that an occupation which is connected with the service must be one which is principally or wholly for the advantage of the owner, and that an occupation which is disconnected from the service must be one which is principally or wholly for the advantage of the servant. In this point of view, the beneficial or nonbeneficial quality of the occupation is a circumstance of a merely secondary and derivative character. But there is one particular class of cases in which it has been treated as a primary factor for the purpose of differentiation, *viz.*,

those involving the liability of "occupiers" to the poor-rates assessment under 43 Eliz. chap. 2, § 1, and other enactments relating to taxes upon realty. On the one hand, the beneficial character of the occupation has been assigned as the *ratio decidendi* in cases where liability for such taxes has been imposed on persons occupying property belonging to the Crown.

The ranger of a royal park was held to be ratable as such, to the poor for inclosed lands in the park, which he cultivated and which yielded certain profits. Bute v. Grindall (1786) 1 T. R. 338. Lord Mansfield held that it made no difference *quo nomine* the ranger was "occupier,"—whether by gift or wages. He considered the case to be like the earlier one of R. v. Matthews (1777) Cald. 1, where a servant occupying the lodge and 2 acres of land, whether he paid for them by a rent or by service, was equally liable. Buller, J., said: "It is perfectly immaterial what interest the occupier has in the lands; whether he holds as tenant at will, or any other tenure."

The controller of Chelsea college, who resided in the apartments assigned to the incumbent of the office, was held to be assessable for the poor rate in respect to those apartments. Eyre v. Smallpace (1750) cited in 2 Burr. 1059. Commenting on this case in Rex v. St. Luke's Hospital (1760) 2 Burr. 1065, Lord Mansfield remarked that such an officer was not charged as a servant of the institution, or as an inhabitant and occupier of the ordinary rooms and lodgings therein, but as having separate and distinct apartments which were considered as his dwelling house.

Where the sessions had found as a fact that the master gunner at a garrison town was the occupier of the battery house there, which was the property of the Crown, and from whence he was removable at pleasure, it was held that the fact of his being the occupier precluded any other question, and fixed his liability to be rated to the relief of the poor. King v. Hurdis (1789) 3 T. R. 497. "It is not," said Lord Kenyon, "a general position that a servant of the Crown, occupying a house in respect to his office, is not ratable for it; for I was always rated for the house which I had, as master of the rolls, and so are the auditors and tellers of the exchequer. Soldiers, indeed, cannot be said to be the occupiers of their barracks, in the legal signification of the word; they are no more than mere servants." In Holford v. Copeland (1802) 3 Bos. & P. 129, Lord Alvanley remarked that the *ratio decidendi* of this case was that the master gunner occupied the house "as his domestic house for his own convenience."

In Martin v. West Derby Union (1883; C. A.) 52 L. J. Mag. Cas. N. S. 66, a superintendent of police was held to be ratable as a tenant in respect to a house occupied by him at some distance from the police station, although it was shown that it had been specially hired for him, that he was compelled to live in it, and that it was liable to be used for such purposes connected with the police administration as the chief constable might direct, no special part of it, however, being appropriated to this use. It was held, first, that there was a "beneficial occupation" in such a sense as to bring the premises within the statute of Elizabeth, and, secondly, that he was not exempt from liability, as occupying the house as servant of the Crown, an exemption being allowed on this ground only in cases where the building occupied belongs to the Crown, or is occupied by a servant of the Crown for the purposes of the Crown. The authority relied upon as regards the latter point was Gambier v. Lydford (1854) 3 El. & Bl. 346, which decided that persons who are occupied about the business of some public building, and connected with it as officers, but who live in houses outside it and separated from it, are ratable.

In King v. Terrott (1803) 3 East, 506, the court, in summing up the effect of some of the earlier decisions, said: "In these cases each of the persons rated had a degree of personal benefit and accommodation from the property enjoyed by him ultra the mere public use of the thing; and which excess of personal benefit and accommodation ultra the public use may be considered as so much of salary emolument annexed to the office, and enjoyed in respect of it by the officer for the time being."

So, the beneficial character has been assigned as the reason for decision where liability for taxes has been imposed on employees of charitable institutions for whom a house was provided.

A master of a free school appointed by the minister and inhabitants of the parish under a charitable trust whereby a house, garden, etc., were assigned "for the habitation and use of the master and his family freely, without payment of any rent, income, gift, sum of money, or other allowance whatsoever," for the teaching of ten poor boys of the inhabitants, was held to be ratable to the poor for his occupation of the same. King v. Catt (1795) 6 T. R. 332.

On the other hand, these taxes have been held not to be leviable upon persons who have the use of the building or other subject of the rate as mere servants of the Crown, or of any public body, or in any other respect, for the mere exercise of public duty therein, and who derive from such use no emolument in any personal and private respect. King v. Terroth (1803) 3 East, 506, where the court, in summing up the effect of the earlier decisions, said: "In all such cases, the parties having the immediate use of the property merely for such purposes are not ratable because the occupation is throughout that of the public, and of which public occupation the individuals are only the means and instruments."

Stables rented by the colonel of a regiment, by order of the Crown, for the use of the regiment, are not liable to be rated to the relief of the poor. Amherst v. Sommers (1788) 2 T. R. 372.

Servants of the defendant hospital were held not to be ratable for the reason that they did not occupy distinct apartments. Rex v. St. Luke's Hospital (1760) 2 Burr. 1053, contrasting Eyre v. Smallpace (1750) Cited in 2 Burr. 1059, note, *supra*.

A person employed by a philanthropic society to superintend the children at annual wages, under an agreement that she should have a dwelling free from taxes, etc., with certain other perquisites, and who might be dismissed at a minute's warning on receiving three months' wages, was held not to be ratable to the poor as the "occupier" of the house provided by the society, she having no distinct apartments in the house but a bedchamber, and her family not being allowed to live there. King v. Field (1794) 5 T. R. 587. It was considered by Grose, J., that the words of the statute (31 Geo. II. chap. 45) showed that the legislature intended only the beneficial occupiers to be taxed. Buller, J., said: "The true question is, whether or not the appellant be an occupier. It is said she is, for that an occupier is the person in the possession of, and having control over, the house. Then try this case by that definition. If it be sufficient to live in a house, that equally applies to every servant; then, as to the control, the appellant is a mere servant; she was hired as such, and is liable to be dismissed at an hour's notice; for though three months' notice was to be given by either party, the society might have turned out this servant immediately, on giving her three months' wages in advance. The articles of agreement are merely personal, and give the appellant no interest in the house, which was to be applied to certain specific purposes. The society, indeed, agreed to provide her with a dwelling, but that dwelling is a mere lodging. The case states that she has no distinct apartments in the house, but a bedchamber; and, if that were sufficient to constitute her the occupier, every maid servant would be equally the occupier. A person so situated is only a servant, and not an occupier, either in the legal or common acceptance of the word."

The trustees of a meeting house, who made no profit out of it, were held not to be liable for the poor rate, in King v. Woodward, 5 T. R. 79.

A woman servant placed as superintendent in a house appropriated to the charitable purpose of educating poor girls was held not to be ratable as occupier. R. v. Waldo (1777) Cald. 358.

The masters in chancery are not ratable as occupiers of their respective apartments under the paving act, 11 Geo. III. chap. 22. Holford v. Copeland (1802) 3 Bos. & P. 129. In a case arising under an earlier paving act, it was held that the colonel of a regiment, who had rented certain stables for the use of a troop of horses, was not ratable in respect to them, as he had occupied them for public purposes. Eckersall v. Briggs, 4 T. R. 6.

Nonbeneficial occupation is also inferred where a servant is allowed to occupy a house as caretaker, and is ready to leave it at any time if the owner so orders. Yates v. Chorlton-upon-Medlock Union (1883) 48 L. T. N. S. 872.

Residence in a lighthouse by one as servant to the owner, at an annual salary, to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the tollhouse. King v. Tynemouth (1810) 12 East, 46.

The exemption of a public officer who is occupying property of the Crown for the purpose of discharging his public duties extends in respect to such occupation, so far as it is reasonably necessary for the performance of his duties, and no farther. Queen v. Stewart (1857) 8 El. & Bl. 360.

The test of beneficial or nonbeneficial occupation is obviously very similar to that which is employed in the cases where the existence of a tenancy has been deduced from the fact that the privilege of occupation was in lieu of the whole or a part of the servant's compensation. See VIII., *infra*.

The relation between the two tests is sometimes indicated quite distinctly by the language used in cases of the type dealt with in the present section. Thus, in King v. Terroth (1803) 3 East, 506, the court, in summing up the effect of some of the earlier decisions, said: "In these cases each of the persons rated had a degree of personal benefit and accommodation from the property enjoyed by him ultra the mere public use of the thing; and which excess of personal benefit and accommodation ultra the public use may be considered as so much of salary emolument annexed to the office, and enjoyed in respect of it by the officer for the time being."

But the complete identity of the two tests is negatived by the fact that, as will be shown in VIII., *infra*, just referred to, evidence going to show that the privilege of occupation was granted for purposes of remuneration is equally compatible with the theory of occupation as a servant or as a tenant.

VII. Character of occupation to the effect of the arrangement as giving or not giving the servant an estate in the land.

In some cases the character of the occupation has been considered with reference to the question whether the effect of the arrangement was or was not to give the servant a specific interest in the subject of the occupation.

The following cases may be cited as illustrations, more or less distinct, of this mode of viewing the position of the occupant:

In King v. Langriville (1830) 10 Barn. & C. 899, it was laid down that, in order to constitute the species of settlement which was based upon the occupation of a tenant of the yearly value of £10, "it is necessary that the pauper should have an interest in

the subject of the occupation (such subject being of the requisite yearly value), as tenant or occupier: though it is not necessary that he should be under an obligation to pay rent, or that he should have more than an estate at will. King v. Fillongley (1824) 1 T. R. 458." In the same case Tenterden, Ch. J., remarked: "It is essential, whether the subject of occupation be the land itself or a part of its profits, that the pauper should have an interest as tenant or occupier,—a possession by mere license without that interest is not enough. If a person were permitted by the owner of a pasture to feed his cow or sheep upon it for a time without any valuable consideration, and without reference to any contract between them, but by a mere act of charity or favor, no settlement would be gained by such a permissive enjoyment of the produce of the land." It was considered that the fact of the master's having given the servant permission to have the milk of a cow, which was to be pastured on the land, should be regarded as betokening a mere act of kindness or favor of the master, not referable to any contract; and that no interest was thereby acquired by the pauper in the profits of the land.

In King v. South Newton (1830) 10 Barn. & C. 838, where a shepherd was allowed the use of a piece of land while attending to some flocks, Littledale, J., laid it down that a servant could not acquire a settlement by estate unless he was the "substantial owner of the property," and that the arrangement proved did not show the acquisition of such an interest as would give him such a settlement. Lord Tenterden remarked that "all the interest which he took was in his character of servant from year to year." The question whether the occupation was ancillary to the service was not specifically referred to in the judgments, but the applicability of this test was discussed by counsel.

In Lake v. Campbell (1862) 5 L. T. N. S. 582, it was held that a person who was engaged to superintend some operations on an estate at a weekly salary and a house to live in, or so much per annum in lieu of it, acquired no estate in the premises. Neither court nor counsel referred to the question whether the occupation was ancillary to the service.

By one entire contract, a master agreed to give his servant £20 a year, a cottage to live in, and the agistment of one cow for his own services; and the sum of £28 and the agistment of another cow in consideration of his lodging and maintaining in the cottage two of the master's laborers. The annual value of the lands on which the two cows were depastured exceeded £10, but the annual value of land sufficient to depasture only one cow would have been less than £10. It was held that the pauper gained a settlement by the right to agist the two cows. Rex v. Cherry Willingham (1823) 1 Barn. & C. 626. Abbott, Ch. J., remarked that, whether the consideration be paid in money, or by service, or by any other matter beneficial to the party, was immaterial on a question of settlement, provided the yearly value be £10.

In Rex v. Lakenheath (1823) 1 Barn. & C. 531, the fact of a schoolmaster's having underlet a part of the house occupied by him to the parish was held to be conclusive proof that he enjoyed the house as his own, and not as the servant of the lord or the receiver of the manor upon which it was situated.

The six preachers, lay clerks, bell ringers, and other functionaries of the Cathedral of Canterbury, being paid salaries out of the chapter revenues, which were derived wholly or in part from lands and tenements situated in certain parishes, in the same division of the county, and which were vested in the dean and chapter, have no such equitable estate in freehold land as will entitle them to vote for a county. Hall v. Lewis (1861) 11 C. B. N. S. 114, Kay & G. 499, 8 Jur. N. S. 646, 31 L. J. C. P. N. S. 45, 10 Week. Rep. 151, 5 L. T. N. S. 491. Erle, Ch. J., said: "There is a mere agreement to pay them certain stipends at the audit room in the Cathedral precinct. I cannot distinguish between the case of these functionaries and that of any private gentleman's servants. The payment is made out of the general funds of the dean and chapter. There is no vestige of any equitable interest in land."

But if we advert to the fact that all the cases cited might, so far as the facts in evidence were concerned, have been decided with reference to the consideration that the servant's occupation was or was not ancillary to his employment, it would seem to be justifiable to say their actual and essential effect is susceptible of being stated thus: From the circumstance of a servant's having obtained, during the continuance of his service, the right to reside in a house, or to use a piece of land, belonging to his employer, it will be inferred that he has or has not acquired such an interest or estate in the premises themselves, or the things produced thereon, as will invest him with the privileges and subject him to the burdens of a tenant, according as it may appear that he occupied the premises in his own right, or merely for the more convenient performance of his duties.

If the provisions of the agreement were on the whole such as to warrant the inference that the servant occupied the premises in the character of a servant, a stipulation that he should not be obliged to leave the premises unless he had notice to quit at a certain date would not of itself convert his occupation into that of a tenant.

In a settlement case where the finding of the justices that the pauper occupied as servant was approved, Williams, J., remarked that they appeared "to have thought that the stipulation as to notice was an indulgence granted, without any view of conferring such an interest as would make the

pauper a tenant." King v. Snape (1837) 6 Ad. & El. 278.

Nor is the circumstance that the right of occupation terminates with the abrogation of the contract of service, by consent or by the discharge of the servant, deemed to be decisive as to the character of the occupation. Kerrains v. People (1875) 60 N. Y. 221, 19 Am. Rep. 158; People ex rel. Hubbard v. Annis (1866) 45 Barb. 304.

But it is undoubtedly a material element for consideration. See King v. Cheshunt (1818) 1 Barn. & Ald. 473, V., *supra*.

One of the facts which, in a case involving the right of the franchise, was relied upon as tending to show that the employee occupied as servant, was that, if he had ceased to be employed, he would have had to give up the possession of the house at once. Ferar's Case (1836) Alcock R. C. R. 248; Rogers, Elections, 81.

VIII. Character of occupation to the effect that the privilege of occupation represents a certain amount of pecuniary compensation.

From a logical standpoint, the fact that an employee received either a smaller pecuniary compensation than would otherwise have been given, or no pecuniary compensation at all, on account of his having obtained the privilege of occupying the premises in question, is obviously susceptible either of the construction that the arrangement which relieved the employer altogether of the obligation of paying any compensation in money, or diminished to a certain extent the amount payable, was adopted as a convenient mode of discharging the whole or a part of the servant's wages, or of the construction that the sum which would otherwise have been paid as wages was represented by the rent of the premises.

In Bertie v. Beaumont (1812) 16 East, 33, Lord Ellenborough remarked, in the course of his judgment: "If the man had been in the occupation of it before as a tenant paying rent, I should have thought that he still continued to occupy it in the same character, if no new agreement had been entered into in that respect, when he was taken into the plaintiff's employ, and that he was only to pay his rent in service instead of money."

Accordingly we find not only that the courts have explicitly recognized the inconclusive quality of this fact, but also that it is frequently mentioned among the evidential elements, both in cases where the employee was held to have been occupying the premises as a servant, and in cases where his occupation was held to have been that of a tenant.

In a case the facts of which are stated in V., *supra*, it was remarked: "The fact, also, of having a lower salary in consequence of being allowed a house, though not immaterial, is by no means decisive; for such a fact might exist in a case in which the house was occupied for the purpose of the service, and not in the character of tenant. It may well happen that something in the service which renders it less onerous or more pleasant may cause a reduction of the salary, without being a part of the salary itself. A master may give lower wages in consequence of lodging his servants in his house, instead of requiring them to find lodgings out of it, without making them his tenants." Hughes v. Chatham (1843) 5 Mann. & G. 79.

While a deduction from wages of a specified sum for the use of the premises, or the absence of such an arrangement, would be a material circumstance, it would not be in all cases conclusive either way. Kerrains v. People (1875) 60 N. Y. 221, 19 Am. Rep. 158.

In Fox v. Dalby (1874) L. R. 10 C. P. 285, Brett, J., is reported to have said: "The result of those three cases [*i. e.*, of Hughes (1843) 5 Mann. & G. 54, Dobson (1843) 5 Mann. & G. 112, and Clark (1856) 1 C. B. N. S. 23, as stated in V., *supra*] seems to be this, that, where a person situate like the respondent is permitted (allowed if so minded) to occupy premises *by way of reward for his services, or as part payment*, his occupation is that of tenant." This statement, however, appears to be somewhat lacking in precision. By consulting the subdivision specified above, it will be seen that all that is really decided by these cases with regard to the significance of the situation described by the words italicized is that, if a tribunal empowered to draw inferences of fact finds that an employee in that situation occupied the premises as a tenant, a court of review should allow the finding to stand, unless there is evidence which goes conclusively to show that the occupation was ancillary to the service. The real effect of these cases is more correctly indicated by the following passage in a judgment delivered by Cockburn, Ch. J., in a case where it was held that a man who occupies as servant is not a "householder" in the sense in which that term is used in 43 Eliz. chap. 2, § 1: "I think the facts are not sufficiently found, the most essential element in the consideration of that question being omitted, namely, whether this occupation was an occupation for the purpose of the service or not,—whether it was necessary to the service or not. If the occupation of the servant be necessary to the service, then I think his occupation is the occupation of the master, although the remuneration which the servant receives is the less on account of his having the advantage of premises or a house of the master for the purpose of his habitation. On the other hand, if the occupation be not necessary to the service, then the fact that the advantage of the occupation is part of the remuneration for the service will not render that occupation less an occupation *qua* tenant than it would have been if the man had paid rent. It may be that it happens to be convenient both to the master and to the servant that the servant,

requiring some place of habitation, shall, by agreement with the master, instead of receiving so much for his wages, out of which wages he would have to find himself a separate habitation, inhabit some premises of the master as part of the remuneration for his services; but it is only an equivalent for wages. He would be receiving in the one instance the whole amount of his wages, and out of those wages he would have to find himself a habitation, for which he would have to pay rent; in the other he inhabits premises of his master, and, instead of paying the master the rent, the master deducts it from the wages. Although, therefore, the relation of master and servant happens to exist between the parties by a subordinate arrangement, and the servant occupies premises of the master rent free, as part of the wages that he would otherwise receive if he paid the rent, it does not follow, from the relation of master and servant happening to exist between the parties, that the occupation may not be an occupation *qua* tenant, independent of the master. As I said before, the essential element in the determination of the question is, whether or not the servant simply occupies as part remuneration for his services, or whether the occupation is subservient to and necessary to the service." Queen v. Spurrell (1865) L. R. 1 Q. B. 72.

That this element is essentially nondiscriminative in its character is also indicated by the remark of Lord Denman, in Queen v. Lynn (1838) 8 Ad. & El. 379, that "it would be strong, however, to say that an allowance by the master, as in this case, in part payment for services, made the occupation of a house auxiliary to the service."

(a) Occupation as servant inferred.

In White v. Bayley (1861) 10 C. B. N. S. 227, 7 Jur. N. S. 948, 30 L. J. C. P. N. S. 253, it was held that an employee who was allowed, under his agreement, to occupy a building rent free, and to have at the same time the privilege of carrying on an independent business, was liable to be turned out of the premises whenever his employment should come to an end; and that he could not maintain an action of trespass against his employer for breaking and entering the premises. Willes, J., said: "Upon the correct construction of the documents, it appears to me—and on the facts there is no dispute—that no interest in the premises, even to the extent of a tenancy at will, ever did vest in the plaintiff. My reason for thinking so is that, looking at the whole of the arrangement between the parties, it resulted in an agreement that the plaintiff was to give his services to the Swedenborg Society as manager for the purpose of selling the Swedenborg publications. The main and principle of the arrangement was that. And the part upon which my brother Parry relies for the purpose of showing that an interest in the premises was vested in the plaintiff was merely accessory to that arrangement, and part of the machinery for carrying it into effect,—a mere mode, in short, of paying the plaintiff in part for his services as manager. Taking the agreement to have been that the plaintiff should be employed as manager, to be paid a certain salary in moneys numbered, there could have been no doubt whatever that his occupation would have been an occupation merely as a servant of the society, can it make any difference that, as part of the remuneration for his services, he was to have liberty to carry on the retail bookselling business on the premises on his own account. Clearly not. Whether the whole amount of his salary was paid to him in money, or part in money and part in the permission to occupy himself and the premises in the carrying on that limited trade, can, as it seems to me, make no difference in the construction of the contract between the parties." See also the following cases, the effect of which has been stated in V. and VII., *supra:* King v. Kelstern (1816) 5 Maule & S. 136 (part of the proof was that, if the pauper for whom a settlement was claimed had not obtained the privilege of occupying the house, he would have had more wages); King v. South Newton (1830) 10 Barn. & C. 838 (enjoyment of land "in lieu of wages which would otherwise have been given for his service"); Bertie v. Beaumont (1812) 16 East, 33 (servant was allowed to occupy a cottage with less wages on that account); Young v. Paton (1808; Sc. Ct. of Sess.) Hume, 582 (rent deducted from wages); Hunt v. Colson (1833) 3 Moore & S. 790 (certain sum deducted from wages by way of rent); King v. Snape (1837) 6 Ad. & El. 278 (privileges allowed were spoken of as being in part remuneration of the services); Doe ex dem. Hughes v. Derry (1840) 9 Car. & P. 494 (employee allowed to have the use of house free of rent); Dobson v. Jones (1843) 5 Mann. & G. 112 (employee, if he had not lived upon his employer's premises, would have received a certain sum as lodging money); Lake v. Campbell (1862) 5 L. T. N. S. 582 (servant had a house to live in, or so much per annum in lieu of it); Fox v. Dalby (1874) L. R. 10 C. P. 285 (certain sum deducted out of pay of employee, in consideration of the privilege of occupation); Mead v. Pollock (1901) 99 Ill. App. 151 (one of the facts in evidence was that the employee whose right to retain possession of the premises was disputed received as her compensation board for herself and daughter); People ex rel. Hubbard v. Annis (1856) 45 Barb. 304 (houseroom and pasture for cows furnished); Doyle v. Gibbs (1871) 6 Lans. 180 (use of house and other property given as part of remuneration); McGee v. Gibson (1840) 1 B. Mon. 105 (the court remarked that the furnishing of the house was "obviously a mode of paying a part of the wages"); Bowman v. Bradley (1892) 151 Pa. 351, 17 L.R.A. 213, 24 Atl. 1062 (house to live in was furnished as part of the remuneration); Heffelfinger v. Fulton (1900) 25 Ind. App. 33, 56 N. E. 688 (occupation allowed as part of remuner-

ation); Eichengreen v. Appel (1892) 44 Ill. App. 19 (certain sum was deducted from wages as rent of premises); Fleming v. Hill (1876) 10 N. S. 268 (servant occupied a house, rent free, as part of his remuneration).

(b) Occupation as tenant inferred.

In Hughes v. Chatham (1843) 5 Mann. & G. 54 (right of voting involved), one of the elements mentioned was that the employee was "permitted to reside in the house in part remuneration of his services."

In another case where liability to the poor rate was the point involved, it was remarked that the "occupation . . . had nothing to do with their wages; nor was it in any way taken into consideration in determining the amount of wages they earned." Smith v. Seghill (1875) L. R. 10 Q. B. 422, per Quain, J.

In a case where the occupant was held liable for poor rates on the ground that his occupation was "beneficial," Brett, L. J., remarked that the effect of the arrangement as shown was that he was to have quarters as part of his remuneration for his services. Martin v. West Derby Union (1883; C. A.) 52 L. J. Mag. Cas. N. S. 66.

In a case where a man was permitted by certain persons having a right in common, to occupy a tenement of £10 a year, and the case stated by the sessions found that the occupation was allowed as a reward for his services, it was held that he had acquired a settlement. King v. Melkridge (1787) 1 T. R. 598.

In a settlement case there was held to be a tenancy in a case where the arrangement was construed as one which enabled the employee to pay his rent by allowing a deduction to be made from the wages of his children. Queen v. Bishopton (1839) 9 Ad. & El. 824.

See also O'Connor v. Tyndall (1836) 2 Jones (Ir.) 20 (curate allowed, in lieu of salary, to occupy glebe house and lands); King v. Lower Heyford (1830) 1 Barn. & Ad. 75 (premises occupied rent free, as an augmentation of salary).

IX. Change in the character of the occupation, when inferred.

See also III., *supra*.

In a few cases a change in the character of the occupation has been held to be inferable from the evidence. Under such circumstances, the rights and liabilities arising out of the occupation will, of course, depend upon whether the controversy relates to the period which preceded, or to the period which followed, the change.

In a case where the defendant in an action of ejectment occupied a cottage as part of an arrangement, under which, for a certain sum of money annually paid, and for the right to cultivate for his own profit certain garden ground, he undertook to do gardening work on the estate, it was held (Lord Moncrieff, dissenting) that his occupancy was that of a tenant, for the following reasons: That the terms of occupancy might reasonably be supposed to have undergone a change when, after having been for some time in the service of the owner of the estate, he obtained the privilege of cultivating the garden for his own benefit, and at his own cost; that, when the new arrangement was entered upon, he took over at a valuation a horse and van, belonging to the landowner, which had been used for conveying produce to the market; that, when the plaintiffs were looking for a person to take the defendant's place, they advertised that the garden was to let; that the plaintiffs' local agent returned the defendant's name as "tenant," and that he was so entered on the valuation roll of the county. Dunbar v. Bruce (1900) 3 Sc. Sess. Cas. 5th series, 137.

B. employed P. to work for him at $50 per month for a period of eight months, agreeing, also, to furnish him a house free of charge from the expiration of that period to a subsequent date specified. B. subsequently permitted P. to sublet this house to S. It was held that after eight months P. occupied the house as tenant, and not as servant, and that S. was liable to P. for the rent. Snedaker v. Powell (1884) 32 Kan. 396, 4 Pac. 869. The court said: "Powell had the right to occupy the house of Burnham to March 1, 1884, free of charge. He was to work for eight months from March 6, 1883. This time expired prior to November 13, 1883. After he moved away, and perhaps quit work, the house belonging to Burnham was not an accessory or aid to the performance of Powell's duties as a servant. Under the contract, Powell had paid by his labor and services for the use of the house to March 1, 1884; and, even if the occupancy of the dwelling during his eight months' service was that of a servant, and not as a tenant, yet, after he had performed that service, the relation existing between Burnham and Powell was that of landlord and tenant. . . . There is no evidence showing, or tending to show, that, after November 13, 1883, the occupancy of the house was for the benefit of Burnham, or as an accessory or aid to the performance of the duties of Powell as a servant. For aught that appears, after the eight months had expired there was no service to be performed by Powell, and yet Powell was entitled to the house for nearly four months thereafter. If the services of Powell had expired, clearly Burnham had no right to enter forcibly and oust him of the possession of the house, for he had expressly agreed with Powell that the latter should have the house until March 1, 1884, although his services as a servant might expire November 6, 1883. As Burnham permitted Powell to transfer his interest or sublet the house to Snedaker, the latter held under Powell, and not under Burnham. Snedaker was therefore liable for the rent which it was adjudged he must pay."

See also the passage quoted in VIII.,

supra, from Lord Ellenborough's judgment in Bertie v. Beaumont (1812) 16 East, 33.

X. Occupancy of a dwelling "by virtue of an office, service, or employment."

The following provision is contained in § 3 of the English representation of the people act of 1884: "Where a man himself inhabits any dwelling house by virtue of any office, service, or employment, and the dwelling house is not inhabited by any person under whom such man serves in such office, service or employment, he shall be deemed, for the purposes of this act and of the representation of the people acts, to be an inhabitant occupier of such dwelling house as a tenant." The construction put upon this provision is shown by the cases collected below. Its effect, when considered with reference to the general doctrine discussed in IV. and V., *supra*, consists in the fact that, in so far as the qualification for the franchise is concerned, it has done away with the distinction between occupation as a servant and as a tenant.

A shop assistant occupied exclusively, by virtue of his employment, a furnished bedroom in a dwelling house belonging to his employers. The house contained other bedrooms similarly inhabited by other persons in the same employment, and a dining room in which the inmates of the house took their meals in common, which were provided for them by their employers. The inmates had no keys of their bedrooms. The employers did not inhabit the house, but they had a resident caretaker who exercised general control over it, and a resident servant who was not under the order of the inmates, and by whom the domestic service requisite for the rooms was done. It was held that there was sufficient inhabitancy of a dwelling house, by virtue of service, to confer the franchise, and that this was not affected by the joint user of another part of the house. Stribling v. Halse (1885) L. R. 16 Q. B. Div. 246.

"H., a servant, occupied exclusively, by virtue of his service, a furnished bedroom in a dwelling house belonging to his master, and had, in common with another young man, the use of a sitting room in the same house. All the furniture belonged to the master, who did not reside in the house, but had free access at all times to every portion of it except H.'s bedroom, and had access to that whenever he asked H. for the key, which he had a right to demand whenever he chose. The bedrooms were made up by a charwoman, who was paid by the master, and did not reside on the premises." It was held, on the authority of Stribling v. Halse, *supra*, that H. was entitled to the franchise. Hasson v. Chambers (1885) Ir. L. R. 18 C. L. 68 (two of the lords justices dissented).

"Each teacher in a college conducted by a religious community had, as such, during the qualifying period, the exclusive use of a separate bedroom in the college, by virtue of his office or employment as a teacher in the college, which was managed by a resident principal, under the supreme control of the superior general of the community, who himself lived in Paris. The revising barrister having found that each bedroom so occupied constituted a 'dwelling house' for the purpose of the franchise, and was not inhabited by the person by whom the teachers were employed, or under whom they served,"—it was held that the teachers were entitled to the franchise. Alexander v. Burke (1887) Ir. L. R. 22 C. L. 443 (following the above cases).

"R. was the foreman of a shop and place of business in which a number of young men were employed. By virtue of that employment he and they lived in a separate house, in which he had a bedroom that he occupied exclusively. He and the other employees took their meals in a common sitting room, and the only other resident in the house was a servant, paid by the employer to attend to the occupants. R. had a latchkey for the hall door, and had also charge of the other keys, and it was his duty to see that the doors were locked, and the occupants within doors, every night." It was held (Fitz Gibbon, L. J., *dubitante*) that R. was entitled to the franchise. Hasson v. Chambers (1885) Ir. L. R. 18 C. L. 69.

"C., as his employer's coachman, occupied a room over her stable, and was treated by her as a domestic servant. The stable was in her yard, and was a portion of the curtilage of her dwelling house, the house and yard being all included under the same number in the poor-rate book. There was a separate gateway and gate from the yard into a back lane, and also a wicket leading from the yard into the lane. The gate and wicket formed the only access to the yard, except by going through the employer's house, and were under her control. Another of her servants cleaned out C.'s room." It was held that C. was not entitled to the franchise. Ibid.

A noncommissioned officer in the service of the Crown claimed the parliamentary franchise as the inhabitant occupier of a dwelling house, in respect of rooms occupied by him as his quarters in barracks. He had inhabited the rooms, which consisted of a bedroom and sitting room, during the qualifying period, subject, however, to certain regulations and powers of superior officers incident to military service; such, for instance, as the power of entry by the commanding officer at any time, and by other superior officers for the purpose of preserving order, and by certain officers at stated times for the purpose of inspection of the rooms, the power of the commanding officer to forbid any person to enter or leave the barracks at any time, and the obligation to be in his quarters at a stated hour every evening. The Crown supplied certain necessary articles of furniture for the rooms, the rest of the furniture being the claimant's own. The rooms formed part of one of the blocks of buildings situate within

the barrack inclosure, the remaining rooms in the block being occupied by other non-commissioned officers, some of whom were superior in rank to the claimant, and the senior of whom was bound to preserve order in the block, and would be entitled to enter the claimant's rooms for that purpose. The colonel commanding lived in a house situate within the walls of the barracks. It was held that the claimant was entitled to the franchise on the ground that he had inhabited a dwelling house, and that no person under whom he served had inhabited such dwelling house. Atkinson v. Collard (1885) L. R. 16 Q. B. Div. 254. In two other cases reported under the same caption, where votes were claimed by persons in military service, the facts with regard to the occupation of the quarters were similar, with the exception that the claimants, non-commissioned officers, had been absent for twenty-one days during the qualifying period, from their quarters on duty elsewhere, and could not return without leave; but, during such absence, in one case the claimant's wife and family, and in the other his furniture, remained in the quarters which were retained for him. It was held that, it not sufficiently appearing in those cases that there had been any constructive inhabitancy of the rooms by the claimants during the twenty-one days when they were in fact absent, they were not qualified. In Lowry v. Collard, also reported under the same caption, L., a captain, occupied rooms in a block in the same barracks, and a major, his superior officer, had rooms in the same block. It was held that the major occupied his own quarters only, and not constructively the whole block; that he was not a person under whom L. served; and that, therefore, L. was to be deemed a tenant under § 3 of the act.

The appellant was an industrial trainer in the employment of poor-law guardians, and as part of his salary was allowed to have the exclusive occupation of a sitting room and bedroom in the main building of the workhouse. The guardians reserved another room in the workhouse, which they used as a board room; The master of the workhouse, whom they employed, resided in other rooms of the building. The appellant could not stay out of his rooms after 9 P. M. without the permission of the master; the master, however, had no power to suspend or dismiss him if he did so, but could only report the matter to the guardians. It was held that the appellant was an inhabitant occupier of a dwelling house "by virtue of his employment," for the workhouse was not, under the circumstances, inhabited by the guardians, and he did not serve under the master of the workhouse so as to disqualify him from voting. Adams v. Ford (1885) L. R. 16 Q. B. Div. 239.

The claimants were laborers residing in cottages on the farms of their employers. They were permitted, but not required, to live in the cottages on the terms that they were to give up possession when their employment ceased, and were either charged a reduced rent, or had the rent deducted from their wages. The rates were paid by the employers, and the names of the claimants appeared in the rate book as occupiers. It was held that the facts showed an occupation by the claimants, not by virtue of service, but as householders. Marsh v. Estcourt (1889) L. R. 24 Q. B. Div. 147.

A policeman had the exclusive occupation, by virtue of his service, of a cubicle in a dormitory at a police barrack. The cubicle was separated from the rest of the dormitory, which contained a number of similar cubicles, by a partition 7 feet high, but there was a space of 5 feet between the top of the partition and the ceiling. The policeman kept the key of his cubicle, and was entitled to lock it up at any time. It was held that the cubicle was not "part of a house separately occupied as a dwelling," within the parliamentary and municipal registration act of 1878, § 5, and that the policeman was not entitled to the franchise in respect of it. Barnett v. Hickmott [1895] 1 Q. B. 691.

The appellant had, by virtue of his services as a policeman, the exclusive occupation of a cubicle in a dormitory at a police station. The cubicle was separated from the rest of the building, which contained a number of similar cubicles, by wooden partitions which did not reach the ceiling. The atmosphere of the dormitory was common to all the cubicles, and a gaslight was shared by them in common. A lavatory and mess room were provided for the policemen who occupied these cubicles, in another part of the police station. The policemen occupying the cubicles were subject to the control of a superior officer, who had power to impose restrictions upon their use of the cubicles, inconsistent with the rights which a person ordinarily exercises in respect of his own dwelling. It was held (by Lord Esher, M. R., and Lopes, L. J., Rigby, L. J., dissenting) that the cubicle was not part of a house separately occupied as a dwelling, within the meaning of the parliamentary and municipal registration act of 1878. § 5, and that the appellant was therefore not entitled to the franchise in respect of it, under the representation of the people act of 1884, § 3. Clutterbuck v. Taylor [1896] 1 Q. B. 395.

The claimants were nuns residing at a convent in the town of E. Each of them occupied a separate bedroom, and was subject to the control of the lady superioress, who could at any time change the occupants from one room to another, or arrange to have more than one occupant of a single room. She could refuse to allow a nun to receive a visitor in her room, demand admission to the room, and require the nun to give up the keys. The nuns took their meals together in the refectory, and occupied in common other general rooms in the convent; they received no remuneration, and were under no contract of employment. The

premises were vested in the Roman Catholic bishop of Clogher, the parish priest, and the senior curate of E., all for the time being, upon trust for the benefit of the Roman Catholic inhabitants of E. The convent was governed by rules subject to the supreme authority of the bishop. It was held that the nuns were not "inhabitant occupiers" of separate dwellings. Semble, the nuns did not occupy their rooms "by virtue of any office, service, or employment." Bannon v. Hanrahan [1900; C. A.] Ir. Rep. Q. B. 455, following the Clutterbuck Case, *supra*. Holmes, L. J., said: "Unless I am bound by authority to decide contrary to my own opinion, I should be unable to hold that a sister of mercy has an office, service, or employment within the meaning of this section. It would be an abuse of language to speak of her membership of a religious congregation as an earthly service or employment; and, although it might be termed an office, there is, as far as I can see, no person under whom she serves. No doubt she is under authority,—the authority of the mother superior, the authority of the bishop of the diocese, and the supreme authority of the Church; but it would seem to me that, except, perhaps, in the case of the mother superior, this authority is of a judicial character, and bears no analogy to that of a master over a servant. The mother superior probably comes nearer to what the section has in contemplation, but, even as to her, I can hardly believe that the legislature intended to describe her as a person under whom a sister of mercy serves."

XI. Character of occupation viewed as an element determining the correctness of the wording of indictments for burglary.

It has been laid down that the essential question to be determined in the cases under this head is whether the dwelling or room which was the subject of the burglary was or was not inhabited by the owner through his servant. King v. Stock (1809) 2 Leach, C. L. 1015.

A consideration of the facts involved in the decisions cited below, in which it was held, either that the dwelling in which a burglary had been committed was properly stated in the indictment, or that it should have been stated as the dwelling, not of the servant who occupied it, but of the master who owned it, indicates that the same conclusion as that which was adopted would have been reached if the test explained in IV., *supra*, had been specifically applied.

Apartments in the King's palaces or in the houses of noblemen, for their stewards and chief servants, must be laid as the mansion house of the King or nobleman. 1 Hale, P. C. 556, 557; 2 East, P. C. chap. 15, § 14, p. 500.

Where three persons were charged with having broken into the lodgings of one H. at Whitehall palace, it was held that the indictment should be for breaking the King's mansion, called Whitehall. Rex v. Williams, 1 Hale, P. C. 522; 2 Russell, Crimes, 6th ed. p. 28.

Where a man was indicted for breaking into a chamber in Somerset house, and the indictment charged it to be the mansion house of the person who lodged in it, it was agreed that the whole house belonged to the Queen-mother, and therefore that the indictment was bad. Rex v. Burgess, J. Kelyng, 27, 2 Russell, Crimes, 6th ed. p. 28.

Where a house at Chelsea was broken into, which was used for an office under government, called the invalid office, and the rent and taxes of which were paid by government, it was held that the indictment was defective in laying it to be the house of a person who occupied the whole of the upper part of it. King v. Peyton (1784) 1 Leach, C. L. 324.

An indictment for a burglary in the custom house rightly describes it as the dwelling house of the King, as he occupies it by his servants. Rex v. Jordan (1836) 7 Car. & P. 432, per Gaselee, J., and Gurney, B.

The prisoner was indicted for breaking the mansion house of one S. It appeared that the house belonged to the African Company, of which S. was an officer; that he and many other persons, as officers of the company, had separate apartments in the house, and that the apartment of S. was the one which was broken open. It was held that the apartment of S. could not be called his mansion house, because he and the others inhabited the house merely as officers and servants of the company. Rex v. Hawkins (1704) Fost. C. L. 38; 2 Russell, Crimes, 6th ed. p. 28.

An indictment for a burglary in the dwelling house of the East India Company was held to be good, the house being inhabited by the servants of that company. Rex v. Picket (1765) 2 East, P. C. chap. 15, § 14, p. 501; 2 Russell, Crimes, 6th ed. p. 28.

Where the servant of a partnership had three rooms assigned to him for lodging over his employer's banking room, with which these rooms communicated by a trapdoor and a ladder, it was held that a burglary committed in the banking room was well laid to be in the dwelling house of the partners. King v. Stock (1810; Exch. Ch.) 2 Taunt. 339. Lord Ellenborough asked: "Could Stevenson [the servant] have maintained trespass against his employers for entering these rooms? Or, if a man assigns to his coachman the rooms over his stable, does he thereby make him a tenant?"

A burglary committed in a banker's shop, in which no person slept, but to which there was a communication by a trapdoor and a ladder from the upper rooms of the house, in which only a weekly workman and his family lived by the permission of the three partners, who were owners of the whole house, may be laid to have been committed in the dwelling house of those partners. King v. Stock (1809) Leach, C. L. 1015.

Where an indictment charged a burglary in breaking into the mansion house of the master, fellows, and scholars of Bennet col-

lege, in Cambridge, the fact being that the prisoner broke into the buttery of the college, all the judges, upon reference to them, held that it was burglary. Rex v. Maynard (1774) 2 East, P. C. chap. 15, § 14, p. 501; 2 Russell, Crimes, 6th ed. p. 28.

Where, upon an indictment for burglary in the dwelling house of B., it appeared that B. worked for one W., who did business as a carpenter for the N. R. Company and put him in to take care of the house and flock mills adjoining, which belonged to the company, and he received no more wages than he did before he lived there, nor had any agreement for any, it was doubted whether the house was properly laid; and it was thought that there might be some difference between this and Rex v. Smith, cited in 7 Car. & P. 150, as here the man was put in by a person who did the work for the company, and it was thought the safest course to consider the indictment as not properly laying it to be the dwelling house of B. Rex v. Rawlins (1835) 7 Car. & P. 150, per Vaughan and Gaselee, JJ.; 2 Russell, Crimes, 6th ed. p. 31.

A member of a club was indicted for stealing some of the plate used at the clubhouse. The house steward slept in the house, and he stated that he had the charge of all the plate and was responsible for it; but it appeared that the plate was delivered every night to the under butler, who was appointed by the club, and by him placed in a chest in the pantry. The indictment described the property as the goods of the house steward, and alleged it to have been stolen in his dwelling house. It was held that upon the evidence it was wrong in both respects, inasmuch as his sleeping in the house was only as a servant of the club; and his alleged responsibility was not coupled with any custody of the property, either by himself or by his own servants. Reg. v. Ashley (1843) 1 Car. & K. 198 (decision by recorder of London).

Where the tenant of a house permitted a servant of a woman who had held it under him to continue occupying it rent free after the subtenant had vacated it, the house is rightly laid as the dwelling house of the servant, as she was there, not as a servant, but as a tenant at will. Rex v. Collett (1823) Russ. & R. C. C. 498.

Where a farmer's servant resides in a cottage annexed to, and under the same roof as, his master's dwelling house, the arrangement being that he is to pay no rent, but that an abatement is to be made in his wages in consideration of the use of the cottage, there is a mere license to lodge in it, and not a letting of it to him. Brown's Case (1799) cited in 2 Leach, C. L. 1016, note.

When a servant has part of a house for his own occupation, and the rest is reserved by the proprietor for other purposes, the part reserved cannot be deemed part of the servant's dwelling house; and it will be the same if any other person has part of the house and the rest is reserved. Rex v. Wilson (1806) Russ. & R. C. C. 115.

A was in the service of B, and lived in a house close to B's place of business. B did not live in the house himself, but he paid the rent and taxes. A paid nothing for his occupation by deduction from his wages or otherwise. Part of the house was used as storerooms for B's goods. It was held that this was the dwelling house of B, and was improperly described in the indictment as the dwelling house of A. Reg. v. Courtenay (1850) 5 Cox, C. C. 218, per Parke, B.

If a man dies in his leasehold house, and his executors put servants in it, and keep them there at board wages, burglary may be committed in breaking into it, and it may be laid as the executor's property. 2 East, P. C. 499.

The same remark may be made with regard to some cases in which the dwelling was held to have been rightly described as that of the servant. Rex v. Jobling (1823) Russ. & R. C. C. 525, where the dwelling was a cottage in which the owner allowed one of his workmen to live free of rent and taxes, his residence there being principally, if not wholly, for his own benefit.

But other decisions in which such a description was pronounced correct cannot, as it would seem, be satisfactorily explained on this footing: and it is only by the aid of extremely subtle distinctions, if at all, that some of them can be reconciled upon the facts with a portion of those decisions in which, as shown *supra*, the dwelling was viewed as being in the occupation of the master.

That the construction put upon evidence similar to that which was presented in the cases cited below would have been different if the civil rights and liabilities of the parties had been in question seems to be scarcely open to controversy.

Though a servant lives rent free, for the purpose of his service, in a house provided for that purpose, yet, if he has the exclusive possession, and it is not a parcel of any premises which his master occupies, it may be described as the house of the servant. Rex v. Camfield (1824) 1 Moody, C. C. 42 (servant was a toll collector in the employ of the lessee of the tolls).

If a servant lives in a house of his master at a yearly rent, the house cannot be described as the master's house though it is on the premises where the business is carried on, and although the servant has it because of his service. Rex v. Jarvis (1824) 1 Moody, C. C. 7 (servant was a warehouseman occupying a dwelling within the walls which enclosed the warehouse yard).

Though a servant lives as a servant in a house belonging to his master, who pays the rent and taxes, and whose business is carried on in the house, yet, if the servant and his family are the only persons who sleep in the house, and the part in which the master's business is carried on is at all times open to those parts in which the servant lives, the house may be stated as the servant's house, though the only part entered by the thief was that in which the master's

business was carried on. The judges refused to say that the house might not also have been described with propriety as that of the master. King v. Witt (1829) 1 Moody, C. C. 248.

The house which was broken into was one in which G. & Co. carried on their trade; M., their servant, lived with his family in the house, and paid £11 per annum for rent and coals, such rent being below the value; M. was allowed to live there because he was a servant; G. & Co. paid the rates and taxes. It was held that, as M. stood in the character of tenant, and G. & Co. might have distrained upon him for rent, and could not arbitrarily have removed him, the occupation of M. could not be deemed their occupation, and that the house was wrongly described in the indictment as the house of G. & Co. Rex. v. Jarvis (1824) 1 Moody, C. C. 7; 2 Russell, Crimes, 6th ed. p. 29.

Where a man, after leaving his house, continues to use part of it as a shop, and permits a servant and his family to live in another part of it to protect it from robberies, the rest being let to lodgers, the habitation by his servant is a habitation by him, and the shop may be laid as his dwelling house. Rex v. Gibbons (1821) Russ. & R. C. C. 442.

If a burglary is committed in the warehouse of a trading company, in the house belonging to which an agent of the company resides with his family for the purpose of carrying on the business, it may be laid to be the dwelling house of the agent, although the rent thereof is paid and the lease is held by the company. King v. Margetts (1801) 2 Leach, C. L. 930.

Upon an indictment for house breaking, describing the house in the first count as the dwelling house of one M., it appeared that M. had been put into the house by one P. to take care of it till it could be let, and she was to have coals for firing found by P.; she paid no rent for the house; she had occasionally been a servant of P., for thirty or forty years, and done work for him, for which she had always been paid. Littledale, J., said: "I think the evidence is sufficient to support the first count. The prosecutrix has had the exclusive occupation of the house, and, although there are very nice distinctions between the cases, I think this was her dwelling house. She was not put in as a servant, to take care of the furniture or goods, which has generally been the case where such questions have arisen. Rex v. James (1830)" 2 Russell, Crimes, 6th ed. pp. 31, 32.

Where a gardener lived in a house of his master, quite separate from the dwelling of his master, and had the entire control of the house, it was held that in an indictment for burglary the gardener's house might be laid either as his or as his master's. Rex v. Rees (1836) 7 Car. & P. 568.

Where a policeman was allowed to live in a house in order to take care of it and a wharf adjoining, it was held that the house was properly described as the dwelling house of the policeman, on the ground that he must live somewhere, and that he was not otherwise the servant of the owner than in the particular matter. Rex v. Smith. Cited in Rex v. Rawlins (1835) 7 Car. & P. 150; 2 Russell, Crimes, 6th ed. p. 31.

In State v. Curtis (1839) 20 N. C. 363 (4 Dev. & B. L. 222), the court remarked, *arguendo*, that, "even where there is no stipulation for rent, yet the premises occupied by the servant may be so far removed and distinct from those in the personal occupation of the master that they may be deemed and stated to be in the possession of the servant, in an indictment, for instance, for burglary." This observation indicates an element which is plainly not material in any case in which the test discussed in IV., *supra*, would be regarded as controlling.

C. B. L.

MISSOURI SUPREME COURT.

CHARLES H. HORNSTEIN, Respt.,
v.
UNITED RAILWAYS COMPANY OF ST. LOUIS et al., Appts.

(— Mo. —, 92 S. W. 884.)

Passenger alighting from street car—care as to cars on other track.

One alighting from a street car, who passes behind it and into the path of cars traveling in the opposite direction, getting so close to a car approaching thereon, without exercising any care to determine whether or not such car is approaching, that a collision is inevitable, is guilty of such negligence that he cannot recover for injuries caused by such collision, although the car is negligently operated.

(February 22, 1906.)

Case Note.—Injury to street-car passenger who, upon alighting, passes around end of car, and is struck by car on other track.—Although it is held that, immediately upon leaving a street car, a person ceases to be a passenger, and becomes a traveler upon the highway merely, to whom the railroad company owes no greater degree of care than to any other pedestrian on the street (Creamer v. West End Street R. Co. 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391; Indianapolis Street R. Co. v. Tenner, 32 Ind. App. 311, 67 N. E. 1044; Bigelow v. West End Street R. Co. 161 Mass. 393, 37 N. E. 367; Gargan v. West End Street R. Co. 176 Mass. 106, 49 L.R.A. 421, 79 Am. St. Rep. 298, 57 N. E. 217), yet, it has been held in some cases that the motorman of a car approaching another car which has stopped at a street crossing for the purpose of permitting passengers to alight is bound to exercise a higher degree of care for the safety of such alighting passengers than he is required to exercise ordinarily when passing cars on the other track, and that a

APPEAL by defendants from a judgment of the Circuit Court for the City of St. Louis in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Mr. George W. Easley, with Messrs. Boyle & Priest, for appellants:

The plaintiff's conduct was so negligent as to bar his recovery.

Meyer v. Lindell R. Co. 6 Mo. App. 30; Hanselman v. St. Louis & M. River R. Co. 88 Mo. App. 123; Dunn v. Cass Ave. & F. G. R. Co. 21 Mo. App. 188; Weber v. Kansas City Cable R. Co. 100 Mo. 204, 7 L.R.A. 819, 18 Am. St. Rep. 541, 12 S. W. 804, 13 S. W. 587; Buzby v. Philadelphia Traction Co. 129 Pa. 559, 12 Am. St. Rep. 919, 17 Atl. 895; Smith v. City & Suburban R. Co. 29 Or. 539, 46 Pac. 136, 780; Creamer v. West End Street R. Co. 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391; Chattanooga Electric R. Co. v. Boddy, 105 Tenn. 666, 51 L.R.A. 885, 58 S. W. 646; Baltimore Traction Co. v. Helms, 84 Md. 515, 36 L.R.A. 215, 36 Atl. 119; Hornstein v. United R. Co. 97 Mo. App. 278, 70 S. W. 1105; Giardina v. St. Louis & M. River R. Co. 185 Mo. 330, 84 S. W. 928.

Mr. Lee Sale, for respondent:

There is no absolute duty to look and listen before crossing a street railway track at a street crossing, but only a duty to exercise one's senses of sight and hearing to the

passenger alighting is entitled to rely upon his performing his duty. Thus, in Pelletreau v. Metropolitan Street R. Co. 74 App. Div. 192, 77 N. Y. Supp. 386, Affirmed in 174 N. Y. 503, 66 N. E. 1113, where a passenger alighting from the rear platform of a cable car, and passing around the end of the car, was struck and injured by a car on the other track, the court said, in discussing another case in which a pedestrian came upon the track from behind an elevated pillar at a street crossing and was immediately struck, that a distinction is to be drawn between such a case, where no particular reason arises from the surrounding circumstances for the motorman's apprehending danger of any kind, and one like the case before it for decision, wherein the motorman, from the conditions existing by the very presence of a car which has stopped at the crossing, has reason to believe that passengers are alighting therefrom, or others may be going over at that point; and that, in approaching such a crossing, he should give some warning of his approach, or have his car under control so as to avoid running down those who desire to cross.

So, in Chicago City R. Co. v. Robinson, 127 Ill. 9, 4 L.R.A. 126, 11 Am. St. Rep. 87, 18 N. E. 772, it is held that running street cars at rapid speed, although not exceeding that allowed by ordinance, without signal or warning, over a sidewalk crossing where a car bound in the opposite direction is discharging passengers, and where the view of the approaching car is obstructed by the one from which the passengers are alighting, is evidence of culpable negligence, to be submitted to the jury.

And, in Dobert v. Troy City R. Co. 91 Hun, 28, 36 N. Y. Supp. 105, where a passenger, after alighting from a car going south, passed around its end and was struck by a north-bound car on the other track, the court said that he had a right to rely with some degree of confidence upon the supposition that the street railway company would not permit a rapidly moving car to pass a car standing at a crossing which was receiving and discharging passengers.

Again, in Capital Traction Co. v. Lusby, 12 App. D. C. 295, it was held that, when a street car has stopped at a crossing to let off or take on passengers, a train on a reversed course should never be allowed to pass the stopping train, except it be on such caution and noticeable signals as are reasonably calculated to avoid the possibility of injury to passengers. The court said that, with the tracks of the two trains nearly approximating each other, with but a narrow space between the tracks, there is always danger to the passengers in getting off and on at such places while a train is passing, especially those having to cross the adjacent tracks; that, unless the trains are conducted with great care in thus passing each other at such places, serious consequences are likely to occur; and that every passenger is entitled to full protection against injury as far as human agency employed in the management of cars can afford it, and especially while getting on or making exit from the car; and that a passenger is entitled to this protective care until he is entirely free from danger from the movement of the cars on the tracks either way, assuming that he is using reasonable care for his own safety and protection.

So, in Cincinnati Street R. Co. v. Snell, 54 Ohio St. 197, 32 L.R.A. 276, 43 N. E. 207, where the court said it was the duty of a street railway company to keep in mind the right of pedestrians on crossings, and especially the duty to observe the rights of its own patrons; and that the company owes to a passenger who has just alighted the duty of permitting him to cross from its car to the opposite side of the street without peril of life or limb from the acts of the company, and so to control the speed of cars on its tracks, and give such warning of their approach, as will reasonably protect the passenger from injury; and that omission of such duty is negligence, and the person injured by reason thereof may maintain an action against the company for damages, unless prevented by his own negligence contributing to the injury.

But the negligence of the servants in charge of a street car approaching a car which has stopped at a crossing or station

extent that a person of ordinary prudence would do under the circumstances.

Burbridge v. Kansas City Cable R. Co. 36 Mo. App. 669; Cincinnati Street R. Co. v. Snell, 54 Ohio St. 197, 32 L.R.A. 276, 43 N. E. 207; Evansville Street R. Co. v. Gentry, 147 Ind. 408, 37 L.R.A. 378, 62 Am. St. Rep. 421, 44 N. E. 311; Consolidated Traction Co. v. Scott, 58 N. J. L. 682, 33 L.R.A. 122, 55 Am. St. Rep. 620, 34 Atl. 1094; Atlantic City R. Co. v. Goodin, 62 N. J. L. 394, 45 L.R.A. 671, 72 Am. St. Rep. 652, 42 Atl. 333; Robbins v. Springfield Street R. Co. 165 Mass. 30, 42 N. E. 334; Bass v. Norfolk R. & Light Co. 100 Va. 1, 40 S. E. 100; Ernst v. Hudson River R. Co. 35 N. Y. 9, 90 Am. Dec. 761; Garrity v. Detroit Citizens' Street R. Co. 112 Mich. 369, 37 L.R.A. 529, 70 N. W. 1018; Dobert v. Troy City R. Co. 91 Hun, 28, 36 N. Y. Supp. 105; Smith v. Union Trunk Line, 18 Wash. 351, 45 L.R.A. 169, 51 Pac. 400; Chicago City R. Co. v. Robinson, 127 Ill. 9, 4 L.R.A. 126, 11 Am. St. Rep. 87, 18 N. E. 772; Weber v. Kansas City Cable R. Co. 100 Mo. 202, 7 L.R.A. 819, 18 Am. St. Rep. 541, 12 S. W. 804, 13 S. W. 587.

There is no rule of law which required plaintiff, after he had alighted from defendants' south-bound car, to stop and wait until the south-bound car had passed out and given him an unobstructed view of the north-bound track.

Cincinnati Street R. Co. v. Whitcomb, 14 C. C. A. 183, 31 U. S. App. 374, 66 Fed. 915.

to permit passengers to alight, in passing at too high a rate of speed, or in failing to come to a stop or sound warnings, does not absolve a passenger alighting from the stationary car and desiring to cross the other track from the duty to exercise vigilance for his own safety. Doyle v. Albany R. Co. 5 App. Div. 601, 39 N. Y. Supp. 440; MacLeod v. Graven, 19 C. C. A. 616, 43 U. S. App. 129, 73 Fed. 627.

And a passenger on a street car cannot rely upon the rule that, being a passenger, he has a right to assume that the company will do nothing to put him in danger when alighting; and that in that respect he stands on a different footing from a pedestrian crossing a track, where he attempts to alight at a crossing from a car in full motion, so that the servants on the approaching car have no reason to suspect that he or anyone else will be in the act of getting off. Weber v. Kansas City Cable R. Co. 100 Mo. 194, 7 L.R.A. 819, 18 Am. St. Rep. 541, 12 S. W. 804, 13 S. W. 587.

Beyond stating that a street railway company is bound to stop its cars at crossings long enough to permit passengers to get on and off with safety; and that the servants in charge of an approaching car on the other track are bound to govern their conduct accordingly, and to exercise reasonable care for the safety of passengers alighting; and that the latter are bound to exercise due diligence for their own safety, and cannot rush blindly around the end of the car and onto the other track without making any effort to ascertain whether or not a car is approaching,—no general rules can be laid down as to when a passenger who, upon alighting and passing around the end of the car, is injured by a car on the other track, may recover, since each case must be judged by its own particular facts. And as a general rule the question of the negligence of the street railway company and the contributory negligence of the passenger will be left to the jury.

In the following cases, in addition to the cases of Pelletreau v. Metropolitan Street R. Co., Chicago City R. Co. v. Robinson, and Capital Traction Co. v. Lusby, above cited, 4 L.R.A.(N.S.)

the questions of negligence and contributory negligence were submitted to the jury, and a verdict returned for the plaintiff: Cohen v. Metropolitan Street R. Co. 63 App. Div. 165, 71 N. Y. Supp. 268, where the passenger, after alighting and passing around a car, looked in both directions for approaching cars, and saw one over 50 feet away, and then started to cross the track, and, just as he was passing from the track, was struck and carried by the car a distance of 63 feet, while the motorman testified that the car could have been stopped within 25 feet; Stevens v. Union R. Co. 75 App. Div. 602, 78 N. Y. Supp. 624, Affirmed in 176 N. Y. 607, 68 N. E. 1125, where the motorman of the car which struck the plaintiff admitted that he had observed the car from which the plaintiff alighted coming to a stop, and had slackened his speed, but the evidence showed that his car approached without warning, and did not stop until it had passed some 40 or 45 feet beyond the place where the passenger was struck, which was a much frequented crossing; Smith v. Union Trunk Line, 18 Wash. 351, 45 L.R.A. 169, 51 Pac. 400, where the plaintiff stepped off one car at a crossing and attempted to walk across the other track, when he was run down by a car on the other track, which approached without any signals being given, the motorman on which was engaged in conversation, and so did not see the plaintiff in front of his car until his attention was called to him by a passenger, when it was too late to avoid a collision.

So, a verdict directed for the defendant was reversed, and the question of contributory negligence held to be for the jury, in Cincinnati Street R. Co. v. Snell, 54 Ohio St. 197, 32 L.R.A. 276, 43 N. E. 207, where a passenger, after passing around the end of the car from which he had alighted, was struck by a car on the other track, moving at a rapid rate of speed without any warning being given, although the passenger failed to look in both directions for the approach of the car; since the court held the company had been guilty of gross negligence, and the passenger, while bound to anticipate that a car might be coming on the

Marshall, J., delivered the opinion of the court:

This is an action for $10,000 damages for personal injuries received by the plaintiff on the 6th of June, 1901, about half past 6 o'clock P. M., in consequence of a collision with the defendants' street car, at the corner of Vandiventer avenue and Page avenue, in the city of St. Louis. There was a verdict and judgment for the plaintiff for $6,000, from which the defendants appealed.

The issues:

The petition alleges that, at the time of the accident, the defendants' cars were provided with a bell or gong, "which it was customary and usual for said motorman to ring, for the purpose of warning persons of the approach of said car, whenever said motorman had reason to anticipate the sudden appearance of persons upon or near the track on which the car was running," and were further provided with a brake for stopping the car or checking the speed thereof; that on the day named the plaintiff was a passenger on one of defendants' cars, going south on Vandiventer avenue, and that, when the car reached the south side of Page avenue, it was stopped for the purpose of permitting passengers to alight from said car; that plaintiff alighted from said car, and was proceeding in the rear thereof, along the south side of Page avenue, going from the west track of defendants to the pavement on the east side of Vandiventer avenue; that as he approached the east track of defendants' railroad, upon said Vandiventer avenue, and was about to cross the same, a north-bound car, in charge of defendants' servants, as aforesaid, carelessly and negligently ran into plaintiff and knocked him down, and injured him in a painful manner; that the injuries were

other track, was not required to anticipate that it would come at such a dangerous rate of speed, and he was required to use such caution, only, as men of ordinary prudence would have used.

And again, in Wallen v. North Chicago Street R. Co. 82 Ill. App. 103, a judgment for defendant, rendered on a verdict which the jury were directed to find, was reversed, and the case held to be for the jury, where a woman, accompanied by a child, passed around the end of a street car from which she had alighted at a crossing for the purpose of crossing the street, and, as she reached the center of the other track, became aware that a car was approaching and was close to her, when she swung her child across the track and out of danger, but was unable to save herself, and there was evidence that the car was running at from 12 to 15 or 16 miles an hour, and that no bell or signal was sounded, and the plaintiff testified that, as she moved around the rear end of the car from which she alighted she could see a distance of from two to three car lengths, and saw no car approaching.

And in Dobert v. Troy City R. Co. 91 Hun. 28, 36 N. Y. Supp. 105, where a passenger, who, after alighting and passing around the end of the car, was struck by a car on the other track, looked in the direction of the approaching car, which did not slacken its speed on approaching the crossing or give any signal of its approach, while the rules of the company required that, when a car was standing upon a crossing, the operators of a car moving in the opposite direction should slack up before reaching the crossing,—it was held that a nonsuit should not have been granted, and the question of negligence and contributory negligence should have been left to the jury.

But in Toledo Consol. Street R. Co. v. Lutterbeck, 11 Ohio C. C. 279, where the passenger passed around the rear end of the car from which he alighted, and stepped upon the other track of the street railway without looking up or down, to the right or to the left, or making any examination to see whether the car was coming, which, when it struck him, was near the usual stopping place, was going very slowly, and was brought to a stop immediately afterward, the case was left to the jury, and a verdict returned for the defendant.

And in the following cases a verdict was directed for the defendant: Doty v. Detroit Citizens' Street R. Co. 129 Mich. 464, 88 N. W. 1050, where a man of intelligence, familiar with the running of street cars, swung off a car at a street crossing, and started to cross the track in the rear of the car he had just left, and was struck by a car which was shut off from his line of vision by the car he had left, although he testified that he looked up the street as he swung off the car, and that he was looking and listening as he approached the track; since the court held that by a moment's delay, allowing the car he had left time to move forward, he would have had a view of the track, which would have enabled him to see any approaching car, and that, if he had exercised ordinary care before attempting to step upon the track, he would have seen the car; Harten v. Brightwood R. Co. 18 App. D. C. 260, where the plaintiff, who was in the habit of riding on street cars, and was familiar with the place at which she alighted, and knew that a car might pass on the opposite track at any minute, alighted from a car and passed around the rear across the adjacent track, in doing which she was run down and injured by a car coming from the opposite direction, although she testified that she looked up and down the tracks and saw no car approaching, where there was nothing to prevent her from seeing the coming car for a distance of between 300 and 400 yards, and the sun was shining brightly, and the approaching car was moving at an ordinary rate of speed; Creamer v. West End Street R. Co. 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391, where a passenger stepped from a street car which was slow-

caused "by the carelessness and negligence of defendants' servants in operating its cars in the following respects, to wit: That immediately prior to the happening of the said injury, and while said south-bound car was discharging its passengers upon the street on the south side of Page avenue, defendants' servants in charge of said car carelessly and negligently failed to give the plaintiff, as he was alighting from said car, and was about to cross defendants' eastwardly track, any warning of the fact that said north-bound car was approaching and was near to the south side of Page avenue; that while said south-bound car was so discharging its passengers as aforesaid, including the plaintiff, said north-bound car was negligently permitted to run at a high and dangerous rate of speed, as it approached and passed the corner of Page avenue; that notwithstanding the fact that his view of the south crossing at Page and Vandiventer avenues was obstructed by defendants' south-bound car, and he had reason to anticipate the sudden appearance of persons desirous of crossing the eastward track of said road, at said point, the motorman of said north-bound car negligently and carelessly failed to ring his gong or to give any warning whatever of the approach of said north-bound car to Page avenue, and negligently and carelessly failed to check the speed of his said car, or to have said car under control; and that the said motorman negligently failed to keep watch for persons approaching said eastward track, or to stop said car as soon as he could have done after he saw, or by the exercise of ordinary care could have seen, plaintiff in a position of danger. Plaintiff further states that but for the carelessness and negligence of the defendants' servants in operating its said cars,

ing up but still in motion, and passed across the track in front of an electric car going in the opposite direction at the rate of 15 miles an hour, which was lighted and could be plainly seen, and the gong of which was ringing; and there was nothing to show that his senses were defective or that he exercised any care or caution, although his fellow passengers shouted to him to stop; Giardina v. St. Louis & M. River R. Co. 185 Mo. 330, 84 S. W. 928, where a passenger, familiar with the movements of street cars, alighted from a car at a crossing, and, passing around it, paused and listened for the sound of a gong, and, hearing none, stepped upon the other track without looking, and was struck by a car, although the defendant was negligent in running a car past a stationary car at a high rate of speed and without sounding the gong.

And plaintiff was held to be properly nonsuited in Buzby v. Philadelphia Traction Co. 126 Pa. 559, 12 Am. St. Rep. 919, 17 Atl. 895, where, after alighting from a car, instead of waiting for it to pass on, he turned sharply around the rear of it, and started across the other track without looking, and was struck by another car, which was upon him the instant he set foot upon the track.

In the following cases, in all of which it appeared that the plaintiff, after alighting from one car, failed to wait for it to pass on, but started immediately around the end of it and stepped upon the other track, paying little heed to his surroundings and taking practically no precautions for his safety, judgment for plaintiff was reversed on the ground of his contributory negligence: Baltimore Traction Co. v. Helms, 84 Md. 515, 36 L.R.A. 215, 36 Atl. 119; Metropolitan Street R. Co. v. Ryan, 69 Kan. 538, 77 Pac. 267; Deane v. St. Louis Transit Co. 192 Mo. 575, 91 S. W. 505; Giardina v. St. Louis & M. River R. Co. *supra*; Indianapolis Street R. Co. v. Tenner, 32 Ind. App. 311, 67 N. E. 1044; Doyle v. Albany R. Co. 5 App. Div. 601, 39 N. Y. Supp. 440.

So, a verdict for plaintiff was reversed in Johnson v. Third Ave. R. Co. 69 App. Div. 247, 74 N. Y. Supp. 599, on the ground that there was no evidence which would justify a finding by the jury that the defendant was negligent or the plaintiff free from contributory negligence, where it appeared that the plaintiff, after alighting from a car and passing around the end to the other track, stood upon the side of the track and waited for a truck to pass, and, as it passed, stepped upon the track immediately in front of an approaching car, and the plaintiff said he did not see the car, although a man who accompanied him saw it, and, if the plaintiff had looked before he attempted to cross the track after the truck had passed, he could have seen the car and avoided the accident, and the only negligence alleged against the defendant was the failure of the motorman to ring the bell. But the court said that the situation, the car being immediately behind the truck, with no reason for the motorman to suppose that anyone would step upon the track in front of the approaching car when it was plainly visible, would not justify a finding of negligence; but that, even if it would justify such a finding, the proof showed that, if the plaintiff had taken any precautions, he would have seen the car and avoided the accident.

In Stowers v. Citizens' Street R. Co. 21 Ind. App. 434, 52 N. E. 710, a special verdict was returned by the jury finding that the plaintiff, at midnight, stepped from a street car in motion some 15 or 20 feet north of a crossing, and, passing hurriedly behind the car, walked into the side of a car coming in the opposite direction on a parallel track, which was lighted with electricity and plainly visible, but failing to find that defendant was negligent or plaintiff free from contributory negligence. Upon this verdict the court rendered judgment in favor of the defendant, which was affirmed upon appeal, upon the ground that the court could not say, as matter of law, from the facts found, that plaintiff's conduct was that of a reasonably prudent person.

as aforesaid, the injuries herein complained of would never have happened." The answer is a general denial, coupled with a plea of contributory negligence, in that the plaintiff stepped upon or near the railway track while the car of the defendants' was in close proximity to him, and in that the plaintiff failed to look or listen or heed the approach of the car. The reply is a general denial.

The case made is this:

Vandiventer avenue runs north and south. Page avenue runs east and west. The defendants have a double street car track on Vandiventer avenue. The south-bound cars run on the west track, and the north-bound cars run on the east track. The space between the said two tracks is 4 feet 8 inches according to the plaintiff's statement, or 5 feet according to the defendants' statement. The space between the passing cars is 10 inches according to the plaintiff's statement, and 1 foot according to the defendants' statement. The plaintiff lived on the south side of Page avenue, and east of Vandiventer. He worked down town. On the day of the accident, as was his custom, he took the car to go home, which would take him west to Vandiventer avenue, and thence south to Page avenue. When the car reached the south crossing of Page avenue on Vandiventer avenue, a passenger alighted therefrom before the car stopped, and crossed Vandiventer avenue towards the east. When the car stopped, the plaintiff alighted, and immediately passed around the rear of the south-bound car, for the purpose of crossing Vandiventer avenue towards the east, in order to reach his home.

The testimony of the plaintiff tends to prove that, as he passed along the rear of the south-bound car, he listened for the bell, to see if a north-bound car was approaching, and heard no bell, and that no bell was sounded; that his view to the south was obstructed by the south-bound car, from which he had alighted, so that he could not see whether a north-bound car was approaching; that as he passed to the east side of the south-bound car, he stooped to look toward the south for a north-bound car, and at that time he was "a little over the west track, one foot over the west track. I guess, with my left foot I went over a little. . . . "

Q. Had you gotten as far as the north-bound track when you saw the car?

A. Yes, sir.

Q. You just now told me that you had gotten to the corner of that car.

A. Yes, sir.

Q. The corner nearest to your house?

A. Yes, sir.

Q. The corner is between the east track and the west track, isn't it?

A. Yes, sir.

Q. Had you gotten as far as the east track, the car track that goes north,—had you gotten that far?

A. Pretty near it, near that.

Q. Then you had not gotten that far; you say you had gotten or had stepped beyond the west track with your left foot?

A. Yes, sir; the west track with my left foot, yes; that is right.

Q. Do you remember how you turned back?

A. I can remember that when I saw the car coming I turned right back with my body, at the same time the car struck me on my right shoulder,—the car running north, the car on the east track,—and I fell down, and I fell unconscious.

For the plaintiff Miss Caroline Zwalhas, a music teacher, testified: That she lived in a flat, upstairs, on the south side of Page avenue, three doors east of Vandiventer avenue. That "I was looking out of my window, and I saw Mr. Hornstein coming towards his house, and just as he was about to cross the east track he turned his head to the south, and then I heard someone halloo, 'Look out!' Just that instant the car struck him."

Q. Where was Mr. Hornstein when you first saw him?

A. He was right behind the south-bound car.

Q. In what track, or where about in the street?

A. On the west track.

Q. You saw him coming east towards his home?

A. Yes, sir.

Q. On what side of Page avenue?

A. On the south side.

Q. He was coming on the south side,—and when you saw him he was there?

A. He was on the track—on the west track—the first time I saw him, and then he was coming towards the east track. He stooped and looked around to the south.

Q. Will you show the jury exactly how he stopped?

A. Well, he was walking this way [indicating], as if looking behind something, just as a person would when looking behind something that was there.

Q. Where was he, do you say, when he stooped as if looking behind something?

A. Well, on the track.

Q. How is that?

A. On the track, on the west track, or a little beyond, a little more to the east.

Q. A little beyond the west track?

A. Yes, sir; on the east side.

Q. Which direction did he look?

A. To the south.

Q. With reference to that action on his part, when was he struck?

A. Just as I saw him do that movement somebody hallooed out, "Look out," and then he was struck just the same time. Those three things went all together, I could not say it as quick as it was done.

Conrad Cohnheim, the passenger who alighted ahead of the plaintiff, testified for the defendants, and said that he got off of the car before it stopped, and had crossed the track going eastwardly. He then testified as follows:

Q. At the time you got off, did you see Mr. Hornstein?

A. I did not.

Q. When did you first see him?

A. I first seen him when I crossed the tracks, and he was coming around the car, the rear end of the car.

Q. Which end was he coming in?

A. He was coming east.

Q. What direction was he facing?

A. He was facing slightly northeast.

Q. When you saw him state whether he was standing still or moving?

A. He was moving when I first saw him.

Q. Did you see this north-bound car coming?

A. Yes, sir, I did.

Q. What, if anything, did you say to Mr. Hornstein at that time?

A. When I got across the street, at the east crossing of Vandiventer and Page avenue, I turned around and I seen the car, and I hallooed to him to stand back.

Q. In what tone did you halloo?

A. A very loud tone.

Q. Louder than you are speaking now?

A. Yes, sir; a good deal louder.

Q. He was then looking in your direction, was he?

A. Yes, sir.

Q. State whether or not, at any time, after he started towards the east track, you saw him look towards the south.

A. I did not.

Q. Did you see the car strike him?

A. Yes, sir; I did.

Q. What portion of the car struck him?

A. Why, the front end of the platform; that is, the northwest corner of the dashboard.

Q. Did you see the north-bound car stop?

A. Yes, sir.

Q. Where was it when it stopped?

A. The rear end stopped about 10 feet from where it struck him. . . .

Q. State whether or not, at any time after Mr. Hornstein started towards the east behind the south-bound car, you saw him stop before he was hit.

A. Well, I don't know as he did stop; he simply was walking along and seemed to look more towards the north.

Q. And was in that position?

A. And was in that position when he was struck.

The testimony of Miss Zwalhas was that the bell of the north-bound car was not rung. Mrs. Fleming, a witness for the plaintiff, who was more than 100 feet west of Vandiventer avenue, testified that she heard the car, from its noise, coming north, half a block away from the crossing. The testimony of the defendants' witness Cohnheim was that he did not remember hearing any gong sounded on the north-bound car. It is conceded in the briefs that the car was running at a speed of 7 miles an hour, and that the grade on Vandiventer avenue, at the point of collision, was a slight up-grade towards the north. Over the objection and exception of the defendants, the plaintiff read in evidence a rule of the defendants as follows: "When passing a car that is discharging passengers, or when at or near the crossings, the gong should be sounded once when within 100 feet of each other, and once when half way past. The current must be turned off, and the car slowed up so that it could be stopped instantly in case any person should attempt to cross the track in front of the moving car. The gong must also be sounded 150 feet before the crossing, at all streets both day and night."

At the close of the plaintiff's case, and again at the close of the whole case, the defendants demurred to the evidence. The court overruled the demurrers and the defendants excepted, and now assign that ruling as the chief error relied on.

1. The first error assigned is the refusal of the trial court to give the instruction asked for a nonsuit. The case was formerly tried and resulted in a verdict for the plaintiff for $1,000. The defendants appealed to the St. Louis court of appeals, where the judgment was reversed, and the cause remanded. The majority of the court (Judges Barclay and Goode) voted in favor of a reversal, because of the failure of the trial court to give an instruction in reference to joint, mutual, and concurring negligence. Bland, P. J., wrote the opinion, and held that the demurrer to the evidence should have been sustained; thus making the court unanimous in favor of a reversal; the two named being in favor of remanding, while the one was in favor of reversing without remanding. The case is reported in 97 Mo. App. 271, 70 S. W. 1105. The opinion of Bland, P. J., upon the question now being considered, is so terse, lucid, and convincing that it is a pleasure to reproduce it here. It is as follows: "Defendant insists that its

demurrer to plaintiff's evidence should have been given. In the circumstances of the case negligence of defendant is not to be inferred from the mere happening of the injury. Murphy v. Wabash R. Co. 115 Mo. 111, 21 S. W. 862; Yarnell v. Kansas City, Ft. S. & M. R. Co. 113 Mo. 570, 18 L.R.A. 599, 21 S. W. 1; Harper v. Standard Oil Co. 78 Mo. App. 338; Breen v. St. Louis Cooperage Co. 50 Mo. App. 202. There is no evidence in support of the first, second, or fourth allegation of negligence in the petition. In respect to the third allegation of negligence, the failure to give the warning signal, it is unquestionably the law that the duty of the motorman in charge of the car running north was to have sounded the gong on approaching the crossing. The omission of this duty was negligence. Dixon v. Chicago & A. R. Co. 109 Mo. 413, 18 L.R.A. 792, 19 S. W. 412; Weller v. Chicago, M. & St. P. R. Co. 164 Mo. loc. cit. 195, 86 Am. St. Rep. 592, 64 S. W. 141. While there is no direct proof that the signal was not given, there is negative evidence of the fact, and it was within the power of the defendant to have proved affirmatively by the motorman in charge of the car, if it was a fact, that the warning was given. Defendant failed to produce the motorman as a witness, or to account for his absence. The negative evidence of the failure to give the warning signal and the failure of defendant to prove affirmatively that it was sounded, if such was the fact, was sufficient proof of the third allegation of negligence to send that issue to the jury, and there was no error in refusing defendant's peremptory instruction, unless the evidence is all one way that plaintiff was guilty of such contributory negligence as to preclude his right of recovery, notwithstanding the defendant was guilty of negligence in failing to give the warning signal. The plaintiff testified that he looked for the north-bound car as he was moving out of his car, but he saw none; that he looked and listened when he got off, but that he neither saw nor heard the approaching car. He could not see on account of the obstruction caused by the car he had just left; looking, under the circumstances, was a useless performance. The car from which he had alighted, he testified, began to move away when he was in the middle of the west track. Had he then halted but for one moment, the car that was obstructing his vision would have moved away and he could have seen the north-bound car, but he did not take this precaution. He moved on towards the east track without halting or hesitating, and arrived sufficiently near that track just in time to come in contact with the corner of the vestibule of the car. This was negligence of the most pronounced sort. It was plaintiff's duty, in the circumstances, to have stopped and waited until he could see whether or not there was an approaching car on the east track before blindly proceeding to cross over that track. Weller v. Chicago, M. & St. P. R. Co. 164 Mo., loc. cit., 198, 86 Am. St. Rep. 592, 64 S. W. 141; Dlauhi v. St. Louis, I. M. & S. R. Co. 139 Mo. 291, 40 S. W. 890; Kelsay v. Missouri P. R. Co. 129 Mo. 362, 30 S. W. 339; Childs v. Bank of Missouri, 17 Mo. 214; Easley v. Missouri P. R. Co. 113 Mo. 236, 20 S. W. 1073; Culbertson v. Metropolitan Street R. Co. 140 Mo. 35, 36 S. W. 834; Pinney v. Missouri, K. & T. R. Co. 71 Mo. App. 577; Lien v. Chicago, M. & St. P. R. Co. 79 Mo. App. 475. Common prudence would have dictated, when the south-bound car began to move away, that the plaintiff stop for a moment that he might have an unobstructed view of the east track and see whether or not it was safe to proceed across the street. His failure to exercise this precaution was negligence, and there is no escape from the conclusion that this act of negligence contributed to and was the proximate cause of his injury; where this is the case, the law is well settled that no recovery can be had. Weber v. Kansas City Cable R. Co. 100 Mo. 194, 7 L.R.A. 819, 18 Am. St. Rep. 541, 12 S. W. 804, 13 S. W. 587; Hogan v. Citizens' R. Co. 150 Mo. 36, 51 S. W. 473; Moore v. Kansas City, Ft. S. & M. R. Co. 146 Mo., loc. cit. 580, 48 S. W. 487; Corcoran v. St. Louis, I. M. & S. R. Co. 105 Mo., loc. cit. 405, 24 Am. St. Rep. 394, 16 S. W. 411, and cases cited; Tesch v. Milwaukee Electric R. & Light Co. 108 Wis. 593, 53 L.R.A. 618, 84 N. W. 823."

There is substantially no difference in the facts as they appeared when this case was before the court of appeals, and the facts as they appear in this record. Counsel for plaintiff claim that the evidence here is different from the evidence there, in this, that at the former trial there was no evidence as to the exact speed of the north-bound car as it passed Page avenue; whereas at the second trial defendants' witnesses admit a speed of 7 miles an hour; also that at the former trial there was only negative evidence that the bell was not sounded, whereas here there is positive evidence that the bell was not sounded. These considerations, however, do not make the essentials of the case here presented different from the case that was presented to the St. Louis court of appeals, for, conceding the speed of the car to have been 7 miles an hour, that was not an unlawful or dangerous rate of speed, and was not shown to have been in excess of the authorized rate of speed; and there is no material difference between the negative evidence that the gong was not sounded and

positive evidence that it was not sounded, so far as the question of whether or not the plaintiff had made out a prima facie case for the jury was concerned. The reasoning and conclusions of Bland, P. J., above quoted, are strictly in harmony with the rules of law declared by this court in the opinion of Valliant, J., in Giardina v. St. Louis & M. River R. Co. 185 Mo. 330, 84 S. W. 928. In that case the plaintiff went to a car, going in one direction, to give his brother a key, and, after he had done so, crossed in the rear of that car and was injured by a collision with the car coming in the opposite direction on the other track. The rule of the company as to the running of the cars, that was introduced in this case, was also introduced in that case. The trial court sustained a demurrer to the evidence in that case, and the plaintiff appealed; and the correctness of the ruling of the trial court was the sole point decided by this court. Valliant, J., said: "Plaintiff testified that he had noticed that it was a custom of the company, in the operation of its cars, to have the motorman of a car which was approaching a car that had stopped, to sound his gong and go slowly, and, knowing this custom, he, before attempting to cross the north track, paused behind the east-bound car and listened, but hearing no gong, concluded that no car was coming west, stepped out, and was struck. The tracks looking east from where the plaintiff stood were straight for 1,000 feet, and the car coming west could have been seen from that distance if one had been looking. It may be conceded that the defendant was negligent in running its car at a high rate of speed and without sounding the gong, past a standing car from the rear of which the motorman ought to have known that people were liable to pass. It is not likely that the peremptory instruction was given on the theory that no negligence of the defendant was shown, but rather that the plaintiff failed to observe that degree of care that was to be expected of a man of ordinary prudence, and that his negligence contributed with the negligence of the defendant to produce the injury complained of. Plaintiff was familiar with the location and also the movements of the cars; he had even taken such notice of the operation of the cars that he was aware that it was the custom for a running car, passing one that had stopped, to be checked in its speed and its gong sounded freely. He was so confident of this custom that he seemingly on this occasion staked his life on its observance, for, after pausing to listen for the sound of the gong and hearing none, he stepped on the north track, or in front of the coming car, without looking, and was struck. From where he stood the body of the east-bound car shut off his view to the east, but one who was as familiar with the movements of the cars as he said he was—in fact, any man of common experience in the plaintiff's place—should have known that in a moment the east-bound car would have gone and the obstruction to his vision have been removed. But, even if he had not had that moment to spare he could have leaned forward beyond the line of the standing car in perfect safety and have seen the west-bound car coming. The measured distance between the tracks was 6 feet 10 inches. One witness for plaintiff said that the distance between two cars passing on those tracks was about 1 foot, but he also said that the distance between the tracks was about 4 feet; he had made no measure for either estimate; he was short 2 feet 10 inches in his estimate as to the distance between the tracks. But, even if the space between the passing cars was only one foot, it was sufficient to enable the plaintiff to have looked, and if he had looked he would have seen the car coming, and would not have been hurt. His act in stepping on or near the north track without looking for the west-bound car was negligence, and it contributed to cause the accident. If authorities are needed to sustain this view of the law, they may be found in the cases cited in the brief for respondent; and the cases cited in the brief for appellant are not to the contrary." In that case it appeared that the car that struck the plaintiff was running at a high rate of speed, and without sounding the gong while passing the standing car, and thus it was shown that the defendant was guilty of negligence; but a recovery by the plaintiff was denied solely on the ground that, although defendant was negligent, the plaintiff was also guilty of such contributory negligence as barred his recovery. There is no substantial difference between that case and the case at bar, except in this, that here it is not shown that the car was running at a high rate of speed, but, on the contrary, it is conceded that the car was running only 7 miles an hour, and that rate of speed is not shown to have been an unauthorized rate; nor was it negligence in itself.

The principal contention of the plaintiff here is that there is no law which requires him to stop until the car from which he had alighted had moved away, so as to afford an unobstructed view of the north-bound car. But, even if this contention be conceded to the plaintiff, nevertheless, it is and must be admitted that the common-law duty was cast upon the plaintiff to exercise ordinary care, before stepping upon the north-bound track, or getting so close thereto as that a collision with a car thereon was almost inevitable, to discover whether or not there

was a car approaching on the north-bound track. The argument of the plaintiff is that there was only a space of 4½ feet between the two tracks, and a space of only 10 inches between the passing cars; and that the plaintiff could not, by the exercise of ordinary care, have discovered the approach of the car on the north-bound track, because there was not space enough between the passing cars for him to have looked around the rear of the southbound car without getting so close to the north-bound track that a collision with the car coming on that track was inevitable. And plaintiff differentiates this case from the Giardina Case by claiming that in the latter there was a distance of 6 feet 10 inches, as against 4 feet 8 inches here, and a distance of 1 foot between the passing cars as against a distance of 8 inches here. The distance between the tracks is immaterial, and the difference between the distance between the cars in the Giardina Case and here was only a difference of 2 inches, which is too insignificant to constitute a difference between the principles of the Giardina Case and of this case. But, conceding that there was not space enough between the passing cars for the plaintiff to have looked around the rear of the south-bound car to see whether there was a car coming on the north-bound track, and that without so doing he could not have determined whether there was or was not a car approaching, it also follows that the motorman of the north-bound car could no more have seen the plaintiff in his position at the rear of the south-bound car than the plaintiff, in his position, could have seen the approach of the north-bound car. These considerations necessarily compel the conclusion that common prudence on the part of the plaintiff demanded that he take some other precaution to discover whether or not there was a car approaching on the north-bound track, before getting so close to that track as to make a collision with the car inevitable. The plaintiff lived in that immediate vicinity, and was familiar with the conditions there existing. He traveled on the same road every day. He knew the frequency with which cars passed. He knew the distance between the tracks, and the distance between the passing cars, or, at any rate, was chargeable with notice thereof, for he had the means constantly at hand of knowing those facts. It would have been but the loss, at most, of a second or two for the plaintiff to have paused, before getting so near to the north-bound track as to come in contact with a passing car, long enough to have permitted the car from which he had alighted to move southwardly far enough for him to see whether or not it was safe for him to attempt to cross the north-bound track. As was well said by Bland, P. J.: "Common prudence would have dictated, when the south-bound car began to move away, that the plaintiff stop for a moment that he might have an unobstructed view of the east track, and see whether or not it was safe to proceed across the street. His failure to exercise this precaution was negligence, and there is no escape from the conclusion that this act of negligence contributed to and was the proximate cause of his injury; where this is the case the law is well settled that no recovery can be had."

The report of this case before the St. Louis court of appeals shows that counsel for plaintiff then cited Cincinnati Street R. Co. v. Snell, 54 Ohio St. 197, 32 L.R.A. 276, 43 N. E. 207; Evansville Street R. Co. v. Gentry, 147 Ind. 408, 37 L.R.A. 378, 62 Am. St. Rep. 421, 44 N. E. 311; Consolidated Traction Co. v. Scott, 58 N. J. L. 682, 33 L. R.A. 122, 55 Am. St. Rep. 620, 34 Atl. 1094; Chicago City R. Co. v. Robinson, 127 Ill. 9, 4 L.R.A. 126, 11 Am. St. Rep. 87, 18 N. E. 772; Smith v. Union Trunk Line, 18 Wash. 351, 45 L.R.A. 169, 51 Pac. 400. Counsel for plaintiff now also cite those same cases, and, in addition thereto, the following cases: Dobert v. Troy City R. Co. 91 Hun, 28, 36 N. Y. Supp. 105; Bass v. Norfolk R. & Light Co. 100 Va. 1, 40 S. E. 100; and Cincinnati Street R. Co. v. Whitcomb, 14 C. C. A. 183, 31 U. S. App. 374, 66 Fed. 915. The cases then and now cited differentiate between steam railroads and street cars, and, whilst conceding that it is contributory negligence for a person to thus enter upon or near a steam railroad, under circumstances like those here presented, hold that it is not contributory negligence for one so to do with reference to street cars. In fact, some of them go to the extent of holding that it is not the duty of the person to stop, look, or listen before attempting to cross a street car track. Counsel for defendant have been equally diligent, and, in addition to the cases from other jurisdictions, cited by them in this case, when it was before the St. Louis court of appeals, now refer the court to the following cases: Buzby v. Philadelphia Traction Co. 126 Pa. 559, 12 Am. St. Rep. 919, 17 Atl. 895; Smith v. City & Suburban R. Co. 29 Or. 539, 46 Pac. 136, 780; Creamer v. West End Street R. Co. 156 Mass. 320, 16 L. R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391; Chattanooga Electric R. Co. v. Boddy, 105 Tenn. 666, 51 L.R.A. 885, 58 S. W. 646, which hold to the rule that where a person deliberately walks from behind a street car, from which he has alighted, and attempts to cross a public street without using his powers of observation, and is injured by an approaching car, which could have been avoided by the use

of ordinary care, he cannot recover damages for such injury. In some of the cases cited by plaintiff, notably Cincinnati Street R. Co. v. Whitcomb, *supra*, it is said that the doctrine contended for by defendant is the rule in Pennsylvania, and that the courts of the other states have not adopted it, and that it is not the rule in the Federal courts. The learned judge who made that statement evidently had not had the benefit of the research of counsel that is afforded this court by the cases cited. The sum of the matter as to the state of the law in other jurisdictions may, therefore, be said to be that in Ohio, New York, Virginia, Illinois, New Jersey, Washington, and Indiana, the rule contended for by plaintiff obtains, and likewise the distinction between steam railways and street cars also obtains, or did obtain before the adoption of rapid transit, such as now exists in all large cities. Whereas, in Pennsylvania, Maryland, Oregon, and Tennessee the rule stated by the defendants obtains. The later cases in Missouri do not recognize such a distinction between steam railroads and street railroads, with respect to the obligation of the pedestrian to look or listen for an approaching car, and, if necessary, stop; but the courts of this state, keeping pace with the progress of the times, recognize that there is quite as much danger to be apprehended now from stepping on the street car tracks, where the cars are run by electricity and at a rapid rate, and with great frequency and at short intervals, as there is from stepping on the steam railroad tracks, where the cars do not run as often. And therefore common prudence requires increased care on the part of the pedestrian in proportion to the dangers to be apprehended. In other words, the decisions in this state have kept step with the times. This is the rationale of Giardina v. St. Louis & M. River R. Co. *supra*, and the principles there announced have been followed by this court ever since.

Plaintiff, however, cites the cases of Riska v. Union Depot R. Co. 180 Mo. 168, 79 S. W. 445, and Eckard v. St. Louis Transit Co. 190 Mo. 593, 89 S. W. 602, as holding a different doctrine. But an examination of those cases clearly demonstrates that the contention is untenable. In Riska v. Union Depot R. Co. the conditions here presented were not shown to have existed. That was a plain case of a person stepping onto the track, without any obstruction, such as a car from which he had just alighted, preventing his seeing the approach of the car. There was no evidence to show whether the deceased in that case looked or listened before stepping onto the track. The car was running from 15 to 30 miles an hour. The authorized rate of speed was 10 miles an hour. The case went off entirely on the proposition that the car was being operated at an unlawful and dangerous rate of speed, and the presumption that the deceased listened and saw the car, but that he indulged the presumption, "as he had a right to do," that the car was not running at a unlawful rate of speed, and that he could cross the track in safety. That case is easily distinguishable from the case at bar in that the plaintiff walked behind the rear of the car and was struck by a car coming in the opposite direction. But it was unlike the case at bar in that the deceased had almost completely crossed the track on which the car was coming that struck him,—one more step would have put him in a place of safety,—and the car that struck him was running at an unlawful rate of speed of from 20 to 25 miles an hour; and that the motorman saw the deceased when he was from 30 to 50 feet away from him; and upon the presumption that the deceased was exercising ordinary care, and that he had a right to presume that the railroad company would obey the ordinance with reference to speed. The vigilant watch ordinance of St. Louis also figured in the case. A recovery was sustained in that case on the ground of the unlawful rate of speed of the car, and the question of the contributory negligence of the deceased was held to be a proper question for the jury, because fair-minded men might reasonably differ as to whether or not it was exercising ordinary care for the deceased to attempt to cross the track, under the circumstances, upon the presumption that the car was not running at a higher rate of speed than the law authorized. Stress was also laid upon the fact that the deceased was not instantly struck upon stepping on or near the track, but that he had almost crossed the track before the collision occurred. That case is very different from the case at bar, and does not support the contention here made, that a person is not obliged, when passing along the rear of one car, to stop until that car moves far enough for him to see whether it is safe to attempt to cross the other track, if it is impossible for him to see while the car from which he has alighted obstructs his view, and likewise impossible for him to look around the end of the car from which he has alighted without getting so close to the other track as to be necessarily struck by an approaching car. The physical facts in this case, even under the most favorable view that can be taken of the plaintiff's testimony, show that he got so close to the north-bound track, before looking to discover whether a car was approaching on that track, as that a collision with that car was inevitable, and that there was either no necessity for him so to do, or that, if there was

such a necessity, it was his duty to wait until the car from which he had alighted had moved far enough away to the south to enable him to see whether a car was approaching on the north track, and would have only been a matter of a second, for the evidence is that the north-bound car was then only half a car length from the place of collision.

The plaintiff says that when he looked around the south-bound car he saw at once the north-bound car coming, and then "I turned back and the car struck me on my shoulder." Conceding that there was only a space of 10 inches between the passing cars and that the plaintiff, therefore, had only that space in which to look for the approaching car, still he could have so looked without placing himself in such close proximity to the approaching car as to make it necessary for him to "turn back," or as to be struck on his shoulder by the approaching car. Upon the case made, therefore, the conclusion is inevitable and irresistible that there is no essential difference between the case at bar and the Giardina Case, and the prior decisions of this court applicable to facts like those here presented. Even conceding that the defendant was guilty of all the negligence charged, nevertheless, under the unquestioned facts in this case, the plaintiff was guilty of contributory negligence, which bars his recovery.

The trial court, therefore, erred in overruling the demurrers to the evidence, and its judgment is reversed.

All concur.

Petition for rehearing denied

TENNESSEE SUPREME COURT.

RUSSELL E. GARDNER
v.
DEEDS & HIRSIG.

(—Tenn. —, 92 S. W. 518.)

Contract—to take goods—breach—damage.

1. The profit which the contract would have produced is the measure of damages for breach of a contract to take goods to be manufactured upon order.

Same—proceeding with performance.

2. One who has contracted to manufacture articles upon order according to specifications to be designated is not, in order to recover damages for breach of the contract, bound to proceed with the manufacture in the absence of order or specifications.

(February 24, 1906.)

ON PETITION by defendants for rehearing after affirmance of a decree of the Court of Chancery Appeals reversing a judgment of the Chancery Court for Davidson County in their favor in an action brought to recover damages for breach of contract. Dismissed.

The facts are stated in the opinion.

Mr. P. M. Estes, for appellants:

The measure of damages was the difference between the contract and the market price.

Hardwick v. American Can Co. 113 Tenn. 675, 88 S. W. 797; Mayberry v. Lilly Mill Co. 112 Tenn. 569, 85 S. W. 401; McDonald v. Unaka Timber Co. 88 Tenn. 44, 12 S. W. 420; 19 Am. & Eng. Enc. Law, 2d ed. pp. 1153, 1154; Gibbons v. United States, 8 Wall. 269, 19 L. ed. 453; Dolph v. Troy Laundry Machinery Co. 28 Fed. 553; Hale v. Hess, 30 Neb. 42, 46 N. W. 261; Shipps v. Atkinson, 8 Ind. App. 505, 36 N. E. 375; Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172; Dwiggins v. Clark, 94 Ind. 49, 48 Am. Rep. 140; Heiser v. Mears, 120 N. C. 443, 27 S. E. 117; Clements v. State, 77 N. C. 142; Brodie v. Watkins, 33 Ark. 547, 34 Am. Rep. 49; Fire-Extinguisher Mfg. Co. v. Clarksville (Tenn. Ch. App.) 52 S. W. 442.

Mr. H. H. Barr for appellee.

McAlister, J., delivered the opinion of the court:

This cause was decided at a former day of the term, in which the decree of the court of chancery appeals in favor of the complainants was affirmed. It is again before the court on a petition to rehear.

The object of the bill was to recover dam-

Case Note.—Loss of profits as damages upon refusal of vendee to take articles manufactured for him.—In considering the question what damages may be recovered by the vendor in case of the breach by the vendee of a contract for the purchase and sale of articles to be manufactured, it must be borne in mind that the aim of the law is to place the vendor in the same position he would have occupied if the vendee had performed his contract. If this object is to be attained, it is evident that the vendor must be permitted to recover the profits which he would have made if there had been no breach of the contract. His right to such profits is generally admitted. But controversy frequently arises as to the manner in which they are to be estimated. Where the subject of the sale has already been manufactured at the time of the breach, and has a market value, the general rule is that the measure of damages is the difference between the contract price and the market price. Penn Plate Glass Co. v. James H. Rice Co. 216 Ill. 567, 75 N. E. 246, Affirming 88 Ill. App. 407; Dwiggins v. Clark, 94 Ind. 49, 48 Am. Rep. 140; Shipps v. Atkinson, 8 Ind. App. 505, 36 N. E. 375; Hau-

ages for the breach of a written contract whereby the defendants, Deeds & Hirsig, purchased from the complainant, Russell E. Gardner, 500 buggies of specified descriptions and stipulated prices. The contract contemplated that the buggies were to be ordered as needed by the purchaser. The vendor was a manufacturer doing business in the city of St. Louis, and had purchased all the necessary material and constituent parts necessary for the construction of the vehicles; but these component parts were not assembled and the buggies manufactured for the reason that the purchasers, Deeds & Hirsig. refused to order them and finally declined to accept performance. The court of chancery appeals expressly found that the vendor, Gardner, was without fault, and that the contract had been breached by Deeds & Hirsig without legal justification.

The crucial question presented to this court on the facts found by the court of chancery appeals was in respect of the measure of damages the vendor was entitled to recover. The contention made on behalf of Deeds & Hirsig in this court was that the measure of damages is the difference between the contract price and the market price of the buggies agreed to be purchased at the time and place of delivery; and that, since the court of chancery appeals had found that the price of buggies and buggy materials during the year 1903, when this contract was to be performed, had materially advanced, therefore the vendor had lost nothing and was entitled to no recovery for the

sesr, B. & F. Co. v. Tate, 105 Ky. 701, 49 S. W. 475; Tufts v. Grewer, 83 Me. 407, 22 Atl. 382; Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172; Kingsland & F. Mfg. Co. v. St. Louis Malleable Iron Co. 29 Mo. App. 526; Belle of Bourbon Co. v. Leffler, 87 App. Div. 302, 84 N. Y. Supp. 385; Clements v. State, 77 N. C. 142; Heiser v. Mears, 120 N. C. 443, 27 S. E. 117.

But where one party agreed with another to furnish an arc motor, the contract not calling for a new one, but one as good as new, and calling, also, for the performance of labor in wiring and setting it up, pursuant to which the party agreeing to supply it purchased a second-hand motor in an outside market and changed and repaired it so as to meet the requirements of the contract, when the other party repudiated the contract and refused to have the motor set up, it was held that the measure of damages was the difference between the amount actually paid for the material and labor necessary for the performance of the contract and the contract price. Silberstein v. Duluth News-Tribune Co. 68 Minn. 430, 71 N. W. 622.

And the general rule can have no application, unless it appears that, upon breach by the vendee, the vendor could have placed the commodity on the market, and, by thus disposing of it, have relieved himself from the consequences of the vendee's default. If the article manufactured is made after a particular pattern or style, so that it would be useless, or practically useless, to anyone except the person for whom made, it would seem as if the vendor should be entitled to recover the whole contract price.

Thus, it is held, in Bookwalter v. Clark, 11 Biss. 126, 10 Fed. 793, that where a person ordered a water wheel of unusual size, which was not kept regularly in stock, and for which the manufacturers only occasionally had an order, and, after it was completed, the vendee repudiated the contract, the manufacturer was entitled to recover the contract price of the article, although no title had passed. The court said that where a person orders an article to be manufactured according to a certain measure, pattern, or style, as a suit of clothes, or a carriage, or a steam engine, it thought the weight of authority and the best reason concur that the manufacturer, after he has completed his contract and tendered the article, is entitled to recover the contract price, and that the reason for the distinction is that in such a case there is presumably no certain market value for goods made according to such a specific order; and that, the manufacturer having done all that is required of him to do to entitle him to the full benefit of his contract, he cannot with any certainty have this full benefit in any other way; and that in such a case it seems more just and equitable that the loss and inconvenience of having a cumbrous article like the one in suit on hand for sale, and taking the chances of finding a purchaser, should fall upon the party who is in fault in not fulfilling his contract, rather than upon the party who is in no fault, and is claiming nothing but just what the other party has agreed to do.

And a contract for the manufacture of printing presses, broken by the vendee after a press had been partially completed, by notifying the vendor to suspend all work, and declining to accept the press, authorizes a recovery of the contract price less the value of the machine as it was at the time the work was stopped and the cost necessary to complete it and set it in place, where the press had no market value when the work was stopped, except as metal, and would have had none, except as metal, when completed, owing to its unusual size. Thomas v. Cauldwell, 58 N. Y. S. R. 142, 26 N. Y. Supp. 785.

But in the case of Tufts v. Grewer, 83 Me. 407, 22 Atl. 382, the general rule was applied, although the article in that case, which was a soda fountain, was manufactured after a particular pattern upon the order of the vendee. The plaintiff in this case did not question the general rule, but contended that a special and more equitable rule governs when a vendor has manufactured the article after a particular pattern especially for the vendee; and the court said it felt there was much force in this posi-

breach of the contract, except, perhaps, nominal damages.

The court of chancery appeals, while finding that the price of buggies and buggy materials had advanced, yet found that the vendor had purchased his material and was ready to perform his contract, and could have furnished the buggies, and was therefore entitled to recover the profits he would have made, had the contract not been breached by the defendants, Deeds & Hirsig.

The court of chancery appeals also finds that in the year 1902 complainant buggy company sold some 30,000 vehicles, the output of its concern: that it practically only manufactured upon orders; that it had all the stock bought, most of it being in somewhat of a finished condition, though not entirely finished, and most of it unpainted; and that the concern could have manufactured and delivered the buggies or vehicles for which the defendants had contracted in addition to the others sold. That court, however, found there was no market upon which these buggies could have been sold at a profit, or for as much as the defendants had contracted to pay for them; and that, if their constituent parts had been assembled and manufactured into buggies, and the lot exposed for sale on the market, it would have resulted in a sacrifice and a loss to the defendants greater than would have been suffered if the buggies had not been manufactured and exposed to sale.

The first complaint made in the petition to rehear is that this court stated in its

tion, supported as it is by considerable authority, but was, nevertheless, inclined to believe that there should be but one rule of damages in cases where a vendee refuses to accept goods which he has agreed to purchase, whether the article to be delivered to the vendee is already in existence or is to be manufactured on his account. In answer to the objection that a peculiarly manufactured article was of little value to anyone besides the vendee, if of any marketable value whatever, the court says that, of course, the less the goods are worth to sell in the market, the more the manufacturer recovers, and, if they are worth nothing at all, then he recovers the full contract price; but that such a result is just as logically attainable under the application of the general, as by any special, rule.

Where the purchaser of goods to be manufactured repudiates the contract in advance of the manufacture of the goods, or is guilty of a breach of contract which justifies the vendor in suspending the further manufacture, and he does so, so that there is no property in existence to which the contract of sale can apply, the measure of damages is the difference between the cost of manufacture and the contract price. In such a case the market value is immaterial, for the market may change before the goods can be manufactured. Neither is the vendor required to invest his time or capital in manufacturing the goods, and to make an actual tender thereof, before bringing an action against the vendee for the profits which he would have realized had the contract been performed. Hinckley v. Pittsburgh Bessemer Steel Co. 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. Rep. 875; Kingman & Co. v. Western Mfg. Co. 34 C. C. A. 489, 92 Fed. 486; Moore v. United States, 17 Ct. Cl. 17; George Delker Co. v. Hess Spring & Axle Co. (C. C. App. 6th C.) 138 Fed. 647; Broadnax v. United Engineering & Contracting Co. (C. C. S. D. N. Y.) 128 Fed. 649; Lincoln v. Levi Cotton Mills Co. 63 C. C. A. 333, 128 Fed. 865; Gibney v. Turner, 52 Ark. 117, 12 S. W. 201; Hale v. Trout, 35 Cal. 230; Sullivan v. McMillan, 26 Fla. 543, 8 So. 450; Penn Plate Glass Co. v. James H. Rice Co. 216 Ill. 567, 75 N. E. 246, Affirming 88 Ill. App. 407; Beardsley v. Smith, 61 Ill. App. 340; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; Chapman v. Kansas City, C. & S. R. Co. 146 Mo. 481, 48 S. W. 646; Masterton v. Brooklyn, 7 Hill, 61, 42 Am. Dec. 38; Underhill v. North American Kerosene Gaslight Co. 31 How. Pr. 34; Dryfoos v. Uhl, 69 App. Div. 118, 74 N. Y. Supp. 532; Belle of Bourbon Co. v. Leffler, 87 App. Div. 302, 84 N. Y. Supp. 385; Todd v. Gamble, 148 N. Y. 382, 52 L.R.A. 225, 42 N. E. 982; Winslow Bros. Co. v. Du Puy, 208 Pa. 98, 57 Atl. 189; Worrell v. Kinnear Mfg. Co. 103 Va. 719, 49 S. E. 988; Cameron v. White, 74 Wis. 425, 5 L.R.A. 493, 43 N. W. 155; Tufts v. Weinfeld, 88 Wis. 647, 60 N. W. 992; Walsh v. Meyers, 92 Wis. 397, 66 N. W. 250; 3 Sutherland, Damages, 3d ed. § 649.

But where a part of the goods have already been manufactured at the time of the breach, and the manufacturer has sold that portion for more than it cost to manufacture it, then the difference between what was received for it and the cost of its manufacture should go as a credit upon the amount which the vendor would otherwise be entitled to recover, which is the difference between the cost of manufacture and the contract price. Puritan Coke Co. v. Clark, 204 Pa. 556, 54 Atl. 350.

And in case of breach by the vendee of a contract by one party to manufacture and another to receive a designated number of scales during five years, enumerating seven different kinds of scales at different prices per scale, without specifying the number of each kind which was to be taken, the measure of damages was held to be the difference between the contract price of the class of scales on which the manufacturer would have received the smallest profit and the cost to him of manufacturing the number of scales of this class which would have been required to fill the contract, making a reasonable deduction for the less amount of time required in the manufacture and the release from trouble, risk, and responsibility attend-

original opinion that "the court of chancery appeals found there was no market upon which these goods could have been sold at a profit or for as much as the defendants had contracted to pay for them." "Defendant respectfully insists that this court has confused the argument of the court of chancery appeals with its finding of fact." We have again reviewed the report of the court of chancery appeals, and find that we committed no error in our interpretation of their findings on this subject. In order that there may be no mistake, we quote the exact language of that court on this subject as follows: "It is shown that there was no established market for buggies in the sense that would have enabled the complainant in the case to have placed the buggies which the defendants had contracted for upon the market and sold them at the advanced price, or even at as much as defendants had contracted and agreed to pay." And again: "Or that there was any place where he could have sold them at all." And again: "The proof does not show that there was any place, either in Nashville where these buggies were to be delivered, or at St. Louis where they were to be manufactured, or elsewhere, where the complainant, or anyone, if he had manufactured them, could have placed them upon the market and sold them at a fixed price." And again: "We are entirely satisfied that, if the complainant could have sold these vehicles at a profit, he would have done so." Again: "We are satisfied that, if the de-

ing the full execution. Kimball Bros. v. Deere, W. & Co. 108 Iowa, 676, 77 N. W. 1041.

So, in Dryfoos v. Uhl, *supra*, where the vendee had an option to take a certain number of skirts, or a certain number of yards of black silk, no more damages could be recovered by the vendor for breach of the contract before the goods were manufactured than the lowest sum which he would have received as profit if the contract had been fulfilled in any form which answered its terms.

And where one party agreed to manufacture for another a large number of shells for electric-light lamps, to be delivered monthly during a period of twenty months; and, before he had done anything toward performing the contract, or incurred any expense, the vendee notified him that they would not carry it out,—it was held, in Ontario Lantern Co. v. Hamilton Brass Mfg. Co. 27 Ont. App. Rep. 346, that the manufacturer could not recover as damages the full amount of his expected profits, since the many contingencies and conditions which might arise to interfere with realization of the expected profits, especially as the contract was to extend over a period of nearly two years, must be taken into consideration. The court said that, while there are general principles on which damages are to be estimated for the breach of contracts of this nature, yet there is nevertheless a considerable degree of elasticity in their application, whether assessed by a jury or a judge, and that, where the evidence does not admit of their being assessed with precise accuracy, they are, within certain limits, left somewhat at large; and added that in this case there was reason to suppose that, if the manufacturer had proceeded to execute the contract, he must have given up some of his ordinary business, of which he had as much as he could handle, and that there was some probability that the only effect of the rejection of the contract was to leave him free to perform this ordinary business.

And in Dolph v. Troy Laundry Machinery Co. (C. C. N. D. N. Y.) 28 Fed. 553, the court said that the well-settled rule of damages in case of breach of an agreement to purchase personal property at a future day is the difference between the contract price and the market value of the property, and that it is quite immaterial whether the article to be delivered is or is not in existence at the time of the contract, or whether it is one to be manufactured from time to time as required; and that the rule, that in case of unmanufactured articles the damages should be the difference between the contract price and the actual cost to the manufacturer of performance of the contract, should be applied only where there is no other criterion for ascertaining the extent of the manufacturer's prospective loss. In this case a party had agreed to manufacture and deliver to another a certain number of washing machines at a certain price, and had also agreed to manufacture certain other washing machines at such prices as might be bid for them in open competition by any other responsible manufacturer for equal quality of goods. The court approved a general instruction of the trial judge that the vendor was entitled to recover as damages what he would have realized had the contract been performed, including as well gains prevented as losses sustained, but held incorrect an instruction that the measure of damages, in case of the first class of machines, was the difference between the contract price and the price which it would have cost the vendor to make and deliver the machines, irrespective of the market value during the period of the contract. The court said the vendor certainly was not entitled to a larger recovery than he would have been entitled to if he had completed all the machines which might have been required to carry out the contract; that he might then have stored or retained them for the defendant and sued for the contract price, but, if he did not choose to do this, and elected to sue for breach of contract to accept them, and, having the machines on hand, could have sold them and realized a larger price than the actual cost of manufacture to himself, it would have been his duty to do so, and his recovery

fendants could have taken and sold them at a profit to themselves during this time, they would have done so." Again, in another place, the court said: "But the proof does not show, and we infer from all these things that there was no place or market where the complainant, if he had manufactured these goods, could have placed them and forced a sale at a profit."

We think that these extracts from the opinion of the court of chancery appeals fully demonstrate that this court was not in error in its former statement of the findings of the court of chancery appeals on this subject. However, the real ground upon which we bottomed our decree was that where goods are to be manufactured upon order, and there is no specific determinate chattel *in esse*, and the purchaser has refused to accept performance of the contract by the manufacturer, the measure of damages is the profit which the manufacturer would have made if he had been permitted to comply with his contract. This is the rule everywhere recognized for the admeasurement of damages in such cases.

This question arose in Hinckley v. Pittsburgh Bessemer Steel Co. 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. Rep. 875. Hinckley agreed in writing to purchase from the steel company rails to be rolled by the latter, and to be drilled as may be directed, and to pay for them $58 per ton. He refused to give directions for drilling, and at his request the steel company delayed rolling any of the rails until after the time prescribed for their delivery, and then the defendant advised the plaintiff that he should decline to take any rails under the contract. Held: (1) Hinckley was liable in damages for the breach of the contract. (2) The steel company was not bound to roll the rails and tender them to the defendant. (3) The proper rule of damages was the difference between the cost per ton of making and delivering the rails and the contract price of $58 per ton. In the midst of its opinion, the court said as follows: "[Hinckley] . . . contends that the . . . [steel company] should have manufactured the rails and tendered them to [Hinckley] . . . and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of . . . [Hinckley,] [the steel company] . . . was excused from actually manufacturing the rails, and the rule of damages applicable to the case of the refusal of a purchaser to take an existing article is not applicable to a case like the present. The proposition that after the defendant had, for his own purposes, induced the plaintiff to delay the execution of the contract until after the 31st of August, 1882, and had thereafter refused to take any rails under the contract, the plaintiff could still have gone on and made the 6,000 tons of rails and sold them in the market for the defendant's account, in order to determine the amount of its recovery against the de-

would have been the difference between what he could have realized on sales and the contract price; that the party who is exposed to loss by the violation of the contract by another must exert himself to make the damages as light as possible. Regarding the other machines for which there was no fixed price, the court held erroneous an instruction that the vendor was entitled to recover the difference between the price the vendee paid other manufacturers for such machines, or the cost of the machines to the vendee when manufactured by itself, and the sum for which the vendor could have manufactured them; saying that as to the damages recoverable for breach of that provision of the contract by which the vendor was to have the privilege of supplying the vendee with other washing machines at the lowest price bid by other manufacturers, it was not clear that the vendor could establish any loss of profits, unless it could be shown that there was some usual or average percentage of profit customarily realized by manufacturers of analogous articles, or some established manufacturers' price; also, that the vendor might have been unwilling to act upon the option at prices which other manufacturers would have offered, and the extent of his prospective losses, if any, was largely a matter of speculation; that the vendee might have been so situated that it could have better afforded to employ its own men and facilities, although by doing so its machines might cost it more than to buy them of others, and that, in this view, the difference between actual cost of the machines to the vendee and the sum it would have cost the vendor to make and furnish them might not be the correct rule of damages; that, in any view, the jury were unduly restricted by the direction that the vendor was entitled to recover the difference between what it cost the vendee to build the machines and what the vendor could have built them for; that at most the cost to the vendee was only evidence to be considered with other evidence of the ordinary manufacturers' price for such machines.

For a full treatment of the general question of the loss of profits of sale or purchase as damages, see note in 52 L.R.A. 209.

fendant, can find no countenance from a court of justice."

The court of chancery appeals finds in the present case, that it was a part of the contract between these parties that Deeds & Hirsig should order the buggies of the sizes and patterns needed, but that, notwithstanding the buggy company had frequently been urged to send forward their orders, they had persistently refused to do so. Under these circumstances, the buggy company was not required or expected to assemble the constituent parts of the vehicle and manufacture them into buggies.

In Ault v. Dustin, 100 Tenn. 366, 45 S. W. 981, it was held by this court that the purchaser of a quantity of rope, which was to be manufactured and delivered upon his orders in assorted sizes by a specified date, breached his contract by failure to give orders a sufficient time before the date fixed for final delivery to reasonably enable the seller to manufacture and deliver the goods. It was further said in that case that the law will imply as a term of this contract that the specifications should be furnished within a reasonable time, in order to enable the defendant to comply with his contract by the time limited; citing 1 Beach on Contracts, § 133. It was clearly the duty of Deeds & Hirsig to have advised the manufacturer of the kind and number of vehicles desired from time to time during the continuance of the contract, and there was no obligation resting on the buggy company to manufacture the vehicles until they were so ordered.

In Hinckley v. Pittsburgh Bessemer Steel Co. *supra*, the court held that, under the circumstances, Hinckley was estopped from insisting that the plaintiff should have undertaken the risk and expense of actually making and selling the rails. These considerations also show that the rule of damages adopted by the circuit court was the proper one. It was in accordance with the rule laid down by this court in Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, 14 L. ed. 157. In that case, a contractor for the building of a railroad sued the company for its breach. On the question of damages, this court said (page 344 of 13 How., page 173 of 14 L. ed.): "It must be admitted that actual damages were all that lawfully could be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits are not to be allowed, understanding, as we must, the term 'profits' in this instruction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam*. In the case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the other party has broken the contract and unlawfully put an end to the work, would be unjust. . . . Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost. See Masterton v. Brooklyn, 7 Hill, 61, 42 Am. Dec. 38, and cases there referred to. We hold it to be a clear rule that the gain or profit of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete the work was a proper subject of damages."

In United States v. Behan, 110 U. S. 344, 28 L. ed. 170, 4 Sup. Ct. Rep. 81, the rule was thus stated: "The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage; namely: First, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson in the case of Masterton v. Brooklyn, 7 Hill, 69, 42 Am. Dec. 38, they are 'the direct and immediate fruits of the contract,' they are free from this objection. They are then 'part and parcel of the contract itself entering into, and constituting a portion of, its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as the fulfilment of any other stipulation.'"

In Hale v. Trout, 35 Cal. 229, the facts were: That A and B entered into a contract by which A was to manufacture for B a given amount of lumber by specified term, for which B was to pay a fixed price per thousand, payable at the end of each month, and B without fault on A's part, refused to

pay for lumber sawed and received, and to receive any more lumber, declaring the contract at an end. Held, that the rule of damages for the breach is the difference between the cost of making the lumber and the contract price. In other words, that the plaintiff was entitled to recover the profits that he would have made had he been permitted to complete the contract. See also Kimball Bros. v. Deere, W. & Co. 108 Iowa, 676, 77 N. W. 1041.

In Cameron v. White, 74 Wis. 425, 5 L.R.A. 493, 43 N. W. 155, it was held: "The measure of damages in an action for refusing to perform a contract to purchase lumber to be gotten out and delivered by plaintiff, notice of which refusal is given after the logs have been purchased, but before any of them have been sawed, is the profit which plaintiff could have made on the contract had he been permitted to perform the same." See also Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; Tufts v. Weinfeld, 88 Wis. 647, 60 N. W. 992; Muskegon Curtain-Roll Co. v. Keystone Mfg. Co. 135 Pa. 132, 19 Atl. 1008; Kingman & Co. v. Western Mfg. Co. 34 C. C. A. 489, 92 Fed. 489; Kingman & Co. v. Hanna Wagon Co. 176 Ill. 553, 52 N. E. 328.

In Page on Contracts, vol. 3, § 1591, the rule is announced that, "if such a contract is broken by the vendee, the measure of damages is the contract price, less the cost of manufacturing;" that is to say, he could recover the profit that he would have made had there been no breach. 13 Cyc. Law & Proc. p. 159, citing numerous cases.

In Ault v. Dustin, *supra*, it was said: "It is insisted, however, on behalf of defendants, that this was not a sale of goods *in esse*, but a contract to manufacture goods; that, after a person ordering goods has given the manufacturer notice not to proceed with his work, the party so notified has no right to proceed with the manufacture." This court recognized this contention as sound, and quoted from 2 Beach on Contracts, § 1716, as follows: The principle is universal that, while a contract is executory, the party has the power to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damages as will be compensation to the other party for being stopped in the performance of his work. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such damages. The legal right of a party, on general principles, to violate, abandon, or renounce his contract, on the usual terms of compensation to the other party for damages which the law allows, is universally recognized.

Now, it is very true that, when Deeds & Hirsig notified the buggy company that they would not accept the vehicles, the manufacturer was not warranted in manufacturing the vehicles, and thereby increasing the damages. But, under all the authorities, he was clearly entitled to compensation for the breach, and, under the rule announced, his compensation is to be measured by the profits he would have made if he had been permitted to complete his contract.

The case of Smith v. O'Donnell, 8 Lea, 468, clearly announced the rule that in such cases the measure of compensation is the profit that would have been derived from the execution of the contract. Singleton v. Wilson, 85 Tenn. 344, 2 S. W. 801. See also Chisholm & M. Mfg. Co. v. United States Canopy Co. 111 Tenn. 211, 77 S. W. 1062. The case of Hardwick v. American Can Co. 113 Tenn. 657, 88 S. W. 797, relied on by the complainants for the rule that the measure of damages in such cases is the difference between the contract price of the chattel and its market value, is not in point, for the reason it appeared that in that case the stoves had all been manufactured and were *in esse*.

Let the petition to rehear be dismissed.

SOUTH CAROLINA SUPREME COURT.

R. L. LUTHER et al.
v.
J. S. WHEELER et al.

(—S. C. —, 52 S. E. 874.)

Municipal corporations—borrowing money.

1. Municipal officers have no implied power to borrow money for corporate purposes.

Same—contraction of debts.

2. The implied power of municipal officers to contract a debt for a public building is limited to such as they reasonably

Case Note.—Implied power of municipality to construct improvements on credit.—That municipal corporations are invested by implication with power to contract on credit with respect to such improvements as they are authorized to make appears to be generally conceded, and is fully supported by authority. Thus, in Police Jury v. Britton, 15 Wall. 566, 21 L. ed. 251, it is said that a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness and issue proper vouchers therefor, it being a necessary incident to the express power granted.

In Hoffman v. Pawnee County, 3 Okla. 325, 41 Pac. 566, it is said: "It is established doctrine that a municipality has the implied power to incur indebtedness when-

and in good faith expect to pay from the ordinary revenue of the town for the current, municipal, fiscal year after the payment of all necessary current expenses.

Note—invalidity—effect of transfer.

3. The indorsement and transfer of a note void because issued by a municipal corporation for borrowed money is not sufficient to give it validity.

Same—loan—money had and received.

4. An action for money had and received may be maintained by one who has loaned money to a municipal corporation, which has been used by it for legitimate corporate purposes authorized by law, although the municipality had no power to borrow the money, and the note given therefor was void.

Same—statutory authority.

5. The omission of a certain class of towns from the statute authorizing municipalities to borrow money does not necessarily imply an intention to deny them the right to contract debts for legitimate expenses in anticipation of the collection of current taxes.

Same—constitutional authority.

6. Although a constitutional provision that "this section shall not be construed to prevent the issuing of certificates of indebtedness in anticipation of the collection of taxes for amounts actually contained, or to be contained, in the taxes for the year when such certificates are issued and payable out of such taxes," does not authorize the borrowing of money on certificates of indebted-

ever it is necessary to do so to carry out any power conferred upon it, unless the contracting of such debt is prohibited by statute."

Municipal corporations may create debts in the accomplishment of any object clearly within their power and reasonably essential to the attainment of their charter purposes. Allen v. La Fayette, 89 Ala. 641, 9 L.R.A. 497, 8 So. 30.

And in Ketchum v. Buffalo, 14 N. Y. 356, it is said that there is no solid basis for any distinction between incurring debts for the ordinary and current expenses of the corporation and debts upon an extended credit for objects of a permanent character.

And that municipal corporations having an express power to construct sidewalks may do so on their general credit was held in Galveston v. Loonie, 54 Tex. 517; Galveston v. Heard, 54 Tex. 420; and Clark v. Des Moines, 19 Iowa, 199, 87 Am. Dec. 423.

In Bigelow v. Perth Amboy, 25 N. J. L. 297, it is held that the power to regulate the streets and walks of a city carries with it authority to incur debts for that purpose.

So, also, in State ex rel. Young v. Neodesha, 3 Kan. App. 319, 45 Pac. 122, it is said that the mayor and council of a city, having power to open and improve streets, are not prohibited from making all needful and necessary improvements or repairs on the streets, and from building sidewalks and street crossings, by reason of want of ready funds to pay for the same.

In Pine Tree Lumber Co. v. Fargo, 12 N. D. 360, 96 N. W. 357, it is held that, unless there is something in the general incorporation act, or general statutes, which otherwise directs, or by necessary implication limits, the right of a city to become generally liable upon its contracts for street paving, it may be held liable for debts so contracted.

The implied power to incur indebtedness in relation to municipal improvements is also recognized in Lehigh Coal & Nav. Co.'s Appeal, 112 Pa. 360, 5 Atl. 231, which holds that a constitutional provision requiring municipal corporations incurring any indebtedness to provide, at or before the time of so doing, for the collection of an annual tax sufficient to pay the interest, and provide a sinking fund, has no application to the incidental and ordinary expenses of making and repairing township roads.

The bond of a municipal corporation having authority to contract for lighting streets with gas, given as a voucher or in payment for lamp posts and fixtures used in lighting the streets, is valid, whether or not such municipality has the power to borrow money and issue negotiable commercial paper. Neeley v. Yorkville, 10 S. C. 141.

An authority vested by statute in commissioners of highways under certain circumstances, to cause a bridge which has been damaged or destroyed to be immediately repaired or rebuilt, carries with it authority to create a debt against the town. Boots v. Washburn, 79 N. Y. 207.

A municipal corporation authorized to purchase real estate for the purpose of constructing public buildings thereon may, in the absence of anything in the charter to the contrary, purchase such real estate on credit; and such transaction is not a loan within the meaning of a charter limitation. Richmond v. McGirr, 78 Ind. 192.

Where counties are empowered to contract for the erection or repair of public buildings, the power to issue vouchers for payment is necessarily implied. Claiborne County v. Brooks, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489.

A town authorized by its charter to maintain public schools may purchase a schoolhouse on credit. Allen v. La Fayette, 89 Ala. 641, 9 L.R.A. 497, 8 So. 30.

But in Waxahachie v. Brown, 67 Tex. 519, 4 S. W. 207, it is said that the power to borrow money or create a debt is not a necessary incident of the power to buy grounds and build schoolhouses, and, hence, should not be implied against the spirit and policy clearly manifested by contemporaneous legislation, as well as by the organic law in force at the time such legislation was enacted.

A municipal corporation authorized to establish markets may purchase real estate for such purpose upon credit. Ketchum v. Buffalo, 14 N. Y. 356; People ex rel. Taylor v. Brennan, 39 Barb. 522.

ness, it authorizes the contracting of debts for services actually rendered in anticipation of taxes or other revenue, and with reasonable expectation at the time the expenses were incurred that they would be paid from the revenue of the current year.

Same—mistaken calculation.

7. An indebtedness incurred by municipal authorities for legitimate expenses, with the reasonable expectation that it will be met from the current revenue for the fiscal year, is not rendered uncollectible by the fact that the expectation is not realized, and that such revenue is exhausted by application to other purposes.

Note—renewal—effect on character of debt.

8. The character of a debt represented by a note given without authority is not changed by renewals of the note.

(November 27, 1905.)

SUIT to enjoin the payment of a note given for money borrowed by a municipal corporation. Relief granted in part.

The facts are stated in the opinion.

Messrs. **Bellinger & Townsend** for petitioners.

Messrs. **Hunt, Hunt, & Hunter** for respondents.

Woods, J., delivered the opinion of the court:

The plaintiffs, as resident taxpayers of the town of Prosperity, brought this action to enjoin the defendants, as intendant and wardens constituting the town council of that town, from paying a note for $1,000 given to the Bank of Prosperity for money borrowed for the purpose of building a town hall, market, and guardhouse. On the application of plaintiffs' attorneys, his Honor, Chief Justice Pope, granted at chambers, on August 4, 1904, a temporary injunction, and required the defendants to show cause why it should not be made permanent. The defendants appeared on August 18, 1904, in answer to the rule to show cause, and, it then appearing that issues of fact were involved, H. C. Holloway, Esq., was appointed referee, "to take the testimony and report the same, together with his conclusions thereon, to the supreme court at its regular November term, 1904." The facts as found by the referee are substantially as follows: On March 9, 1902, after due notice given by the town council, about 65 or 70 out of the 90 or 95 registered voters of the town of Prosperity, at least one of the plaintiffs being present, met at the high-school building for the purpose of nominating an intendant and wardens to serve for the ensuing year. The testimony shows after the nominations a resolution to the effect that it be "the sense of this meeting that the new council procure a lot, and erect thereon a town hall, market, and guardhouse," was unanimously adopted. The design and cost of the building were not considered at this meeting, and at no time was the question of borrowing money for its erection ever submitted to the citizens of the town, the newly elected council assuming entire charge of all these matters. The new council made an estimate of the income of the town for that fiscal year, and reached the conclusion that by managing economically they could pay $150 for the lot, expend $1,500 on the building, and still meet the ordinary current expenses of the town. On June 30, 1902, a lot for the site of the building was actually purchased at the price of $150, council giving a note of the town for the purchase money, with interest, due in one year. Relying on their estimate, council passed an ordinance on July 5, 1902, to borrow $1,000 from the Palmetto Bank & Trust Company, Columbia South Carolina, "for the purpose of building city hall." A resolution dated July 9, 1902, and properly signed and attested by the town officials, authorized the borrowing of $1,000 from the Palmetto Bank & Trust Company with which "to carry on the affairs of the town," the obligation to be secured by pledge of "the taxes of the town arising from the levy for the present year, or the profits derived by the town from the dispensary, or both if necessary." This resolution is not referred to in the minute book of council, but the referee found that it was

That the extent of the implied power of municipal officers to contract debts in the name of the corporation has not more frequently been the subject of judicial construction is doubtless due to the fact that it has generally been found advisable to impose some limitation by constitutional, charter, or statutory provision. That such power is subject to inherent limitation, however, seems to be recognized by Justice Bradley in Nashville v. Ray, 19 Wall. 468, 22 L. ed. 164, in which he says that indebtedness may be incurred in carrying out the objects of the incorporation "to a limited extent."

And in Windsor v. Des Moines, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476, it is said that a right, vested in the city, to establish an electric light plant, to be paid for out of general revenues, will not authorize anticipation of such general revenues.

In Guffield v. Bowlinggreen, 6 B. Mon. 224, in sustaining the power of the board of trustees to grade and pave the streets by general taxation, the court said that the power to pledge the funds and bind the faith of the town for improvements of the streets is limited to the extent of the revenue not otherwise appropriated by law,—a *dictum* which, so far as the report of the case shows, does not appear to have been based upon any express statutory limitation.

the same as the ordinance mentioned as passed on July 5, 1902; and this seems correct, council explaining the apparent difference in purpose for which the money was borrowed by saying that when it was found necessary to borrow they decided to put the sum borrowed into the common treasury and pay it out as needed, whether for work on the building, or for ordinary current expenses. On July 11, 1902, the town council negotiated the note of the town for $1,000, payable January 10, 1903, the resolution of July 9th being attached, at the Palmetto Bank & Trust Company, and received thereon $960. At this time the only debt outstanding against the town, so far as the testimony shows, was the $150 note given for the purchase money of the lot. It is true the ordinary current expenses for the remainder of the year had to be met, but the resolution authorizing the creation of the debt specified that the money was to be used "to carry on the affairs of the town," and there is nothing to show that the bank had express notice of the original ordinance specifying that the money was to be used for the purpose of building a town hall.

The cash book of the town shows that the total municipal income from all sources for the fiscal year beginning April 22, 1902, was $1,832,19. The receipts up to July 11, 1902, were $455.56, and the expenditures $440.82, of which $297.60 was paid out on the building and the balance on current expenses. This left available to council $1,391.37 with which to pay the ordinary current expenses from July 11th to the end of that fiscal year, amounting to $1,001.13, and with which to pay the balance of $1,352.40 on the lot and building debts of $1,650, thus showing council had fallen far short in their estimate. If the $1,650 had not been spent on the town hall, council would have had a balance of $687.84 on hand at the end of the fiscal year; but, instead of limiting the cost of the building and lot to $1,650 as originally contemplated, they decided to enlarge and improve the building, and, to meet the additional expense, borrowed, on September 8, 1902, $600 from the Bank of Prosperity, giving therefor the note of the town, payable in one year, thus making the total indebtedness of the town for the fiscal year 1902 $3,394.35, as against a total income of $1,832.19. At maturity, on January 10, 1903, the $1,000 note to the Palmetto Bank & Trust Company was taken up by the Bank of Prosperity, and a renewal note, under the seal of the town, was given by the council; the ordinance authorizing such action, which was similar to the resolution under which the original debt was incurred, being attached thereto. A like second renewal note was given at the maturity of the first, in 1904, under the authority of a similar ordinance. From this it clearly appears that this last renewal note for $1,000 to the Bank of Prosperity, maturing January 7, 1905, payment of which is herein sought to be enjoined, evidences the same debt that was created on July 11, 1902, with the Palmetto Bank & Trust Company. Thus it will be seen that council had created a debt against the town of $1,750, evidenced by three notes for $150, $1,000, and $600, respectively, which would necessarily have to be paid by a future council, after the expiration of their term of office, and out of taxes and licenses to be levied and collected in another fiscal year, and so the revenues of a future fiscal year would have to be applied to the payment of a debt contracted in a prior year. From the cash book of the town it appears that the total income of the town, including cash on hand, from April 22, 1903, to April 26, 1904, was $1,806.95, and the expenditures $1,743.96, which included payment of the $150 note for the purchase money of the lot and of the $600 note to the Bank of Prosperity. The total income of the town from January 1, 1903, to January 1, 1904, was $1,504.17, and from January 1, 1904, to November 1, 1904, $1,292, showing that at no time have funds been on hand with which to pay the note for $1,000 held by the Bank of Prosperity. At the time it was determined to erect this building, the council had no place to meet, the market was in bad condition, and the guardhouse totally inadequate; and therefore it was necessary to erect a building of some kind for municipal purposes. When completed, the town hall cost $2,291.01, but the work appears to have been done cheaply, and the building to be quite satisfactory in every way. During the progress of the work on the building, itemized statements of the receipts and expenditures of the town, showing the amount of its indebtedness and to whom due, were published in the newspaper or posted in public places, and any other information of this kind could have been had from the clerk and treasurer. Plaintiffs acquiesced in the incurring of these debts and the building of the town hall to the extent of making no complaint until the bringing of this action. We consider first the general principles of law applicable to the case, and then the effect of the Constitution and the statute law of the state.

1. Municipal corporations have only such powers as are granted to them by the Constitution or by statute, either expressly or by necessary implication. The following statement of the law, taken from 1 Dillon on Municipal Corporations, § 89, is supported by practically unbroken authority: "It is

a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." State ex rel. Heise v. Columbia, 6 Rich. L. 404; State ex rel. Atkins v. Maysville, 12 S. C. 76; Blake v. Walker, 23 S. C. 517; White v. Rock Hill, 34 S. C. 242, 13 S. E. 416; State ex rel. Columbia Club v. McMaster, 35 S. C. 1, 28 Am. St. Rep. 826, 14 S. E. 290; Mauldin v. Greenville, 42 S. C. 293, 27 L.R.A. 284, 46 Am. St. Rep. 723, 20 S. E. 842. The power to borrow money is not a necessary incident of municipal life, and hence does not exist unless expressly given, or unless some duties are imposed or powers conferred on the corporation which manifestly could not be exercised at all without borrowing money. The two leading cases on the subject are Nashville v. Ray, 19 Wall. 468, 22 L. ed. 164, and Hackettstown v. Swackhamer, 37 N. J. L. 191. Authorities to the same effect will be found collected in 8 Rose's Notes, 253; note to Jones v. Camden (S. C.) 51 Am. St. Rep. 828; Wells v. Salina, 119 N. Y. 280, 7 L.R.A. 759, 23 N. E. 870; Allen v. La Fayette, 89 Ala. 641, 9 L.R.A. 497, 8 So. 30; 1 Dill. Mun. Corp. § 125 (1), 507a; 20 Am. & Eng. Enc. Law, p. 1143. A contrary view was taken in a number of the earlier cases cited in 1 Dillon on Municipal Corporations, § 118, and by some of the justices of the Supreme Court of the United States, in Nashville v. Ray, *supra*. There is now, however, little, if any, judicial dissent from the view that municipal officers are not the general fiscal agents of the corporation, with the implied power to borrow money for corporate purposes. This conviction of the courts has been greatly strengthened by the disasters which have befallen so many communities, growing out of the negligent and fraudulent misappropriation of money borrowed by counties, cities, and towns. In State ex rel. Atkins v. Maysville, *supra*, the court says: "The only point discussed at bar is the power of the town of Maysville to levy taxes. It appears that no express authority is granted for that purpose in its charter. Such power can only be implied on the ground of necessary implication. To raise such an implication, it would be necessary to hold that municipal powers cannot be effectively granted without the taxing power,—a proposition that we cannot affirm. No such power of taxation can therefore be implied." The power to levy taxes is far more usual and necessary to corporate existence than the power to borrow money on the faith of taxes, and, if the former is not implied from the fact of incorporation, for a stronger reason the latter is not.

There is, however, an obvious difference between borrowing money, even for the purpose of applying it to the ordinary current expenses of the town, and contracting debts to those who are employed to do those things requisite to the conduct of the town's affairs, such as street laborers, policemen, etc., or even for the erection of buildings to be used for municipal purposes. "In the one case the application of the credit is secured to the advancement of the authorized object, while money borrowed is liable to be lost, to be squandered, or to be diverted to illegitimate purposes." 2 Dan. Neg. Inst. § 1530. Under the general rule of law, the council of the town of Prosperity could have made a debt for a town hall and guardhouse to one who contracted to build it. Neely v. Yorkville, 10 S. C. N. S. 141; 1 Dill. Mun. Corp. § 125 (6); Police Jury v. Britton, 15 Wall. 566, 21 L. ed. 251; Nashville v. Ray, *supra*; 21 Am. & Eng. Enc. Law, p. 31; Claiborne County v. Brooks, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489; Merrill v. Monticello, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. Rep. 441; Allen v. La Fayette, *supra*; Newgass v. New Orleans, 42 La. Ann. 163, 21 Am. St. Rep. 368, 7 So. 565; Clark v. Des Moines, 87 Am. Dec. 423, and note (19 Iowa, 199). But even the power to contract debts for municipal purposes should be restricted to such debts as the council could reasonably expect, and in good faith did expect, to pay from the ordinary revenue of the town for the current municipal fiscal year. Without such a restriction, it is manifest there would be no safeguard against involving the town in overwhelming debt for municipal buildings and enterprises out of all proportion to its present or reasonably-to-be-expected population and wealth. While this might not imply the same moral turpitude, it is as disastrous to the taxpayer as intentional misappropriation of borrowed money. Especially when any unusual enterprise is contemplated, all who deal with the municipal authorities are chargeable with knowledge that the council would have no right to involve the town in debt for its prosecution, unless, after a careful estimate, they with good reason believed there would be a surplus revenue for the current year, over all necessary current expenses, sufficient to pay the debt to be contracted for such building or other enterprise. If,

however, such an estimate is made, leading to the reasonable conclusion that the anticipated revenue will be sufficient to meet the debt contemplated for the municipal building or other special enterprise as well as current charges, and accordingly the building or other enterprise is commenced, and any considerable expense incurred, and then it should turn out that the estimates of the expenses were too low, or the estimates of the revenue too high, indebtedness thereafter incurred in the prosecution of the enterprise would nevertheless be valid, because the law is not so unreasonable as to require in such circumstances the waste of the public funds which would be consequent upon the abandonment of the work in an incomplete condition. Judicial expression as to this limitation upon the power of municipal officers to contract debts in the name of the corporation, which we think should be insisted on, is not as explicit as might be desired; but this view is clearly intimated in the very strong opinion of the court, delivered by Mr. Justice Bradley, in Nashville v. Ray, *supra*. And the view of Judge Dillon is that the usual grants of municipal powers contemplate that the expense of the execution of such powers shall be met year by year from revenue derived from current taxation and other ordinary sources. 1 Dill. Mun. Corp. § 125. The case of Neely v. Yorkville, *supra*, is not an authority to the contrary, for there one of the bonds in issue was dated February 11, 1861, and the other June 4, 1861, and both were payable January 1, 1862. Presumably, they were given in anticipation of the collection of the revenues of 1861. Certainly there is no evidence in the record that they were not so given, and the question here under discussion, as far as the reported case shows, was not made in argument and was not referred to in the opinion. But, even if the general rule of law should be thought not so rigid as we have stated it, as to the circumstances under which a municipality may contract debts without special authority, as we shall hereafter see, it was made so by the Constitution of 1895.

2. The indorsement of a note given by a municipal corporation which has no power to borrow money, or which has not exercised such power in compliance with the conditions required by law, cannot avail to give it validity. The Bank of Prosperity, therefore, cannot stand on any higher ground than the Palmetto Bank & Trust Company. There was never any power, either real or apparent, to give the note, and, being therefore void from the beginning, no force could be given it by indorsement. Even when the power to borrow money is expressly given, though the holder of the paper is not bound to see that the money is properly applied, yet he takes it subject to the risk that it has been properly and lawfully issued. The authorities to this effect are so numerous that we refer only to Jones v. Camden, 44 S. C. 323, 51 Am. St. Rep. 819, 23 S. E. 141; Claiborne County v. Brooks, *supra;* Brenham v. German-American Bank, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559. Under the principles of law to which we have adverted, the conclusion cannot be avoided that the note held by the Bank of Prosperity, having been given for borrowed money, is not a valid obligation of the town. Of course, if the instrument here under consideration, in form a note, is to be regarded a bond, that would be an additional reason for holding it void; for it is not pretended there was any compliance with the constitutional conditions essential to the validity of a municipal bond issue. The question is not a practical one in this case, because the instrument is invalid, even if it be regarded as a note, since it was given for borrowed money. The court does not, however, wish to be understood as assenting to the proposition, urged by counsel for the plaintiffs, that a paper, in form a promissory note, becomes a municipal bond, merely because it has affixed the seal of the corporation. Central Nat. Bank v. Charlotte, C. & A. R. Co. 5 S. C. N. S. 156, 22 Am. Rep. 12.

Regarding the note entirely void, and therefore eliminated from the transaction, it is still to be considered whether the bank could recover the amount loaned for which the note was given, as money had and received by the town; not because it had been loaned by the town, or because its officers had borrowed it and promised to pay, but because it was money of another used by the town for legitimate corporate purposes authorized by law. Cogent argument may be made and strong authority adduced on both sides of this question. The argument against such a recovery is stated with great force by Beasley, Ch. J., in Hackettstown v. Swackhamer, 37 N. J. L. 191, and by Judge Earl in Wells v. Salina, 119 N. Y. 280, 7 L.R.A. 759, 23 N. E. 870. The view expressed in these and other cases is that to allow a recovery for money had and received, while denying the power to corporate officers to make a valid contract to repay borrowed money, would be (1) to repudiate such a contract in the abstract while ratifying and giving it full effect in the concrete, and (2) to raise an implied contract to repay where there is no power to make an express contract. A statement of the basis of the action for money had and received, we venture to think, will show that these arguments are not sound. Express contracts and contracts

a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." State ex rel. Heise v. Columbia, 6 Rich. L. 404; State ex rel. Atkins v. Maysville, 12 S. C. 76; Blake v. Walker, 23 S. C. 517; White v. Rock Hill, 34 S. C. 242, 13 S. E. 416; State ex rel. Columbia Club v. McMaster, 35 S. C. 1, 28 Am. St. Rep. 826, 14 S. E. 290; Mauldin v. Greenville, 42 S. C. 293, 27 L.R.A. 284, 46 Am. St. Rep. 723, 20 S. E. 842. The power to borrow money is not a necessary incident of municipal life, and hence does not exist unless expressly given, or unless some duties are imposed or powers conferred on the corporation which manifestly could not be exercised at all without borrowing money. The two leading cases on the subject are Nashville v. Ray, 19 Wall. 468, 22 L. ed. 164, and Hackettstown v. Swackhamer, 37 N. J. L. 191. Authorities to the same effect will be found collected in 8 Rose's Notes, 253; note to Jones v. Camden (S. C.) 51 Am. St. Rep. 828; Wells v. Salina, 119 N. Y. 280, 7 L.R.A. 759, 23 N. E. 870; Allen v. La Fayette, 89 Ala. 641, 9 L.R.A. 497, 8 So. 30; 1 Dill. Mun. Corp. § 125 (1), 507a; 20 Am. & Eng. Enc. Law, p. 1143. A contrary view was taken in a number of the earlier cases cited in 1 Dillon on Municipal Corporations, § 118, and by some of the justices of the Supreme Court of the United States, in Nashville v. Ray, *supra*. There is now, however, little, if any, judicial dissent from the view that municipal officers are not the general fiscal agents of the corporation, with the implied power to borrow money for corporate purposes. This conviction of the courts has been greatly strengthened by the disasters which have befallen so many communities, growing out of the negligent and fraudulent misappropriation of money borrowed by counties, cities, and towns. In State ex rel. Atkins v. Maysville, *supra*, the court says: "The only point discussed at bar is the power of the town of Maysville to levy taxes. It appears that no express authority is granted for that purpose in its charter. Such power can only be implied on the ground of necessary implication. To raise such an implication, it would be necessary to hold that municipal powers cannot be effectively granted without the taxing power,—a proposition that we cannot affirm. No such power of taxation can therefore be implied." The power to levy taxes is far more usual and necessary to corporate existence than the power to borrow money on the faith of taxes, and, if the former is not implied from the fact of incorporation, for a stronger reason the latter is not.

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2. The indorsement of a note given by a municipal corporation which has no power to borrow money, or which has not exercised such power in compliance with the conditions required by law, cannot avail to give it validity. The Bank of Prosperity, therefore, cannot stand on any higher ground than the Palmetto Bank & Trust Company. There was never any power, either real or apparent, to give the note, and, being therefore void from the beginning, no force could be given it by indorsement. Even when the power to borrow money is expressly given, though the holder of the paper is not bound to see that the money is properly applied, yet he takes it subject to the risk that it has been properly and lawfully issued. The authorities to this effect are so numerous that we refer only to Jones v. Camden, 44 S. C. 323, 51 Am. St. Rep. 819, 23 S. E. 141; Claiborne County v. Brooks, *supra;* Brenham v. German-American Bank, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559. Under the principles of law to which we have adverted, the conclusion cannot be avoided that the note held by the Bank of Prosperity, having been given for borrowed money, is not a valid obligation of the town. Of course, if the instrument here under consideration, in form a note, is to be regarded a bond, that would be an additional reason for holding it void; for it is not pretended there was any compliance with the constitutional conditions essential to the validity of a municipal bond issue. The question is not a practical one in this case, because the instrument is invalid, even if it be regarded as a note, since it was given for borrowed money. The court does not, however, wish to be understood as assenting to the proposition, urged by counsel for the plaintiffs, that a paper, in form a promissory note, becomes a municipal bond, merely because it has affixed the seal of the corporation. Central Nat. Bank v. Charlotte, C. & A. R. Co. 5 S. C. N. S. 156, 22 Am. Rep. 12.

Regarding the note entirely void, and therefore eliminated from the transaction, it is still to be considered whether the bank could recover the amount loaned for which the note was given, as money had and received by the town; not because it had been loaned by the town, or because its officers had borrowed it and promised to pay, but because it was money of another used by the town for legitimate corporate purposes authorized by law. Cogent argument may be made and strong authority adduced on both sides of this question. The argument against such a recovery is stated with great force by Beasley, Ch. J., in Hackettstown v. Swackhamer, 37 N. J. L. 191, and by Judge Earl in Wells v. Salina, 119 N. Y. 280, 7 L.R.A. 759, 23 N. E. 870. The view expressed in these and other cases is that to allow a recovery for money had and received, while denying the power to corporate officers to make a valid contract to repay borrowed money, would be (1) to repudiate such a contract in the abstract while ratifying and giving it full effect in the concrete, and (2) to raise an implied contract to repay where there is no power to make an express contract. A statement of the basis of the action for money had and received, we venture to think, will show that these arguments are not sound. Express contracts and contracts

implied in fact depend upon the will of the parties to be bound, indicated in the one case expressly in some form recognized by law, and in the other by circumstances from which assent may be inferred as a conclusion of fact. Quasi contracts, or contracts implied in law, are obligations imposed by law as duties, quite independent of the assent of the party held to be bound, and often in spite of his earnest dissent. In an action on an express contract, or a contract implied in fact, the measure of the recovery is ordinarily fixed by the promise. In an action depending on the obligation or duty called quasi contract, the measure of the recovery is the extent of the duty or obligation imposed by law, and is expressed by the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff. If a recovery were allowed against a municipal corporation on a note for money borrowed, the judgment must be for the amount of the note, however large, and though the money may have been squandered. But in an action against a town for money had and received, the question is not what the claimant has parted with to officers who were not authorized to take his money for the town, or what they have promised him, but, How much has the town been benefited? If the money was squandered, there can be no recovery; if it was used extravagantly, for buildings or enterprises not reasonably necessary for municipal purposes, there can be no recovery beyond the actual benefit. This view, it will be seen, leaves no room to say that a promise to pay back money is implied where no valid contract can be made, or that allowing any recovery for money had and received subjects the town to the same peril as to admit the unrestricted right of a municipal council to borrow money. The right to such a recovery is supported by the weight of authority, as will appear by reference to the following citations, though it has been denied, as we have seen, by courts whose opinions should receive great consideration: 1 Dill. Mun. Corp. § 126, note, and §§ 460, 461; 20 Am. & Eng. Enc. Law, p. 1158; Keener, Quasi Contracts, 272; Marsh v. Fulton County, 10 Wall. 676, 19 L. ed. 1040; Salt Lake City v. Hollister, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055; Parkersburg v. Brown, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; Chelsea Sav. Bank v. Ironwood, 66 C. C. A. 230, 130 Fed. 410; Allen v. La Fayette, 89 Ala. 641, 9 L.R.A. 497, 8 So. 30. The view of the court expressed in Carolina Nat. Bank v. State, 60 S. C. 465, 85 Am. St. Rep. 865, 38 S. E. 629, is not in the least inconsistent with this view. The distinction between that case and this is made obvious by these sentences of the opinion of the court, delivered by Mr. Justice Jones: "Nor do we think this action can be sustained, as contended by the respondent, as an action for money had and received. The state has only received that to which it was entitled, *viz.*, money for the hire of convicts, received from the hands of the superintendent of the penitentiary. Plaintiff has paid no money to the state by mistake; for in the eye of the law plaintiff dealt with Neal, not with the state, and received from Neal all that it contracted for, the liability of the makers of the notes, supported by Neal's indorsement." There the state was not unjustly enriched, but received only its due, and there was no legal or equitable principle upon which it could be required to refund to a mere volunteer.

In this case these important facts are established: (1) The money was expended for a municipal purpose impliedly authorized by the charter, because reasonably necessary for the proper conduct of municipal affairs; for we suppose it will not be disputed that, both under the general principles of law and the special provisions of the statute, the expenditure of public funds for the erection of a guardhouse, council chamber, and town hall, would be sustained; (2) the town received full benefit for the entire amount expended; (3) the council had reason to believe, and did believe, when the building of the town hall was commenced and until they had expended on it about $300, that the entire debt of $1,000 contemplated and afterwards contracted to the Palmetto Bank & Trust Company, could and would be repaid from the regular income of the town for the current fiscal year, and, if the bank had exhausted all means of inquiry into the town's affairs, as it was its duty to do, nothing would have been discovered beyond these facts. If the general principles of law above stated are applied to these facts, the conclusion is obvious that the Bank of Prosperity, as the equitable assignee of the Palmetto Bank & Trust Company, could recover against the town the sum advanced as money had and received by the town for its benefit. But it remains to consider to what extent, if at all, these general rules have been modified by the Constitution and the statutes of this state,—whether these general rules have been so altered that the town of Prosperity is under no legal obligation to refund the amount received from the Palmetto Bank & Trust Company. For it is to be observed that, while a recovery for money had and received does not require either an express contract or a contract implied in fact to support it, yet it does require for its support a debt imposed by law; and, where

the Constitution or statute law of the state forbids, not only the borrowing of money, but the incurring of any debt, or that a debt, to be valid, must be created under certain restrictions, as, for instance, that it must have the sanction of taxpayers or voters expressed at an election, then there can be no recovery for money had and received. In its last analysis, the action for money had and received stands on the judicial conception that the use by one person of the money of another creates a debt; but this judicial conception manifestly could have no application to municipal corporations in the face of positive constitutional or statute law that no debt shall be contracted by a municipality, or that a debt shall be contracted only in a certain manner.

Warned by the disasters resulting from the abuse of public credit, the constitutional convention of 1895 endeavored to protect it by making the sanction of a *referendum* in almost all cases necessary to the validity of public debt. Even the general assembly was forbidden to increase the debt of the state, except by the affirmative vote of two thirds of the qualified electors voting at a popular election. Const. 1895, art. 10, § 11. As to municipal corporations, the Constitution provides: "The general assembly shall provide by general laws for the organization and classification of municipal corporations. The powers of each class shall be defined so that no such corporation shall have any powers, or be subject to any restrictions, other than all corporations of the same class." Const. art. 8, § 1. The general assembly, in pursuance of this requirement, divided towns and cities into classes according to population. The town of Prosperity falls in the class of those containing less than 1,000 inhabitants. The Constitution further provides in § 3, art. 8: "The general assembly shall restrict the powers of cities and towns to levy taxes and assessments, to borrow money, and to contract debts; and no tax or assessment shall be levied, or debt contracted, except in pursuance of law, for public purposes specified by law." For the creation of a debt of any description, therefore, it is necessary for municipal authorities to find either legislative authority or warrant in some other provision of the Constitution itself. In the statutory provision relating to towns of less than 1,000 inhabitants, to be found in art. 1, chap. 49, of the Civil Code of 1902, which may be said to constitute the charter of such towns, no authority is given to contract a debt of any description whatever, not even to anticipate in any way the collection of taxes for the current fiscal year. The fact that by § 1989 of the Civil Code of 1902, relating to towns of over 1,000 inhabitants, it is provided: "In cities of over 5,000 inhabitants, that, in anticipation of the collection of taxes in any fiscal year, said city council may from time to time, as occasion may require, borrow money for corporate purposes, and pledge the taxes levied, or to be levied, in said year for said purposes for the payment of the money so borrowed and interest thereon,"—clearly implies that the general assembly did not intend to confer upon towns of less than 1,000 inhabitants the power to borrow money for corporate purposes, and to pledge the taxes of the current year for its payment. But, as we have seen, the power to borrow money is a much larger and more dangerous power than the power to contract a debt, either for labor or supplies, or for money had and received for the benefit of the town. In the one case, the lender has only to show that the proper corporate officer received the money, and his right to recover does not in the least depend upon the benefit accruing by the actual application of the money; in the other, he who furnishes money can only recover for a debt arising from the actual benefit or enrichment of the town at his expense. The exclusion by omission, therefore, of towns of less than 1,000 inhabitants from the provision allowing towns to borrow money in anticipation of the collection of taxes does not necessarily imply an intention to deny such towns the power to create a debt of any kind in anticipation of the collection of current taxes.

While, as already said, there is no warrant in any act of the general assembly for the creation of any debt by towns of less than 1,000 inhabitants, the following constitutional provision, attached as a proviso to the section prohibiting the creation of bonded indebtedness, except upon certain conditions, applies to all municipal corporations, and we think does warrant the creation and payment of a debt, like that now under consideration, by any municipality organized under the laws of this state, including those of less than 1,000 inhabitants: " . . . This section shall not be construed to prevent the issuing of certificates of indebtedness in anticipation of the collection of taxes for amounts actually contained, or to be contained, in the taxes for the year, when such certificates are issued and payable out of such taxes." [Const. art. 8, § 7.] This section of the Constitution was framed and adopted in the light of the law of municipal corporations to which we have referred as generally recognized in this country. The well-established rule of law denying the right of municipal corporations to borrow money without special authority conferred expressly, or by necessary implication, was well known when the Constitution was adopted, as one of

the greatest safeguards against waste and corruption. If it had been intended to change this rule, there would have been an express conferring, or, at least, an express recognition, of the power to borrow money. Hence we think it would be going much too far to hold that this section gives by implication the power to borrow money on certificates of indebtedness, which would, of course, be binding on the corporation as soon as the money passed into the public treasury, without respect to whether it should thereafter be used for corporate purposes or not. But this provision of the Constitution must be held to have been made in view also of the other established rule to which we have adverted, that the proper municipal officers may contract debts for services actually rendered and money had and received to the actual benefit of the town in the prosecution of authorized municipal work, in anticipation of the taxes or other revenue, and with the reasonable expectation, at the time the work was commenced and expenses incurred, that payment could and would be made from such expected revenue of the current year. When, therefore, the convention recognized the authority of municipalities to contract debts and issue certificates in anticipation of the expected collection of taxes, it plainly meant those debts which the existing law recognized as being within their province and authority to contract; and, as we have seen, a debt for money had and received for the benefit of the town, used in an enterprise authorized by law reasonably necessary for corporate purposes, the town receiving full value and the council believing and having reason to believe it would be paid from the revenue of the current year, was within the province and authority of the officers of the corporation. It is true, § 3, art. 8, of the Constitution, provides that no debt shall be "contracted, except in pursuance of law, for public purposes specified by law." But this section is necessarily modified by § 7, which follows, and allows indebtedness to be incurred in anticipation of the collection of taxes. There is in this last section no specification of any particular purposes for which such debts may be contracted, and the meaning, therefore, manifestly is, they may be contracted for any legitimate corporate purpose. This was the character of the debt to the Bank of Prosperity, and its payment is authorized by the general rules of law, and is not only not forbidden by constitutional or statute law, but, on the contrary, the authority to create such a debt is strongly implied in the Constitution itself. The debt being valid at its creation, its validity is not affected by the fact that it turned out that the reasonable expectations of the council as to the ability to pay from anticipated revenues were not realized, or even that the revenues received for the current year were exhausted by the application of them to other purposes.

It is true, the referee finds that on July 11, 1902, when the money was actually received from the Palmetto Bank & Trust Company, in expecting to repay it from the revenue of the current fiscal year, the council did not take into the account the ordinary current expenses for the remainder of the year; but at the beginning of the fiscal year they did take all items into the account, and reached the conclusion that the money to be expended on the town hall could be refunded in addition to providing for the ordinary current revenues, and when the money was received from the bank had actually expended on the building about $300. To prosecute the work thus in good faith begun, rather than incur the waste of abandoning it, stood on nearly as high ground of necessity as the ordinary expenses of the town.

The character of the debt was not changed by the several renewals of the note; for it was not created by the original note, which was given entirely without authority, and it therefore could not be changed in character by any change of the note. The note was of no force as against the town, but, as between the Palmetto Bank & Trust Company and the Bank of Prosperity, it should be recognized as the symbol of the debt, and hence its indorsement to the Bank of Prosperity will be recognized as a transfer of the debt. The note being without validity, and not representing the debt as between the town and the bank, the rate of interest expressed in it is of no consequence. The real debt is $960, the amount actually received and used, with interest from July 11, 1892, at the rate of 7 per cent per annum, less any sums paid by the town thereon in the form of discount, interest, or otherwise.

3. Under the views herein expressed, it is not necessary to discuss the question of acquiescence; but it may be well to say that there is no evidence of participation or active assent by the plaintiffs to the borrowing of money or the incurring of the debt, and hence there could be no estoppel. Milster v. Spartanburg, 68 S. C. 34, 46 S. E. 539.

The judgment of this court is that the town council of Prosperity be enjoined from paying more than the real debt as above stated. As the practical result is mainly in favor of the defendants, the plaintiffs must be charged with the costs of the cause.

The Chief Justice did not participate in this opinion because of illness.

UTAH SUPREME COURT.

K. P. MINING COMPANY, Respt.,
v.
TONY JACOBSON, Appt.

(— Utah, —, 83 Pac. 728.)

Option—surrender.

1. The surrender of an option to purchase a mining claim is shown by evidence of an intimation to the seller of the purchaser's desire to make the surrender, followed by the seller's taking possession of the claim for the purpose of making a survey for a patent and continuing in possession thereof, performing work, and incurring expenses in the development of the claim.

Land contract—damages for breach.

2. Under a contract for the purchase of a mining claim, which provides for periodic payments, which, together with any other sums which may have been paid, shall be forfeited to the seller as liquidated damages in case of the purchaser's breach of contract, no recovery can be had in case the purchaser surrenders possession for the value of development work which the purchaser agreed, but failed, to do on the property.

(January 25, 1906.)

APPEAL by defendant from a judgment of the District Court for Salt Lake County in plaintiff's favor in an action brought to recover damages for breach of contract to purchase a mining claim. Reversed.

Case Note.—Damages; effect of provision for forfeiture of sums paid or retained under executory contract, to prevent recovery of any other damages after breach of contract.—Whenever the clause of an executory contract providing that, in case of breach by one of the parties thereto, all moneys paid by him to the other party under the terms thereof shall be forfeited and become the absolute property of the payee, is construed to be a provision for stipulated damages, and not a penalty, the courts are all in accord with K. P. MINING CO. v. JACOBSON in holding that no other damages can be recovered by such payee for a breach of the contract.

Where it was agreed that, upon the failure of the vendee to pay the balance of the purchase price of the land, the vendor should have the right to re-enter and take possession of the land, and to retain the sum already paid by the vendee, as liquidated damages for the latter's failure to complete the purchase, no action will lie for the balance of the purchase price, it not appearing that at the time of the vendee's refusal to pay the same he was in possession of the land, or in any way resisted the vendor's re-entry. Allison v. Dunwody, 100 Ga. 51, 28 S. E. 651.

Where a lease, in addition to the usual covenants, provided for the sale of the leased premises within a specified time, and recited that, to secure the payment of the rent and the making of the purchase as agreed, the lessee had assigned certain shares of stock to the lessor, which were to become the latter's absolutely, "as and for liquidated damages, and not as penalty," if the lessee failed to pay rent and to make the purchase as agreed; and the lessee defaulted in both particulars; and the lessor made no offer to return the stock,—he cannot recover the unpaid rent and damages for the lessee's breach of the contract, since the stipulation as to the stock is a bar to the action, whether regarded as a penalty or as stipulated damages. Stillwell v. Temple, 28 Mo. 156.

Where the lessees, upon the execution of the lease, paid a sum of money equal to two months' rent, which was to be applied in payment of the rent for the last two months of the term of the lease, unless before that time they should violate their contract, in which case the lessors were to retain the money "as liquidated damages and not as a penalty;" and the lessees defaulted in their rent and were evicted,—it was held that the lessors could not recover the unpaid rent, as any damage from a breach of the contract was fixed thereby and paid by the sum in their hands. Rosenquist v. Canary, 20 Misc. 46, 45 N. Y. Supp. 342.

It follows, therefore, that where the answer, in an action to recover money deposited with the defendant, averred that the money sued for was delivered to the defendant by the plaintiff as liquidated damages in the event of the plaintiff's failure to fulfil a contract between the parties, the trial court properly refused to permit the defendant to prove special items of damage. Morrison v. Ashburn (Tex. Civ. App.) 21 S. W. 993.

This same principle of law is also applied to any contract by the terms of which one of the parties is to retain, as liquidated damages for a breach thereof, money which would otherwise be due to the party in default.

So, where, by the terms of a railroad construction contract, the company was to hold back a percentage of the value of the monthly estimates of the work done by the contractor, which, in the event of its annulment of the contract for the fault of the contractor, it was to retain as liquidated damages, and the contract was so annulled by the company before the completion of the work, it had a right to retain such percentage, but could not, in an action by the contractor for the balance due for his work, recover any special damages incurred by it in completing the work after the termination of the contract. Wolf v. Des Moines & Ft. D. R. Co. 64 Iowa, 380, 20 N. W. 481.

And in an action for the balance due the contractor under a similar contract, it was held that the railroad company had a right to retain the percentage of the value of the

Statement by McCarty, J.:

This is an action to recover for an alleged breach of a certain contract made between plaintiff and defendant August 28, 1903. The contract contained an option giving the defendant the right to purchase from the plaintiff certain mining claims known as the Native Copper No. 1, No. 2, and No. 3 lode mining claims, situated in Little Cottonwood mining district, Salt Lake county, Utah. The contract, so far as material here, recites that the agreed purchase price for all the claims mentioned is $40,000, payable as follows: $5,000 on or before February 28, 1904; $10,000 on or before August 28, 1904; $25,000 on or before August 28, 1905. That the second party shall, on or before February 28, 1904, or immediately thereafter, make application and proceed to procure a patent from the government of the United States in the name of the first party, and that said application shall be prosecuted with diligence to final entry, and all sums of money required for the procuring of said patent shall be advanced by the second party. "Time is the essence of this contract; and, in the event the second party shall fail to pay any one of said instalments within the time provided therefor; or in the event said second party shall fail to comply with the covenants and conditions herein imposed upon him, or any one of the same,—then this contract shall terminate and be of no force and effect, and all instalments or other sums which may have been paid by the second party under this contract or by reason thereof shall be forfeited by the said second party, and become the property of the first party as liquidated damages and as additional compensation for the use of the property under said contract; and the said first party shall be relieved from all liability existing hereunder. The second party shall take possession of said mining claims at once, and commence work upon the same within fifteen days after the date of this lease, and shall cause to be performed upon said property not less than 120 shifts (one man working one day constituting one shift) of mining labor each and every month of the term of this lease. And it is further understood and agreed that, in the event the second party shall fail to comply with each and all of the covenants, conditions, and agreements assumed and imposed upon him under this contract, then the party of the first part may, at his option, terminate this lease by giving a written notice of his option so to do to the second party; and in such event this lease shall become null and void and of no effect, and thereupon the contract of sale and purchase hereinabove set forth shall immediately terminate and be of no force or effect, and all payments or instalments made by the second party under the contract of sale and purchase and under this lease shall be forfeited by the second party and become the property of the first party as liquidated damages and as additional compensation for the use of said property under this contract, and the said first party in such event shall be re-

estimates reserved as liquidated damages, but not any sum in addition thereto which it owed the contractor on account of the monthly estimates of work. Geiger v. Western Maryland R. Co. 41 Md. 4.

Where the plaintiffs contracted to cut a certain number of cords of wood by a specified time, and the defendants were to hold a part of the price of the work until its completion and thereafter to pay the balance due, unless the plaintiffs failed to cut, in the time set, the full amount contracted for, in which event the defendants were to retain out of the last payment due on the contract 5 cents per cord for every cord actually cut and received, such stipulation fixed the amount of damage to be paid by the plaintiffs upon their breach of the contract; and, in an action to recover the balance due for the wood actually cut, the defendants can set off no special damage to themselves by reason of the plaintiffs' failure to cut the full amount of the wood contracted for. Louis v. Brown, 7 Or. 326.

Where the plaintiff contracted to deliver to the defendant a certain quantity of lumber each year at a specified price, and, upon failure to deliver the amount agreed upon, deduction was to be made from the contract price, the defendant, in an action for the balance due for the lumber actually delivered, was not entitled to a further deduction as damages for the failure to deliver the stipulated amount. Jackson v. Hunt, 76 Vt. 284, 56 Atl. 1010.

Where the plaintiff agreed to deliver to the defendant certain machinery at a time specified, and, upon failure so to do, to permit the defendant to deduct $50 per day from the purchase price thereof for every day between such time specified and the day of delivery, the defendant, in an action for the balance of the purchase price, cannot recoup damages for delay in excess of the *per diem* amount provided by the contract. Wheeling Mold & Foundry Co. v. Wheeling Steel & I. Co. (W. Va.) 51 S. E. 129.

Where a contract for delivery of a boiler provides that on the failure to deliver the same by a certain date the buyers are authorized to deduct from the last payment a certain sum *per diem* as liquidated damages, such provision does not prevent a suit for damages for failure to deliver the boiler as agreed; but, if the plaintiff has in his hands sufficient to cover the damages stipulated, the defendant may show this in bar of the action. Mitchell v. McKinnon, 65 Mich. 683, 32 N. W. 895.

lieved of all liability otherwise existing hereunder."

Defendant went into possession of the mining claims, and, during the month of September, 1903, caused to be performed thereon 35 shifts of labor. On October 5, 1903, he informed William Kiesling, who was manager and also a director of plaintiff company, that he (the defendant) guessed he would have to surrender the property. Kiesling was called as a witness for the plaintiff, and testified on this point in part as follows: " Well, he says [referring to defendant]: 'I don't know if we can do anything with it,' he says: 'I guess I will have to give it back to you.' . . . I said to him: 'If you had thought of that a month ago, why didn't you tell us? You ought to have told us that a month ago.' And he said: 'Well, I guess I will have to give it back to you.' And I said: 'We will see what we can do.'" On this point defendant testified, and he is corroborated by two other witnesses, that he stated he could not do anything with the property, and would have to give it up, and Kiesling answered: "All right, I am glad of it." On October 15, 1903, ten days after the foregoing conversation, plaintiff, without notice to or consulting defendant, went upon the property referred to and had it surveyed by a United States deputy mineral surveyor for the purpose of obtaining a patent therefor, and in due time made application for patent. On February 4, 1904, plaintiff commenced this action to recover from defendant $1.500, because of defendant's failure to perform, during each and every month since the 28th day of August, 1903, 120 shifts of labor on the mining claims referred to. The case was tried by the court without a jury, and, after hearing the evidence, the court among other things found "that said defendant did not, on or before the 1st day of October, 1903, or at any time, or at all, surrender to the plaintiff all or any rights under said contract option and lease, and did not then and there, or at any time, or at all, surrender and deliver to the plaintiff the possession of said premises, or any part thereof; . . . and said plaintiff did not then and there, or at any other time, or at all, prior to the 28th day of February, 1904, enter into possession of said premises, or any part or portion thereof; and that said plaintiff was not, at any time between the 28th day of August, 1903, and the 28th day of February, 1904, in possession of said premises, or any part thereof."

Judgment was entered in favor of plaintiff for $1,410. Defendant appeals.

4 L.R.A.(N.S.)

Messrs. Cannon, Irvine, & Snow, for appellant:

A surrender takes place when the lessee signifies his intention to surrender, and the plaintiff, by his acts, impliedly accepts and consents to said surrender.

18 Am. & Eng. Enc. Law, 2d ed. p. 358.

Messrs. Frick, Edwards, & Smith, for respondent:

The surrender of a lease must be in writing, unless it results from the giving up of possession by the tenant and its acceptance by the landlord.

18 Am. & Eng. Enc. Law, 2d ed. p. 362.

McCarty, J., delivered the opinion of the court:

Appellant contends that the finding made by the court wherein it was held that he did not surrender his option on October 5, 1903, and that the plaintiff did not take possession of the property on the 15th day of the same month, is contrary to, and not supported by, the evidence. While there is some conflict in the evidence respecting the language used by appellant when he claims to have notified Kiesling, who was the manager of respondent company and one of the directors, that he wanted to forfeit the option he had under the contract to purchase and surrender the property, yet, when considerd in connection with the admitted fact that the company, on the 15th day of October, went into possession of the property for the purpose of making a survey for patent, and, for aught that appears in the record, has ever since continued in possession thereof, and performed work and incurred expenses which the contract expressly provided should be performed and borne by appellant, shows that, whatever the exact language used by appellant may have been when he signified his intention to surrender his option and forfeit his rights under the contract, the company, by its acts in taking and continuing in possession of the property, accepted and treated the statements and conduct of appellant as a surrender by him of the property and a forfeiture of his rights under the contract. "An actual and continued change of possession by the mutual consent of the parties will operate as a surrender by operation of law, though there was no express agreement of the parties that it should so operate." 18 Am. & Eng. Enc. Law, 2d ed. p. 362. The finding of the court on this point is not only unsupported by, but is contrary to, the evidence.

There is another reason why respondent cannot recover in this action. The contract itself provides for liquidated damages; that is, the parties have stipulated therein what the damages shall be in case of a breach by

appellant of any of its covenants. And the general rule is that when parties to a contract of this kind, where the damages resulting from a breach thereof are uncertain in amount, have stipulated what such damages shall be, no other or greater damages than those agreed upon can be recovered. In 8 Am. & Eng. Enc. Law, 2d ed. p. 636, the doctrine is stated as follows: "If the parties to a contract themselves limit the damages by stipulations in the contract itself, the measure of damages will be thereby controlled and determined. Thus, in an action on a written contract for a stipulated amount, the contract itself furnishes the measure of damages." In 13 Cyc. Law & Proc. p. 90, it is said: "The contract is to govern, and the true question is, What was the contract? Whether it was folly or wisdom for the contracting parties thus to bind themselves is of no consequence, if the intention is clear. If there be no fraud, circumvention, or illegality in the case, the court is bound to enforce the agreement." In Paige on Contracts, § 1171, the author, in stating this general doctrine, says: "If the actual damages exceed those contracted for, the injured party is bound by the stipulation of the contract, and cannot recover the actual amount of damages." 1 Sutherland, Damages, 3d ed. § 279; Hennessy v. Metzger, 152 Ill. 505, 43 Am. St. Rep. 267, 38 N. E. 1058; Jackson v. Hunt, 76 Vt. 284, 56 Atl. 1010. This doctrine is so well settled that we deem a further discussion and citation of authorities unnecessary.

The contract under consideration in part provides that in case appellant shall fail to pay any one of the instalments of the purchase price therein mentioned, "or shall fail to comply with the covenants and conditions therein imposed upon him, or any one of the same, then this contract shall terminate, . . . and all instalments or other sums which may have been paid by the second party [appellant] shall be forfeited by the said second party and become liquidated damages," etc. It will thus be observed that the contract by its terms clearly provides what the damages shall be in case of a breach of any of its provisions by appellant: First, he shall forfeit whatever instalments of the purchase price he may have paid, and, second, "other sums which may have been paid by him." Now, the term "other sums" undoubtedly includes the money paid by appellant for work done on the mining claims referred to, and which is one of the forfeitures therein mentioned. If respondent could recover for the price of unperformed labor sued for in this case, he would be entitled to recover the amount of the first instalment, $5,000, of the purchase price of the property; and it appears to be conceded that an action would not lie for the breach of this covenant.

The judgment is reversed, and, as it is plain that respondent, by the terms of the contract itself, is precluded from recovering damages in any sum, the trial court is directed to dismiss the case; the costs of this appeal to be taxed against respondent.

Bartch, Ch. J., and Straup, J., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CONNECTICUT FIRE INSURANCE COMPANY of Hartford, Connecticut, Plff. in Err.,

v.

E. M. BUCHANAN.

NATIONAL FIRE INSURANCE COMPANY of Hartford, Connecticut, Plff. in Err.,

v.

SAME.

(141 Fed. 877.)

Insurance—construction of policy—normal school.

1. One of the policies in suit insured a building as a "normal school and dwelling," and the other insured it "occupied, and only while occupied, as a normal school and dwell-

Headnotes by VAN DEVANTER, Circuit Judge.

Case Note.—Provisions of insurance policy in respect to vacancy, as affected by agent's representations or knowledge.—The case in hand, in holding that the rule against the admittance of parol evidence as to matters preceding the execution of a contract operates to prevent the insured from making proof of circumstances which would estop the insurer from relying on a breach of provisions in the policy against vacancy or non-occupancy, due to conditions existing when the policy was issued, or which would show an implied waiver of such provisions, is undoubtedly opposed to the numerical weight of authority. This conflict of opinion results from the application of the well-established rule that, in the absence of fraud, accident, or mistake, the insured cannot avail himself of prior parol statements or agreements by the insurer to vary the terms of a policy subsequently issued, to a state of facts commonly regarded as falling within the enumerated exceptions. The two doctrines, that a prior parol waiver of stipulations in a written contract cannot be relied on, and that an insurer cannot avoid a policy by showing the existence of facts of which it had full knowledge when the policy was issued, become harmonious only when the application of the first is restricted to cases where an attempt is made to avoid

ing." Both declared: "If the occupants should be changed, except change of occupants without increase of hazard, or if the use be changed, . . . it shall be held to be an election on the part of the insured to cancel said policy, and the said policy shall stand canceled." And also: "This entire policy . . . shall be void . . . if the building, . . . whether intended for occupancy by owner or tenant, be or become vacant or unoccupied." Held, these provisions are consistent, certain, and unambiguous; the difference in the two policies is one of words, not of meaning or legal effect; and both plainly contemplate use and occupancy of the building as a normal school and dwelling, and make the same a condition to the acceptance and continuance of the risk.

Same—use for storage.

2. At the time of the loss the building was used for the temporary storage of the library and a portion of the household effects of a teacher formerly living therein. Its use for school purposes had been suspended for an indefinite period, not in the sense of an ordinary recess or vacation, but in the sense of an absolute suspension of the school by those who had been conducting it. A lease contemplating the establishment of another school of the same character had been negotiated, but the tenant had not arrived or taken possession. No one was living in the building, and it was not the abode of anyone who was only temporarily absent. Held, that the condition respecting the use and occupancy of the building was broken, and that there was no liability under the policies for the loss.

Same—oral representations.

3. In the absence of fraud or mutual mistake, no representation, promise, or agreement made, or opinion expressed, in

the effect of a future violation of the terms of the policy by the insured, and when the second is considered as governing where the policy would, by reason of circumstances known to the insurer at the time of its issue, become by its terms void; in the latter of which cases some courts have taken the view that the acceptance of a premium on a policy which the insurer knows is not binding would amount to a fraud on the insured, while others hold that the issuance of a policy invalid at its inception, by an agent with knowledge of the situation, must be deemed to be due to his mistake or neglect, thus bringing the case within the well-established exceptions to the rule against the admission of parol evidence of prior negotiations.

That the courts recognize a distinction between a waiver operative on a concurrent, and a waiver operative on a future, violation of the terms of a policy, is shown by reference to the following groups of cases:

The first group, in which it is to be noted that the waiver or estoppel was held operative as to breaches existing at the inception of the insurance, comprehends such cases as Cassimus Bros. v. Scottish Union & Nat. Ins. Co. 135 Ala. 256, 33 So. 163, which holds that a condition avoiding the policy if the hazard should be increased by any means within the control or knowledge of the insured, unless otherwise provided by agreement indorsed thereon or added thereto, was waived so far as the same operated to avoid the insurance because of the keeping of gasolene on the premises, where the agent issued the policy and accepted the premium, after having been informed that the insured was then keeping and intended to keep gasolene in his stock, although the agent's statement, in response to an inquiry, that the keeping of gasolene was covered by the expression "usually carried in similar stocks," in a description of the stock of merchandise insured as "consisting principally of confectionaries, liquors, cigars, tobacco, toys, and such other merchandise, usually kept in similar stocks," did not operate as an estoppel upon the insurer, being merely an expression of opinion as to the meaning of the words, equally open to both parties; Peoria M. & F. Ins. Co. v. Hall, 12 Mich. 213, which holds that a condition against keeping gunpowder without written permission in the policy is waived where the agent was informed before the issuance of the policy that gunpowder was being kept and was intended to be kept, and said that it would make no difference; Michigan Shingle Co. v. State Invest. & Ins. Co. 94 Mich. 389, 22 L.R.A. 319, 53 N. W. 945, which holds that the knowledge of an insurance agent that a warranty by the assured that "a continuous clear space of 150 feet shall hereafter be maintained" between the property insured and any woodworking or manufacturing establishment did not represent the existing state of facts, and that there was no intent to change the situation, and that the insured could not control a clear space for that distance, prevents a forfeiture of the policy for breach of the warranty, where the agent accepts the premium and issues the policy without taking any steps subsequently to rescind it, though knowing of the breach of the warranty; and it appears that on account of the situation of the property, the manner of its use, and its proximity to water, he considered that the existing space was equivalent to that required; Anderson v. Manchester Fire Assur. Co. 59 Minn. 182, 28 L.R.A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241, which holds a condition against other insurance waived by delivery of the policy with knowledge of the existence of such other insurance; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 32 L. R.A. 112, 65 N. W. 738, which holds that issuing an insurance policy when the insurance agent has full knowledge of the existence of encumbrances is a waiver of conditions in the policy against such encumbrances; and Hamilton v. Dwelling House Ins. Co. 98 Mich. 535, 22 L.R.A. 527, 57 N. W. 735, which holds that knowledge of an insurance agent that the insured had made a contract for the sale of the property es-

the previous parol negotiations, as to the terms or legal effect of the resulting written contract, can be permitted to prevail, either in law or in equity, over the plain provisions and proper interpretation of the contract.

Same—estoppel.

4. The theory that proof of prior and contemporaneous negotiations and representations, though not admissible to vary the terms or legal effect of the written contract, may be received for the purpose of raising an estoppel *in pais* is a mere evasion of the salutary rule which protects written contracts from impeachment by loose collateral evidence, and, upon principle and authority, is not tenable.

(September 27, 1905.)

ERROR to the Circuit Court of the United States for the Southern District of Iowa to review judgments in favor of plaintiff in actions brought to recover the amounts alleged to be due on certain policies of fire insurance. Reversed.

Statement by Van Devanter, Circuit Judge:

These cases are so nearly alike that they may be considered together. In separate actions at law upon two policies of fire insurance, one issued by the National Fire Insurance Company of Hartford, Connecticut, and the other by the Connecticut Fire Insurance Company, of the same place, E. M. Buchanan, the insured, recovered verdicts and judgments against the insurers. The actions

tops the insurer from denying that he had the "sole and unconditional ownership" required by the policy.

But a different conclusion is reached in cases of the second group, in which the breach as to which the waiver or estoppel is sought to be asserted takes place after the inception of the contract of insurance; as in J. W. Gillum & Co. v. Fire Asso. of Philadelphia, 106 Mo. App. 673, 80 S. W. 283, in which it was held that an inventory and iron-safe clause in an insurance policy is not waived by an agent's assurance that it would not be necessary to keep books or to keep a safe, such prior or contemporaneous agreement being merged in the written instrument; nor by an issuance of the policy with knowledge that the insured did not intend to comply with such requirements; Worachek v. New Denmark Mut. Home F. Ins. Co. 102 Wis. 81, 78 N. W. 165, which holds that an insurer is not estopped from relying on, nor is it to be deemed to have waived, a provision in the policy that no property should be insured unless 200 feet apart from any steam power, by the fact that the agent, at the time of issuing the policy, was informed by the insured of an intention to use a portable steam engine within the prohibited limits at a future time.

As hereinbefore stated, the cases are almost unanimous in holding that vacancy or nonoccupancy existing at the time of the issuance of the policy, and of which the insurer, through its agent, has knowledge, will not be allowed to avoid the policy, although such vacancy or nonoccupancy is in some form stipulated against therein.

Among the cases supporting this doctrine are Germania F. Ins. Co. v. Klewer, 27 Ill. App. 590, and Williams v. Niagara F. Ins. Co. 50 Iowa, 561, which hold that an insurance company issuing a policy with full knowledge that the premises insured were unoccupied and would be for a time is estopped from alleging or proving that the policy never had a legal existence because of a breach of its provision that, "if the premises are at the time of issuing, or during the life of the policy, vacant, unoccupied, and not in use, . . . this insurance shall be void and of no effect."

In Aurora F. & M. Ins. Co. v. Kranich, 36 Mich. 289, it is held that where the insured property is vacant at the time the policy is issued, of which fact the insurer has notice, there is no breach of a condition that "if, at any time during the continuance of this policy, . . . the insured property . . . shall become vacant or unoccupied," the insurer should be absolved from all liability, since such condition clearly refers and applies to property occupied at the time the policy is issued, and afterward becoming vacant. The court also says: "The company could not insure vacant buildings, take and retain the premium, and in case of loss relieve itself from responsibility, under a claim that it was not liable unless they were occupied, unless some provision was inserted in the policy by which the insured agreed they should not be permitted to remain vacant."

In German Ins. Co. v. Frederick, 57 Neb. 538, 77 N. W. 1106, it is held that an insurance policy containing a provision that it shall be void if the insured premises "be or become vacant or unoccupied" is waived where the company issues the policy with knowledge of an existing vacancy.

In Thackery Min. & Smelting Co. v. American F. Ins. Co. 62 Mo. App. 293, a condition avoiding insurance on a manufacturing establishment if it should cease to be operated for more than ten days, and in Hackett Bros. v. Philadelphia Underwriters, 79 Mo. App. 16, a condition avoiding the policy should the premises be or become vacant, were held waived by the issuance of the policy with knowledge that such conditions existed.

In Woodruff v. Imperial F. Ins. Co. 83 N. Y. 133, a condition declaring a policy to be of no force and effect in case the insured premises should "become vacant and unoccupied . . . without special agreement indorsed on the policy," was held waived by the taking of the premium and the issuance of the policy with knowledge that the insured premises were then unoccupied and vacant.

related to the same loss by fire and were consolidated for purposes of trial. The policies covered the same building at Humeston, Iowa, were issued by the same local recording agent, bore the same date, April 1, 1903, and were to continue in force one year from that date, unless avoided or terminated as therein provided. The insurance stipulated for in one policy was "against all direct loss or damage by fire, except as hereinafter provided, . . . on the two and three story frame building . . . occupied, and only while occupied, as a normal school and dwelling house," and that stipulated for in the other policy was "against all direct loss or damage by fire, except as hereinafter provided, . . . on two and three story frame normal school and dwelling house." It was further stipulated in both policies: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied. It is understood, and the insured, by accepting this policy, so agrees, unless permission be indorsed hereon that, . . . if the possession be changed, or if the occupants should be changed, except change of occupants without increase of hazard, or if the use be changed, . . . then in every such case it shall be held to be an election on the part of the insured to cancel said policy, and the said policy shall stand canceled from the happening of any one of the foregoing events, and the insured shall

In Haight v. Continental Ins. Co. 92 N. Y. 51, it was held that the provision avoiding the policy "if the building become unoccupied without the consent of the company," if susceptible of applicability to other than future conditions, is waived by the issuance of the policy with knowledge of an existing vacancy.

And in Hilton v. Phœnix Assur. Co. 92 Me. 272, 42 Atl. 412, an insurer was held to be precluded from relying upon a condition in the policy which provided that it should be void if there was any false representation by the assured of the condition, situation, or occupancy of the property, where a knowledge of the fact of nonoccupancy is imputable to the insurer, although the house was described in the policy as "occupied by assured."

In Liverpool, L. & G. Ins. Co. v. Maguire, 52 Miss. 227, it was held not to be error to allow the insured to testify to the verbal representations made to the agent of the insurer at the time of effecting insurance, as to the manner in which the house insured was occupied by him, as it showed in what sense the contracting parties employed the words used in the policy describing the insured premises as the "dwelling house occupied by" the insured.

On the other hand, in Pottsville Mut. F. Ins. Co. v. Fromm, 100 Pa. 347, it is held that where, in an application for a policy of insurance, premises were described as a dwelling house occupied by the applicant, and by the terms of the policy all statements in the application were warranted to be true, the policy was vitiated by the breach of warranty, although the agent knew at the time of the application that the building was vacant.

The foregoing case, however, was also decided with reference to a condition avoiding the policy should the premises become vacant for a period of fifteen days without the consent of the insurer, thus imposing a continuing engagement upon the insured; and may, therefore, possibly be considered as falling within the exception now to be discussed.

Such exception arises where the policy contains a condition avoiding it should the insured premises be or become vacant or unoccupied, and so remain, for a specified length of time; in which case the breach is not to be regarded as occurring at the inception of the insurance, but only after the continuance of the vacancy for the specified period, so that the reasons supporting the doctrine of waiver hereinbefore discussed become inapplicable.

The question is discussed in England v. Westchester F. Ins. Co. 81 Wis. 583, 29 Am. St. Rep. 917, 51 N. W. 954, as follows: "On behalf of the respondents, it is claimed that, as the premises were vacant and unoccupied at the date of the policy, it is to be presumed that the insurer knew of the fact, or is chargeable with knowledge of it, and is deemed to have waived the requirement in question. Neither the argument nor the cases cited meet the necessity of the case, for it may well be said that actual knowledge, at the time of issuing the policy, of existing facts that, by the terms of the policy, would prevent it from attaching, and render it void from its inception, will amount to a waiver of stipulations in the policy in relation thereto; but it cannot, we think, be successfully maintained that, conceding that knowledge of vacancy or nonoccupancy is to be imputed as a matter of law to the insurer, there is any implied consent to the continuance of such condition of the premises or that the insurer is thereby affected with notice that they so continued and remained thereafter vacant and unoccupied, contrary to the express continuing warranty or condition on that subject contained in the policy. Under the policy in question, it was clearly the duty of the insured to make good their warranty in this respect; and they knew perfectly well that they had failed to do so. Nothing took place between the parties on the subject. There is no reason for imputing to the insurer, as a matter of law, knowledge of the breach of the stipulation in regard to the occupancy or use of the premises, for there is nothing inconsistent in the fact of existing vacancy or nonoccupancy with the express stipulation of an executory character that it

be entitled to receive, on return of this policy to the company, the unearned premium from date of surrender. It is understood, and the insured by the acceptance of this policy so agrees, that . . . any change of use, or any change of occupancy (except change of tenants without increase of hazard), is in each instance an increase of hazard within the meaning of § 1743, Code of Iowa. This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company, except the manager of this company in Chicago, shall have power to waive, change, or modify any provision or condition of this policy, except such as, by the terms of this policy, may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative, except the manager of this company in Chicago, shall have such power, or be deemed or held to have waived, changed, or modified such provision or conditions, and such waiver, if any, shall be written upon or attached hereto; nor shall any privilege nor permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." No indorsement upon, or written addition to, either of the policies was made, at the time of their issuance or afterwards, by either the local recording agent or the manager in Chicago.

The building was destroyed by fire May 20, 1903. The principal defense interposed to the actions upon the policies was that at the time of the fire and for a long time prior thereto the building was not used or occupied as a normal school or as a dwelling, but was vacant and unoccupied, by reason of which the policies were inoperative and void. With their answers the defendants paid into court and tendered to the plaintiff the amount of the premiums paid on the policies, with interest thereon from the date of payment. The plaintiff replied, denying that the building was vacant or unoccupied, and stating that it had been used for normal-school purposes to within six months of the fire; that at the time the policies were issued and thence to the time of the fire the household furniture and library of one Heskett was stored in the building; that the recording agent who issued the policies had at the time actual knowledge of how, and the extent to which, the building was used and occupied, and that by reason there-

shall not so continue for ten days; for such mere implied knowledge at the date of the policy cannot be construed into a consent that it shall continue for a longer period, contrary to the express stipulation of the parties. There is therefore no ground for saying that the insurer, after having taken the stipulation in question, took the chances as to whether the insured complied with it. Failure to comply with the policy in this respect terminated all liability under it."

The same doctrine is upheld in Moore v. Niagara F. Ins. Co. 199 Pa. 49, 85 Am. St. Rep. 771, 48 Atl. 869, and Queen Ins. Co. v. Chadwick, 13 Tex. Civ. App. 318, 35 S. W. 26.

Unfortunately for the consistency of the law on this subject, this exception seems to have been overlooked in some jurisdictions, which apply the general doctrine that knowledge of the vacancy at the time of the insurance operates as a waiver, although the condition does not avoid the insurance unless the vacancy continues without the consent of the insurer for longer than a designated period. See Milwaukee Mechanics' Ins. Co. v. Brown, 3 Kan. App. 225, 44 Pac. 35; London & L. Ins. Co. v. Gerteisen, 106 Ky. 815, 51 S. W. 617; Chamberlain v. British-American Assur. Co. 80 Mo. App. 589; Rochester Loan & Bkg. Co. v. Liberty Ins. Co. 44 Neb. 547, 48 Am. St. Rep. 745, 52 N. W. 877; Cross v. National F. Ins. Co. 132 N. Y. 133, 30 N. E. 390; Blass v. Agricultural Ins. Co. 18 App. Div. 481, 46 N. Y. Supp. 392, Affirmed in 162 N. Y. 639, 57 N. E. 1104 (in which case it appears that the agent knew that the premises were to remain unoccupied for longer than ten days); Bear v. Atlanta Home Ins. Co. 34 Misc. 613, 70 N. Y. Supp. 581; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. 88.

Although, as appears from the foregoing cases, the doctrine that an existing vacancy affords no ground for an avoidance of a policy containing a condition against vacancy, where the insurer has notice, is well established, it must be admitted, as remarked in Welch v. Fire Asso. of Philadelphia, 120 Wis. 456, 98 N. W. 227, that the judicial rule that the insurer must be held to waive conditions which would operate to avoid the policy by reason of facts known at the time of its issuance "is peculiar to insurance contracts, and significantly exceptional in that it ignores the familiar principle applied to written obligations generally, that he who becomes a party to such an obligation is presumed to have knowledge of its contents, and is bound thereby, unless, by some artifice resorted to by the other party thereto, reasonably calculated to prevent or deter him from obtaining such knowledge, he is so prevented or deterred." This exception is doubtless based on the recognition by the courts of the fact, (more often existing in earlier times before the adoption of the standard clause policy, when cunningly contrived conditions rendered policies of insurance a trap to the unwary rather than a protection), that the insurer and insured do not as a rule stand on the equal footing of parties to an ordinary contract.

of the defendants were estopped from interposing the defense of vacancy and nonoccupancy, and had waived the stipulations in the policy respecting the use and occupancy of the building. Another matter alleged in an amendment to the reply—that these stipulations had been orally waived by the agent after the policies were issued—need not be considered, because there was no evidence to sustain it.

The facts shown by the evidence were these: The building was designed and arranged for use as a normal school and dwelling, and was so used and occupied for several years; the school being conducted during nine months of each year, and one of the teachers, with his family, living in the building throughout the year. The use for normal-school purposes ceased in the summer of 1902, and had not been resumed at the time of the fire, May 20, 1903, although a lease contemplating the resumption of that use was negotiated three months before. The tenants had not arrived or taken possession. Heskett, the former resident teacher, with his family, moved out of the building in December, 1902, leaving his library and a portion of their household effects, not required for living purposes in their new abode, stored in some of the rooms. Shortly thereafter one Dotson, with his family, moved into two of the living rooms and resided there until about March 18, 1903, when they went elsewhere. At that time one Sires moved his household effects into some of the rooms, and also put his dog in the building. April 7th, Sires, with his family, set up housekeeping there. May 4th they went elsewhere with their effects, including the dog. No one was actually living in the building, nor was it the home or abode of anyone who was temporarily absent, either when the policies were issued, April 1st, or when the fire occurred, May 20th.

Referring to the extent to which he exercised a supervision over his effects, which remained stored in the building until the fire, Heskett testified: "I visited the building a part of the time twice a day. The visits were to the part designated as the kitchen on the first floor. The period I was there every day was two or three months commencing from the beginning of the winter until the 1st of May, say from the middle of December to the 1st of May. When I went to the room alone, I went for the purpose of getting ground feed for my cow. This was the kitchen on the first floor. There were stored in there some articles of kitchen furniture and the feed that I used for my cow. That was the purpose for which I went there every day. . . . I went to and through the rooms our goods were in two or three times a week. I went there for the purpose of getting articles I wanted to use, and sometimes I went in to see that all of the goods were intact." In like manner, but referring only to the period intervening between March 18th and April 7th, Sires testified: "We had a dog there that remained in the normal-school building. I kept it there and fed it there. . . . I went back and forth to the rooms, and went into the rooms. 'Did not remain there very long."

The evidence relating to the negotiations leading up to the issuance of the policies, and relating to the knowledge possessed by the local recording agent, Calbreath, at that time, respecting the condition of the building, was as follows: Calbreath testified:

When I wrote the policies sued upon I knew the conditions and manner in which the building was occupied on the 1st day of April, 1903. It was occupied by Mr. Heskett. No one else occupied it to my knowledge. I knew Mr. Heskett occupied it. I do not know what Mr. Heskett had in the building, because I never was in the rooms. At the time I wrote the risk I did not know of anyone occupying the building in any manner than in the manner I stated it was occupied by Mr. Heskett. I knew that at the time the policies were written and delivered. . . . I did not know whether a tenant had moved in when Mr. Heskett moved out, nor whether a tenant had moved out and another moved in or not, when these policies were issued. . . . I didn't know whether a family was living in those rooms or not when I issued the policies. I knew that Mr. Heskett had moved out. Moved his family to the hotel. I knew he was at the hotel. I don't know the Dotsons that moved in there after Mr. Heskett moved out. Didn't know that Mr. Dotson was in there at all.

Q. Then for aught you knew, or these companies, the building was occupied by a family when these policies were issued?

A. That was my understanding. It was my understanding that Mr. Heskett remaining and keeping the building in control was an occupancy. That is the reason why—

Q. You did not know whether any other family was living in there or not?

A. No, sir. . . . When I issued the policies I had a conversation with Mr. Buchanan. I went to him about the renewal of the policies. I did not go to Mrs. Buchanan. My conversation was with her agent. He told me the building was to be occupied as a normal-school building. I think he said the man was to be there either in May or June. Did not ask him whether he was going to move there with his family. All that was

said was that he had about rented or had rented the building, and the man was going to occupy it as a normal school. There was nothing said about the present occupancy of the building. Not a word, I think.

C. E. Buchanan, who was the husband of the plaintiff, managed the property for her, and obtained the issuance of the policies, testified that he told Calbreath "how the building was occupied," and showed him the lease before named, and that in a conversation occurring about a week before the policies were issued, and having reference to whether or not it would be necessary to obtain a vacancy permit and to pay extra insurance, Calbreath said: "You don't have to. I understand the occupancy, and you don't have to do anything of the kind. The man [new tenant] is coming here, and school is going to open right away, and you don't have to do anything of the kind."

Calbreath's duties as agent of the defendant companies, save as his authority may have been restricted by the terms of the policies, were those of soliciting insurance, writing and delivering policies, receiving premiums, and making the necessary indorsements and transfers. There was no evidence of any act or conduct of Calbreath, after the policies were issued, upon which a waiver of any of their conditions could be predicated, even if he was authorized to waive them. Much of the evidence here recited was admitted over the objections of the defendants, and their request for a directed verdict in their favor, made at the conclusion of the evidence, was denied.

The Iowa Code of 1897 contains these provisions:

"Sec. 1743. Any condition or stipulation in an application, policy, or contract of insurance, making the policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss: Provided, however, that any condition or stipulation referring . . . to vacancy of the insured premises, . . . or to a change in the occupancy or use of the property insured, if such . . . change or use makes the risk more hazardous, . . . shall not be . . . affected by this provision."

"Sec. 1749. Any person who shall hereafter solicit insurance or procure application therefor shall be held to be the soliciting agent of the insurance company, or association issuing a policy on such application or on a renewal thereof, anything in the application, policy, or contract to the contrary notwithstanding.

"Sec. 1750. . . . Any officer, agent, or representative of an insurance company doing business in this state who may solicit insurance, procure applications, issue policies, adjust losses, or transact the business generally of such companies, shall be held to be the agent of such insurance company with authority to transact all business within the scope of his employment, anything in the application, policy, contract, by-laws, or articles of incorporation of such company to the contrary notwithstanding."

Argued before Van Devanter, Hook, and Adams, Circuit Judges.

Mr. **A. C. Parker**, with Messrs. **Carr, Parker, Hewitt, & Wright** and **J. J. Sullivan**, for plaintiffs in error:

For a building to be in a state of occupation there must be such occupation as is ordinarily incident to such building.

Ashworth v. Builders' Mut. F. Ins. Co. 112 Mass. 422, 17 Am. Rep. 117; Herrman v. Adriatic F. Ins. Co. 85 N. Y. 162, 39 Am. Rep. 644; Continental Ins. Co. v. Kyle, 124 Ind. 132, 9 L.R.A. 81, 24 N. E. 727; Cook v. Continental Ins. Co. 70 Mo. 610, 35 Am. Rep. 438; Bonenfant v. American F. Ins. Co. 76 Mich. 653, 43 N. W. 682; Limburg v. German F. Ins. Co. 90 Iowa, 709, 23 L.R.A. 99, 48 Am. St. Rep. 468, 57 N. W. 626; Bennett v. Agricultural Ins. Co. 50 Conn. 420; Halpin v. Insurance Co. of N. A. 120 N. Y. 73, 8 L.R.A. 79, 23 N. E. 989; North American F. Ins. Co. v. Zaenger, 63 Ill. 464; American Ins. Co. v. Padfield, 78 Ill. 167; Phœnix Ins. Co. v. Tucker, 92 Ill. 64, 34 Am. Rep. 106; Moore v. Phœnix F. Ins. Co. 64 N. H. 140, 10 Am. St. Rep. 384, 6 Atl. 27.

The fact that the recording agent knew that the property was vacant at the time the policy was issued does not estop the insurance company from relying upon the provisions of the policy.

Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133.

Messrs. **Lewis Miles** and **C. W. Steele**, for defendant in error:

The issuing of the policies by the plaintiffs in error with knowledge as to the condition and character of the occupancy of the building was a waiver of the condition of the policies as to the matter of nonoccupancy.

Liquid Carbonic Acid Mfg. Co. v. Phœnix Ins. Co. 126 Iowa, 225, 101 N. W. 749; Viele v. Germania Ins. Co. 26 Iowa, 9, 96 Am. Dec. 83.

The knowledge and acts of the agents of the plaintiffs in error at the time the policies were issued were the knowledge and acts of the insurance companies under the provisions of § 1750 of the Code of Iowa.

Continental L. Ins. Co. v. Chamberlain, 132

U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; Marston v. Kennebec Mut. L. Ins. Co. 89 Me. 266, 56 Am. St. Rep. 413, 36 Atl. 389; Liquid Carbonic Acid Mfg. Co. v. Pœnix Ins. Co. *supra*.

Oral testimony is competent for the purpose of showing the knowledge of the agent.

McMaster v. New York L. Ins. Co. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10.

Van Devanter, Circuit Judge, delivered the opinion of the court:

One of the policies insured the building as a "normal school and dwelling," and the other insured it "occupied and only while occupied as a normal school and dwelling." Both declared: "If the occupants should be changed, except change of occupants without increase of hazard, or if the use be changed, . . . it shall be held to be an election on the part of the insured to cancel said policy, and the said policy shall stand canceled." And also: "This entire policy . . . shall be void . . . if the building, . . . whether intended for occupancy by owner or tenant, be or become vacant or unoccupied."

These provisions are consistent, certain, and unambiguous, and counsel for the insured do not even suggest that they are otherwise. The difference in the two policies is one or words only, not of meaning or legal effect. Both plainly contemplate use and occupancy of the building as a normal school and dwelling, and make the same a condition to the acceptance and continuance of the risk. Words could hardly have been chosen to better or more certainly express the purpose of the parties to exclude liability on the part of the insurers for any loss occurring when the building was without the care, supervision, and protection involved in such use and occupancy. The only use made of the building at the time of the fire was as a place for the temporary storage of the library and a portion of the household effects of a teacher formerly living therein. Its use for normal-school purposes had ceased, not in the sense of a temporary suspension of school work during an ordinary recess or customary vacation, but in the sense of an absolute suspension of the school by those who had been conducting it. A lease contemplating the establishment of another school of the same character had been negotiated, but the tenant had not arrived or taken possession. No one was actually living in the building, and it was not the home or abode of anyone who was only temporarily absent. Occasional visits were made to the building by the former resident teacher, in connection with his library and effects, which were temporarily stored therein; but he and his family were living elsewhere. In these circumstances, the building was unquestionably without the care, supervision, and protection necessarily incident to its use and occupancy as a normal school and dwelling, and was vacant and unoccupied within the meaning of the policies. Limburg v. German F. Ins. Co. 90 Iowa, 709, 23 L.R.A. 99, 48 Am. St. Rep. 468, 57 N. W. 626; Feshe v. Council Bluffs Ins. Co. 74 Iowa, 676, 39 N. W. 87; Ashworth v. Builders' Mut. F. Ins. Co. 112 Mass. 422, 17 Am. Rep. 117; Corrigan v. Connecticut F. Ins. Co. 122 Mass. 298; Herrman v. Adriatic F. Ins. Co. 85 N. Y. 162, 39 Am. Rep. 644; Halpin v. Phœnix Ins. Co. 118 N. Y. 165, 174, 23 N. E. 482; Halpin v. Ætna F. Ins. Co. 120 N. Y. 70, 23 N. E. 988; Cook v. Continental Ins. Co. 70 Mo. 610, 35 Am. Rep. 438; American Ins. Co. v. Padfield. 78 Ill. 167; Bennett v. Agricultural Ins. Co. 50 Conn. 420; Moore v. Phœnix F. Ins. Co. 64 N. H. 140, 10 Am. St. Rep. 384, 6 Atl. 27; Continental Ins. Co. v. Kyle, 124 Ind. 132, 9 L.R.A. 81, 19 Am. St. Rep. 77, 24 N. E. 727; Watertown F. Ins. Co. v. Cherry, 84 Va. 72, 3 S. E. 876; Weidert v. State Ins. Co. 19 Or. 261, 20 Am. St. Rep. 809, 24 Pac. 242, 249.

Counsel for the insured neither concede nor controvert the conclusion last stated, but make this contention: The condition of the building when the fire occurred was the same as when the policies were issued. The recording agent issued the policies with full knowledge of that condition, and his knowledge was the knowledge of the insurers. "Oral testimony is competent to show the knowledge of the agent. . . . Certainly if the plaintiff in error knew the condition of the property as to occupancy at the time the policy sued on herein was issued, it is estopped from setting up said condition as a defense in this suit. If the property was not occupied, and the plaintiff in error knew that fact at the time the policy was issued, then it appears to us that the law is well settled that the plaintiff in error waived any condition in the policy as to the matter of occupancy." In the view which must be taken of the attempt to thus vary and contradict the terms of the written policies, it will not be necessary to consider some of the matters discussed in the briefs, *viz.*: Whether the condition of the building when the fire occurred was the same as when the policies were issued; whether Sire's intervening occupancy of a portion of the building as a dwelling terminated the claimed waiver and avoids an estoppel; and whether the statutes of Iowa (Code 1897, §§ 1749, 1750) are valid and have the effect of preventing any limitation upon the authority of insurance agents within that state.

The question for decision is this: When the parties to written policies of insurance have in plain and unambiguous terms de-

clared it to be their intention that the insurance shall cover a described building while it is used and occupied as a normal school and dwelling, and shall be inoperative if and when the building is not so used or occupied, may it be shown by oral testimony—there being no charge of fraud or mutual mistake in reducing the agreement to writing, and the actions upon the policies being at law—that it was in fact the intention of the parties that the insurance should cover the building when not so used or occupied, but clearly vacant and unoccupied within the meaning of the policies? Although the question is discussed by counsel for the insured as if it were one of waiver or estoppel, its real character cannot be obscured or disguised. Stated in its simplest form, the question is whether or not, in actions at law upon written policies of insurance, oral testimony of the conditions existing when the policies were issued, and of the contemporaneous and prior negotiations of the parties, may be availed of to enable the insured to recover for a loss which the policies in plain and unambiguous terms declare shall give no right of recovery? Upon principle and upon the authority of controlling decisions of the Supreme Court of the United States, the question must be answered in the negative. But, in deference to the ruling to the contrary by the learned judge who presided at the trial, a somewhat extended reference will be made to the authorities deemed applicable.

As much is said in the briefs respecting the statutes of Iowa, set forth in the foregoing statement (Code 1897, §§ 1749, 1750), and the decision of the supreme court of the state in Liquid Carbonic Acid Mfg. Co. v. Phœnix Ins. Co. 126 Iowa, 225, 101 N. W. 749, holding that these statutes were enacted "for the express purpose of prohibiting the limitation of the agent's power by provisions in the contract," it will be assumed, without considering the validity or effect of the statutes, that the recording agent had full authority to represent the insurers, and that the provisions in the policies designed to limit his authority are inoperative. In this connection, however, it should be observed that no question of the admissibility of oral testimony of the conditions existing when the policy was issued, or of contemporaneous or prior negotiations, was presented in Liquid Carbonic Acid Mfg. Co. v. Phœnix Ins. Co., but only the question whether, subsequently to the issuance of the policy, the agent could orally waive its conditions, notwithstanding the limitations attempted to be placed upon his authority. The conclusion was that these limitations were in conflict with the statutes, and inoperative, and that he could orally waive conditions of the policy subsequently to its issuance; a question entirely apart from the present discussion.

The rule inhibiting resort to parol evidence of contemporaneous or prior conditions or negotiations to supersede, contradict, or vary valid written contracts is stated in Starkie on Evidence, 10th Am. ed. 647, in this manner: "It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law or by the compact of parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy,—of principle, because such instruments are in their own nature and origin entitled to a much higher degree of credit than parol evidence; of policy, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence."

This rule is fully recognized by the decisions of the supreme court of the state in which this controversy arose. Fawkner v. Lew Smith Wall Paper Co. 88 Iowa, 169. 45 Am. St. Rep. 230, 55 N. W. 200; Congower v. Equitable Mut. Life & Endowment Asso. 94 Iowa, 499, 505, 63 N. W. 192. It is also well stated, and sustained by the citation of many cases, in 17 Cyc. Law & Proc. pp. 567–571, 596, 606, 622.

In Glendale Woolen Mfg. Co. v. Protection Ins. Co. 21 Conn. 19, 36, 54 Am. Dec. 309, where the rule was applied in an action upon a policy of fire insurance, it was said: "If we have the precise contract which the parties chose to make for themselves, and there be no imperfection or ambiguity in the language used to express the meaning of the parties, clearly we have no right to depart from the language, and travel out of the contract, to see if the parties did not, after all, mean something different from what is written. Why, we ask, resort to inferior and secondary evidence, such as inferences from supposed usages or circumstances, or the knowledge or the talk of the parties, at the time of entering into the contract? . . . The rule is well established that when the parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing. After this, to permit oral testimony of prior or contemporaneous conversation, or circumstances, or usages, etc., in order to learn what was intended or to

contradict what is written, would be dangerous and unjust in the extreme."

Batchelder v. Queen Ins. Co. 135 Mass. 449, was an action upon a policy of fire insurance conditioned to be void if there was other insurance. To avoid the defense that there was other insurance when the policy was issued, the insured sought to show that the insurer had full knowledge thereof at the time, and claimed that the issuance of the policy with such knowledge was a waiver of the condition. Mr. Justice Holmes, then a member of the supreme judicial court of Massachusetts, delivered the opinion of the court, saying: "A breach of condition, happening after a policy is issued, may be waived, no doubt; but when the breach exists at the moment when, if ever, the contract comes into existence, it must be waived at that moment, if ever, and at that very instant the writing purports to establish and insist upon the condition. We must follow the decisions that parol evidence of such a waiver as is relied on in this case would contradict the written instrument upon which the suit is brought."

In Atherton v. Brown, 14 Mass. 152, it was held that the words in a policy "on board Spanish brig New Constitution" amounted to a warranty that the vessel was Spanish, and that it was not competent for the insured to show by parol, in avoidance of a breach of the warranty, that the insurer knew the true character of the vessel at the time of issuing the policy.

Jennings v. Chenango County Mut. Ins. Co. 2 Denio, 75, was assumpsit on a policy of fire insurance. There was a breach of the conditions of the policy respecting the occupancy and location of the insured building, and it was held the effect of the breach could not be avoided by parol evidence that the insurer was informed of and assented to the true occupancy and location of the building before the policy was issued.

In Higginson v. Dall, 13 Mass. 96, an underwriter sought to prevent a recovery by parol proof of a prior understanding that the policy should be conditional, when by its terms it was absolute. It was held this could not be done, Chief Justice Parker observing: "The policy itself is considered to be the contract between the parties; and whatever proposals are made, or conversations had, between the parties, prior to the subscription, they are to be considered as waived, if not inserted in the policy, or contained in a memorandum annexed to it."

New York Ins. Co. v. Thomas, 3 Johns. Cas. 1, is a case wherein it was sought to explain by proof of the prior negotiations that a provision in a policy relating to prior insurance was intended to include subsequent insurance as well. Judge Kent, afterwards Chancellor, disposed of the matter in this manner: "I know no rule better established than that parol evidence shall not be admitted to disannul or substantially vary or extend a written agreement. The admission of such testimony would be mischievous and inconvenient. Parol evidence is to be received in the case of an *ambiguitas latens* to ascertain the identity of a person or thing; but before the parol evidence is to be received in such case the latent ambiguity must be made out and shown to the court. In the present instance, there is no ambiguity. The language of the contract throughout is consistent and explicit. This general rule of law has been particularly and emphatically applied to policies. (Skinn. 54.) And, except in the special instance of explanations resulting from the usage of trade, they have never been allowed to be contradicted by parol agreements. Without, therefore, giving any opinion, what would be the effect of the parol proof, if admissible, we think it was inadmissible."

Dewees v. Manhattan Ins. Co. 35 N. J. L. 366, is especially in point, and is worthy of particular attention, as in Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, the Supreme Court of the United States referred to the opinion and quoted therefrom at length, saying: "It contains, as we think, an able and sound statement of the law on this important subject."

The action was assumpsit on an insurance on a building "occupied by the assured for country store" and on his stock of merchandise therein. One of the stipulations of the policy declared that it should be of no effect if the building should be subjected to more hazardous uses, one of which was that of keeping a private stable. It appeared on the trial that at the date of the policy and at the date of the fire a portion of the building was applied to the excepted use, and that the agent of the insurer knew of this use when the policy was issued. In the course of delivering the opinion it was said by Chief Justice Beasley: "The contract between these litigants, on the point which I shall discuss, is clear and unambiguous. The defendants agreed to insure a building occupied as a country store, and the stock of goods, consisting of the usual variety of a country store. This, by the plain meaning of the terms employed, is a warranty on the part of the insured that the building was used, at the date of the agreement, for the purpose specified. It was a representation on the face of the policy touching the premises in question and which affected the risk; and such a representation, according to all the authorities, amounts to a warranty. . . . It can be intended for no other pur-

pose than to characterize the use of the building at the date of the insurance; for, unless this be done, there can be no restriction on the use of the property by the insured during the running of the risk. Unless this description has the force thus attributed to it, the premises could have been used for any of the most hazardous purposes. A building described in a policy as a 'dwelling house' could, except for the rule above stated, be converted into a mill or a factory. I think it is incontestably clear that the description of the use of the premises in this case was meant to define the character of the risk to be assumed by the defendants. . . . The contract of these parties, as it has been committed to writing, is that, if the plaintiff shall keep a stable on the premises insured, for the time being the policy shall be vacated. But it is said the agent of the defendants who procured this contract was aware that the real contract designed to be made was that the plaintiff might apply the premises to this use. This knowledge of the agent of the defendants, and which, it is conceded, will bind the defendants, is to have the effect to vary the obligations of the written contract. Upon what principle is this to be done?"

The want of power in a court of law to reform the policy on the ground of mutual mistake, if there were such, was adverted to, and the opinion proceeded: "Nor do I think, if this court should sustain the present action, that it could be practicable to preserve in any useful form the great primary rule that written instruments are not to be varied or contradicted by parol evidence. The knowledge of the agent, in the present transaction, is important only as showing what the tacit understanding of the contracting parties was. Suppose, instead of proof of such tacit understanding, the plaintiff had offered to make a stronger case, by showing that the agent expressly agreed that the building might be used, not only as a country store, as the policy stated, but also as a stable, and that the restraining stipulation did not apply to the extent expressed; can anyone doubt that, according to the practice and decisions in this state, such proofs should have been rejected? A rule of law admitting such evidence would be a repeal of the principle giving a controlling efficacy to written agreements. The memory and understanding of those present at the formation of the contract would be quite as potent as the written instrument."

Referring to a case which was claimed to establish the doctrine that parol evidence of contemporaneous and prior negotiations, while not admissible for the purpose of altering or contradicting a written contract was admissible to establish an estoppel *in pais*, it was further said: "I think there is no doubt that this application of the doctrine of estoppel to written contracts is an entire novelty. In the long line of innumerable cases which have proceeded and been decided on the ground that parol evidence is not admissible as against a written instrument, no judge or counsel has ever intimated, as it is believed, that the same result could be substantially attained by a resort to this circuity. It is true that, if there be a substantial ground in legal principle for its introduction, the fact that it is new will not debar from its adoption; but I have not been able to perceive the existence of such substantial ground. In my apprehension, the doctrine can be made to appear plausible only by closing the eyes to the reason of the rule which rejects, in the presence of written contracts, evidence by parol. That reason is that the common good requires that it shall be conclusively presumed in an action at law, in the absence of deceit, that the parties have committed their real understanding to writing. Hence it necessarily follows that all evidence merely oral is rejected whose effect is to vary or contradict such expressed understanding. Such rejection arises from the consideration that oral testimony is unreliable in comparison with that which is written. It is idle to say that the estoppel, if permitted to operate, will prevent a fraud or inequitable result. Most parol evidence contradictory of a written instrument has the same tendency; but such evidence is rejected, not because, if true, it ought not to be received, but because the written instrument is the safer criterion of what was the real intention of the contracting parties. In the case now criticized, the party insured stipulated against the existence of buildings within a definite number of feet from the insured property. By the admission of parol testimony this stipulation was restricted and limited in its effect. This result, no doubt, was strictly just, if we assume that the parol evidence was true; but, standing opposed to the written evidence, the law presumed the reverse. The alternative is unavoidable. It is a choice between that which is written and that which is unwritten. In the case cited the effect of the rule adopted by the court was to give a different effect to the written terms from that which they intrinsically possessed,—a result induced by the admission of oral evidence. This, I cannot but think, was a palpable alteration of the agreement of the parties. The mistake of the court appears to have been in regarding simply the legal effect of the facts which were proved by parol. Receiving that testimony into the case, a clear estoppel was made out; but the error consisted in the circumstance that such oral

evidence was, on rules well settled, inadmissible. The question presented was purely one as to a rule of evidence, but it was treated as a problem relating to the application of general legal principles to an admitted state of facts. The case was not decided by a unanimous court. Three judges dissented, and, in my judgment, that dissent was based on satisfactory grounds. But it has been already observed that, even if the doctrine of this adjudication should be received by this court, such result could have no effect on our decision of the present case. The reason is that the facts now before us do not present the elements of an estoppel. Such a defense rests on a misconception as to a state of facts, induced by the party against whom it is set up. The person who seeks to take advantage of it must have been misled by the words or conduct of another. Now, in the present case, the agent did not make any statement, nor did he do anything, which led the plaintiff to alter his condition. The most that can be laid to his charge is that, from carelessness, he omitted properly to describe the use of the premises insured. But this was not a misstatement of a fact on which the plaintiff acted, because the plaintiff was aware of the circumstance that the building was put to another use. The alleged error in the description is plain on the face of the policy, and the law incontestably charges the defendant with knowledge of the meaning and legal effect of his own written contract. Certainly the entire state of things was as well known to the plaintiff as it was to the agent of the defendants. To found an estoppel on the ignorance of the plaintiff of the plainly expressed meaning of his own contract would be absurd."

Another case which was extensively and approvingly quoted from in Northern Assur. Co. v. Grand View Bldg. Asso. *infra*, is Franklin F. Ins. Co. v. Martin, 40 N. J. L. 568, 29 Am. Rep. 271. The facts, so far as material to the present discussion, were these: The policy sued upon described the building insured as "occupied as a dwelling and boarding house." In fact it was also occupied as a country tavern, and one of the rooms was maintained as a billiard room. This continued to be the condition at the time of the fire. The policy showed that taverns and billiard rooms were classified as extrahazardous risks. The trial court, having admitted evidence that the agent of the insurer inspected the building before issuing the policy and knew the manner in which it was used, left the question to the jury whether the parties did not intentionally use the term "boarding house" to describe the very thing that was insured. The opinion declares that the words "occupied as a dwelling and boarding house" defined the character of the risk assumed, and constituted a warranty that the building was at the time used for that purpose, and also holds: "It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel *in pais*, is a mere evasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law must be conclusively presumed to be aware of what the contract contains, and the legal effect of his agreement is that its terms shall be complied with. Extrinsic evidence of the kind under consideration must entirely fail in its object, unless its purpose be to show that the contract expressed in the written policy was not, in reality, the contract as made. A defendant cannot be estopped from making the defense that the contract sued on is not his contract, or that his adversary has himself violated it in those particulars which are made conditions to his rights under it, on the ground of negotiations and transactions occurring at the time the contract was entered into, unless the plaintiff is permitted to show, from such sources, that the contract as put in writing does not truly express the intention of the parties. The difficulty lies at the very threshold. An estoppel cannot arise except upon proof of a contract different from that contained in the written policy; and an inflexible rule of evidence forbids the introduction of such proof by parol testimony, when offered to vary or affect the terms of the written instrument. . . . The cases usually cited for the proposition that a contract of insurance is excepted out of the class of written contracts with respect to the admissibility of parol evidence to vary or control the written contract will be found on examination to be to a large extent those in which the proof has been received with a view to the reformation of the policy in equity, or to meet the defense that the contract was induced by false and fraudulent representations not embodied in the contract, or are the decisions of courts in which the legal and equitable jurisdictions are so blended that the functions of a court of equity have been transferred to the jury box. . . . How the contract was effected, whether directly with the insurer or by the intervention of agents, is of no consequence. The question of the admissibility of the testimony does not relate to the method by which the contract was made. It concerns the rule of evidence by which the contract, however made, shall be interpreted. Upon principle, it is impossible to perceive on what ground such testimony shall be re-

ceived. A policy of insurance is a contract in writing of such a nature as to be within the general rule of law that a contract in writing cannot be varied or altered by parol testimony. If it be ambiguous in its terms, parol evidence such as would be competent to remove an ambiguity in other written contracts may be resorted to for the purpose of explaining its meaning. If it incorrectly or imperfectly expresses the actual agreement of the parties, it may be reformed in equity. If strict compliance with the conditions of insurance, with respect to matters to be done by the insured after the contract has been concluded, has been waived, such waiver may, in general, be shown by extrinsic evidence, by parol. Further than this it is not safe for a court of law to go. To except policies of insurance out of the class of contracts to which they belong, and deny them the protection of the rule of law that a contract which is put in writing shall not be altered or varied by parol evidence of the contract the parties intended to make, as distinguished from what appears by the written contract to be that which they have in fact made, is a violation of principle that will open the door to the grossest frauds. . . . A court of law can do nothing but enforce the contract as the parties have made it. The legal rule that in courts of law the written contract shall be regarded as the sole repository of the intentions of the parties, and that its terms cannot be changed by parol testimony, is of the utmost importance in the trial of jury cases, and can never be departed from without the risk of disastrous consequences to the rights of parties. In the present case the property insured was described in the policy as a dwelling and boarding-house. There was no ambiguity in the terms used that justified resort to extrinsic evidence to explain the meaning of the contract. The effect given to the testimony on this subject by the charge of the court was to change the terms of the contract and reform it, and make another and a different contract. In this there was error, for which the judgment should be reversed."

It should be observed that in none of the cases to which reference has been made was the decision made to turn upon any limitation upon the authority of the agent, or otherwise than upon the application of the salutary rule which prevents the subordination of unambiguous written contracts to parol proof of contemporaneous and prior conditions and negotiations. That the rule announced and applied in these cases has been treated by the Supreme Court of the United States as fundamental and invariable is attested by repeated decisions of that court, among which may be mentioned: The Delaware (The Delaware v. Oregon Iron Co.) 14 Wall. 579, 20 L. ed. 779; Merchants' Mut. Ins. Co. v. Lyman, 15 Wall. 664, 21 L. ed. 246; Hearne v. New England Mut. M. Ins. Co. 20 Wall. 488, 22 L. ed. 395; Brawley v. United States, 96 U. S. 168, 173, 24 L. ed. 622, 624; Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674; Thompson v. Knickerbocker L. Ins. Co. 104 U. S. 252, 26 L. ed. 765; Simpson v. United States, 172 U. S. 372, 379–381, 43 L. ed. 482–485, 19 Sup. Ct. Rep. 212; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133.

In the case of The Delaware it was held it could not be shown in avoidance of a liability on a maritime bill of lading, the legal import of which, in the absence of a stipulation to the contrary, was that the goods should be stowed under deck, that in fact they were stowed on deck by the consent of the shippers and in pursuance of an oral agreement consummated before the goods were sent on board, and before the bill of lading was executed. The opinion contains this statement: "Subsequent oral agreements in respect to a prior written agreement, not falling within the statute of frauds, may have the effect to enlarge the time of performance, or may vary any other of its terms, or, if founded upon a new consideration, may waive and discharge it altogether. Verbal agreements, however, between the parties to a written contract, . . . are in general inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract."

In Merchants' Mut. Ins. Co. v. Lyman, *supra*, where it was sought to recover on an oral contract of insurance differing from the written policy, the court held: "Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a recovery, as in all other cases where contracts may be made either by parol or in writing. But it is also true that when there is a written contract of insurance it must have the same effect, as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect, in excluding parol testimony in its application to it, that other written instruments have."

In Hearne v. New England Mut. M. Ins. Co. *supra*, it was said that the rule excluding parol proof where it is inconsistent with the written contract is not confined to what is stated in express terms, because "what is implied is as effectual as what is expressed," and that to establish the inconsistency "it

is sufficient if it appears that the parties intended to be governed by what is written, and not by anything else."

Union Mut. L. Ins. Co. v. Mowry, *supra*, was an action upon a policy of life insurance. The facts and the ruling in respect to a claim of estoppel *in pais* similar to that now insisted upon are fully shown in the following portion of the opinion:

"By the express condition of the policy the liability of the company was released upon the failure of the insured to pay the premium when it matured: and the plaintiff could not recover unless the force of this condition could in some way be overcome. He sought to overcome it by showing that the agent who induced him to apply for the policy represented to him, in answer to suggestions that he might not be informed when to pay the premiums, that the company would notify him in season to pay them, and that he need not give himself any uneasiness on that subject; that no such notification was given to him before the maturity of the second premium, and for that reason he did not pay it at the time required. This representation before the policy was issued, it was contended in the court below and in this court, constituted an estoppel upon the company against insisting upon the forfeiture of the policy. But to this position there is an obvious and complete answer. All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was there expressed, for the very purpose of avoiding any controversy or question respecting them. The entire engagement of the parties, with all the conditions upon which its fulfulment could be claimed, must be conclusively presumed to be there stated. If by inadvertence or mistake provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company. The previous representation of the agent could in no respect operate as an estoppel against the company. Apart from the circumstance that the policy subsequently issued alone expressed its contract, an estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact,--to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion; liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. The doctrine of estoppel is applied, with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party who, by his statements as to matters of fact or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent."

In Thompson v. Knickerbocker L. Ins. Co. *supra*, the court used this language: "An insurance company may waive a forfeiture, or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing."

A line of decisions sometimes claimed to be in opposition to those last cited is illustrated by the case of Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617, where an insurance company was held to be estopped from interposing as a defense to an action on a life policy the falsity of certain statements in the application upon which the policy was based, because these statements had been inserted in the application by the company's agent, notwithstanding truthful

statements were made to him at the time by the insured. Referring to the rule which prevents written contracts from being contradicted or varied by parol, the opinion opens with this statement: "The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper circumstances and in an appropriate proceeding the instrument may be set aside or reformed, as best suits the purposes of justice."

Language is then used which, if construed broadly and without reference to the facts of that case, might give support to the theory that the rule mentioned can be practically defeated by the application of the principle of estoppel *in pais;* but, as if to restrain the force of this language, the opinion concludes: "This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it: that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it."

This ruling was followed in American L. Ins. Co. v. Mahone, 21 Wall. 152, 155, 22 L. ed. 593, 594, and in New Jersey Mut. L. Ins. Co. v. Baker, 94 U. S. 610, 614, 24 L. ed. 268, 269, to the extent only of holding the company estopped from asserting the falsity of statements in the application where it was prepared by the company's agent after truthful statements were made to him by the insured. In Northern Assur. Co. v. Grand View Bldg. Asso. *supra*, Union Mut. L. Ins. Co. v. Wilkinson was relied upon by counsel for the insured as showing an abandonment of the doctrine announced and applied in earlier cases; but it was observed by the court, evidently to correct any misapprehension as to the extent of the decision relied upon, that the matter in respect of which parol testimony had been admitted "was not a fact or statement contained in the policy sued on, but an extrinsic fact or statement contained in the application. The defense made upon that statement was, in legal effect, a denial of the execution of the statement,—a defense that can always be sustained by parol evidence. However this may have been, we are unwilling to have the case regarded as one overthrowing a general rule of evidence. Some of the remarks contained in the opinion might seem to bear that interpretation, but not necessarily so. That Mr. Justice Miller did not intend, in the case of Union Mut. L. Ins. Co. v. Wilkinson, to lay down a new rule of evidence in insurance cases, is clearly shown in the subsequent case of Merchants' Mut. Ins. Co. v. Lyman, 15 Wall. 664, 21 L. ed. 246, where the opinion was delivered by the same learned justice."

The case principally relied upon by counsel for the insured is Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87. That was an action upon a life policy issued in Iowa. The facts were these: The blanks in the application upon which the policy was based were filled in by the agent for the company. One of the questions propounded therein was. "Has the party [applicant] any other insurance on his life?" When the question was read the applicant truthfully stated that he had certificates of membership in certain co-operative associations, and that he did not know whether they would be considered insurance. The agent, having replied that co-operative associations were in no sense insurance companies, and that he did not consider the certificates insurance, wrote the answer "No other" into the application, and it was signed by the applicant. The certificates did constitute other life insurance. The defense interposed by the company was that the answer to the question was false and avoided the policy, which contained provisions to the effect that it would be void if there were any false statement in the application, that no statement made to the agent would be binding on the company unless written into the application, that the contract should be deemed to be fully set forth in the policy and the application, and that none of its terms could be modified or waived by the agent. The decision may be summarized as follows: (1) Under the Iowa statute (§ 1749, *supra*) the agent represented the company, and not the insured, in preparing the application, notwithstanding the provisions of the policy; and his act in writing the answer, alleged to be untrue, was the act of the company. (2) The purport of the word "insurance" in the question was not so

absolutely certain as to preclude proof of what kind of insurance the parties had in mind when the question was answered, and such proof did not contradict the written contract. (3) In these circumstances the company was estopped from asserting that the answer was the statement of the insured or that the question and answer embraced insurance in co-operative associations. The case is certainly not an authority for the admission of parol testimony to contradict or vary a plain and unambiguous stipulation in a written contract, whether offered in support of a claimed estoppel *in pais* or otherwise. In respect of this question it is not different from Union Mut. L. Ins. Co. v. Wilkinson.

In this connection it will be well to refer to the case of Marston v. Kennebec Mut. L. Ins. Co. 89 Me. 266, 56 Am. St. Rep. 412, 36 Atl. 389, cited by counsel for the insured. It was there held, following Union Mut. L. Ins. Co. v. Wilkinson and Continental L. Ins. Co. v. Chamberlain, that where the application, upon which the policy is issued, is drawn by an unauthorized agent of the insurer, and the answers to the interrogatories are written by him, without fraud or collusion on the part of the applicant, the insurer is estopped from controverting the truth of such answers in an action upon the policy; the reason for the ruling being that the answers are not the statements of the applicant, but of the insurer. The case, however, makes a clear distinction between admitting parol testimony to show that the statements in the application are those of the insurer, through its authorized agent, and admitting such testimony to contradict or vary a statement or stipulation of the policy itself, as in the present cases,—a distinction pointed out, as before shown, in Northern Assur. Co. v. Grand View Bldg. Asso. in the observation there made respecting Union Mut. L. Ins. Co. v. Wilkinson. Referring to a prior case in which parol testimony of a contemporaneous representation or assurance of the agent relating to the time within which the premium could be paid was held inadmissible, the supreme judicial court of Maine states the distinction in the following language in the case cited (page 276 of 89 Me., page 420 of 56 Am. St. Rep., and page 392 of 36 Atl.): "But we think that case is to be distinguished from the case at bar. In that case the provision in relation to the time of payment of the premiums was one of the express terms of the contract, as much as was the amount of the insurance, the party insured, or to whom it was payable. They constituted the essential elements of a completed contract, and, of course, could not be varied by parol. But the questions and answers in the application in this case, while they form the 'basis of the contract,' are really propositions for a contract, or proposals upon which it is to be issued, if satisfactory to the company. The evidence which was held inadmissible in the one case and that which is received in the other bears upon entirely distinct propositions. In the former, it was excluded because it tended to vary a written contract by parol; in the latter, it becomes admissible to show that the recitals in the application are not, under the circumstances, the representations of the applicant, although signed by him, but the statements of the company, which had full knowledge of all the facts and which is estopped from controverting the truth of these statements."

McMaster v. New York L. Ins. Co. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10, is also relied upon as sustaining the admission of oral testimony of the recording agent's knowledge of the condition of the insured building when the policies were issued and of his prior verbal assurance to the husband of the insured; and this, notwithstanding counsel make no claim that there is any inconsistency, uncertainty, or ambiguity in the provisions of the policies now in suit. That such is not the proper interpretation of the decision in that case is plain, for otherwise it would be in conflict, not only with many prior decisions which it does not mention, but also with the later decision in Northern Assur. Co. v. Grand View Bldg. Asso. which does not mention it. The case was unusual in its facts, but it will sufficiently show what was presented for decision to say: The action was upon five life policies, which were dated and took effect December 18, 1893, but provided for the payment of annual premiums on December 12th in every year thereafter. The application was dated December 12, 1893, and contained a request that the policies bear the same date. The insured died January 18, 1895, without paying the second premiums. The policies provided for a grace of one month in the payment of premiums, and there was deemed to be an inconsistency and uncertainty in the provisions in respect of the period covered by the first premiums and of the forfeiture imposed for nonpayment of subsequent premiums. As to the second premiums, "it was conceded that payment on January 12th, in one view, and on January 18th, in the other, would have averted a forfeiture." In these circumstances it was held that oral testimony of extrinsic facts was properly received to show the interpretation which the parties put upon the inconsistent and uncertain provisions when the policies were issued, and to further show that the plaintiff was not estopped from asserting that the

policies did not take effect in advance of their actual date, because the request respecting the dating of the policies, and therefore respecting the time when they should be effective, was inserted in the application by the company's agent without the knowledge of the applicant, and was never assented to by him. The case is therefore like Continental L. Ins. Co. v. Chamberlain, which it cites and applies, and is not an authority for the admission of oral testimony to contradict or vary the plain and unambiguous terms of a written policy. Another matter which militates strongly against its use as such an authority is that the decision was ultimately rested upon the proper construction of the policies, irrespective of extrinsic facts, as is shown by the concluding portion of the opinion, which reads: "The truth is, the policies were not in force until December 18th, and, as the premiums were to be paid annually, and were so paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the 12th to the 18th. And, as the policies could not be forfeited for nonpayment during that time, the month of grace could not be shortened by deducting the six days which belonged to McMaster of right. In our opinion the payment of the first year's premiums made the policies nonforfeitable for the period of thirteen months, and, inasmuch as the death of McMaster took place within that period, the alleged forfeiture furnished no defense to the action."

If it be, as is insisted by counsel for the insured, that there is language in Continental L. Ins. Co. v. Chamberlain and in McMaster v. New York L. Ins. Co. which justifies the admission, by way of establishing an estoppel *in pais*, of oral testimony to contradict or vary the terms of a written contract in an action at law on the contract, such language cannot now be regarded as controlling, for the reason that the question has been ruled otherwise, in conformity with prior decisions, in the case of Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, which is the last deliverance of the court upon the subject; and, as illustrating that the decision in that case may properly be regarded as having the effect of limiting any such language in the two intervening cases, it may be observed that the two learned members of the court who wrote the opinions in those cases dissented from the decision in the last one. It is, of course, the duty of this court to ascertain and follow the true rule of decision in the Supreme Court, as gathered from its several opinions upon the subject, and not to follow expressions in particular opinions, which, upon consideration of all, appear to be without the court's approval.

What has been said shows it is important to consider the circumstances under which Northern Assur. Co. v. Grand View Bldg. Asso. was brought before the court, the questions presented for decision, and what was actually decided. It was an action at law upon a fire policy which contained two provisions which need be mentioned: One, that the policy should be void, unless otherwise provided in an indorsement thereon or addition thereto, if the insured then had or should thereafter procure other insurance on the property covered by that policy; and the other, that no agent could waive any provision of the policy, except by a written indorsement thereon or addition thereto. It was shown by oral testimony that there was other concurrent insurance on the property when the policy was issued, and that the company's agent was so informed at the time. No consent to other insurance was indorsed on the policy or added to it. A judgment for the plaintiff was affirmed by this court; there being majority and dissenting opinions. 41 C. C. A. 207, 101 Fed. 77. The majority opinion applied the principle of estoppel *in pais*, and held that the written stipulation respecting other insurance was avoided or superseded by the oral testimony of the agent's knowledge of the existence of such insurance when the policy was issued. It also held that the stipulation limiting the agent's authority was not applicable to his acts at the inception of the contract, but only to such as might occur after the policy should become operative. The dissenting opinion was to the effect that the stipulation invalidating the policy if there was other insurance could not be contradicted or varied by parol, as was permitted by the majority opinion, citing, among others, certain decisions of the circuit court of appeals for the seventh circuit, and that the other stipulation was an effectual limitation upon the authority of the agent at the inception of the contract as well as thereafter. Thus, when the case was removed to the Supreme Court by certiorari, two questions were distinctly presented: One whether, notwithstanding the rule which protects written contracts against contradiction or alteration by parol testimony, the act of the agent in issuing the policy with knowledge of the existing insurance could be shown by parol for the purpose of avoiding or superseding the stipulation against other insurance, through the application of the principle of estoppel; and the other, whether the other stipulation was an effectual limitation upon the agent's authority. In its opinion the Supreme Court

cites with approval several of the decisions of state courts before mentioned, particularly commends the ruling in the two New Jersey cases that the principle of estoppel cannot be invoked to defeat the rule which prevents the contradiction or alteration of written instruments by parol, and then proceeds: "It must be conceded that it is shown, in the able brief of the defendant in error, that in several of the states the courts appear to have departed from well-settled doctrines in respect both to the incompetency of parol evidence to alter written contracts and to the binding effect of stipulations in policies restricting the authority of the company's agents. . . . We do not consider it necessary or profitable to examine in detail the decisions of the circuit courts or of the circuit courts of appeals. It is sufficient for our present purpose to say that the circuit court of appeals for the seventh circuit has held consistently to the doctrines on this subject laid down by the English and American courts generally (United Firemen's Ins. Co. v. Thomas, 47 L.R.A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406), and that the court of appeals for the eighth circuit in the present case has, by a majority of its members, adopted and applied the view that a written contract may, in an action at law, be changed by parol evidence; and that such clauses as restrict the power of agents of insurance companies to contract otherwise than by some writing should be given effect, if at all, as they respect such modifications of a policy as are made, or attempted to be made, after it has been delivered and taken effect as a valid instrument, and should not be considered as having relation to acts done by the company or its agents at the inception of the contract. 41 C. C. A. 207, 101 Fed. 77. In such divergence of decisions, we have deemed it proper to have the present case brought before us by a writ of certiorari. As to the fundamental rule that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as invariable and salutary. The rule itself and the reasons on which it is based are adequately stated in the citations already given from the standard works of Starkie and Greenleaf. Policies of fire insurance in writing have always been held by this court to be within the protection of this rule."

Prior decisions of that court are then reviewed, including Union Mut. L. Ins. Co. v. Wilkinson, and it is said (pages 361, 364 of 183 U. S., pages 234, 236 of 46 L. ed., and pages 153, 154 of 22 Sup. Ct. Rep.: "What, then, are the principles sustained by the authorities and applicable to the case in hand? They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; . . . that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter; and, where such limitation is expressed in the policy executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation. . . . This case is an illustration of the confusion and uncertainty which would be occasioned by permitting the introduction of parol evidence to modify written contracts, and by approving the conduct of agents and persons applying for insurance in disregarding the express limitations put upon the agents by the principal to be affected. It should not escape observation that preserving written contracts from change or alteration by verbal testimony of what took place prior to and at the time the parties put their agreements into that form is for the benefit of both parties. In the present case, if the witnesses on whom the plaintiff relied to prove notice to the agent had died, or had forgotten the circumstances, he would thus, if he had depended to prove his contract by evidence extrinsic to the written instrument, have found himself unable to do so. So, on the other side, if the agent had died, or his memory had failed, the defendant company might have been at the mercy of unscrupulous and interested witnesses. It is not an answer to say that such difficulties attend other transactions and negotiations; for it is the knowledge of the inconveniences that attend oral evidence that has led to the custom of putting important agreements in writing and to the legal doctrine that protects them, when so expressed and when no fraud or mutual mistake exists, from being changed or modified by the testimony of witnesses as to conversations and negotiations that may never have taken place, or the real nature and meaning of which may have faded from recollection."

Thus, the opinion shows that both of the questions presented in the case were deliberately determined by the Supreme Court, after full consideration of its prior decisions and of the conflicting decisions in the state courts; that, in respect of the first question, it was held that, in the absence of fraud or mutual mistake, unambiguous written contracts must be permitted to speak for themselves, and cannot, at the instance of one of the parties, be altered or contradicted by parol testimony; and that the theory that such testimony, although not competent to alter or contradict the contract, may yet be received for the purpose of raising an estoppel *in pais*, is a mere evasion of the true rule, and wholly untenable. While that ruling is determinative of the present cases, there are also decisions of this court which would lead to the same result. Thus, in Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Ins. Co. 9 C. C. A. 1, 3, 8, 19 U. S. App. 510, 60 Fed. 351, 353, 358, there was proof that the inspector, through whom a policy was obtained insuring seven boilers against explosion, had stated to the insured, in advance of the issuing of the policy, that if additional boilers were obtained, but not more than seven were used at the same time, the risk would be no greater and the policy would cover the additional boilers; but it was held that there was no liability under the policy for the explosion of an after-acquired boiler, and that the inspector's statement "was merged in the written contract evidenced by the policy, and was not available to the plaintiff either as a representation, an agreement, or an estoppel." So, also, in Travelers' Ins. Co. v. Henderson, 16 C. C. A. 390, 395, 32 U. S. App. 536, 540, 69 Fed. 762, 768, which was a suit in equity to reform a policy, it was held: "Where the class of risks intended to be insured against is clearly described in the policy, and the assured has a full and fair opportunity to read the instrument, the company will not be bound by representations made by its agent, in good faith, that the policy covers risks that are not in fact within its provisions."

In other cases it has been often stated that, in the absence of fraud or mutual mistake, no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations, as to the terms or legal effect of the resulting written contract, can be permitted to prevail, either in law or in equity, over the plain provisions and proper interpretation of the contract. Wilson v. New United States Cattle-Ranch Co. 20 C. C. A. 244, 36 U. S. App. 634, 73 Fed. 994; McKinley v. Williams, 20 C. C. A. 312, 36 U. S. App. 749, 74 Fed. 94; Green v. Chicago & N. W. R. Co. 35 C. C. A. 68, 92 Fed. 873; Union Selling Co. v. Jones, 63 C. C. A. 224, 128 Fed. 672; Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co. 66 C. C. A. 67, 132 Fed. 957; Rucker v. Bolles, 67 C. C. A. 30, 34, 133 Fed. 858; Davis Calyx Drill Co. v. Mallory, 69 L.R.A. 973, 69 C. C. A. 662, 137 Fed. 332.

The decisions cited exhaust the argument upon the subject. Nothing could be added to what they contain. Because of the error in admitting parol testimony which enabled the insured to recover on policies different from those which the parties had made for themselves, and because of the error in refusing to direct verdicts for the defendants upon the evidence properly admitted, the judgments are reversed, with directions to grant a new trial in both cases.

ILLINOIS SUPREME COURT.

WATERMAN HALL, Appt.,
v.
ALBERT H. WATERMAN et al.

(220 Ill. 569, 77 N. E. 142.)

Adverse possession under cotenant.

1. One entering into possession of real estate under a will and deed from testator's executors purporting to convey the entire tract may secure title by adverse possession against cotenants of the testator.

Same—quitclaim deed as color of title.

2. A quitclaim deed which purports to convey the entire interest in a parcel of land is good color of title upon which to found a title by adverse possession.

Same—against trust.

3. An adverse title to real estate may be secured against a trust where the pos-

Case Note.—Quitclaim deed as color of title for purposes of adverse possession.—In many, if not most, jurisdictions, title by adverse possession may be acquired by a possession actually and notoriously adverse for a sufficient length of time, even though the original entry was not under color of title. But even in those jurisdictions entry and claim under color of title frequently operates to reduce the period of adverse possession otherwise necessary to bar the legal title or to extend the territorial limits of possession, and, in some cases, to rebut the presumption that the actual possession was in subordination to the legal title, or to supply the lack of other evidence of its adverse character. A quitclaim deed is generally held to be sufficient to constitute color of title for any of these various purposes. Thus, in Parker v. Newberry, 83 Tex. 428, 18 S. W. 815, the court said that the essential requisites of a deed necessary as the foundation of the five-years plea of limitations are that it shall "by its own terms, or with such aid as the law requires, assume

session is taken under a conveyance from one claiming adversely to the creator of the trust.

Trust—interest of remainder-man.

4. A conveyance of land to trustees for a period of years, at the expiration of which it is to be conveyed to testator's heirs, vests a present estate in the heirs, subject to the chattel interest of the term.

Barring trust estate—effect on remainder.

5. The barring by the statute of limitations of a legal estate conveyed to trustees for a term of years by possession held adversely to the trust will apply to the whole estate, so as to prevent a recovery by those entitled to possession at the termination of the trust period.

Adverse possession—ignorance of true owner.

6. Ignorance on the part of the true owner of title to real estate does not prevent the acquisition of a title adverse to it.

Same—defects in record title.

7. Defects in the record title of one in possession of real estate in good faith under color of title will not prevent his obtaining a title by adverse possession.

(Wilkin, J., dissents.)

(February 21, 1906.)

APPEAL by defendant from a decree of the Circuit Court for DeKalb County partitioning certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. Carnes, Dunton, & Faissler, for appellant:

A quitclaim deed is good color of title.

Safford v. Stubbs, 117 Ill. 389, 7 N. E. 653; Glos v. Furman, 164 Ill. 585, 45 N. E. 1019; Holloway v. Clark, 27 Ill. 483; McConnel v.

and purport to operate as a conveyance;" and held that a quitclaim deed fulfils these requisites. The court said, *arguendo* and by way of distinction, "that the rule that a purchaser who takes only such interest as is conveyed by a quitclaim deed technically cannot, under that character of conveyance, be protected as a purchaser in good faith, etc., has no application where such deed is made the basis of the five-years plea of limitation."

In McDonough v. Jefferson County, 79 Tex. 535, 15 S. W. 490, counsel contended that a quitclaim deed purporting to convey the "right, title, and interest" of the grantor would not support a title under the five-years statute of limitations; but the court said that, under the facts of the case, the objection to the introduction of the deed was properly overruled. What the facts of the case were to which the court referred does not appear from the report of the case.

A quitclaim deed taken in good faith is sufficient color of title upon which to support title by adverse possession for seven years, under the Georgia statute. Castleberry v. Black, 58 Ga. 386; Johnson v. Girtman, 115 Ga. 794, 42 S. E. 96.

And a quitclaim deed is color of title, so that possession thereunder, accompanied by payment of taxes for seven successive years, will bar a recovery by the owners of the legal title under the Illinois seven-years statute of limitations. McConnel v. Street, 17 Ill. 253; Holloway v. Clark, 27 Ill. 483; Winslow v. Cooper, 104 Ill. 235.

And Safford v. Stubbs, 117 Ill. 389, 7 N. E. 653, holds that a quitclaim deed of all the grantor's "right, title, interest, estate, claim, and demand," executed to one having no notice that the grantor's title was limited to an estate for life, constitutes a good color of title to support a title by adverse possession under the seven-years statute of limitation against the remainder-men, if accepted in good faith and accompanied by payment of taxes.

But it was held in Busch v. Huston, 75 Ill. 343, that a quitclaim deed purporting to convey merely the "right, title, interest, and estate" of the grantor is color of title only to the extent of the grantor's interest,—in this case an undivided fractional interest; and therefore will not support a title by adverse possession against the cotenants of the grantor. The court said, in effect, that, if the deed had purported to convey the land in controversy, and not merely the interest of the grantor therein; and had been accepted and acted on in good faith, and followed by payment of taxes,—it would have supported a title by adverse possession under that statute.

In Laraway v. Zenor, 100 Iowa, 181, 69 N. W. 416, it was held that a quitclaim deed from husband to wife of land in which she knew his only interest was under an executory contract to purchase, which was subsequently forfeited by failure to comply with the conditions thereof, does not furnish color of title upon which to base ownership by adverse possession.

A quitclaim deed constitutes color of title which will operate to make actual occupancy of a part of the tract described constructive possession of the entire tract for the purposes of adverse possession. Swift v. Mulkey, 14 Or. 59, 12 Pac. 76.

And this is true of an unrecorded quitclaim deed purporting to convey all of the right and title which the grantor has under a tax collector's deed. Minot v. Brooks, 16 N. H. 374; Wells v. Jackson Iron Mfg. Co. 47 N. H. 235, 90 Am. Dec. 575.

But a quitclaim deed is not color of title to land other than that actually described therein. Archer v. Beihl, 69 C. C. A. 101, 136 Fed. 113; Woods v. Banks, 14 N. H. 101.

Hence deeds releasing and quitclaiming the grantor's rights in lots in the "second and third division right of Abel Camp" are not color of title to a particular lot in such second division, as to which it does not appear that the grantors ever had title, or were in possession. Woods v. Banks, *supra*.

In Knight v. Campbell, 76 Iowa, 730, 39 N. W. 829, the question was whether a statute by which possession under the former

Street, 17 Ill. 253; Winslow v. Cooper, 104 Ill. 235.

It is immaterial if the grantor had no title, and if the record showed that she had no title.

McConnel v. Street, *supra;* McClellan v. Kellogg, 17 Ill. 498; Winters v. Haines, 84 Ill. 585; Dickenson v. Breeden, 30 Ill. 279; Jandon v. McDowell, 56 Ill. 53; Hardin v. Crate, 60 Ill. 215.

The deed of a tenant in common of the entire tract constitutes color of title, and his grantee may claim the benefit of the statute.

1 Cyc. Law & Proc. p. 1096; Goewey v. Urig, 18 Ill. 242; Hinchman v. Whetstone, 23 Ill. 185; Lavalle v. Strobel, 89 Ill. 370; Kotz v. Belz, 178 Ill. 434, 53 N. E. 367; Hinkley v. Greene, 52 Ill. 230; Baldwin v. Ratcliff, 125 Ill. 376, 17 N. E. 794; Littlejohn v. Barnes, 138 Ill. 478, 28 N. E. 980; Hodgen v. Henrichsen, 85 Ill. 259; McDowell v. Sutlive, 78 Ga. 142, 2 S. E. 937; King v. Carmichael, 136 Ind. 20, 43 Am. St. Rep. 303, 35 N. E. 509; Rutter v. Small, 68 Md. 133, 6 Am. St. Rep. 434, 11 Atl. 698.

It is of no importance that the disseisin was of testamentary trustees.

Hayward v. Gunn, 82 Ill. 385; Smilie v. Biffle, 2 Pa. St. 52, 44 Am. Dec. 156; Bozarth v. Largent, 128 Ill. 95, 21 N. E. 218; McNeer v. McNeer, 142 Ill. 388, 19 L. R. A. 256, 32 N. E. 681; Conner v. Goodman, 104 Ill. 365; Bonney v. Stroughton, 122 Ill. 536, 13 N. E. 833; Kotz v. Belz, *supra.*

Messrs. **Jones & Rogers** and **W. C. Kellum**, for appellees:

There could be no adverse possession as against the *cêstuis que trust* or remaindermen until the termination of the trust.

Turner v. Hause, 199 Ill. 464, 65 N. E. 445; Bradsby v. Wallace, 202 Ill. 239, 66 N. E. 1088; Jackson ex dem. Hardenbergh v. Schoonmaker, 4 Johns. 390; Jackson ex dem. McCrea v. Mancius, 2 Wend. 357; Jackson ex dem. Beekman v. Sellick, 8 Johns. 262; Jackson ex dem. Swartwout v. Johnson, 5 Cow. 75, 15 Am. Dec. 433; Parker v. Hall, 2 Head, 641; McCoy v. Poor, 56 Md. 197; Lamar v. Pearre, 82 Ga. 354, 14 Am. St. Rep. 168, 9 S. E. 1043; Allen v. DeGroodt, 98 Mo. 159, 14 Am. St. Rep. 626, 11 S. W. 240; Miller v. Ewing, 6 Cush. 34; Salmons v. Davis, 29 Mo. 176; Guion v. Anderson, 8 Humph. 325; McCorry v. King, 3 Humph. 267, 39 Am. Dec. 165; Foster v. Marshall, 22 N. H. 491; Bradbury v. Grinsell, cited in 2 Wms. Saund. 175; Pierre v. Fernald, 26 Me. 440, 46 Am. Dec. 573; Daniel v. North, 11 East, 372; Sargent v. Ballard, 9 Pick. 251.

A devise of all lands belonging to the testator in the state of Illinois will not be given effect as to a particular tract claimed under the will, without proof that the testator owned the same at the time his will took effect.

Holbrook v. Forsythe, 112 Ill. 307; Sholl v. German Coal Co. 139 Ill. 21, 28 N. E. 748; Heacock v. Lubuke, 107 Ill. 397; Busch v. Huston, 75 Ill. 343; Blackaby v. Blackaby, 185 Ill. 94, 56 N. E. 1053.

Waterman Hall was notified by the quitclaim deed of the executors and trustees that they could convey to it no title, except such as they held in their official capacity under the will of Abbie L. Waterman.

9 Am. & Eng. Enc. Law, 2d ed. p. 107; Babcock v. Collins, 60 Minn. 73, 51 Am. St. Rep. 503, 61 N. W. 1020; Price v. King, 44 Kan. 639, 25 Pac. 43; Hiss v. McCabe, 45 Md. 77; Ennis v. Leach, 36 N. C. (1 Ired. Eq.) 416; West v. Fitz, 109 Ill. 425; Busch

title will defeat a tax title, unless an action to recover possession is brought by the holder of the tax title within five years after the execution and recording of the tax deed, was available to the grantees under a quitclaim deed purporting to convey all the grantor's "right, title, interest, claim, and demand," with a covenant against the grantor's acts, executed by the former owner after the execution and recording of the tax deed, but before the expiration of the five-years period above referred to; it appearing that, previous to the execution of such deed, but after the execution and recording of the tax deed, the grantor had quitclaimed his interest to a third person, who subsequently conveyed to the holder of the tax title, neither of the latter two deeds, however, being recorded until more than five years after the recording of the tax deed. The court held that the grantees in the quitclaim deed last executed were in no better position than their grantor, and that, as he had, by the first quitclaim deed, parted with his right to avail himself of the statute in question, they were equally unable to claim its benefit, but could only avail themselves of the general statute of limitations applicable to strangers to the title.

The fact that the prescriptive title sought to be established is based upon a quitclaim deed as color of title does not itself negative the presumption of good faith. McCamy v. Higdon, 50 Ga. 629; Hammond v. Crosby, 68 Ga. 767. In this case the court went further, and said that a deed without warranty is written evidence of title; and, in the absence of proof to the contrary, the presumption is that the party claiming possession under it does so in good faith.

As indicated in the opinion in Parker v. Newberry, 83 Tex. 428, 18 S. W. 815, the question whether one holding under a quitclaim deed is entitled to protection as a bona fide purchaser is an entirely different question from that considered in this note. The general question as to the effect of a quitclaim deed in an otherwise perfect record title is discussed in a note in 29 L.R.A. 33.

v. Huston, 75 Ill. 344; Ball v. Palmer, 81 Ill. 370; Bracken v. Cooper, 80 Ill. 221; Boyd v. Boyd, 176 Ill. 40, 68 Am. St. Rep. 169, 51 N. E. 782; Stewart v. Stewart, 83 Wis. 364, 35 Am. St. Rep. 67, 53 N. W. 686; Hignite v. Hignite, 65 Miss. 447, 7 Am. St. Rep. 673, 4 So. 345; Seaton v. Son, 32 Cal. 481; Edwards v. Bishop, 4 N. Y. 61; Moore v. Antill, 53 Iowa, 612, 6 N. W. 14; Reuter v. Stuckart, 181 Ill. 529, 54 N. E. 1014.

The widow, Abbie L. Waterman, after her renunciation under the will of James S. Waterman held the lands in question simply as statutory heir, and entitled simply to one-half share thereof.

Colvin v. Hauenstein, 110 Mo. 575, 19 S. W. 948; Melton v. Fitch, 125 Mo. 281, 28 S. W. 612; Hall v. Mathias, 4 Watts & S. 331; Dugan v. Follett, 100 Ill. 581; McMahill v. Torrence, 163 Ill. 277, 45 N. E. 269; Sontag v. Bigelow, 142 Ill. 143, 16 L.R.A. 326, 31 N. E. 674.

The record was notice of defects in title.

2 Pom. Eq. Jur. 2d ed. § 730; 2 Perry, Tr. 3d ed. § 223; Trull v. Bigelow, 16 Mass. 406, 8 Am. Dec. 144; Chadwick v. Fonner, 69 N. Y. 404; Mulford v. Minch, 11 N. J. Eq. 22, 64 Am. Dec. 472; Gilman v. Hamilton, 16 Ill. 225; Atty. Gen. v. Illinois Agri. College, 85 Ill. 517; Wade, Notice, § 50; 2 Pom. Eq. Jur. 2d ed. § 1048; Chicago, R. I. & P. R. Co. v. Kennedy, 70 Ill. 350; Doyle v. Teas, 5 Ill. 202; Morris v. Hogle, 37 Ill. 150, 87 Am. Dec. 243; Maples v. Medlin, 5 N. C. (1 Murph.) 219; Russell v. Ranson, 76 Ill. 167; Watt v. Scofield, 76 Ill. 261; Indiana, I. & I. R. Co. v. Swannell, 157 Ill. 616, 30 L.R.A. 290, 41 N. E. 989; Mechanics' Bank v. Seton, 1 Pet. 299, 7 L. ed. 152; Bradley v. Luce, 99 Ill. 234; Long v. Fox, 100 Ill. 43; Breit v. Yeaton, 101 Ill. 242.

A party obtaining trust property with notice of the trust holds it as trustee for the beneficiary.

Philadelphia Nat. Bank v. Dowd, 2 L.R.A. 480, 38 Fed. 172; Mechanics' Bank v. Levy, 3 Paige, 606; Adair v. Shaw, 1 Sch. & Lef. 243; Rolfe v. Gregory, 4 De G. J. & S. 576; Leigh v. Macaulay, 1 Younge & C. Exch. 260; Smith v. Barnes, L. R. 1 Eq. 65; Boursot v. Savage, L. R. 2 Eq. 134; Heath v. Crealock, L. R. 18 Eq. 215; Newton v. Newton, L. R. 6 Eq. 135; Re European Bank, L. R. 5 Ch. 358; Ex parte Cooke, L. R. 4 Ch. Div. 123; Re Hallett, L. R. 13 Ch. Div. 696; Lane v. Dighton, 1 Ambl. 409; Mansell v. Mansell, 2 P. Wms. 678; Lench v. Lench, 10 Ves. Jr. 511; Lewis v. Madocks, 17 Ves. Jr. 48; Pennell v. Deffell, 4 De G. M. & G. 372; Berwick-upon-Tweed v. Murray, 7 De G. M. & G. 497; Ernest v. Croysdill, 2 De G. F. & J. 175; Griffin v. Blanchar, 17 Cal. 70; Sharp v. Goodwin, 51 Cal. 219; Scott v. Umbarger, 41 Cal. 410; Price v. Reeves, 38 Cal. 457; Siemon v. Schurck, 29 N. Y. 598; Swinburne v. Swinburne, 28 N. Y. 568; 2 Pom. Eq. Jur. 621.

Cartwright, Ch. J., delivered the opinion of the court:

On April 29, 1902, appellees filed their bill in this case in the circuit court of De Kalb county, claiming title to an undivided one-half of 80 acres of land in said county as devisees of James S. Waterman, deceased, and alleging that appellant, Waterman Hall, a corporation, which was made defendant, owned the other undivided one-half as devisee under the will of Abbie L. Waterman and by virtue of a conveyance from the executors of said will, and that appellant had been in possession of the whole of the tract of land since June 1, 1888, and had received the rents, issues, and profits. The bill prayed for partition and for an accounting for said rents and profits. Appellant answered, denying the ownership of James S. Waterman, averring that Abbie L. Waterman owned the land in her lifetime, and was in the actual, open, visible, and notorious possession thereof, claiming to be the owner in fee simple, from the death of her husband, on July 18, 1883, until her death, on March 25, 1888; that she and her executors paid all taxes on the land up to the time of the conveyance to appellant, and that thereafter appellant had been in possession under claim and color of title and had paid all taxes; and appellant claimed the benefit of the seven-year statute of limitations. Upon a hearing the court found that appellant was the owner of the undivided one-half of the tract and appellees were the owners of the other undivided one-half, and entered a decree for partition.

On November 18, 1853, the land in question was owned by James S. Waterman, and on that day he conveyed it to Abbie L. Cushman, his intended wife, for the expressed consideration of $500. On January 8, 1854, James S. Waterman and Abbie L. Cushman were married, and on October 18, 1859, they conveyed the land, with a 1-acre tract of timber, to Stephen A. Bemis for $2,600, the whole of which was secured by notes and a mortgage payable to James S. Waterman. On November 18, 1864, before the maturity of the mortgage, Bemis and wife reconveyed the premises to James S. Waterman for the same consideration of $2,600, and the mortgage was released of record. From 1859 to 1883 James S. Waterman and wife lived on the farm of 540 acres, which included this tract. All of the land was managed as one farm by James S. Waterman. A tract of 60 acres included in the farm was known

as the "homestead," 400 acres were known as the "home farm," and this tract was usually called "Abbie's eighty." Other tracts included in the farm were also designated by the names of other persons from whom they had been purchased, but none of the names indicated possession or ownership. On October 6, 1877, James S. Waterman conveyed the homestead tract to his wife, Abbie L. Waterman, through a third person, but neither those deeds nor the one to Abbie L. Cushman was put on record. James S. Waterman died July 18, 1883, leaving a will in which he named two persons as executors and testamentary trustees, and, after making provision for his widow, gave to the trustees the residue of his estate for a period of twenty-one years after his death, in trust for his brothers and sisters, and at the expiration of the trust the property was given to said brothers and sisters, their heirs and assigns, forever, the child or children of any deceased brother or sister to take the same share as the father and mother would have taken if living, and, in case of the death of any of them without issue, the share such brother or sister would have taken was to be divided among the surviving brothers and sisters. The executors filed an inventory of his estate, which did not include this 80-acre tract. The widow, Abbie L. Waterman, renounced the benefits of the will, and the deeds transferring the homestead tract and the deed to her under the name of Abbie L. Cushman were put on record by her in September, 1883. She had possession of this tract at all times after her husband's death, paid all taxes on it, built a hay barn on it, and treated it in all respects as her own. On November 7, 1883, she filed her bill for partition of all the lands of James S. Waterman, deceased, making the trustees and the living beneficiaries under the will parties defendant. This tract was not included in the partition, and until the filing of this bill her ownership was not questioned. She died March 25, 1888, leaving a will, by which she gave to her executors a large amount of lands, including this tract, with directions to convey the lands to a corporation to be organized under the name of Waterman Hall. The defendant was organized as such corporation, and the executors, who had possession of this tract, conveyed it, with the other real estate, as executors of the will, to defendant. This tract was devised with the home farm under the following description: "Together with the adjoining 80 acres which stand in my maiden name of Abbie L. Cushman." The conveyance to defendant was made by the executors in terms as executors and trustees of the estate of Abbie L. Waterman, deceased; and by it they conveyed and quitclaimed all interest in the real estate therein described to the defendant. The defendant had been in the open, notorious, and exclusive possession of the tract of land in question for more than thirteen years before the bill was filed, claiming the absolute title under the will of Abbie L. Waterman and the conveyance by the executors and trustees as directed by said will, and during all that time had appropriated the rents and profits and paid the taxes; so that its defense under the statute of limitations of seven years was perfect, unless it is not entitled to avail itself of the benefits of that statute.

It is first contended that the provisions of the statute are not applicable in this case for the reason that, by the renunciation of Abbie L. Waterman, she became the owner of an undivided one-half of the tract and a tenant in common with the owners of the other undivided one-half, and therefore her possession was not adverse to them. In nearly all cases the possession of one tenant in common is not adverse to a cotenant, and one who enters under the common title holds possession for the benefit of all. But one tenant in common is not incapable of holding adversely to his cotenant. The presumption must be overcome, and stronger evidence is required to prove an adverse holding by a tenant in common than by a stranger. The possession of one tenant in common is adverse to a cotenant where it is of such a character as to give notice to the cotenant that his title is not acknowledged and that the possession is adverse to him. Where one tenant in common takes actual and exclusive possession of the entire estate, with such outward acts of exclusive ownership as give notice that an adverse possession is intended, the possession amounts to a disseisin of the cotenant, and is adverse. Lavalle v. Strobel, 89 Ill. 370; Littlejohn v. Barnes, 138 Ill. 478, 28 N. E. 980; Kotz v. Belz, 178 Ill. 434, 53 N. E. 367; 1 Cyc. Law & Proc. p. 1077. An entry by the grantee of one tenant in common under a conveyance which purports to convey the whole estate, not acknowledging the right of any other person in the land, amounts to an ouster of cotenants, and the possession of the grantee is adverse as to them. Goewey v. Urig, 18 Ill. 238; 1 Am. & Eng. Enc. Law, 2d ed. p. 806. There is no doubt that the possession of Abbie L. Waterman and defendant was adverse to all the world, and defendant entered under the will and conveyance which purported to transfer the whole estate. Even if Abbie L. Waterman was a tenant in common, the possession of defendant was under a will and conveyance purporting to

convey the whole estate, and not an undivided part, and its possession was adverse to complainants.

It is next contended that defendant did not have color of title. The will described the tract of land in connection with the home farm as the adjoining tract of 80 acres which stood in the maiden name of the testatrix. It was not described as land of which she had the legal title, and there was a deed of the tract on record made to her by her maiden name. The will furnished the means of identifying the tract, and the description was sufficient. The deed made by the executors and trustees in pursuance of the will described the land particularly and correctly. But counsel say that it was not color of title because it was a quitclaim deed. A warranty deed and a quitclaim deed both purport to accomplish the same thing and have the same effect in transferring title. The covenants of a warranty deed do not pass the title, but create a liability, and a quitclaim deed which purports to convey the property is as good color of title as a warranty deed. Holloway v. Clark, 27 Ill. 483; Winslow v. Cooper, 104 Ill. 235. The grantee in such a deed is not required to see that it passes paramount title before he can rely upon it as color of title, because if that were so he would have no occasion to rely on the statute. It is true that a quitclaim deed which conveys only the right, title, and interest of the grantor in the property limits the estate to such right and interest as the grantor may have; and, if the grantor is a tenant in common, the deed is not color of title for anything more than his interest. But the deed in this case was not of that kind. It did not purport to convey the right, title, and interest of the grantors in the property, but conveyed all interest in the tract; which has a broader signification than all the right, title, and interest of the grantors. Glos v. Furman, 164 Ill. 585, 45 N. E. 1019. It was made by the grantors as executors and trustees under the will and in execution of a power to convey the whole title.

The next proposition of counsel is that the possession of the defendant did not avail anything under the statute because by the will of James S. Waterman a trust was created for twenty-one years, with remainder to complainants, and the possession did not become adverse as to them until the termination of the trust. The trust existed up to about three years before the bill was filed, when it was brought to an end before the termination of the period for which it was created; but, so far as the trust estate is concerned, the statute ran against the estate the same as though there had been no trust. As between the trustee and the *cestui que trust*, lapse of time does not bar a trust estate, but, to exempt the estate from the bar of the statute, the question must arise between them. Hayward v. Gunn, 82 Ill. 385. Where the trustee and the *cestui que trust* are both out of possession for the time limited by the statute, the party in possession has a good bar against them both. 1 Am. & Eng. Enc. Law, 2d ed. p. 814; 1 Cyc. Law & Proc. p. 1068. As between the trust estate and a stranger, the statute of limitations runs as in other cases, and, if the trustee is barred, the *cestui que trust* is equally barred. 19 Am. & Eng. Enc. Law, 2d ed. p. 186. In this case the bar of the statute was complete against the trustees and the beneficiaries, who were also entitled to the estate at the termination of the trust. The will of James S. Waterman is not contained in the abstract, and if it merely devised his property to the trustees for a term of twenty-one years, and gave it to the beneficiaries and their issue at the expiration of that time, the estate limited to take effect after the term of years was not, strictly speaking, a remainder, but rather a present vested estate subject to the chattel interest of the term. In the case of Illinois Land & Loan Co. v. Bonner, 75 Ill. 315, that rule was stated, and the court quoted from 1 Jarman on Wills, 734, as follows: "Where a testator devises lands to trustees until A shall attain the age of twenty-one years, and if or when he shall attain that age then to him in fee, this is construed as conferring on A a vested estate in fee simple, subject to the prior chattel interest given to the trustees." The law on that subject and the quotation were repeated in Kingman v. Harmon, 131 Ill. 171, 23 N. E. 430.

The existence of the prior term of years does not prevent the first vested estate of freehold from being an estate of freehold in possession; but, if the estate of complainants was of that character, it was subject to the rights of the trustees, which deprived complainants of the occupation of the land during the term; and perhaps the result would be the same as though it were a technical remainder, since there would be no right to make an entry or bring an action to recover the land until the expiration of the trust. We understand, however, from the argument of counsel for both parties, that the sixth clause of the will empowered the trustees to sell and dispose of the estate at public or private sale at such time or times, and upon such terms, and in such manner, as to them should be deemed for the best interest of the estate, and to invest the

proceeds subject to the trust; and therefore the trustees were invested with the full legal title. It must be conceded that said legal estate was completely barred, and we can see no ground for saying that the bar did not apply to the whole estate. It is held that the rule that the *cestui que trust* is barred when the trustee is barred applies, although the *cestui que trust* is a remainderman. 1 Cyc. Law & Proc. p. 1069. A *cestui que trust* is barred as to a trust estate, although under a disability, and must seek the remedy which he has against the trustee who has negligently allowed the statute to run. While the beneficiaries under the will had no right of entry in their own name, they had a right at any time to require the trustees to make an entry or bring an action for the recovery of the estate for their benefit. That is so in any view of the nature of the trust or the estate of the trustees; and we see no good ground for saying that the statute does not apply to this case.

The argument that the possession was not adverse because the complainants did not know that they had any title is clearly unsound. The possession of one claiming the exclusive ownership of land is adverse to all the world, and not merely adverse to those who know or claim that they have some title to the property. A person's possession of land is notice to all the world of his claim to possession of the same; and, if another person does not learn of his claim to possession until the bar of the statute of limitations has attached, it will be his own neglect and inattention, from which he can claim no immunity. Conner v. Goodman, 104 Ill. 365. There was constructive notice of the state of the record title; but one who has color of title acquired in good faith need not trace his title to the source to see whether it is apparently perfect and free from defects. Goewey v. Urig, *supra*; Hinchman v. Whetstone, 23 Ill. 185. So far as defendant is concerned, it is entirely immaterial what the state of the title may be as shown by the record. The purpose of the statute of limitations is to protect one who brings himself within its provisions against the paramount title.

The decree is reversed and the cause is remanded, with directions to dismiss the bill for want of equity.

Wilkin, J., dissents.

Petition for rehearing denied April 11, 1906.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

ROBERT FORTUNE, Plff. in Err.,
v.
TOWN OF WILBURTON.

(142 Fed. 114.)

Municipal ordinance—violation—nature of proceeding for penalty.

1. A proceeding for violation of a municipal police ordinance which is not a public offense under the statutes is, for the purpose of determining the method of review, a civil, and not a criminal, proceeding, although a fine to be enforced by imprisonment is provided for the violation.

Mayor's court—criminal procedure.

2. The statutory adaptation of the criminal procedure of circuit courts to a mayor's court is applicable only to criminal proceedings, and does not change the nature or character of any case that may be brought before such court.

(October 17, 1905.)

Case Note.—Character of proceeding for violation of municipal ordinance as civil or criminal.—This subject is treated in a note in 33 L.R.A. 33, to which reference is made for the earlier cases. The theory there advanced, "that, if such violations are not made crimes or misdemeanors by the common or statute law, the proceedings to enforce, or for a violation of, such ordinances, are civil in their nature," finds additional support in FORTUNE v. WILBURTON, and the first two Dakota cases which appear in this note. But, as will be seen from its latest decision, this latter court has shifted its position, and now takes what may be termed the middle ground, by pronouncing such actions quasi criminal. The other cases cited in this note, which were decided after the earlier note, do not expressly refer to the distinction based upon the question whether or not the act prohibited by the ordinance is one which would be criminal under the statute or common law, but, for the purpose of saving the distinction, if it exists, the nature of the act prohibited by the ordinance is briefly indicated in connection with the citation of the cases.

In Huron v. Carter, 5 S. D. 4, 57 N. W. 947 (a violation of a health ordinance), and Sioux Falls v. Kirby, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156 (ordinance requiring the taking out of a building permit, and imposing a fine of not less than $5, nor more than $100, for violation), it was held that an action to recover a penalty prescribed by a municipal ordinance on account of an act not criminal by the general law of the state, but forbidden by such ordinance, is a civil action and the case is properly taken up for review by appeal.

And the parties may agree to a jury of less than the regular number. Huron v. Carter, *supra*.

Actions for the violation of city ordi-

ERROR to the United States Court of Appeals in the Indian Territory affirming a judgment of the United States Court for the Central District of such territory dismissing an appeal from a Mayor's Court to review a judgment convicting defendant of violating a municipal ordinance. Affirmed.

The facts are stated in the opinion.

Argued before Van Devanter, Hook, and Adams, Circuit Judges.

Mr. James S. Arnote, for plaintiff in error:

The prosecutions for the violations of ordinances of incorporated towns and cities have been treated by the laws in force in this jurisdiction as criminal prosecutions. The offense is defined, by ordinance and statute, as a misdemeanor, and the punishment as a fine. Both words have a clear, technical meaning which applies to criminal offenses.

Mansfield, Digest, §§ 766–770, 1494, 1966; 16 Enc. Pl. & Pr. p. 234, and cases cited; People v. Craycroft, 2 Cal. 243, 56 Am. Dec. 331; Hanscomb v. Russell, 11 Gray, 373.

The supreme court of the state of Arkansas has decided that the prosecution upon an ordinance to regulate trade, and which is not a public offense, and which is not otherwise an offense against the laws of the state, is a quasi criminal prosecution.

Taylor v. Pine Bluff, 34 Ark. 603.

The appeal must be taken as appeals are taken from the justices of the peace in criminal causes.

Ullery v. Ft. Smith, 35 Ark. 214.

nances are not criminal actions, and the rules of criminal pleading are not applicable thereto (Lead v. Klatt, 11 S. D. 109, 75 N. W. 896 [a violation of a health ordinance]); and, as writs of error are properly allowed only in criminal cases in which the state is a party, defendant must go to the appellate court by appeal, and not by writ of error (Madison v. Horner, 15 S. D. 359, 89 N. W. 474 [the nature of the ordinance does not appear]).

In Centerville v. Olson, 16 S. D. 526, 94 N. W. 414, it was held that an action brought for the violation of a city ordinance was quasi criminal, and therefore it was not necessary to give a written notice of appeal, as required in civil cases; but that oral notice, as authorized in criminal cases, was sufficient (an ordinance prescribing imprisonment in the event of the failure of defendant to pay the fine and costs imposed on him). In this case the court said: "We have never held that the action is strictly a civil one," but an examination of Huron v. Carter, *supra*, shows that this statement is not strictly true. It also said that the action is not strictly criminal, because the statutes of that state provide that "a criminal action is one prosecuted by the state as a party against a person charged with a public offense, for the punishment thereof;" and the action in this case was not brought in the name of the state.

Although an action brought by a city for a violation of an ordinance forbidding the erection or removal within the fire limits of wooden buildings is a civil action, it is nevertheless quasi criminal; and the sufficiency of defendant's plea of former acquittal should be determined by the rule applicable to criminal cases, rather than by the doctrine of *res judicata* as applied to cases strictly civil. Noland v. People, 33 Colo. 322, 80 Pac. 887.

Proceedings for the violation of town or city ordinances are civil actions; and, if the jury finds the accused guilty, it must also find the amount of the penalty to be inflicted, where the precise penalty is not fixed, but left discretionary within certain limits. Walton v. Canon City, 13 Colo. App. 77, 56 Pac. 671 (ordinance prohibiting sale of liquor within city limits; violation punishable by fine of not less than $50, nor more than $200).

Since a proceeding instituted before a police magistrate upon a complaint charging defendant with selling intoxicating liquors without license from the town was civil in its nature, exactitude was not required in stating the cause of action; and upon appeal the trial in the county court was controlled by the same procedure as obtains in the trial of any other ordinary civil action in such court. Saner v. People, 17 Colo. App. 307, 69 Pac. 76.

These Colorado cases are in line with former decisions of the courts of that state, except that, with reference to questions of pleading, the middle ground seems to have been adopted.

In Delaware, it would seem that such actions are criminal proceedings in which it is proper to file an information. Pratesi v. Wilmington, 4 Penn. (Del.) 258, 54 Atl. 694 (obstructing a city street).

In Mohrman v. Augusta, 103 Ga. 841, 31 S. E. 95, defendant was fined $100; but the nature of the ordinance violated does not appear. It was held that a proceeding for the violation of a city ordinance was in its nature a criminal proceeding, and therefore no bond was necessary as a condition precedent to the issuance of the writ of certiorari. This court has heretofore held that such proceedings are not criminal. It now apparently takes the position that they are quasi criminal.

In State ex rel. Courrege v. Fisher, 50 La. Ann. 45, 23 So. 92, it was held that proceedings for the punishment of offenses against municipal ordinances are not usually or properly regarded as criminal; and therefore it is not essential that an affidavit should precede an arrest for the violation of such ordinance, or that a formal warrant for arrest should issue. (Defendant allowed lewd women to enter his saloon and drink at the bar in violation of an or-

Mr. Charles H. Hudson, for defendant in error:

There is no penalty imposed by statute, and, if there is no penalty imposed, there is no criminal offense.

Dill. Mun. Corp. §§ 411–415; 15 Enc. Pl. & Pr. p. 413, and note 1; McQuillin, Mun. Ord. § 304.

Hook, Circuit Judge, delivered the opinion of the court:

Fortune was found guilty in the mayor's court of Wilburton, Indian territory, of the violation of a town ordinance, and sentenced to pay a fine of $10 and costs. His appeal to the United States court for the central district of Indian territory was dismissed for the reason that the action was a civil one, and he had not perfected the appeal by filing an affidavit in the court of first instance to the effect that it was not taken for the purpose of delay, but that justice might be done him. The judgment of dismissal was affirmed by the United States court of appeals in the Indian territory.

Under the Arkansas statutes in force in the territory, appeals from municipal courts are taken in the same manner as from decisions of justices of the peace; an affidavit being requisite in civil, but not in criminal, cases. Fortune contends that the case against him was a criminal prosecution, both under general principles of law and under the controlling statutes of Arkansas. The offense of Fortune was not a statutory misdemeanor, but was merely a violation of a local police regulation of the town. The complaint against him, which was framed in the language of the ordinance, would not have supported a conviction of any public offense under the statutes. The weight of authority is that such an action is civil in character, and not criminal, even though, as in this case, payment of the penalty assessed is authorized to be enforced by the arrest and detention of the person. McQuillin, Mun. Ord. § 304; Dill. Mun. Corp. §§ 411, 432; Williams v. Augusta, 4 Ga. 509; Shafer v. Mumma, 17 Md. 331, 79 Am. Dec. 656; Lewiston v. Proctor, 27 Ill. 414, 419; Quincy v. Ballance, 30 Ill. 185; Alton v. Kirsch, 68 Ill. 261; Tiedeman, Mun. Corp. § 156; McGear v. Woodruff, 33 N. J. L. 213, 217; Greensburgh v. Corwin, 58 Ind. 518; Hammond v. New York, C. & St. L. R. Co. 5 Ind. App. 526, 31 N. E. 817, 820; State ex rel. Kansas City v. Renick, 157 Mo. 292, 57 S. W. 713; St. Louis v. Knox, 74 Mo. 79; Re Miller, 44 Mo. App. 125; Bristol v. Burrow, 73 Tenn. 128; Chafin v. Waukesha County, 62 Wis. 463, 467, 22 N. W. 732; Sutton v. McConnell, 46 Wis. 269, 50 N. W. 414.

With some exceptions, unnecessary to be noted, the civil and criminal procedure of Arkansas and the laws relating to municipal corporations and to the jurisdiction and procedure of justices of the peace in civil and

dinance which prescribed punishment by fine, or imprisonment, or both, at the discretion of the mayor.)

A proceeding by a city against a violator of an ordinance is of a civil character, and no information need be filed. Billings v. Brown, 106 Mo. App. 240, 80 S. W. 322 (selling meat without a license).

Such proceedings cannot be instituted by a common-law information. Canton v. Ligon, 71 Mo. App. 407 (assault and battery).

And the sufficiency of the complaint in such proceeding is to be determined by the same rules as are applicable in other civil cases. Mexico v. Harris, 115 Mo. App. 707, 92 S. W. 505 (setting up gambling device).

The complaint need not be so formal and technical as an indictment or information for a criminal offense against the laws of the state. Gallatin v. Tarwater, 143 Mo. 40, 44 S. W. 750 (appearing upon streets in state of intoxication).

While proceedings for the violation of city ordinances are likened to civil proceedings, and are, in general, regarded as penal in their character, and not criminal, in cities of the fourth class, under the Laws of 1895, page 65, appeals from such proceedings are governed by the same mode of procedure as prosecutions for misdemeanors. Golden City v. Hall, 68 Mo. App. 627 (unlawful sale of liquors).

But this statute does not make a violation of the ordinances of the cities of that class a misdemeanor. Cassville v. Jimerson, 75 Mo. App. 426.

And it is not necessary that defendant be arraigned. Monett v. Beaty, 79 Mo. App. 315 (assault and battery; violation punishable by fine of not less than $1, nor more than $100).

In White v. Neptune City, 56 N. J. L. 222, 28 Atl. 378, it is held that proceedings for the recovery of penalties incurred by the violation of ordinances are civil suits (ordinance respecting licenses).

In Massinger v. Millville, 63 N. J. L. 123, 43 Atl. 443, it was said: "The proceedings under the ordinance passed in accordance with the statute are summary in their character, and the conviction must show on its face every necessary ingredient of the offense. It must set out the offense with which the offender was charged, the names of the witnesses, and sufficient of the evidence to show what offense was committed, upon what evidence the conviction was had, and of what offense the offender was found guilty, and the judgment which was imposed" (ordinance prohibiting riding of bicycles at night without lighted lamp attached).

In Unger v. Fanwood Twp. 69 N. J. L. 548, 55 Atl. 42, it was held that where the ordinance imposes punishment by imprisonment alone, although the offender may

criminal cases were put in force in the Indian territory. Act May 2, 1890, chap. 182, 26 Stat. at L. 81; Act March 1, 1895, chap. 145, 28 Stat. at L. 693; Act June 28, 1898, chap. 517, § 14, 30 Stat. at L. 499. A careful investigation has failed to disclose anything in these statutes that changes the prevailing doctrine as announced by the courts, or that prescribes for this particular class of cases a different procedure for appeals than obtains in civil actions generally. A section of the law relating to municipal corporations provides that the mayor shall be a conservator of the peace within the corporate limits, confers upon him all of the powers and jurisdiction of a justice of the peace in all matters, civil and criminal, arising under the laws of the state, imposes upon him the performance of all duties required of him by the municipal laws and ordinances, and further provides that appeals may be taken in the same manner as from decisions of justices of the peace. Mansf. Dig. § 797 (Ind. Terr. Anno. Stat. 1899, § 567).

It is contended on behalf of Fortune that another provision of the law, "that the procedure in circuit courts for the trial of criminal cases, so far as applicable, shall govern the proceedings of city and police courts" (Mansf. Dig. § 2356 [Ind. Terr. Anno. Stat. 1899, § 1699]), is a legislative recognition of the criminal character of a proceeding for the violation of an ordinance. Of course, the arrangement and distribution of legislative provisions, while proper for consideration, cannot change the essential character of an action. Moreover, the argument loses whatever significance it may apparently possess, when it is noted that the mayor is invested with a dual jurisdiction. There may be tried before him, not only cases involving infractions of the local ordinances, but also cases involving the criminal laws of the state. Again, his jurisdiction extends, not only to crimes and punishments, but also to civil rights and remedies. The adoption of the criminal procedure in the circuit courts was only so far as the same might be applicable; and it is evident that it was not the purpose thereby to change the nature or character of any cause that might be brought for trial before the mayor.

It is also contended that error was committed in denying Fortune's motion for an order requiring the mayor to send up a full and complete transcript of the proceedings, and also in the refusal of the court of appeals to permit an amendment of the bill of exceptions. But it is nowhere contended that an affidavit of appeal, such as is required in civil cases, was in fact filed; and, as we have found that such failure is fatal to the appeal, the other contentions just adverted to are immaterial and need not be considered.

The judgment is affirmed.

be tried without a jury, it is in the nature of a criminal proceeding, and not a civil suit: and certiorari will lie after a judgment below (ordinance regulating speed of automobiles).

In People v. Garabed, 20 Misc. 127, 45 N. Y. Supp. 827, it was held that village ordinances imposing only a penalty for violation, may be enforced by criminal proceedings (ordinance prohibited beating drums, etc., on streets or sidewalks without written permission, etc.).

A proceeding for the violation of a city ordinance, which imposes for its infraction imprisonment or a fine, left wholly to the discretion of the court within certain limits, is essentially and necessarily criminal in character; and an appeal will not lie from a judgment acquitting defendant. Hudson v. Granger, 23 Misc. 401, 52 N. Y. Supp. 9 (interfering with fire-alarm system of city; violation punishable by fine not exceeding $25, or by imprisonment until the same shall be paid, not exceeding, etc.). This case and Walton v. Canon City, 13 Colo. App. 77, 56 Pac. 671, seem to be in direct conflict.

An ordinance defining and punishing disorderly conduct, enacted under certain sections of the city charter which provide for criminal proceedings, does not authorize a civil action in the municipal court to recover the fine. Buffalo v. Preston, 81 App. Div. 480, 80 N. Y. Supp. 851.

A suit in the name of a borough, and not in the name of the commonwealth, for the recovery of a fine or penalty for the violation of a borough ordinance relating to street hawking and peddling, is of a civil nature; and defendant's right to appeal must be decided by the rule applicable to civil cases. Lehighton v. Roth, 7 Pa. Dist. R. 426.

An action brought under a statute which declares the violation of any rules and regulations for the government of a park to be a misdemeanor punishable by fine, "to be recovered before any alderman of said city as debts of that amount are recoverable," is in form a civil action, and not a summary proceeding; but, like a proceeding for the recovery of a fine for the violation of a city ordinance, it is penal in character, and some of the principles relative to summary proceedings are applicable. Philadelphia use of Fairmount Park v. Junker, 9 Pa. Dist. R. 673.

In Charleston v. Beller, 45 W. Va. 44, 30 S. E. 152, it was held that prosecutions for violations of municipal ordinances are criminal proceedings; and in such prosecutions costs are not recoverable against the municipality (nature of ordinance violated does not appear).

MINNESOTA SUPREME COURT.

ELIZABETH L. GRACE, Appt.,
v.
JOHN GRACE, Respt.

(— Minn. —, 104 N. W. 969.)

Homestead—partition.

1. A husband and wife had for many years occupied as a homestead premises which, from their nature, were not capable of partition by allotment in kind. As a part of a settlement in divorce proceedings, the husband deeded through a third person an undivided half interest therein to his wife, and the wife continued for some time to live with him on the premises as a homestead. Held, the wife cannot, upon leaving him for alleged valid justification, acquire the right to partition the premises still occupied by him as a homestead.

Same—disposal of.

2. Neither husband nor wife can dispose, by sale or conveyance, of a homestead right, without the express consent of the other. What neither is able to do directly, neither will be permitted to do indirectly by sale on partition.

(November 24, 1905.)

APPEAL by plaintiff from a judgment of the District Court for Ramsey County in favor of defendant in an action brought to partition certain real estate. Affirmed.

The facts are stated in the opinion.

Headnotes by JAGGARD, J.

Subject Note.—Partition of homestead.

I. Separation and divorce, 786.
II. Homestead right in widow and minor children, 787.
III. Homestead right in widower or widow, 790.
IV. Homestead right of minor children, 792.
V. Parol partition, 792.
VI. Abandonment or failure to assert claim by widow, 793.
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VIII. Texas cases.
1. Under the act of 1848, 794.
2. Under the Constitution of 1876.
a. Generally, 795.
b. Conveyance or abandonment, 797.
3. Homestead in community property.
a. Generally, 795.
b. Abandonment or sale, 799.
IX. Summary, 800.

I. Separation and divorce.

Neither husband nor wife is entitled to a partition of the homestead, as against the other, so long as that relation exists. Where the husband and wife separate without a divorce, and there is no decree affecting the homestead, it is held not to be subject to partition, as in GRACE v. GRACE, where the wife obtained from her husband a deed for an undivided half of the homestead in settlement of a separation suit, and lived with him for some time thereafter, and then abandoned him for cause. It was held that she could not obtain a partition of the land occupied by him as a homestead, on the ground that she could not do indirectly, through a suit for partition, what she could not do directly, by sale or conveyance. In divorce decrees the homestead rights are usually fixed (see note to Rosholt v. Mehus, 23 L.R.A. 239); but this note is not intended to include such cases. Where the rights are not so fixed, it seems that the husband and wife occupy the relation of tenants in common as to property owned jointly by them. In cases where one owns the real estate, the other would have no interest therein unless fixed by the decree of divorce.

So, where the parties were living separate and apart, it was held that this made no difference, as the home of the husband was, in law, the home of the wife. Mitchell v. Mitchell, 101 Ala. 183, 13 So. 147. This was under the Alabama Constitution prohibiting the alienation of the homestead by the owner thereof, if a married man, without the voluntary signature and assent of the wife to the same. It was held that a husband could not obtain a decree on his application to have the homestead sold for distribution, where it was owned jointly by him and his wife.

But where the community homestead was partitioned in a decree of divorce, it was held that the homestead character attached to the premises would be lost, and the land would then be subject to execution. Shoemake v. Chalfant, 47 Cal. 432.

In a divorce decree, where the community homestead was not affected, and the wife and children remained on the land, and subsequently the husband gave a deed of trust in the property, it was held that the purchaser was entitled to maintain an action of partition against the wife. Kirkwood v. Domnau, 80 Tex. 645, 26 Am. St. Rep. 770, 16 S. W. 428. The court held that after the divorce the husband and wife occupied the relation of tenants in common.

In a suit for partition of community homestead, brought pending a suit for divorce, a decree of division was rendered after the decree of divorce. It was held that, in case of divorce, there could be no valid objection to a division of the homestead, which had become attached to the common property. Gimmy v. Doane, 22 Cal. 635.

In an action for divorce and for a partition of the homestead, brought by the wife, the court, on cross-complaint of the husband, granted him a divorce, and set aside the certificate of homestead, and held that the wife had no interest therein. Lowell v.

Messrs. C. E. Otis, J. C. Otis, S. E. Day, and S. C. Olmstead, for appellant:

The sale should have been decreed.

Hamilton v. Detroit, 85 Minn. 83, 88 N. W. 419; Gillespie v. Gillespie, 64 Minn. 381, 67 N. W. 206; Spencer v. St. Paul & S. C. R. Co. 22 Minn. 29.

Messrs. Durment & Moore, for respondent:

The homestead cannot be sold.

Canole v. Hurt, 78 Mo. 649; Keyes v. Hill, 30 Vt. 760; 23 Am. & Eng. Enc. Law, pp. 159, 160; Hanna v. Russell, 12 Minn. 80, Gil. 43; Wolf v. McKinley, 65 Minn. 156, 68 N. W. 2; Marvin v. United States, 44 Fed. 411; United States v. Murphy, 82 Fed. 899.

Jaggard, J., delivered the opinion of the court:

Substantially in the language of appellant, the issues and facts in this case are as follows: The action is one for partition of premises described in the complaint by a sale thereof, for the reason that they could not, from their nature, be partitioned by allotment in kind. The parties to the action are, and have been for thirty years past, husband and wife. For many years prior to the fall of 1903, they lived together therein and occupied the same as the homestead of the defendant, in whom title stood. In the fall of that year the plaintiff commenced an action against the defendant for a legal separation on the ground of cruel and inhuman treatment. Pursuant to an amicable ar-

Lowell, 55 Cal. 316. See Kirkwood v. Domnau, 80 Tex. 645, 26 Am. St. Rep. 770, 16 S. W. 428, subd. VIII. b.

II. Homestead right in widow and minor children.

Where a homestead exemption is given by statute to a class, each person entitled to occupy the same can successfully resist its partition. This was held in cases where the homestead was given to the widow and minor children.

So, where a widow and minor children were left occupying the homestead, it was held that partition could not be made before they became of age, where they objected. Trumbly v. Martell, 61 Kan. 703, 60 Pac. 741, Reversing 9 Kan. App. 364, 58 Pac. 120.

In Dayton v. Donart, 22 Kan. 256, it was held that, so long as the widow and children continued to occupy the homestead, and the widow did not marry, and a child remained a minor, the property was incapable of division; but that an abandonment of the homestead would render it subject to debts and to division.

And where a widow and three children were left, and the homestead was occupied by the family, and the children became of age, and one brought an action for partition, it was held that he could not maintain such action, where the widow had purchased the interest of the other children, and the intestate had advanced to plaintiff more than his share. White v. White, 41 Kan. 556, 21 Pac. 604.

And it was held that after the children became of age they were not entitled to recover their portion of the land as against their mother, where a homestead had been allotted to a widow for the benefit of herself and minor children. Holloway v. Holloway, 92 Ga. 340, 17 S. E. 281. On a former trial of this case, in 86 Ga. 576, 11 L.R.A. 518, 22 Am. St. Rep. 484, 12 S. E. 943, this question was not decided because not properly presented.

So, it was held that where a homestead had been set apart, all the beneficiaries were jointly interested, and none of them could sever the homestead use. Stephens v. Montgomery, 74 Ga. 832. In this case an execution against the widow was levied on the property, and she set up a claim of homestead for herself and children.

And stepchildren were held not to be entitled to compel the widow to account for their share of the rent, or to a partition, where she was entitled to homestead rights during their minority. Walker v. Walker, 195 Ill. 409, 63 N. E. 271. The court said: "In the case of minor children, as they become of age their interests cease, and the remaining members of the family succeed to the whole homestead estate. It would therefore be impracticable to attempt to allot to each member of the family a share of it, and clearly such was not the intention of the legislature in passing the act creating it."

In Turner v. Bennett, 70 Ill. 263, it was held that the grantee of one of the children was entitled to maintain partition against the widow and other children. The court said: "We are of opinion that, when the husband dies intestate, without any debts for the payment of which the homestead is exempt, without any alienation by him, his real estate descends to his children, equally, and must be divided, according to the laws of dower and descent, between the widow and heirs, precisely the same as if the homestead law of 1851, amended by the law of 1857, had no existence on the statute book." The same rule was applied in Eggleston v. Eggleston, 72 Ill. 24. Since these decisions, the Illinois act of July 1, 1873 (Rev. Stat. 1874, § 1, p. 497), was passed, declaring that every householder, etc., shall be entitled to an "estate of homestead," and it shall be exempt from the laws of conveyance, descent, and devise, except as herein provided. Eldridge v. Pierce, 90 Ill. 474. This would prevent partition as long as anyone entitled to occupy was in possession. See Walker v. Walker, *supra*.

And it was held that the estate in reversion could not be sold for partition, under Miss. act 1865, by which the homestead descended to the widow for the use of herself and the children of the deceased dur-

ceived. A policy of insurance is a contract in writing of such a nature as to be within the general rule of law that a contract in writing cannot be varied or altered by parol testimony. If it be ambiguous in its terms, parol evidence such as would be competent to remove an ambiguity in other written contracts may be resorted to for the purpose of explaining its meaning. If it incorrectly or imperfectly expresses the actual agreement of the parties, it may be reformed in equity. If strict compliance with the conditions of insurance, with respect to matters to be done by the insured after the contract has been concluded, has been waived, such waiver may, in general, be shown by extrinsic evidence, by parol. Further than this it is not safe for a court of law to go. To except policies of insurance out of the class of contracts to which they belong, and deny them the protection of the rule of law that a contract which is put in writing shall not be altered or varied by parol evidence of the contract the parties intended to make, as distinguished from what appears by the written contract to be that which they have in fact made, is a violation of principle that will open the door to the grossest frauds. . . . A court of law can do nothing but enforce the contract as the parties have made it. The legal rule that in courts of law the written contract shall be regarded as the sole repository of the intentions of the parties, and that its terms cannot be changed by parol testimony, is of the utmost importance in the trial of jury cases, and can never be departed from without the risk of disastrous consequences to the rights of parties. In the present case the property insured was described in the policy as a dwelling and boarding-house. There was no ambiguity in the terms used that justified resort to extrinsic evidence to explain the meaning of the contract. The effect given to the testimony on this subject by the charge of the court was to change the terms of the contract and reform it, and make another and a different contract. In this there was error, for which the judgment should be reversed."

It should be observed that in none of the cases to which reference has been made was the decision made to turn upon any limitation upon the authority of the agent, or otherwise than upon the application of the salutary rule which prevents the subordination of unambiguous written contracts to parol proof of contemporaneous and prior conditions and negotiations. That the rule announced and applied in these cases has been treated by the Supreme Court of the United States as fundamental and invariable is attested by repeated decisions of that court, among which may be mentioned: The Delaware (The Delaware v. Oregon Iron Co.) 14 Wall. 579, 20 L. ed. 779; Merchants' Mut. Ins. Co. v. Lyman, 15 Wall. 664, 21 L. ed. 246; Hearne v. New England Mut. M. Ins. Co. 20 Wall. 488, 22 L. ed. 395; Brawley v. United States, 96 U. S. 168, 173, 24 L. ed. 622, 624; Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674; Thompson v. Knickerbocker L. Ins. Co. 104 U. S. 252, 26 L. ed. 765; Simpson v. United States, 172 U. S. 372, 379–381, 43 L. ed. 482–485, 19 Sup. Ct. Rep. 212; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133.

In the case of The Delaware it was held it could not be shown in avoidance of a liability on a maritime bill of lading, the legal import of which, in the absence of a stipulation to the contrary, was that the goods should be stowed under deck, that in fact they were stowed on deck by the consent of the shippers and in pursuance of an oral agreement consummated before the goods were sent on board, and before the bill of lading was executed. The opinion contains this statement: "Subsequent oral agreements in respect to a prior written agreement, not falling within the statute of frauds, may have the effect to enlarge the time of performance, or may vary any other of its terms, or, if founded upon a new consideration, may waive and discharge it altogether. Verbal agreements, however, between the parties to a written contract, . . . are in general inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract."

In Merchants' Mut. Ins. Co. v. Lyman, *supra*, where it was sought to recover on an oral contract of insurance differing from the written policy, the court held: "Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a recovery, as in all other cases where contracts may be made either by parol or in writing. But it is also true that when there is a written contract of insurance it must have the same effect, as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect, in excluding parol testimony in its application to it, that other written instruments have."

In Hearne v. New England Mut. M. Ins. Co. *supra*, it was said that the rule excluding parol proof where it is inconsistent with the written contract is not confined to what is stated in express terms, because "what is implied is as effectual as what is expressed," and that to establish the inconsistency "it

is sufficient if it appears that the parties intended to be governed by what is written, and not by anything else."

Union Mut. L. Ins. Co. v. Mowry, *supra*, was an action upon a policy of life insurance. The facts and the ruling in respect to a claim of estoppel *in pais* similar to that now insisted upon are fully shown in the following portion of the opinion:

"By the express condition of the policy the liability of the company was released upon the failure of the insured to pay the premium when it matured; and the plaintiff could not recover unless the force of this condition could in some way be overcome. He sought to overcome it by showing that the agent who induced him to apply for the policy represented to him, in answer to suggestions that he might not be informed when to pay the premiums, that the company would notify him in season to pay them, and that he need not give himself any uneasiness on that subject; that no such notification was given to him before the maturity of the second premium, and for that reason he did not pay it at the time required. This representation before the policy was issued, it was contended in the court below and in this court, constituted an estoppel upon the company against insisting upon the forfeiture of the policy. But to this position there is an obvious and complete answer. All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was there expressed, for the very purpose of avoiding any controversy or question respecting them. The entire engagement of the parties, with all the conditions upon which its fulfulment could be claimed, must be conclusively presumed to be there stated. If by inadvertence or mistake provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company. The previous representation of the agent could in no respect operate as an estoppel against the company. Apart from the circumstance that the policy subsequently issued alone expressed its contract, an estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact,—to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion; liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. The doctrine of estoppel is applied, with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party who, by his statements as to matters of fact or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent."

In Thompson v. Knickerbocker L. Ins. Co. *supra*, the court used this language: "An insurance company may waive a forfeiture, or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing."

A line of decisions sometimes claimed to be in opposition to those last cited is illustrated by the case of Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617, where an insurance company was held to be estopped from interposing as a defense to an action on a life policy the falsity of certain statements in the application upon which the policy was based, because these statements had been inserted in the application by the company's agent, notwithstanding truthful

statements were made to him at the time by the insured. Referring to the rule which prevents written contracts from being contradicted or varied by parol, the opinion opens with this statement: "The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper circumstances and in an appropriate proceeding the instrument may be set aside or reformed, as best suits the purposes of justice."

Language is then used which, if construed broadly and without reference to the facts of that case, might give support to the theory that the rule mentioned can be practically defeated by the application of the principle of estoppel *in pais*; but, as if to restrain the force of this language, the opinion concludes: "This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it."

This ruling was followed in American L. Ins. Co. v. Mahone, 21 Wall. 152, 155, 22 L. ed. 593, 594, and in New Jersey Mut. L. Ins. Co. v. Baker, 94 U. S. 610, 614, 24 L. ed. 268, 269, to the extent only of holding the company estopped from asserting the falsity of statements in the application where it was prepared by the company's agent after truthful statements were made to him by the insured. In Northern Assur. Co. v. Grand View Bldg. Asso. *supra*, Union Mut. L. Ins. Co. v. Wilkinson was relied upon by counsel for the insured as showing an abandonment of the doctrine announced and applied in earlier cases; but it was observed by the court, evidently to correct any misapprehension as to the extent of the decision relied upon, that the matter in respect of which parol testimony had been admitted "was not a fact or statement contained in the policy sued on, but an extrinsic fact or statement contained in the application. The defense made upon that statement was, in legal effect, a denial of the execution of the statement,—a defense that can always be sustained by parol evidence. However this may have been, we are unwilling to have the case regarded as one overthrowing a general rule of evidence. Some of the remarks contained in the opinion might seem to bear that interpretation, but not necessarily so. That Mr. Justice Miller did not intend, in the case of Union Mut. L. Ins. Co. v. Wilkinson, to lay down a new rule of evidence in insurance cases, is clearly shown in the subsequent case of Merchants' Mut. Ins. Co. v. Lyman, 15 Wall. 664, 21 L. ed. 246, where the opinion was delivered by the same learned justice."

The case principally relied upon by counsel for the insured is Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87. That was an action upon a life policy issued in Iowa. The facts were these: The blanks in the application upon which the policy was based were filled in by the agent for the company. One of the questions propounded therein was, "Has the party [applicant] any other insurance on his life?" When the question was read the applicant truthfully stated that he had certificates of membership in certain co-operative associations, and that he did not know whether they would be considered insurance. The agent, having replied that co-operative associations were in no sense insurance companies, and that he did not consider the certificates insurance, wrote the answer "No other" into the application, and it was signed by the applicant. The certificates did constitute other life insurance. The defense interposed by the company was that the answer to the question was false and avoided the policy, which contained provisions to the effect that it would be void if there were any false statement in the application, that no statement made to the agent would be binding on the company unless written into the application, that the contract should be deemed to be fully set forth in the policy and the application, and that none of its terms could be modified or waived by the agent. The decision may be summarized as follows: (1) Under the Iowa statute (§ 1749, *supra*) the agent represented the company, and not the insured, in preparing the application, notwithstanding the provisions of the policy; and his act in writing the answer, alleged to be untrue, was the act of the company. (2) The purport of the word "insurance" in the question was not so

absolutely certain as to preclude proof of what kind of insurance the parties had in mind when the question was answered, and such proof did not contradict the written contract. (3) In these circumstances the company was estopped from asserting that the answer was the statement of the insured or that the question and answer embraced insurance in co-operative associations. The case is certainly not an authority for the admission of parol testimony to contradict or vary a plain and unambiguous stipulation in a written contract, whether offered in support of a claimed estoppel *in pais* or otherwise. In respect of this question it is not different from Union Mut. L. Ins. Co. v. Wilkinson.

In this connection it will be well to refer to the case of Marston v. Kennebec Mut. L. Ins. Co. 89 Me. 266, 56 Am. St. Rep. 412, 36 Atl. 389, cited by counsel for the insured. It was there held, following Union Mut. L. Ins. Co. v. Wilkinson and Continental L. Ins. Co. v. Chamberlain, that where the application, upon which the policy is issued, is drawn by an unauthorized agent of the insurer, and the answers to the interrogatories are written by him, without fraud or collusion on the part of the applicant, the insurer is estopped from controverting the truth of such answers in an action upon the policy; the reason for the ruling being that the answers are not the statements of the applicant, but of the insurer. The case, however, makes a clear distinction between admitting parol testimony to show that the statements in the application are those of the insurer, through its authorized agent, and admitting such testimony to contradict or vary a statement or stipulation of the policy itself, as in the present cases,—a distinction pointed out, as before shown, in Northern Assur. Co. v. Grand View Bldg. Asso. in the observation there made respecting Union Mut. L. Ins. Co. v. Wilkinson. Referring to a prior case in which parol testimony of a contemporaneous representation or assurance of the agent relating to the time within which the premium could be paid was held inadmissible, the supreme judicial court of Maine states the distinction in the following language in the case cited (page 276 of 89 Me., page 420 of 56 Am. St. Rep., and page 392 of 36 Atl.): "But we think that case is to be distinguished from the case at bar. In that case the provision in relation to the time of payment of the premiums was one of the express terms of the contract, as much as was the amount of the insurance, the party insured, or to whom it was payable. They constituted the essential elements of a completed contract, and, of course, could not be varied by parol. But the questions and answers in the application in this case, while they form the 'basis of the contract,' are really propositions for a contract, or proposals upon which it is to be issued, if satisfactory to the company. The evidence which was held inadmissible in the one case and that which is received in the other bears upon entirely distinct propositions. In the former, it was excluded because it tended to vary a written contract by parol; in the latter, it becomes admissible to show that the recitals in the application are not, under the circumstances, the representations of the applicant, although signed by him, but the statements of the company, which had full knowledge of all the facts and which is estopped from controverting the truth of these statements."

McMaster v. New York L. Ins. Co. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10, is also relied upon as sustaining the admission of oral testimony of the recording agent's knowledge of the condition of the insured building when the policies were issued and of his prior verbal assurance to the husband of the insured; and this, notwithstanding counsel make no claim that there is any inconsistency, uncertainty, or ambiguity in the provisions of the policies now in suit. That such is not the proper interpretation of the decision in that case is plain, for otherwise it would be in conflict, not only with many prior decisions which it does not mention, but also with the later decision in Northern Assur. Co. v. Grand View Bldg. Asso. which does not mention it. The case was unusual in its facts, but it will sufficiently show what was presented for decision to say: The action was upon five life policies, which were dated and took effect December 18, 1893, but provided for the payment of annual premiums on December 12th in every year thereafter. The application was dated December 12, 1893, and contained a request that the policies bear the same date. The insured died January 18, 1895, without paying the second premiums. The policies provided for a grace of one month in the payment of premiums, and there was deemed to be an inconsistency and uncertainty in the provisions in respect of the period covered by the first premiums and of the forfeiture imposed for nonpayment of subsequent premiums. As to the second premiums, "it was conceded that payment on January 12th, in one view, and on January 18th, in the other, would have averted a forfeiture." In these circumstances it was held that oral testimony of extrinsic facts was properly received to show the interpretation which the parties put upon the inconsistent and uncertain provisions when the policies were issued, and to further show that the plaintiff was not estopped from asserting that the

policies did not take effect in advance of their actual date, because the request respecting the dating of the policies, and therefore respecting the time when they should be effective, was inserted in the application by the company's agent without the knowledge of the applicant, and was never assented to by him. The case is therefore like Continental L. Ins. Co. v. Chamberlain, which it cites and applies, and is not an authority for the admission of oral testimony to contradict or vary the plain and unambiguous terms of a written policy. Another matter which militates strongly against its use as such an authority is that the decision was ultimately rested upon the proper construction of the policies, irrespective of extrinsic facts, as is shown by the concluding portion of the opinion, which reads: "The truth is, the policies were not in force until December 18th, and, as the premiums were to be paid annually, and were so paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the 12th to the 18th. And, as the policies could not be forfeited for nonpayment during that time, the month of grace could not be shortened by deducting the six days which belonged to McMaster of right. In our opinion the payment of the first year's premiums made the policies nonforfeitable for the period of thirteen months, and, inasmuch as the death of McMaster took place within that period, the alleged forfeiture furnished no defense to the action."

If it be, as is insisted by counsel for the insured, that there is language in Continental L. Ins. Co. v. Chamberlain and in McMaster v. New York L. Ins. Co. which justifies the admission, by way of establishing an estoppel *in pais*, of oral testimony to contradict or vary the terms of a written contract in an action at law on the contract, such language cannot now be regarded as controlling, for the reason that the question has been ruled otherwise, in conformity with prior decisions, in the case of Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, which is the last deliverance of the court upon the subject; and, as illustrating that the decision in that case may properly be regarded as having the effect of limiting any such language in the two intervening cases, it may be observed that the two learned members of the court who wrote the opinions in those cases dissented from the decision in the last one. It is, of course, the duty of this court to ascertain and follow the true rule of decision in the Supreme Court, as gathered from its several opinions upon the subject, and not to follow expressions in particular opinions, which, upon consideration of all, appear to be without the court's approval.

What has been said shows it is important to consider the circumstances under which Northern Assur. Co. v. Grand View Bldg. Asso. was brought before the court, the questions presented for decision, and what was actually decided. It was an action at law upon a fire policy which contained two provisions which need be mentioned: One, that the policy should be void, unless otherwise provided in an indorsement thereon or addition thereto, if the insured then had or should thereafter procure other insurance on the property covered by that policy; and the other, that no agent could waive any provision of the policy, except by a written indorsement thereon or addition thereto. It was shown by oral testimony that there was other concurrent insurance on the property when the policy was issued, and that the company's agent was so informed at the time. No consent to other insurance was indorsed on the policy or added to it. A judgment for the plaintiff was affirmed by this court; there being majority and dissenting opinions. 41 C. C. A. 207, 101 Fed. 77. The majority opinion applied the principle of estoppel *in pais*, and held that the written stipulation respecting other insurance was avoided or superseded by the oral testimony of the agent's knowledge of the existence of such insurance when the policy was issued. It also held that the stipulation limiting the agent's authority was not applicable to his acts at the inception of the contract, but only to such as might occur after the policy should become operative. The dissenting opinion was to the effect that the stipulation invalidating the policy if there was other insurance could not be contradicted or varied by parol, as was permitted by the majority opinion, citing, among others, certain decisions of the circuit court of appeals for the seventh circuit, and that the other stipulation was an effectual limitation upon the authority of the agent at the inception of the contract as well as thereafter. Thus, when the case was removed to the Supreme Court by certiorari, two questions were distinctly presented: One whether, notwithstanding the rule which protects written contracts against contradiction or alteration by parol testimony, the act of the agent in issuing the policy with knowledge of the existing insurance could be shown by parol for the purpose of avoiding or superseding the stipulation against other insurance, through the application of the principle of estoppel; and the other, whether the other stipulation was an effectual limitation upon the agent's authority. In its opinion the Supreme Court

cites with approval several of the decisions of state courts before mentioned, particularly commends the ruling in the two New Jersey cases that the principle of estoppel cannot be invoked to defeat the rule which prevents the contradiction or alteration of written instruments by parol, and then proceeds: "It must be conceded that it is shown, in the able brief of the defendant in error, that in several of the states the courts appear to have departed from well-settled doctrines in respect both to the incompetency of parol evidence to alter written contracts and to the binding effect of stipulations in policies restricting the authority of the company's agents. . . . We do not consider it necessary or profitable to examine in detail the decisions of the circuit courts or of the circuit courts of appeals. It is sufficient for our present purpose to say that the circuit court of appeals for the seventh circuit has held consistently to the doctrines on this subject laid down by the English and American courts generally (United Firemen's Ins. Co. v. Thomas, 47 L.R.A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406), and that the court of appeals for the eighth circuit in the present case has, by a majority of its members, adopted and applied the view that a written contract may, in an action at law, be changed by parol evidence; and that such clauses as restrict the power of agents of insurance companies to contract otherwise than by some writing should be given effect, if at all, as they respect such modifications of a policy as are made, or attempted to be made, after it has been delivered and taken effect as a valid instrument, and should not be considered as having relation to acts done by the company or its agents at the inception of the contract. 41 C. C. A. 207, 101 Fed. 77. In such divergence of decisions, we have deemed it proper to have the present case brought before us by a writ of certiorari. As to the fundamental rule that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as invariable and salutary. The rule itself and the reasons on which it is based are adequately stated in the citations already given from the standard works of Starkie and Greenleaf. Policies of fire insurance in writing have always been held by this court to be within the protection of this rule."

Prior decisions of that court are then reviewed, including Union Mut. L. Ins. Co. v. Wilkinson, and it is said (pages 361, 364 of 183 U. S., pages 234, 236 of 46 L. ed., and pages 153, 154 of 22 Sup. Ct. Rep.: "What, then, are the principles sustained by the authorities and applicable to the case in hand? They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; . . . that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter; and, where such limitation is expressed in the policy executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation. . . . This case is an illustration of the confusion and uncertainty which would be occasioned by permitting the introduction of parol evidence to modify written contracts, and by approving the conduct of agents and persons applying for insurance in disregarding the express limitations put upon the agents by the principal to be affected. It should not escape observation that preserving written contracts from change or alteration by verbal testimony of what took place prior to and at the time the parties put their agreements into that form is for the benefit of both parties. In the present case, if the witnesses on whom the plaintiff relied to prove notice to the agent had died, or had forgotten the circumstances, he would thus, if he had depended to prove his contract by evidence extrinsic to the written instrument, have found himself unable to do so. So, on the other side, if the agent had died, or his memory had failed, the defendant company might have been at the mercy of unscrupulous and interested witnesses. It is not an answer to say that such difficulties attend other transactions and negotiations; for it is the knowledge of the inconveniences that attend oral evidence that has led to the custom of putting important agreements in writing and to the legal doctrine that protects them, when so expressed and when no fraud or mutual mistake exists, from being changed or modified by the testimony of witnesses as to conversations and negotiations that may never have taken place, or the real nature and meaning of which may have faded from recollection."

Thus, the opinion shows that both of the questions presented in the case were deliberately determined by the Supreme Court, after full consideration of its prior decisions and of the conflicting decisions in the state courts; that, in respect of the first question, it was held that, in the absence of fraud or mutual mistake, unambiguous written contracts must be permitted to speak for themselves, and cannot, at the instance of one of the parties, be altered or contradicted by parol testimony; and that the theory that such testimony, although not competent to alter or contradict the contract, may yet be received for the purpose of raising an estoppel *in pais*, is a mere evasion of the true rule, and wholly untenable. While that ruling is determinative of the present cases, there are also decisions of this court which would lead to the same result. Thus, in Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Ins. Co. 9 C. C. A. 1, 3, 8, 19 U. S. App. 510, 60 Fed. 351, 353, 358, there was proof that the inspector, through whom a policy was obtained insuring seven boilers against explosion, had stated to the insured, in advance of the issuing of the policy, that if additional boilers were obtained, but not more than seven were used at the same time, the risk would be no greater and the policy would cover the additional boilers; but it was held that there was no liability under the policy for the explosion of an after-acquired boiler, and that the inspector's statement "was merged in the written contract evidenced by the policy, and was not available to the plaintiff either as a representation, an agreement, or an estoppel." So, also, in Travelers' Ins. Co. v. Henderson, 16 C. C. A. 390, 395, 32 U. S. App. 536, 540, 69 Fed. 762, 768, which was a suit in equity to reform a policy, it was held: "Where the class of risks intended to be insured against is clearly described in the policy, and the assured has a full and fair opportunity to read the instrument, the company will not be bound by representations made by its agent, in good faith, that the policy covers risks that are not in fact within its provisions."

In other cases it has been often stated that, in the absence of fraud or mutual mistake, no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations, as to the terms or legal effect of the resulting written contract, can be permitted to prevail, either in law or in equity, over the plain provisions and proper interpretation of the contract. Wilson v. New United States Cattle-Ranch Co. 20 C. C. A. 244, 36 U. S. App. 634, 73 Fed. 994; McKinley v. Williams, 20 C. C. A. 312, 36 U. S. App. 749, 74 Fed. 94; Green v. Chicago & N. W. R. Co. 35 C. C. A. 68, 92 Fed. 873; Union Selling Co. v. Jones, 63 C. C. A. 224, 128 Fed. 672; Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co. 66 C. C. A. 67, 132 Fed. 957; Rucker v. Bolles, 67 C. C. A. 30, 34, 133 Fed. 858; Davis Calyx Drill Co. v. Mallory, 69 L.R.A. 973, 69 C. C. A. 662, 137 Fed. 332.

The decisions cited exhaust the argument upon the subject. Nothing could be added to what they contain. Because of the error in admitting parol testimony which enabled the insured to recover on policies different from those which the parties had made for themselves, and because of the error in refusing to direct verdicts for the defendants upon the evidence properly admitted, the judgments are reversed, with directions to grant a new trial in both cases.

ILLINOIS SUPREME COURT.

WATERMAN HALL, Appt.,
v.
ALBERT H. WATERMAN et al.

(220 Ill. 569, 77 N. E. 142.)

Adverse possession under cotenant.

1. One entering into possession of real estate under a will and deed from testator's executors purporting to convey the entire tract may secure title by adverse possession against cotenants of the testator.

Same—quitclaim deed as color of title.

2. A quitclaim deed which purports to convey the entire interest in a parcel of land is good color of title upon which to found a title by adverse possession.

Same—against trust.

3. An adverse title to real estate may be secured against a trust where the pos-

Case Note.—Quitclaim deed as color of title for purposes of adverse possession.—In many, if not most, jurisdictions, title by adverse possession may be acquired by a possession actually and notoriously adverse for a sufficient length of time, even though the original entry was not under color of title. But even in those jurisdictions entry and claim under color of title frequently operates to reduce the period of adverse possession otherwise necessary to bar the legal title or to extend the territorial limits of possession, and, in some cases, to rebut the presumption that the actual possession was in subordination to the legal title, or to supply the lack of other evidence of its adverse character. A quitclaim deed is generally held to be sufficient to constitute color of title for any of these various purposes. Thus, in Parker v. Newberry, 83 Tex. 428, 18 S. W. 815, the court said that the essential requisites of a deed necessary as the foundation of the five-years plea of limitations are that it shall "by its own terms, or with such aid as the law requires, assume

session is taken under a conveyance from one claiming adversely to the creator of the trust.

Trust—interest of remainder-man.

4. A conveyance of land to trustees for a period of years, at the expiration of which it is to be conveyed to testator's heirs, vests a present estate in the heirs, subject to the chattel interest of the term.

Barring trust estate—effect on remainder.

5. The barring by the statute of limitations of a legal estate conveyed to trustees for a term of years by possession held adversely to the trust will apply to the whole estate, so as to prevent a recovery by those entitled to possession at the termination of the trust period.

Adverse possession—ignorance of true owner.

6. Ignorance on the part of the true owner of title to real estate does not prevent the acquisition of a title adverse to it.

Same—defects in record title.

7. Defects in the record title of one in possession of real estate in good faith under color of title will not prevent his obtaining a title by adverse possession.

(Wilkin, J., dissents.)

(February 21, 1906.)

APPEAL by defendant from a decree of the Circuit Court for DeKalb County partitioning certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. **Carnes, Dunton, & Faissler**, for appellant:

A quitclaim deed is good color of title.

Safford v. Stubbs, 117 Ill. 389, 7 N. E. 653; Glos v. Furman, 164 Ill. 585, 45 N. E. 1019; Holloway v. Clark, 27 Ill. 483; McConnel v.

and purport to operate as a conveyance;" and held that a quitclaim deed fulfils these requisites. The court said, *arguendo* and by way of distinction, "that the rule that a purchaser who takes only such interest as is conveyed by a quitclaim deed technically cannot, under that character of conveyance, be protected as a purchaser in good faith, etc., has no application where such deed is made the basis of the five-years plea of limitation."

In McDonough v. Jefferson County, 79 Tex. 535, 15 S. W. 490, counsel contended that a quitclaim deed purporting to convey the "right, title, and interest" of the grantor would not support a title under the five-years statute of limitations; but the court said that, under the facts of the case, the objection to the introduction of the deed was properly overruled. What the facts of the case were to which the court referred does not appear from the report of the case.

A quitclaim deed taken in good faith is sufficient color of title upon which to support title by adverse possession for seven years, under the Georgia statute. Castleberry v. Black, 58 Ga. 386; Johnson v. Girtman, 115 Ga. 794, 42 S. E. 96.

And a quitclaim deed is color of title, so that possession thereunder, accompanied by payment of taxes for seven successive years, will bar a recovery by the owners of the legal title under the Illinois seven-years statute of limitations. McConnel v. Street, 17 Ill. 253; Holloway v. Clark, 27 Ill. 483; Winslow v. Cooper, 104 Ill. 235.

And Safford v. Stubbs, 117 Ill. 389, 7 N. E. 653, holds that a quitclaim deed of all the grantor's "right, title, interest, estate, claim, and demand," executed to one having no notice that the grantor's title was limited to an estate for life, constitutes a good color of title to support a title by adverse possession under the seven-years statute of limitation against the remainder-men, if accepted in good faith and accompanied by payment of taxes.

But it was held in Busch v. Huston, 75 Ill. 343, that a quitclaim deed purporting to convey merely the "right, title, interest, and estate" of the grantor is color of title only to the extent of the grantor's interest,—in this case an undivided fractional interest; and therefore will not support a title by adverse possession against the cotenants of the grantor. The court said, in effect, that, if the deed had purported to convey the land in controversy, and not merely the interest of the grantor therein; and had been accepted and acted on in good faith, and followed by payment of taxes,—it would have supported a title by adverse possession under that statute.

In Laraway v. Zenor, 100 Iowa, 181, 69 N. W. 416, it was held that a quitclaim deed from husband to wife of land in which she knew his only interest was under an executory contract to purchase, which was subsequently forfeited by failure to comply with the conditions thereof, does not furnish color of title upon which to base ownership by adverse possession.

A quitclaim deed constitutes color of title which will operate to make actual occupancy of a part of the tract described constructive possession of the entire tract for the purposes of adverse possession. Swift v. Mulkey, 14 Or. 59, 12 Pac. 76.

And this is true of an unrecorded quitclaim deed purporting to convey all of the right and title which the grantor has under a tax collector's deed. Minot v. Brooks, 16 N. H. 374; Wells v. Jackson Iron Mfg. Co. 47 N. H. 235, 90 Am. Dec. 575.

But a quitclaim deed is not color of title to land other than that actually described therein. Archer v. Beihl, 69 C. C. A. 101, 136 Fed. 113; Woods v. Banks, 14 N. H. 101.

Hence deeds releasing and quitclaiming the grantor's rights in lots in the "second and third division right of Abel Camp" are not color of title to a particular lot in such second division, as to which it does not appear that the grantors ever had title, or were in possession. Woods v. Banks, *supra*.

In Knight v. Campbell, 76 Iowa, 730, 39 N. W. 829, the question was whether a statute by which possession under the former

85 S. W. 46, it was held that minor children were not entitled to enforce partition of a homestead set apart to the widow, under Sayles's (Tex.) Civ. Stat. art. 2057. The court said: "If she should fail to use it for business purposes within such time as to indicate that she had abandoned the same, and did not intend to use it for such purpose, then the appellants would be entitled to recover their interest, and to have a partition of the same."

Where a widower remarried, and his children ceased to be members of his family, it was held that they could not obtain a partition of a homestead acquired by the separate means of their father, and which was set apart to the widow and children of the second marriage, notwithstanding such widow had removed from the premises. Foreman v. Meroney, 62 Tex. 723. The court said: "The homestead, therefore, is not to be likened to prison bounds, within which the family must always remain, but to a sanctuary, to which they may always return. And an abandonment is accomplished, not by going away without any intention of returning at any particular time in the future, but by going away with the definite intention never to return at all."

And the homestead was held not to be subject to partition where it was the duty of the court to protect the minors by an order.

So, where a husband and wife were divorced, and the mother was allowed the custody of the minor children, and the father died leaving a will, and his executor sold his property, it was held that the interest of the minor children, claimed through their guardian, was not subject to partition. Hall v. Fields, 81 Tex. 553, 17 S. W. 82. The court said: "Under the facts of this case, it is the duty of the court to set apart the homestead in its entirety to the minors for their use and occupation with their guardian. We know of no law which would authorize the setting apart of a portion of the homestead, and do not so construe the Constitution. It is treated as an entirety, and is not subject to partition 'so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having jurisdiction, to use and occupy the same.' How long she may be permitted to do this is a question for determination hereafter by the court, on proper application made to it showing that the reason for such use and occupation no longer exists, and whenever a proper case may arise."

After the death of the father and mother, it was held that, in order to protect the use and occupation of the homestead, by the minor children, from partition at the suit of other tenants in common, it should be done through the agency of the guardian under an order of the probate court having jurisdiction. Osborn v. Osborn, 76 Tex. 494, 13 S. W. 538. The court said: "We think the court erred in holding that the land was not subject to partition, and in decreeing the use of it to defendant during his minority. But, while we decide that the facts presented in this case did not entitle appellee to judgment in his favor, we are not to be understood as holding that in such a case the minor is without remedy. Being under disability and not able to protect his rights, the court should protect him. We are therefore of opinion that when, in a case like this, a partition of the homestead is sought among the children of the deceased, and it appears that the minor has never had a guardian, and the probate court has never determined his right to occupy it, it is the duty of the court to arrest the proceedings, and suspend further action in the case until the county court shall appoint a guardian and determine whether or not he shall be permitted to occupy and use it for his ward."

But, where the guardian of the minors failed to ask for a court order protecting their interest, the homestead was held subject to partition.

So, where the guardian of minor children, after the death of both parents, failed to apply to the probate court for permission to occupy the land, it was held that the homestead was subject to partition among the heirs, under Tex. Const. art. 18, § 52. Powell v. Naylor, 32 Tex. Civ. App. 340, 74 S. W. 338. The court said: "When a guardian has been appointed, the failure of the guardian to ask the permission of the court to use and occupy the homestead for his ward, or the failure or refusal of the court to grant such order, can form no ground for a refusal to partition the land."

And under Tex. Civ. Stat. art. 2057, providing, as in the Constitution, that the homestead shall not be partitioned during the lifetime of the widow so long as she occupies the same, or so long as the guardian of minor children may be permitted to use and occupy the same, and art. 2058, providing that when the widow dies or does not use the homestead, and when the court does not permit the guardian of minor children to use the same, it may be partitioned,—it was held that, where the husband and wife both died, and the county court found that it was to the best interest of the minors that they should not occupy the homestead, the heirs were entitled to a partition. Garrison v. Ferguson (Tex. Civ. App.) 54 S. W. 247. This was on the ground that it was discretionary with the county court, and that its action was not an abuse of discretion.

But where an order of occupancy by the minors was made, the homestead was held to be liable to partition, subject to such right of occupancy.

In Hudgins v. Sansom, 72 Tex. 229, 10 S. W. 104, where an order had been made for the occupancy of the homestead by the guardian of minor devisees, it was held that the estate could be partitioned, subject to such right of occupancy; saying: "This right to occupy is the sole right which it was the purpose to protect by the provision of the Constitution quoted, and the partition of an entire estate of which a homestead may be a part, which does not take away this right, neither contravenes the spirit

nor the letter of that instrument." Tex. Const. art. 16, § 52, providing for the descent and distribution of the homestead, and that it shall not be partitioned among the heirs during the lifetime of the surviving husband or wife, so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of minor children of the deceased may be permitted, under the order of the court, to use or occupy it, was construed; saying: "It is a partition of the homestead that is forbidden; but it does not follow from this that in the partition of an estate the homestead may not enter into the partition if that may be made without defeating the right of the surviving wife, husband, or children to occupy the homestead, as under the Constitution they are entitled to occupy."

The homestead was held to be subject to partition where both husband and wife were dead, and there were no minors, in Simms v. Hixon (Tex. Civ. App.) 65 S. W. 36.

An adult, being the only child of deceased parents, was held not entitled to resist a partition of the homestead, sought by other heirs, under Tex. Rev. Stat. § 2057, providing that the homestead shall not be partitioned among the heirs during the lifetime of the widow, or so long as she elects to use or occupy the same as a homestead, or so long as the guardian of minor children may be permitted, under an order of the court, to use the same. White v. Small, 22 Tex. Civ. App. 319, 54 S. W. 915.

b. Conveyance or abandonment.

A conveyance or abandonment of the homestead by the husband and wife, or survivor, was held to authorize a partition.

So, under Tex. Const. art. 15, § 52, providing that, on the death of the husband or wife, the homestead shall descend and vest as other property, and shall be governed by the same law of descent and distribution, but shall not be partitioned among the heirs so long as the survivor may elect to use or occupy it as a homestead,—it was held that, on the death of the wife, who owned the homestead, her land vested in her daughter, subject to the right of the husband to occupy the same as a homestead. It was further held that the abandonment of the homestead deprived him of all homestead right, which he could not resume at his pleasure. Moss v. Smith, 29 Tex. Civ. App. 458, 68 S. W. 533. In this case, as there was no prayer for partition, the trial court erred in ordering it.

And where the widow was entitled, under the Texas Constitution, to retain the possession of the homestead during her life as long as she chose to occupy it, it was held that she had the right to abandon the use of it as a homestead, when it would become subject to partition, as other property; and that filing a suit for partition was a waiver of the homestead; and that she could not then ask the court to set it aside as exempt. Moore v. Moore, 89 Tex. 29, 33 S. W. 217.

And where a husband and wife conveyed an undivided interest in the homestead, it was held that the purchaser became a tenant in common, and was entitled to a partition. Ferguson v. Reed, 45 Tex. 574. The court said: "The objection that the land is a part of appellant's homestead resolves itself into the assertion of this broad proposition, that, where there is not more than 200 acres in the entire tract, if one tenant in common goes into possession and resides upon the land with his family, it becomes his homestead, and a partition cannot be had at the instance of the other part owners through the court. And especially is this the case when, from its nature, the property itself is not susceptible of an actual division. The constitutional inhibition against the forced sale of homesteads, it is believed, has no application to such a case, and can be given no such unreasonable and inequitable construction. The right of the occupant, in whatever light we regard it, can only extend, as between the cotenants, to his part of the land. No right of homestead can attach to land which he does not own. Certainly it would, in effect, do so if, by reason of his homestead claim, he could deprive the other cotenants of the use and enjoyment of their parts of it."

3. Homestead in community property.

a. Generally.

A community homestead, on the death of a husband or wife, is subject to occupancy by the survivor. When such survivor remarries and afterwards dies, the heirs of the first decedent are entitled to partition of one half which descends to them, and the survivor of the second marriage is entitled to a homestead in the remainder, which is not subject to partition so long as occupied.

Children of a first wife have been held entitled to a partition of their mother's interest in community homestead as against the widow of their father by a second marriage.

So, where a husband and wife had a homestead on community property, and the wife died and the husband remarried, it was held that while he was living he had a homestead, and the children could not have the same partitioned; but upon his death the land of the children, inherited from their mother, was no longer subject to homestead rights, and the homestead of the second wife must come from the estate of the decedent. Crocker v. Crocker, 10 Tex. Civ. App. 296, 46 S. W. 870.

A husband and wife owned community property. On the death of the wife the husband remarried, and afterwards died leaving his second wife in possession of the homestead. It was held that on the death of their father the children were entitled to a partition of their interest in the land derived through their mother, and this irrespective of the question of homestead. Pressley v. Robinson, 57 Tex. 453. This case was distinguished in Foreman v. Meroney, 62 Tex. 723, on the ground that in the for-

mer case the homestead was the community property of the husband and his first wife, and her interest passed upon his death to the children of the marriage. The court said: "The second wife had no children. Here the homestead was the separate property of the husband. The second wife with her children has the same interest in the property which was possessed by the first. The plaintiffs are not claiming as the heirs of their mother, but of their father."

The homestead of a second wife and children, after assigning the part descending to the heirs of the first wife, was held not subject to partition so long as the widow chose to occupy it. McDougal v. Bradford, 80 Tex. 558, 16 S. W. 619. In this case a widower having community property, and not a homestead, had children by his first wife, remarried and had other children, and afterwards died.

A decedent left children by his first wife and a widow, and the homestead was encumbered, which debt was paid by his administrator, and the widow was allowed money in lieu of the homestead, to be paid after community debts of the first marriage were all paid. It was held that the interest of the heirs of the first wife could not be diminished for the widow; that the heirs of the first wife would take nothing if the community debts exceeded the entire value; that, if there was an excess in value over debts, each heir of the first wife was entitled to his proportionate share of the excess; that the widow should be paid in full if it could be done with the remainder; and that the balance should be distributed to the husband's heirs. Hoffman v. Hoffman, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471. The court said: "In this case, the residence of the deceased not being in a condition, as to the title, to be treated as a homestead, it should be sold like other unexempted property. The allowance made to a widow in lieu of a homestead becomes a substitute for the homestead."

Children of the first wife brought suit against the widow by second marriage for a partition of community homestead. It was held that they could maintain the action as to any property inherited from their mother; but as to the homestead interest in the balance, it was held that, if the estate was insolvent, the widow and minor children took the fee, and that neither could exclude the other. Putnam v. Young, 57 Tex. 461.

In an action by heirs of a deceased husband for partition of a community homestead, the defense by the widow, who was a second wife, that plaintiffs had received more than their share by advancements, was sustained. It was held that there was not more than enough to satisfy the portions due the children by the second marriage after deducting the homestead, which was not subject to distribution. Harris v. Reed, 47 Tex. 523.

The surviving husband or wife, in regard to their community homestead, is held entitled to occupy the same, and may resist partition.

So, it was held that the right of an heir to partition the homestead was subject to the right of its use and occupation by the surviving parent and minor children, and so long as it was occupied, whether by order of the probate court having charge of the minors, or not, it could not be partitioned or devested of its homestead character. Adair v. Hare, 73 Tex. 273, 11 S. W. 320. In this case a community homestead was occupied by a widower and his family, some of whom were minors. One of the daughters brought an action against the father and children for partition.

And a widow occupying a community homestead on partition with the heirs of the husband by a prior marriage was held entitled to have her husband's interest set aside and to retain the homestead so long as she chose to occupy it. Gilliam v. Null, 58 Tex. 298. The court said: "Whilst, under our statute of descent and distributions, the fee of the land thus set apart as a homestead descended at the death of Richard Gilliam to his heirs at law, who are among the appellees herein, yet it did so subject to the homestead rights of the widow. Const. 1876, art. 16, § 52. And no partition of it can take place until she ceases to occupy it as a homestead. . . . The Constitution refers in its terms only to a descent of the land to the heirs of one of the spouses occupying it at the time of such death as a homestead, and prohibits its partition among the heirs of such decedent during the lifetime of the survivor, or as long as he or she may choose to occupy it as a homestead. In this case the decedent was Richard Gilliam, and it was to parties claiming as heirs of his estate that the partition is prohibited, not to those claiming an interest in the land through other titles. Hence, the appellees were not entitled to have the undivided interest inherited by them from their father set apart to them. But that claimed by them through their deceased mother was derived by title in which Richard Gilliam had no interest at the time of his death, and was subject to a severance from the balance of the land and a partition amongst them."

In Rogers v. Trevathan, 67 Tex. 406, 3 S. W. 569, where the testator gave to each of his five children 108 acres of a tract of 640 acres, and the remaining 100 acres, on which the homestead was situated, to his wife for life with remainder to one of his daughters, the court said: "The entire tract of 640 acres, of which the land in controversy is a part, was community property, and of that Mrs. Gallion owned one half. By the terms of this will, as found, the testator gave of that tract to each of his five children 108 acres, and the remaining 100 acres, embracing that part used as homestead, he gave to his wife during her life, with remainder to Mrs. Trevathan. This clearly evidenced the intention of the testator to dispose of property which was not his own, and at the same time to confer upon his wife a right which she would not have if his estate was solvent; for, under the law

then in force, the homestead belonging to a solvent estate would have been subject to partition as other real property." This estate vested prior to the Constitution of 1876. The widow, having elected to take under the will, was held estopped by the partition therein made and adopted by her.

An agreement for partition has been held binding.

In Watson v. Rainey, 69 Tex. 319, 6 S. W. 840, where the father died, and the widow and children made an agreement for the partition of his estate, the widow to take half of the property, which was community, and the four children the residue, it was held that this agreement bound the children to pay one half of the debts of the estate in so far as the share of the estate received by them would do this, but no farther.

b. Abandonment or sale.

In Texas, where the surviving husband or wife abandoned the homestead, the same was held to be subject to partition.

So, where the survivor in community homestead property abandoned the same, it was held that the heirs who took the interest of the deceased were entitled to a partition. Bell v. Schwarz, 37 Tex. 572.

A husband and wife occupied community land, and on the wife's death he remarried and afterwards died, and the land was divided, giving the children of the first marriage 125 acres as their mother's community interest, and the remainder was set apart to the widow and children as a homestead, but was abandoned by the widow. In a suit for partition, by the heirs of the first wife, it was held that the minor children of the second wife could not claim any homestead interest where there was no order of the probate court setting it aside to the guardian for occupancy, under Tex. Const. 1876, art. 16, § 52; and the child of the widow was held entitled to her interest; and, as the law gave the surviving wife and minor children an absolute title in the homestead, the wife had one fifth and the four minor children four fifths, and on the death of the widow her child was entitled to two fifths. Gaines v. Gaines, 4 Tex. Civ. App. 408, 23 S. W. 465. This title by descent attached prior to the adoption of the Constitution of 1876.

And where a wife devised her share in community property to her children, and her husband married, and the homestead was set apart to his widow, the children were entitled to a partition of their share in the community property as a homestead; and, where the widow remarried and abandoned the homestead, it was held that the heirs could have the remainder of the same partitioned. Craddock v. Edwards, 81 Tex. 609, 17 S. W. 228.

The sale or mortgage of the homestead by a surviving husband or wife, or by husband and wife, is held to entitle the purchaser to a partition as against the heirs.

So, where a husband and wife owned a homestead in community property, and the wife died, and the husband made a deed of trust on his property, it was held that the purchaser under the deed of trust was entitled to a partition as against the heirs of the wife. It was further held that the husband had the power to dispose of his homestead, and that the children had no homestead right in the home of their father or mother, and their homestead right, if any, must be asserted by a guardian, if minors, properly appointed by the court. Lee v. British & A. Mortg. Co. 25 Tex. Civ. App. 481, 61 S. W. 134.

And where a widow conveyed community homestead in satisfaction of community debts, it was held that the land was subject to partition at the instance of the purchaser, notwithstanding the heirs were entitled to a homestead in the husband's share of the land. King v. Summerville (Tex. Civ. App.) 80 S. W. 1050, Affirmed in 98 Tex. 332, 83 S. W. 680. The court said: "The property in controversy is subject to partition. The inhibition in the Constitution of Texas as to partition of the homestead has reference to the heirs of decedent, and not to those claiming interest in the land through other titles. The property of an outside party cannot be tied up with that of the heirs of a decedent, and held by them as a homestead."

And where a surviving husband disposed of his community interest in the homestead, it was held that the purchaser became a tenant in common with the children who inherited their mother's interest, and that he was entitled to partition of the property. Hartman v. Thomas, 37 Tex. 90. The court said: "As we have before said, the children could not control the father in the disposition of the homestead, but they could control him in any effort to sell the estate which descended to them."

The purchaser of a community homestead from the widower brought suit against his children to quiet title. They asserted a right of partition, claiming the whole. It was held that where the estate was insolvent, as in this case, the father had the right to sell to pay community debts. Ashe v. Yungst, 65 Tex. 631. The court said: "The present Constitution gives to the father or mother, surviving, the right to occupy the homestead without reference to the ownership of the fee, and this right either of them may decline to exercise, in which event the property, under the terms of the Constitution, would become subject to partition if children of the deceased parent take any part of it by inheritance. Adult, as well as minor heirs, would partake in such partition on equal terms, unless the plain language of the Constitution, which declares that 'the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution,' is to be disregarded. . . . It is unnecessary to consider how far the rules laid down in reference to the homestead set apart to a widow

and minor children under former laws, or vesting in them under act of August 15, 1870, can be applied, under the present Constitution, where an estate is insolvent; for the facts of this case do not bring it within these rules."

Where a husband and wife were in possession of community property as a homestead, and the wife devised her interest to her minor child by a former husband, it was held that the surviving husband had the right to use and occupy the premises as a homestead, and the child could not claim partition so long as the surviving husband continued to occupy and use it; and that, on a conveyance by the husband to another party, his grantee and the child were tenants in common, and the child was entitled to a partition. Foster v. Johnson, 89 Tex. 640, 36 S. W. 67.

The purchaser of community interest in the homestead from a divorced husband was held to have sufficient title to maintain a suit for partition.

So, where parties having a homestead were divorced, and no provision was made for the property, but the children were placed in the care of their mother, who remained on the homestead supporting them, it was held that the husband had the right to sell the community interest, and that the homestead was subject to partition. Kirkwood v. Domnau, 80 Tex. 645, 26 Am. St. Rep. 770, 16 S. W. 428. In this case the husband gave a mortgage upon the property, and the purchaser sued the wife for partition. It was held that, as the land was not divisible, it should be sold; but that the costs should not be taxed against the wife's share.

IX. Summary.

The separation of husband and wife without a divorce will not entitle either party to a partition of the homestead, as was held in GRACE v. GRACE. After a divorce, if the property rights have not been adjusted in that decree, it seems that neither party will be entitled to homestead rights in the lands of the other party. A partition cannot be had where the homestead exemption is given to a class, as to the widow and minor children, and any party belonging to that class can successfully resist a partition. The Kansas statutes prohibit a partition until the widow remarries or the minor children arrive at majority. Where a homestead is given to the surviving husband or wife, a partition cannot be had by the heirs where the survivor objects, unless provided for by statute. The abandonment of a homestead, or the failure to assert homestead rights in a suit for partition, will preclude such party from afterwards asserting that the property was not liable to a partition. In Michigan the law of descent and distribution is held to vest a right superior to that of homestead exemption, and a partition of the homestead can be had at the instance of the heirs at law. This was also held in Illinois prior to the statute of 1873. In Texas the act of 1848 provided for a partition of the homestead where the estate was solvent; but the Constitution of 1876 prohibits a partition amongst the heirs during the lifetime of the surviving husband or wife, or so long as the guardian and minor children are authorized by an order of court to occupy the same as a homestead. In this state, in regard to community property where the surviving husband or wife remarried and afterwards died, the heirs of the first decedent were entitled to a partition of one half of the property which descended to them, and the remainder was not subject to partition so long as occupied by the widow and minor children. The abandonment or sale by the surviving husband or wife renders the property subject to partition.

I. T.

KENTUCKY COURT OF APPEALS.

A. J. GROSS, Impleaded with W. G. Smart et al., Appt.,
v.
BRECKINRIDGE BANK.

(— Ky. —, 90 S. W. 5.)

Partnership creditor—receiving payment from incoming partner.

1. Acceptance by a firm creditor of a dividend from the insolvent estate of a partner who purchased the interest of one who was a member of the firm at the time the debt was incurred does not estop the creditor from looking to the latter for payment.

Same—notice of change.

2. Means of knowledge, on the part of bank officers, of a change in the membership

Case Note.—Necessity of actual notice of retirement of member of firm to relieve retiring member from liability on obligation renewed after his retirement.—It is a well-established rule that a retiring partner who desires to avoid liability to those who have previously dealt with the firm for firm obligations incurred subsequent to his withdrawal from the firm must bring actual notice of such retirement and dissolution of the partnership home to them. Ellison v. Sexton, 105 N. C. 356, 18 Am. St. Rep. 907, 11 S. E. 180; Cowan v. Roberts, 133 N. C. 629, 45 S. E. 954; Neal v. M. E. Smith & Co. 54 C. C. A. 226, 116 Fed. 20; Bank of Monongahela Valley v. Weston, 159 N. Y. 201, 45 L.R.A. 547, 54 N. E. 40.

And the same rule holds a withdrawing partner liable for any obligations incurred prior to his retirement, but renewed afterwards, if the creditor has no actual knowledge of any change.

In 1 Randolph on Commercial Paper, 2d ed. § 432, the rule is stated as follows: "To discharge the firm's liability for a debt secured by its note which had been renewed by one partner after dissolution of the firm, the holder must have had notice of such

of a firm whose note is held by the bank at the time of a renewal thereof, is not sufficient to exonerate the retiring members from liability thereon if they had not in fact received such knowledge.

(January 5, 1906.)

APPEAL by defendant Gross from a judgment of the Circuit Court for Breckinridge County in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. **Mercer & Mercer, W. McC. Mercer, Claude Mercer,** and **W. S. Pryor** for appellant.

Messrs. **David R. Murray** and **H. C. Murray,** for appellee:

Actual notice of the change in the firm must be brought home to the payee to release the original members from liability.

Story, Partn. § 161; Price v. Towsey, 3 Litt. (Ky.) 424, 14 Am. Dec. 81; Gaar v. Huggins, 12 Bush, 260; Montague v. Reakert, 6 Bush, 393; Cronly v. Bank of Kentucky, 18 B. Mon. 410; Mitchum v. Bank of

dissolution before taking the renewal and relinquishing the original note given for the debt."

And in Sinclair v. Hollister, 14 Misc. 607, 36 N. Y. Supp. 460, the court said that, while the general rule is that one partner cannot bind his copartner after dissolution, even by the renewal of a partnership note, an exception is made in favor of one having dealings with the firm, and taking the new note without actual notice of the dissolution.

One who loans money to a firm and takes a partnership note for the amount is entitled to actual notice of the subsequent retirement of one of the partners; and if, without such notice, she accepts a renewal note after the retirement of such member, signed in the firm name, she may hold the latter liable for the debt. Jansen v. Grimshaw, 26 Ill. App. 287, Affirmed in 125 Ill. 468, 17 N. E. 850.

In the absence of actual notice of the dissolution of a partnership, a retiring partner is liable for a partnership debt secured by a firm note given about a week prior to his withdrawal from the firm, and later renewed in the name of the old firm: and the publication of notice of dissolution in a newspaper, which accidentally reaches one of the directors of the holder of the note, is not equivalent to actual notice to the holder, where such director has no power, by the charter, to act except in conjunction with the other directors. National Bank v. Norton, 1 Hill, 572.

Actual notice of dissolution is essential to relieve a retiring partner from liability to a bank discounting a firm note which had been repeatedly renewed after the withdrawal of such member; and publication of notice in a newspaper of which the bank was a subscriber does not amount to such actual notice. Vernon v. Manhattan Co. 22 Wend. 183.

Actual notice of the retirement of a partner by the name of Porter from the firm of J. B. Rose & Co. is necessary to relieve him from liability to the holder of a check, drawn to the order of the partnership and indorsed in the name of the latter subsequent to such retirement, and transferred to such holder as renewal of a promissory note executed and indorsed by the same parties prior to such retirement; and publication of notice of dissolution in two newspapers, without proof that the creditor took or read either of them, does not constitute actual notice of dissolution. Rose v. Coffield, 53 Md. 18, 36 Am. Rep. 389.

Clear and satisfactory evidence of notice of the retirement of one member of a partnership is essential to relieve such member from liability on firm notes given as renewals of notes executed for a partnership debt prior to such retirement. Ransom v. Loyless, 49 Ga. 471.

A published statement that a copartnership formerly existing between J. D. Putnam and Alfred J. Goss, under the firm name of J. D. Putnam & Co., is dissolved, and business will in the future be carried on under the firm name of J. D. Goss & Co., who will settle all claims of the old partnership, which is seen by the payee of a note given by the old firm for money loaned, which note the payee afterwards surrenders, and takes in its place a note signed by the new firm, believing Alfred J. Goss to be a member of the new firm, is an insufficient notice of the withdrawal of such partner, so as to relieve him from liability on the renewal note. Thayer v. Goss. 91 Wis. 90, 64 N. W. 312.

Notice to a depositor of a change in the membership of a partnership doing a general banking, mortgage, and insurance business, so as to exonerate the retiring partners from liability arising from failure to pay deposits, some of which were made prior to the dissolution of the partnership, is not shown by proving that, immediately after the dissolution, the succeeding firm caused a glass sign, bearing the name of the new firm as successors to the former partnership, to be hung inside the bank window just above the name of the old firm, and caused a large number of calendars of the new firm to be left in the windows of the bank for its patrons, and that receipts for withdrawals were signed in the name of the new firm, where the depositor stated that knowledge of the dissolution of the original partnership never came to him until after the bank's failure: that he did not see the calendars, or notice the change in the sign, or read the receipts given him, further than to ascertain that the amount was correct; and it was shown that his pass book remained the same throughout his entire dealings with the bank. Arnold v. Hart, 176 Ill. 442, 52 N. E. 936.

Kentucky, 9 Dana, 166; Kennedy v. Bohannon, 11 B. Mon. 119; Merritt v. Pollys, 16 B. Mon. 355.

Messrs. **Miller & Todd** and **J. R. Skillman** also for appellee.

Nunn, J., delivered the opinion of the court:

About the year 1890 W. G. Smart and A. J. Gross formed a partnership and engaged in the mercantile business in Cloverport, Breckinridge county, Kentucky. They continued the business as partners until the year 1894, when Gross sold his half interest in the business to Walter Smart, a son of W. G. Smart and nephew of Gross, for the sum of $2,000, taking his note for that amount; Walter Smart agreeing with Gross to pay all his firm liabilities. The firm was continued as before in the name of Smart & Company. Soon after W. G. Smart and A. J. Gross entered into this partnership they borrowed of appellee, the Breckinridge Bank, $1,000, and executed a note due in four months. This money was borrowed and the note executed by W. G. Smart, who signed the firm name "Smart & Company," to the note. The interest was paid on this note every four months, and the note renewed, until December, 1896, when the note sued on in this action was executed. The appellee recovered a judgment on this note as against W. G. Smart by default. The appellant, Gross, made a defense, alleging in his answer that he sold his interest in the firm in December, 1894, to Walter Smart, and he was thereby released from all the liabilities of the firm; that since 1894 he had had no interest in the firm of Smart & Company and was not responsible in any way for the liabilities and obligations of the firm of Smart & Company; that the appellee knew, long prior to the execution of the note sued on, of the dissolution of the firm and the withdrawal of appellant, A. J. Gross, from it; that appellee, with full knowledge of the facts stated, from time to time accepted renewals of the note from Smart & Company, composed of W. G. and W. S. Smart, which he alleged was a novation of the original obligation and released him from any further liability thereon. He further alleged that about the year 1897 Walter S. Smart made an assignment for the benefit of his creditors; that his assignee sold his interest in the store, collected the proceeds, prorated it among the creditors of the assignor, and paid to the appellee $220; that this was accepted by appellee and credited on the note sued on, which he pleaded and relied on as an estoppel and in bar of appellee's right to recover the balance of the note from him. The appellee by reply controverted all the affirmative allegations of the answer, except the assignment of Walter S. Smart and the payment by his assignee to it of the $220. A jury was waived, and a trial was had upon these issues before the court, who, after hearing the evidence, adjudged that appellee recover of appellant, Gross, the debt sued on, with interest, less the credit referred to. The appellant moved to set aside the judgment and asked a new trial upon the ground of newly discovered evidence. This motion was sustained by the court. The next trial was had before a jury, and appellee again recovered. The court again, on motion and reasons filed, granted appellant a new trial. The third trial was by a jury, which again resulted in favor of appellee. The court refused to sustain appellant's motion for another trial, and he has appealed.

The appellant assigns three reasons why the judgment should be reversed: First, that the verdict of the jury was not authorized by the evidence; second, that the court should have peremptorily instructed the jury to find for him on his plea of estoppel; third, that the court erred in refusing to give to the jury instruction No. 3 offered by him.

On the first question we deem it unnecessary and without profit to anyone to state the evidence produced upon the trial. We have examined and carefully considered it, and are of the opinion that it preponderates in favor of the appellant to the effect that appellee had notice of the withdrawal of appellant from the firm of Smart & Company long before the date of the note sued on. But, on the other hand, the evidence offered by appellee was sufficient to sustain the verdict of the jury. The jury was the trior of the facts. It was its province to hear and weigh the testimony, and this court is not authorized to disturb the verdict of a jury, unless it is palpably and flagrantly against the evidence, which does not appear in this case.

The appellant's plea in estoppel cannot avail. There is no element of estoppel in the facts relied on. The acceptance by the appellee of the $220 from Walter Smart's assignee did not change the position of appellant in any way. He did not do, or refrain from doing, anything that he otherwise would have done. The receipt of that money by appellee was a benefit, rather than an injury, to appellant. The assignee, in making this payment, did in part for Walter Smart what appellant contends Smart had agreed with him to do; that is, pay all the debts of the firm.

Instruction 3 offered by appellant, which the court refused to give, is as follows: "The court instructs the jury that if, at the time of the execution of the note sued on

herein, the cashier or assistant cashier had the means of obtaining or knowledge of the sale of said interest of said Gross in said firm of Smart & Company, and failed to make use of said opportunity, then the law is for the defendant, and the jury should so find." The court, in effect, told the jury that, if they believed from the evidence that before or at the time the note sued on was executed the officials of the bank had knowledge or information that appellant had ceased to be a member of the firm of Smart & Company, then the law was for him. In our opinion the instructions given were correct, and submitted to the jury the sole question in issue, and the court did not err in refusing to give instruction 3.

The appellant cites the cases of Gaar v. Huggins, 12 Bush, 260, and Mitchum v. Bank of Kentucky, 9 Dana, 166, as supporting his contention that instruction 3 should have been given. The facts of these cases were not similar to the case at bar. In the first case Gaar, the retiring partner, withdrew before the creation of the debt sued on, and in that case the court in effect said that the rule appliçable to the liability of a partner retiring from the firm, in regard to those who had had dealings with the firm, in order to avoid future responsibility, is to show notice to such persons of dissolution, or actual knowledge on their part, or adequate means of knowledge. This was said to be the rule as to indebtedness created after the retiring partner had gone out of the firm. In the other case referred to the facts were that the partnership was dissolved on the 2d day of November, 1836, and the writing sued on was executed on the 12th day of November, 1836. Mitchum pleaded dissolution of the partnership and the want of authority in his previous partner to bind him. In that case the court used the following language: "It was not necessary to prove express notice to the plaintiffs. Partners, upon dissolving their connection, are not required to give personal notice to any except those who have had previous dealings with them. They could not give direct notice to everybody. And as to those who have not had previous dealings with them, it is only requisite that they should afford to all who may be concerned a reasonable opportunity of knowing the fact of dissolution." These authorities do not sustain appellant's theory of the law applicable to this case, as the debt sued on was created while appellant was a partner in the firm of Smart & Company and with his express knowledge and consent.

The case of Lieb v. Craddock, 87 Ky. 525, 9 S. W. 838, is a case in point. In that case the court said: "By the formation of a partnership, each member, unless expressly restricted, authorizes the other to act as his agent within the scope of the partnership business, and the act of each, within such scope, is for himself as principal and for the other members as their agent; and when one member makes a contract with a third person in behalf of his firm, and within the scope of the partnership business, he does so in behalf of himself as principal and as agent of his associates. Although one of the members withdraws from the firm, he, as to such persons as theretofore dealt with the firm with the knowledge that he was a member, is liable for any contract that the remaining members may make in the name of the firm with such persons, unless they had in some way actual notice of the withdrawal of the member. As to such persons the retiring member does not withdraw the agency of the remaining member to bind him, until such persons have received actual notice in some way that the agency has been withdrawn. It is not necessary, in order to bind the withdrawing member, that such persons should have given credit to the firm upon the faith that he was a member of it. All that is necessary is that they, not having notice of his withdrawal, believed that he was a member. The basis of his liability is not that such persons gave credit upon the faith of his being a member, but it is based upon the fact that he theretofore agreed that his copartner should act as his agent and legally bind him to all contracts made with them within the scope of the partnership business, and that such agency for the purpose of legally binding him should continue until they should receive notice of its withdrawal." See also case of Kerr v. Franks, 17 Ky. L. Rep. 335, 30 S. W. 1012.

Under these authorities, the appellee must in some way have had notice of the withdrawal of appellant from the firm before he could have been relieved of liability, and upon the issue as to such notice the jury, under proper instructions, decided against him.

For these reasons, the judgment of the lower court is affirmed.

A petition for rehearing having been filed, Hobson, Ch. J., on March 29, 1906, handed down the following response:

In the petition for rehearing our attention is called to Scarf v. Jardine, L. R. 7 App. Cas. 345, and it is insisted that the opinion herein is inconsistent with the rule of law laid down in that case by the House of Lords. The facts of that case are these: A firm composed of Rogers and Scarf, and doing business in the firm name of W. H. Rogers & Company, had dealings with Jardine. On July 27, 1877, the firm was dissolved, Scarf retiring and Beech going into partner-

ship with Rogers. Rogers and Beech carried on the same business under the same name from that time forward. In January, 1878, the firm, according to the ordinary course of business, bought goods of Jardine, who at the time had no notice that Scarf had gone out or that Beech had come in. On the 25th of February, 1878, he received notice of the dissolution, in which it was stated that all debts owing to or by the old firm would be received and paid by Rogers alone, who would continue to carry on the business as theretofore, in partnership with Beech under the same firm name. Jardine afterwards sold other goods to the new firm. He made no break in the account on the books, and rendered an account to the new firm for all that was due him. After this the new firm went into liquidation and Jardine proved up his entire debt in the liquidation proceeding. Subsequently he brought a suit against Scarf for the price of the goods which he had sold before he had notice of Scarf's withdrawal from the firm. It was held that he could not recover.

The reasons for the conclusion are thus stated: "There was therefore in this case undoubtedly a state of circumstances which would have entitled the plaintiff, if he had thought fit, to hold Mr. Scarf liable; the credit being given to him and to Rogers, there being no knowledge on the part of the plaintiff of the dissolution of partnership,—no knowledge of any revocation of the agency at the time when these goods were delivered. On the other hand, if you look not to the estoppel, but to the fact, the plaintiff was entitled to hold the persons who actually gave the order and received the goods, and were interested in the profit and loss of the firm which ordered them, liable to him; those persons being not Scarf, Rogers, and Beech, or Scarf and Rogers, but Rogers and Beech alone. Now it appears to me that the real question which your lordships have to determine is not as it was treated in the court below,—in I think both the courts below,—namely, the question of what is called 'novation;' but it is this, whether in that state of circumstances there was a concurrent, joint liability of the three persons, Scarf, Rogers, and Beech, upon the principles which I have stated, or whether the plaintiff had a right to make his choice whether he would sue those who were liable by estoppel, or sue those who were liable upon the facts. Put it as I can, I am unable to understand how there could have been a joint liability of the three. The two principles are not capable of being brought into play together. You cannot at once rely upon estoppel and set up the facts; and if the estoppel makes A and B liable, and the facts make B and C liable, neither the estoppel nor the facts, nor any combination of the two, can possibly make A, B, and C all liable jointly. Therefore it appears to me that, if the plaintiff chose to go upon the facts, and to make the persons who actually ordered and got the benefit of the goods his debtors (which he had a plain and certain right to do), he entirely disavowed the estoppel, and could no longer set it up."

The facts of the case at bar are dissimilar. W. S. Smart, in his purchase of Gross's interest, had assumed the payment of the debts of the old firm. W. S. Smart had bought out W. G. Smart, and in that contract had again assumed the debts of that firm, which, of course, included the debts of the old firm, as these debts had been assumed by that firm. The bank had a joint cause of action against Gross and each of the Smarts, and might sue all or any of them. Allen v. Thomas, 3 Met. (Ky.) 198, 77 Am. Dec. 169; Pom. Rem. § 139. It was not required to elect between them. It could sue first one and then the other until it received satisfaction of its debt. Its claim against W. S. Smart did not rest upon the principle of estoppel, and therefore the reasoning of the case cited has no application. The bank did not assert its claim against the assignee of W. S. Smart, or file or prove its claim against the estate assigned by him. The money was voluntarily paid to it by the assignee under the direction of W. G. Smart. W. G. Smart was liable on the note, and the bank had no right to refuse money tendered to it by the direction of W. G. Smart, which went to lessen his liability; for, in the contract between W. S. Smart and W. G. Smart, W. S. Smart had agreed to pay these debts.

The petition for rehearing is overruled.

TENNESSEE SUPREME COURT.

FOSTER-HERBERT CUT STONE COMPANY, Plff. in Err.,
v.
HATTIE PUGH, Admrx., etc., of Willie Pugh, Deceased.

(—Tenn. —, 91 S. W. 199.)

Master—liability for servant's act.

1. A master who places a skilful driver in charge of his delivery wagon is not liable for injuries to a child who has been permitted by the driver to ride upon the wagon,

Case Note.—Master's liability for injury to child invited into place of danger by employee.—In Schulwitz v. Delta Lumber Co. 126 Mich. 559. 85 N. W. 1075, it was held that even if the driver of a wagon had invited a seven-year-old boy to ride, the owner of the wagon was not liable for an injury to the boy, it appearing that the driver had

and who, in undertaking to get off, falls under the wheel.

Attractive nuisance—stone wagon.

2. A wagon constructed for hauling stone, with a low bed below the axles, is not so attractive and dangerous to children that the owner must take special precautions to avoid injury to such as attempt to ride upon it.

(January 13, 1906.)

ERROR to the Circuit Court for Davidson County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of her child. Reversed.

The facts are stated in the opinion.

Messrs. *J.* M. Anderson and Walter Stokes, for plaintiff in error:

Not every act or wrong done by the servant, which renders him personally liable, binds the master.

Cantrell v. Colwell, 3 Head, 472; Deihl v. Ottenville, 14 Lea, 191; Puryear v. Thompson, 5 Humph. 397; Williams v. Gobble, 106 Tenn. 367, 61 S. W. 51.

The driver of the wagon in this case, when he invited the deceased to get on the wagon and ride, transcended his authority, and acted beyond the scope of his authority.

Driscoll v. Scanlon, 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. E. 100; Bowler v. O'Connell, 162 Mass. 319, 27 L.R.A. 173, 44 Am.

been told by his employer not to allow children to ride.

This ruling was approved in Mahler v. Stott, 129 Mich. 614, 89 N. W. 340.

In Formall v. Standard Oil Co. 127 Mich. 496, 86 N. W. 946, it was held that an employer is not liable for injury to a boy on the premises by invitation of an employee, who is not the employer's *alter ego*.

In Houck v. Chicago & A. R. Co. 116 Mo. App. 559, 92 S. W. 738, it was held that an engineer whose duty it was to keep children out of the room and away from the machinery acted within what at least appeared to be his duty when he invited a ten-year-old boy into the room; and, if the boy acted upon the invitation, and was injured without negligence on his part, the master was liable, unless care for the boy's safety, proportionate to the danger, was observed.

In Houston & T. C. R. Co. v. Bulger, 35 Tex. Civ. App. 478, 80 S. W. 557, where the facts were very similar to the preceding case, the court said that, had it been proved that the engineer had specific orders from the company not to allow anyone to come on the premises, his disobedience of such orders in inviting and allowing the boy there would be no defense to the action.

But in Curtis v. Tenino Stone Quarries, 37 Wash. 355, 79 Pac. 955, a six-year-old boy was driven from the engine room by the engineer in charge, whereupon he went to the power room, where two boys about eighteen years old, employees of defendant, asked him to stay and blow the whistle at the close of work. These boys had no authority to invite strangers upon the premises. It was held that the employer was not liable to the six-year-old boy for an injury not wantonly or wilfully inflicted.

And in Buch v. Amory Mfg. Co. 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809, a thirteen-year-old employee in a mill, without authority, requested his eight-year-old brother to go into the mill for the purpose of learning the work. The overseer ordered him to leave, but the boy was unable to speak English and did not understand the order, and remained until he was injured. It was held that the boy was entitled only to the rights of a trespasser.

In Bowler v. O'Connell, 162 Mass. 319, 27 L.R.A. 173, 44 Am. St. Rep. 359, 38 N. E. 498, it was held that the scope of employment of a servant leading a colt from a watering tub to a yard nearby did not extend to an invitation to ride, given by him to a boy who was injured in attempting to accept it; and the master was, therefore, not responsible for the injury.

In Siddall v. Jansen, 168 Ill. 43, 39 L.R.A. 112, 48 N. E. 191, the father of plaintiff was an employee of defendant, and the plaintiff, when injured, was on the premises by invitation of his father. It also appeared that defendant was a book seller, and that the general public was invited to the floor where plaintiff was injured. It was contended that he was a trespasser. The court said: "If the father had any right to invite plaintiff, then the invitation to a child of five years (the age of this plaintiff) would, in its ordinary sense, have given him the right to be in those places where his father was;" and it was held to be a question for the jury whether or not the child was a trespasser.

In Missouri, K. & T. R. Co. v. Rodgers, 89 Tex. 675, 36 S. W. 243, a twelve-year-old boy was injured while riding upon a hand car upon the alleged invitation of the employee in charge thereof, and the court laid down the following rules: "If the jury should find that the plaintiff, by reason of his age and want of intelligence, was not capable of appreciating the danger of getting upon the car, and that the employees of the railway company invited or permitted him to get upon it; and if it should appear that to ride upon such a car was dangerous for a child of his age; and, further, that the act of getting upon the same, under the circumstances, was such as might have been done by a child of his age and intelligence,—the defendant would be liable to him for the injuries inflicted, although its employees may have been forbidden to permit anyone to ride upon said car. Disobedience of orders by its servants in such case would not be available to the defendant as a defense to the action. . . . If, however, the jury should find that the plaintiff had such a degree of intelligence that he could and should have appreciated the dan-

St. Rep. 359, 38 N. E. 498; Flower v. Pennsylvania R. Co. 69 Pa. 210, 8 Am. Rep. 251; Williams v. Gobble, *supra*.

Messrs. K. T. McConnico and W. H. Washington for defendant in error.

Beard, Ch. J., delivered the opinion of the court:

This action was brought to recover damages for the death of a boy about six years of age, resulting, as is alleged, from the actionable negligence of the plaintiff in error. The facts are that the mother of the deceased was employed in a factory of Nashville, and on the day of the accident had left the boy at and in the care of a charitable institution located near the place of her employment, where a large number of children of tender years were cared for during the day and while their parents were absent

ger of his act, then the burden would be upon him to prove that the person or persons who invited or permitted him to ride upon the car had authority so to do; and the rules of the company forbidding employees to permit persons to ride upon such cars would be admissible upon this issue, whether the plaintiff knew of their existence or not. If the proof should show that the employees had such authority, this would only affect the degree of care due to plaintiff under the circumstances, but would not relieve him of the consequences of his own negligence, if any, in boarding the car. If the employees had no such authority, then the defendant cannot be held liable for the injuries received by the plaintiff, although such employees may have been guilty of negligence."

Later, the father of this boy sued for loss of the boy's services, growing out of this same injury, and, with reference to the question discussed in this note, the court held that, if the boy was without mental capacity to understand the danger of riding on the hand car, and he was invited or permitted by the employees of the railroad company to ride on the car, and was thereby injured, it would be liable for the damages whether the employees knew of the incapacity of the boy or not. Missouri K. & T. R. Co. v. Rodgers (Tex. Civ. App.) 39 S. W. 383.

In Flower v. Pennsylvania R. Co. 69 Pa. 210, 8 Am. Rep. 251, it was held that there was no actual or presumptive authority on the part of a locomotive fireman, whose duty it was to supply the engine with water, to invite a ten-year-old boy to climb up on the side of the tender, put in the hose, and turn on the water at a water tank; and the boy's father could not recover from the railroad company for his death caused by his being knocked from the tender by a collision.

It was said in Chicago M. & St. P. R. Co. v. West, 125 Ill. 320, 8 Am. St. Rep. 380, 17 N. E. 788, that "conceding, as must be done, the engineer invited plaintiff to ride with him on his engine, he was acting without the scope of any duty he owed to his employer; and, had any injury come to plaintiff on account of that act of the engineer itself, whether negligently done or not, the master would not be liable." But in this case it was held that the rules of the company forbidding any stranger to ride upon the engine clearly made it the duty of the engineer to put him off, and in so doing he would be acting within the general scope of his employment; and therefore the master was liable to a seven-year-old child invited upon the engine by the engineer and then injured as a result of the engineer's negligently directing him to get off the engine while in motion.

It was said in Mexican Nat. R. Co. v. Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126, that if plaintiff, a seven-year-old boy, was on the box car which was being unloaded, at the invitation, either express or implied, of the servants of the defendant, it was the duty of defendant and its servants to exercise ordinary care toward him to prevent his being injured, and to abstain from doing any act which would reasonably result in his injury, taking into consideration his tender years; but, if the plaintiff was not upon the car at the invitation of defendant, or by its permission, he was an intruder, and in that event he was not entitled to recover, except for injury knowingly or wilfully inflicted.

In Keating v. Michigan C. R. Co. 97 Mich. 154, 37 Am. St. Rep. 328, 56 N. W. 346, plaintiff, a seven-year-old boy, taken upon a gravel train by the employee in charge thereof, wishing to return home, was advised by that employee to get on an approaching freight train, also belonging to defendant. It was held that the company was not liable for an injury resulting from the boy's attempt to board the moving train, although he was led to the act by the direction of its employee, the direction and advice given being outside the scope of every requirement of the servant's duty.

Where a motorman has authority to receive and let off passengers, and a boy innocently accepts his invitation to ride without paying fare, the boy is not a trespasser; and it is the duty of the company to extend to him the diligence due to passengers of his age and discretion. Little Rock Traction & Electric Co. v. Nelson, 66 Ark. 494, 52 S. W. 7.

But in Finley v. Hudson Electric R. Co. 64 Hun, 373, 19 N. Y. Supp. 621, plaintiff, an eight-year-old boy, was injured while getting upon a moving car by invitation of the motorman or conductor in payment for his services in opening a switch, the company having ordered its motorman not to permit or allow such practice; and it was held that it was not a part of the motorman's or conductor's business, or within the scope of his employment, or for the benefit of the defendant, or in furtherance of its interests, to invite the boy upon the car under the circumstances, and therefore a judgment in his favor could not stand.

from their homes at work. At that time some improvements were being made upon the building occupied by those in charge of the institution, and the plaintiff in error contributed the stone needed for that purpose, and sent its wagon under the charge of a careful driver to deliver the stone. The plaintiff in error had knowledge of the character of this institution and that daily a great many small children were assembled at it and cared for by its managers.

The wagon used upon this occasion was one constructed for and adapted to the purpose of receiving and delivering stone, and its only peculiarity was that its bed, instead of being raised above the axles, was below them, and so was nearer the ground than a bed of a farm or any other wagon in general use. At the time this delivery took place many children of various ages and sizes were playing on the premises of the institution. Upon the approach of the wagon a number of these children were attracted to it, and some of them as it entered the premises climbed upon it, but, under the direction of the driver, at once dismounted.

After the wagon stopped, and while the stones were being unloaded, the children in considerable numbers gathered around and were eager to get upon it, but were forbidden by the driver, who said to them, however, "Wait until I am rid of this load, and then I will give you a ride." Immediately after the work of unloading was finished, several of these children clambered upon the wagon, and the driver started upon his return trip. After riding a short distance they began one after another to dismount, and, in undertaking to do likewise, the deceased either fell or jumped to the ground between the wheels, and one of these, passing over his body, so badly injured him that he soon afterwards died.

It is also in evidence that young Pugh called to the driver once, if not twice, to stop and let him get down, but, either disregarding the call if heard, or else not hearing it, the driver did not stop, so that the boy, while undertaking to leave the wagon still in motion, or falling, received the injury complained of.

The declaration contains three counts. The case was rested for the plaintiff, however, upon a fourth count, embraced in an amended declaration, which, in substance, averred that the defendant sent upon the premises in question a wagon of such nature and description as to be both dangerous and attractive to children, great numbers of whom the defendant knew were left during the day by their parents; that the driver in charge of the wagon was incompetent and unfit; that the defendant failed to provide sufficient servants to deliver the stone, and negligently failed to provide any safeguard or protection while the wagon was being unloaded; and that when it was leaving the premises, its driver having negligently permitted the deceased to mount the wagon, the latter fell therefrom and was fatally injured.

Upon the trial of the issue made by a plea of not guilty, the testimony of the plaintiff disclosed the facts as set out in the beginning of this opinion. At its close the defendant demurred to the evidence, and, its demurrer being overruled, the case went to the jury to ascertain the damages sustained, whereupon a verdict was returned in favor of the plaintiff for $2,500. From the judgment thereon the defendant has prosecuted an appeal in the nature of a writ of error.

From a careful examination of this record we are unable to discover any legal ground upon which the verdict and judgment can rest. The case made out is one where a skilful driver is placed in charge of his master's wagon, with direction that he deliver pieces of dressed stone at a place where they are to be used in making some improvement. Having arrived there and unloaded the stone, a number of children, who were gathered about, in answer to his invitation got upon the wagon to enjoy a ride, and while riding away from the premises one of these children, either in falling or undertaking to jump from the wagon, is run over by one of its wheels, and is so injured that death soon results. It is not claimed that the driver was either expressly or by implication authorized by his master to extend the invitation to the children to get upon the wagon, or that this act of the servant was in any sense or degree within the scope of his employment or in furtherance of his master's business. Under these facts, we think it is well settled the master cannot be called upon to respond in damages for the injury resulting from such unauthorized act. Puryear v. Thompson, 5 Humph. 397; Cantrell v. Colwell, 3 Head, 472; Deihl v. Ottenville, 14 Lea, 191.

These cases lay down the rule which we think controlling here; but many are to be found where the rule has been applied to acts very similar to those presented in this record. In Driscoll v. Scanlon, 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. E. 100, the facts were that a boy of nine accepted the invitation of a driver of a dump cart, belonging to the defendant, to get upon the cart and take a ride, during which the boy was injured. In an action against the master to recover for the injury, in sustaining the ruling of the trial court that on these facts there could be no recovery, the supreme court said: "It was not within the scope of the employment of the driver of the dump

cart to invite persons to drive upon it for their pleasure,"—citing Bowler v. O'Connell, 162 Mass. 319, 27 L.R.A. 173, 44 Am. St. Rep. 359, 38 N. E. 498, and Powers v. Boston & M. R. Co. 153 Mass. 188, 26 N. E. 446. In Morris v. Brown, 111 N. Y. 318, 7 Am. St. Rep. 751, 18 N. E. 722, it is said: "Where a servant is employed to manage a dump car hauling stone and other material out of a tunnel, he has no authority to assent to a third person riding in such car; and his permitting such person to so ride is not equivalent to an invitation by his master, and . . . cannot make [him] the master answerable for acts or omissions in the management of the car, from which the person so riding is killed or suffers substantial injuries." So, in Cook v. Houston Direct Nav. Co. 76 Tex. 353, 18 Am. St. Rep. 52, 13 S. W. 475, it was held that where a minor child was drowned, through having been invited on the tugboat by the servants of the owner, which act was outside their authority and against orders, no recovery could be had. But, as has already been stated, the main reliance of the defendant in error, in order to maintain the judgment in this case, is in the assumption that the wagon, on account of its peculiar construction, was so dangerously attractive to young children that the duty devolved upon the owner to exercise corresponding diligence to see that no injury resulted to them therefrom, and, failing to do so in the present case, it is liable.

The record disclosed that the plaintiff in error is engaged in the stone business, and that this wagon was constructed for and was adapted to use in that business. Evidently with a view to this use, it was built with a low bed for the easy hoisting of stone into it and of unloading stone from it. Its peculiarity consisted alone in this feature of its construction. It is true, thus built, it was more easily mounted by small children than if its bed had been placed above the axles. But can it be said that this increased facility to children in ascending to the bed made it so dangerous and attractive to children that the owner could not, without the peril of liability for injury to a thoughtless child, received while either mounting to or dismounting from it, send it out in the course of his business with a careful driver, unless he had at the same time one or more reliable guards along to warn such a one away? For it is to be observed that, if the contention of the defendant in error that the owner of this wagon is liable for the killing of Pugh, because he sent this dangerous agency to the place in question, though under the charge of a prudent driver, then it would have been equally liable for a like accident occurring in one of the thoroughfares of Nashville; for on these at all hours of the day it would be conceded that many children are in the habit of passing unattended by persons of sufficient discretion to keep them out of danger.

It is a matter of common observation, which cannot be ignored by the court, that the instinct of a boy impels him to mount, where permitted to do so, and even in the absence of permission, a moving vehicle, whatever its construction or the purpose for which it is used. An ordinary farm wagon, a dump cart, a carriage, or a buggy, equally invites him, yet it would hardly be argued that for an injury occurring like the one in question, and under conditions existing in this case, on one of these vehicles, its owner would be liable. The case of Whirley v. Whiteman, 1 Head, 619, is no authority for the contention of the counsel for the defendant in error. In that case there was dangerous machinery in operation uninclosed and unguarded, with the knowledge of the owner that small children were in the habit of playing in dangerous proximity to it.

Lynch v. Nurdin, 1 Q. B. 29, referred to with approval in Whirley's Case, equally fails to support this contention.

There the facts were that the defendant's servant left the master's horse and cart in a public street unattended while he was visiting in a neighboring house. In the meantime several children engaged in climbing into and out of the cart, and as the plaintiff was getting down from it another boy caused the horse to move, in consequence of which the plaintiff fell and received the injury complained of. Lord Denman, in disposing of the motion for a rule nisi, made by the defendant for a new trial on the ground of misdirection and that the verdict was against the evidence, said that, upon the facts established, the question of negligence was "strictly within the province of a jury:" that "they would naturally inquire whether the horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could have been procured to watch the horse: whether the street was at that hour likely to be clear or thronged with a noisy multitude; especially whether large parties of young children might be reasonably expected to resort to the spot. If this last-mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established.

Leaving a horse and cart in a public street unattended and loose, subject to natural observation and interference from children passing along the street, might be held a proper question for a jury to say whether it was or was not negligence. But the facts of that case furnished no analogy to those of

the present, where the owner has placed his wagon under the direction of a careful driver in the course of his business, and the injury occurs, not in the absence of the driver, but in his presence and as the result of his unauthorized act.

The case of Burke v. Ellis, 105 Tenn. 702, 58 S. W. 855, is relied upon with much confidence as sustaining the present judgment.

In that case it seems the receiver of a railroad was held liable for the injury sustained by a child, who was permitted by those in charge of a car loaded with dirt to climb and ride upon it, and who while so doing fell off and was run over. In the court below the trial judge said to the jury "that if the plaintiff was a child of only six or seven years of age, and was allowed by the receiver and employees to get upon and ride on the car loaded with dirt, and while so riding he fell off and was injured by the car running over him, and this was the proximate cause of the injury, the receiver would be liable." To the criticism made upon this charge it was said by this court, speaking through Wilkes, J., that there was no error in it; the court adding: "It is negligence *per se* to permit a child of such tender years to climb on and ride upon a car loaded with loose earth that is liable to slip and throw the child off at any time. . . . An open car loaded with earth is such an inducement as would naturally lead children into danger, and it was negligence not to keep them away from the cars under such circumstances. There is proof tending to show that the child was not only permitted, but invited, to ride by the railroad employees and with the knowledge of the superintendent."

The authority of this case must be confined within the narrow limits of its own facts, and will not be extended to support a judgment resting on facts like those presented in this record. In Nashville & C. R. Co. v. Starnes, 56 Tenn. 52, 24 Am. Rep. 296, while recognizing the established doctrine of the common law that the master is not liable for the torts of his servant, committed not in the line of the master's service, or with his consent or ratification, yet it was held that a party injured as the result of the wanton blowing by an engineer of his whistle could recover against the railroad company because of the absolute necessity for more stringent care in the protection of life and property against the perils of the steam engine with its capacity for mischief.

In addition, the Burke Case shows that the invitation was extended to the child, whose injuries were there in question, by the railroad employees with the knowledge of the superintendent, who evidently was a superior officer of the company and might well be held *pro hac vice* to be the corporation itself.

The doctrine of an attractive nuisance,—and this, after all, is at the bottom of the contention,—while by no means having its beginning, at least found material support, in the case of Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745. This was the first of what are called "the turntable cases." While this case has been followed by the Supreme Court of the United States in a number of subsequent cases, and by the courts of last resort of several of the states, yet its authority has been partially or absolutely repudiated in others. Among the cases of the latter class are Walsh v. Fitchburg R. Co. 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068; Daniels v. New York & N. E. R. Co. 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 28 N. E. 283; Frost v. Eastern R. Co. 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790.

While the case of Walsh v. Fitchburg R. Co. *supra*, and those following it, are not mentioned in Bates v. Nashville, C. & St. L. R. Co. 90 Tenn. 36, 25 Am. St. Rep. 665, 15 S. W. 1069, yet the effect of the holding of this court in this latter case was to impose very much of a limitation upon the rule announced in the former. That was a case where a boy of nine was injured upon the turntable belonging to the defendant railroad company. His companions took out the bolt used to keep the turntable at rest and set it in motion, when the plaintiff, undertaking to mount it, was injured. There were two trials of the case; the first resulting in a verdict and judgment against the railroad company. There was a reversal in this court upon the ground that the circuit judge failed to charge, as a matter of law, first, "that the defendant was not required to so fasten or secure the turntable that the boys like the injured boy could not displace such fastening and put the table in motion; second, that the defendant was not required to fasten the turntable any more securely than necessary to keep it securely in place." Upon the second trial, while following the direction of this court and giving in charge to the jury the special requests, for the refusal of which the reversal had been had, yet the trial judge, by other paragraphs in his charge, so neutralized their effect that the case was again reversed. In Cooper v. Overton, 102 Tenn. 235, 45 L.R.A. 591, 73 Am. St. Rep. 864, 52 S. W. 183, it is said that the rule of the turntable cases was not applicable to a case involving such facts as were disclosed by the case then in hand, and that "it should not be carried be-

yond the class of cases to which it has been applied."

We think to apply it under such circumstances as are disclosed in this record would be in the face of sound principle and of all well-considered authority. The judgment of the lower court is therefore reversed, and the case is dismissed.

IDAHO SUPREME COURT.

VILLAGE OF SAND POINT, Appt.,
v.
WILLIAM DOYLE, Respt.

(— Idaho, —, 83 Pac. 598.)

Injunction—nuisance—public health.

1. Where the complaint alleges the corporate capacity of plaintiff, and that by some threatened act defendant will create a nuisance, or threatens to, or is about to, commit some act that will endanger the health of the inhabitants of the village or city, or that will result in damage to the property of the city or village, or may be the means of causes of action for damage against the city or village, equity will grant relief.

Complaint—demurrer.

2. Where a complaint states any cause of action that will put the defendant on his defense of the alleged wrongful act, it is not subject to demurrer.

(December 30, 1905.)

APPEAL by plaintiff from a judgment of the District Court for Kootenai County sustaining a demurrer to a complaint filed to enjoin interference with a bridge. Reversed.

The facts are stated in the opinion.

Messrs. **Herman H. Taylor** and **Charles L. Heitman**, for appellant:

The laws place the burden of maintaining and keeping in safe repair all thoroughfares, within their corporate limits, upon cities, towns, and villages.

Rev. Stat. § 2230 subdiv. 16; Genesee v. Latah County, 4 Idaho, 141, 36 Pac. 701; Nelson v. Garfield County, 6 Colo. App. 279, 40 Pac. 474.

Any negligence in this regard by the municipality would render it liable for any damages that might be caused by said negligence.

Topeka v. Hempstead, 58 Kan. 328, 49

Headnotes by STOCKSLAGER, Ch. J.

Case Note.—Injunction against saloon because of character of locality.—There are numerous cases where the question of injunction against the maintenance of saloons has been discussed and decided, and different phases of this subject have been considered in notes to State v. Creeden, 7 L.R.A. 299, and Red Wing v. Guptil, 41 L.R.A. 321. But in most of these cases the conducting of the saloon, or, rather, the sale of liquor, was a crime under the laws of the state; and cases frequently arise in states where there is a statutory provision for injunctions against the maintenance of places where liquor is illegally sold. So, the injunction is frequently sought upon the ground that the saloon, by reason of the manner in which it is conducted, is a nuisance to neighborhood property. But there are comparatively few cases in which the injunction has been sought upon the ground that the character of the locality was such as necessarily to render the maintenance of a saloon therein a nuisance, irrespective of anything improper in the mode of conducting it.

In Haggart v. Stehlin, 137 Ind. 43, 22 L. R.A. 577, 35 N. E. 997, which was an action for damages and for a permanent injunction against the defendant to restrain him from conducting a saloon in a certain locality for which a license had been granted, the court held that a saloon constitutes an actionable nuisance to neighboring property where property is largely depreciated in selling and rental value by reason of the proximity of the saloon, frequented by persons for the purpose of drinking intoxicating liquor therein, when it is established in a residence neighborhood that has been previously free from such business, and which, aside from residences, included little except churches, schools, a female college, and an orphan asylum, and in which the people are largely opposed to saloons. But, as the case came before the court on a demurrer to the complaint, the question as to the injunction was not fully decided; but the trend of the discussion seemed to indicate that the court believed that an injunction should not issue in such a case.

In Northern P. R. Co. v. Whalen, 3 Wash. Terr. 452, 17 Pac. 890, which was an action brought by a railroad company to restrain the board of county commissioners from granting licenses to the defendants for the sale of liquors in certain saloons and gambling houses conducted by said defendants along the lines of the plaintiff's railroad; and also to restrain defendants from selling liquors at such places to the employees of the plaintiff,—the court held that the action would not lie; that the board of county commissioners acted in a quasi judicial capacity, and, if their act were erroneous, the remedy would be by appeal or certiorari; and that, although the liquor sold by defendants to the employees of the plaintiff might render such employees intoxicated and unfit to perform their duties to the plaintiff, the only remedy would be for plaintiff to discharge the employees; and that an injunction would not lie to enforce the terms of such a contract of employment.

Pac. 87; Mischke v. Seattle, 26 Wash. 616, 67 Pac. 357.

The use of a street, highway, or bridge within the corporate limits of the municipality, by an individual simply for his own convenience and accommodation, unaccompanied by public uses, is unauthorized, and essentially a nuisance.

Mischke v. Seattle, *supra;* Wendell v. Troy, 39 Barb. 329.

Equity will enjoin to prevent a multiplicity of suits.

1 Pom. Eq. Jur. §§ 252, 257, 271, 273; Atty. Gen. ex rel. Raleigh v. Hunter, 16 N. C. (1 Dev. Eq.) 12.

Mr. R. E. McFarland, for respondent:

The respondent, being an abutter, is entitled to a way of ingress and egress through streets, and, if the bridge is a street, through the bridge; and has a right to connect with the bridge.

Spencer v. Metropolitan Street R. Co. 120 Mo. 154, 22 L.R.A. 668, 23 S. W. 126; Willamette Iron Works v. Oregon R. & Nav. Co. 26 Or. 224, 29 L.R.A. 88, 46 Am. St. Rep. 620, 37 Pac. 1016; Bannon v. Rohmeiser, 90 Ky. 48, 29 Am. St. Rep. 355, 13 S. W. 444; Brakken v. Minneapolis & St. L. R. Co. 29 Minn. 41, 11 N. W. 124; Haynes v. Thomas, 7 Ind. 38; Heller v. Atchison, T. & S. F. R. Co. 28 Kan. 625; 2 Smith, Modern Law of Mun. Corp. 1214; 1 Am. & Eng. Enc. Law, p. 225.

Equity will not interfere to restrain the commission of a criminal offense.

Horr & B. Mun. Pol. Ord. § 206, p. 186; 1 High, Inj. §§ 20–28; Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; State ex rel. Wood v. Schweickardt, 109 Mo. 496, 19 S. W. 52; Neaf v. Palmer, 103 Ky. 496, 41 L.R.A. 219, 45 S. W. 506; Planet Property & Financial Co. v. St. Louis, O. H. & C. R. Co. 115 Mo. 613, 22 S. W. 616.

Stockslager, Ch. J., delivered the opinion of the court:

Plaintiff filed its complaint alleging that it is a corporation. It is shown a stream known as Sand creek runs through the village of Sand Point, and that there is a bridge across said stream connecting the streets at either end of the village. This bridge, it is alleged, is 450 feet long, 16 feet wide, inclusive, and 14½ feet in width within the railing, and from 15 to 20 feet high. It is built of wood, and is a principal highway connecting the east and west side of said creek. It was constructed by Kootenai county years ago, and has along its entire length on both sides substantial wooden railings necessary for the safety of the traveling public. It is alleged that it is necessary that such railings should remain intact and in sound condition; that large numbers of women and children residing in said municipal corporation cross this bridge daily; that the street at each end of this bridge is 50 feet wide, and has been dedicated to the public and accepted by the municipal corporation; that the chairman and board of trustees of said municipal corporation did on or about March 2, 1903, enact an ordinance prohibiting the sale of intoxicating liquors within a distance of 100 feet on the north and south sides of said bridge. This ordinance was published and took effect April 10, 1903, and has never been repealed. The ordinance prohibits the sale of ardent, distilled, fermented, or liquors of any character within the prescribed limits. It is next shown that respondent claims to be the owner of land situated within the ravine through which said stream flows within the corporate limits of appellant, which lot of land touches the right of way upon which said bridge is situated, on the north, 110 feet from the west end of said bridge, and that respondent has constructed a wooden frame building on said lot, and is building a platform or bridge from said building over and upon the right of way crossed by said bridge with the intention of connecting said wooden building by said bridge or platform with the floor of said bridge, and that he threatens to tear down and remove the railing upon said public bridge at a point where said platform is extended to connect with the floor of said public bridge, in order to use said public bridge as an outlet from said building; that defendant intends to use said building as a saloon for the purpose of retailing intoxicating liquors to the public therein in violation of the provisions of the municipal ordinance before mentioned; that defendant's said building is from 17 to 20 feet from the railing of said public bridge on the north side; that, if defendant is allowed to connect said building with the floor of said public bridge, and remove the railing therefrom, in order to give him an outlet upon said bridge, by reason of the removal of said railing said bridge will become unsafe and insecure for the traveling public and for teams and vehicles; that, if defendant is allowed to conduct a saloon in said building, that portion of the public bridge in front of his saloon will become a loitering place for drunken and idle men, and will be annoying as well as unsafe for the public, especially women and children, to cross the public bridge at said point; that said bridge was erected at considerable cost, and is the principal highway across said creek for the public; that a wooden building will jeopardize the existence of said bridge by reason of probable danger from fire from

respondent's wooden building; that plaintiff, prior to the commencement of the construction of said wooden building by defendant, notified defendant that he would not be allowed to construct or maintain a building for saloon purposes, or for any other purpose, along the line of said bridge, but that defendant disregarded said notice and persisted in constructing said building, and still persists in connecting said building with the public bridge, with the intention of using his building for saloon purposes; that said building used as a saloon, with ingress and egress to and from said public bridge, will be a nuisance, especially to the women and children who are daily compelled to pass over said bridge; that on or about July 1, 1903, defendant opened said building and moved a stock of intoxicating liquors therein, and for several days thereafter openly violated said ordinance by retailing intoxicating liquors to the public; that on July 3, 1903, a complaint sworn to and filed was issued by a justice of the peace for said precinct and county charging defendant with violation of said ordinance, and thereupon a warrant of arrest was issued upon said complaint, and defendant pleaded guilty to the charge, and was sentenced to pay a fine of $100, or be imprisoned in the village jail for the term of fifty days; that thereafter said fine was paid by defendant; that appellant has no adequate remedy at law, and that to allow respondent to maintain a saloon in said building will inflict irreparable injury upon the public, and that it will result in the establishment and maintenance of a nuisance, besides violating the local laws of said municipal corporation, and jeopardize the safety of said bridge. This statement is taken from appellant's brief, and is conceded by counsel for respondent to be in the main correct. We think it correctly states the issue presented by appellant's complaint.

To this complaint a demurrer was interposed as follows: "(a) That said complaint does not state facts sufficient to constitute a cause of action in this: (1) That said complaint lacks equity; (2) that it appears from the facts stated therein, and shows on the face of the complaint, that complainant has a complete, speedy, and adequate remedy at law for all the acts complained of, and for all the threatened or apprehended acts complained of; (3) that it appears from said complaint that any injuries which may result from any act alleged to be threatened by defendant or apprehended by plaintiff are mere possibilities, and exist only in imagination; (4) that the injuries alleged to be threatened or apprehended are too remote to justify any relief by injunction; (5) that an injunction granted under the circumstances set forth in said complaint would deprive defendant of his property without due process of law, and without compensation; (6) that said injunction would deprive defendant of his legal right to the reasonable and proper use of a public highway. (b) That the complaint herein is ambiguous, unintelligible, and uncertain in this; (7) That the said complaint does not show how the cutting of the rail mentioned in said complaint would in any way weaken or impair the bridge therein mentioned, or how the building of defendant would endanger said bridge from fire in any way, or any more than any other lawfully constructed building of similar character in the vicinity of said bridge, or how it would increase the travel on said bridge any more than if constructed at either end thereof."

On the 17th day of April, 1905, the demurrer having theretofore been submitted to the court, a judgment was entered first finding "that the said amended complaint does not state facts sufficient to constitute a cause of action or a cause of suit, and that the plaintiff has an adequate remedy at law;" and judgment for respondent for his costs. It will only be necessary for us to ascertain whether a court of equity can grant appellant any of the relief prayed for in his complaint as shown by the record. If so, then the demurrer should not have been sustained. That municipalities of the character of appellant are given very large power in the control and management of their affairs is not and could not be disputed. They have the right to regulate and control the sale of liquors; to say where and under what conditions liquors may be sold within their corporate limits; to prescribe certain districts wherein buildings dangerous to the welfare of the people shall not be erected; to prohibit the conducting of any business dangerous to the morals and good order of the people of the municipality. The complaint must be taken as true in all its allegations. The demurrer admits this fact, but by its averments says that there is not enough stated in the complaint to warrant a court of equity to grant any relief: (1) That a cause of action is not stated; and (2) that appellant has a plain, speedy, and adequate remedy at law; and it is so found by the court. If we find that the village of Sand Point has full power and control over its streets, alleys, and bridges, and the right to declare by ordinance how and where certain classes of business shall be conducted, then appellant has the right to declare by ordinance that a saloon business shall not be conducted within 100 feet of either the north or south side of the bridge crossing Sand creek. Again, if the city is responsible in damages (and like-

ly it is) for any accident that may occur on said bridge by reason of any defect in its construction or maintenance, then it becomes the duty of the village authorities to guard carefully the safety of the people who travel over and across this part of the highway. This being true, we think the village authorities have the power to permit or reject the application of anyone to construct any kind of a building connecting with this bridge. If it is by them considered dangerous to the traveling public, offensive to any class of people who may have occasion to pass over the bridge, or if it will in any manner weaken or reduce the safety of the bridge, then they may prohibit its construction.

It is urged by counsel for appellant that women and children pass and repass over and across this bridge; that, if respondent is permitted to conduct a saloon in his building, it will be offensive to women and children who have occasion to pass back and forth across the bridge; that drunken men will congregate in front of said building and consequently on or near the bridge, and thus create a nuisance. Counsel for respondent meets this argument by the statement in his brief that "it is a notorious fact that in every city and village in the state saloons open upon the sidewalks and pavements; and yet it is not anywhere claimed that the sidewalks or streets immediately in front of such saloons are loitering places for 'drunken and idle men.'" This statement does not quite meet the issues. It is shown that the streets at either end of this bridge and connecting therewith are 50 feet wide, whilst the bridge is only 14½ feet wide in the clear. Again, if women and children are passing along any of the streets of the village where a saloon is being conducted, if "idle and drunken men" are congregated in front thereof, they may pass to the opposite side of the street, or pursue their way on another street. In other words, they are not compelled to pass within the narrow limits of 14½ feet. This alone may not be sufficient to warrant a court of equity to grant relief by injunction; but it is certainly apparent that there is much more reason for the village authorities to prohibit the sale of intoxicating liquors in a building with its only outlet connected with the bridge, than there is to allow saloons to be conducted on the streets that have back entrances through which intoxicated persons may pass without encountering persons to whom they would be obnoxious, or the opposite side of the street, or other streets on which people may travel, and thus avoid close proximity with such persons.

Counsel for respondent insists that Kootenai county, and not the village of Sand Point, has the care, supervision, and control of the bridge in question under the provisions of § 81, p. 208, Sess. Laws 1899. This section provides: "The city council or board of trustees shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and commons within the city or village; and shall cause the same to be kept open and in repair and free from nuisance. . . . All public bridges exceeding 60 feet in length, over any stream crossing a state or county highway, shall be constructed and kept in repair by the county." This act was approved February 10, 1899. In an act passed on the 14th day of February, 1899 (at page 270 of the same Session Laws), we find the following provision: "Each incorporated city, town, or village in this state constitutes a separate road district under this title, and the city council of each city and the board of trustees of each town or village, as far as relates to their city, town, or village, have the powers conferred, and must perform the duties imposed, upon the board of county commissioners of their respective counties by this chapter. Each city council and board of trustees must appoint a road overseer who must, within such city, town, or village have the powers conferred, and perform the duties imposed by this chapter. . . . " Subdivisions 27, 28, and 29 of § 73, p. 205, Acts 1899, authorize and empower cities and villages to "prevent and remove all encroachments into and upon all sidewalks, streets, avenues, and alleys," and to "open, widen, or otherwise improve any street, avenue, lane, or alley," and to "create, open, and improve new streets," etc. All of the above provisions were construed by this court in the case of Carson v. Genesee, 9 Idaho, 244, 74 Pac. 862. After reviewing the authorities and the various legislative acts pertaining to the organization of cities, towns, and villages, the powers, duties, and responsibilities thereof, Mr. Justice Ailshie said: "It will be seen from the foregoing that the power of cities and villages in this state over the streets is exclusive and unlimited, and the question therefore arises: Are their express or implied duties to the public and the individual commensurate with the powers granted them? It is conceded that there is no express statute in this state making municipal corporations liable in damages for negligence. The only remaining question is, Can such liability be said to be implied?" After collecting and discussing a great many authorities bearing on this question, the opinion concludes thus: "It had all the authority requisite to have kept its streets in repair, and thereby avoid the liability to which it now finds itself subjected." The above case

was an action for damages resulting from an injury received on one of the streets of the village of Genesee by reason of a defective sidewalk.

In this case it is not disputed that the bridge connecting the two streets of said Sand Point is a part of the public thoroughfare, and is within the corporate limits of said village; hence, with the same construction given our laws governing cities and villages as is shown in Carson v. Genesee, we must conclude that the village of Sand Point has complete and exclusive control over the bridge crossing Sand creek with the duty imposed upon it by law of keeping it in repair and at all times safe and convenient for the accommodation of the traveling public. Since we have reached this conclusion, the question arises as to who would be liable for any damage or injury resulting from an accident caused by the erection of the building of respondent in close proximity to said bridge and connecting therewith by a platform. In our view of the law, the village is responsible for the condition of this bridge and any and every thing connected therewith. In case an injury should occur to anyone resulting from an accident occasioned by the construction of the platform connecting with the bridge, if it could be shown that the accident occurred on the right of way or street of appellant, under our holding in Carson v. Genesee, the city could be made to respond in damages; and we have no disposition to change the construction given our laws governing the questions involved in that case and this.

We think the demurrer should have been overruled. The judgment is reversed, and cause remanded to the lower court, for such further proceedings as is consistent with this opinion. Costs awarded to appellant.

Ailshie and Sullivan, JJ., concur.

IOWA SUPREME COURT.

RE ESTATE OF CHARLES F. COE, Deceased.

GEORGE W. COE, Admr., etc., of Charles F. Coe, Deceased, et al.,
v.
M. C. WAINWRIGHT, Guardian, etc., of Reuben Coe et al., Appts.

(— Iowa, —, 106 N. W. 743.)

Wrongful death—distribution of fund—conflict of laws.

The statute of the state where the accident occurs, and not of that of decedent's domicil, governs the distribution of a fund collected without suit, for the wrongful killing of a person.

(April 3, 1906.)

APPEAL by defendants from a judgment of the District Court for Harrison County in favor of claimant in a proceeding to establish title to money which had been paid for the negligent killing of Charles F. Coe. Affirmed.

Statement by **Sherwin, J.:**

Charles F. Coe, a resident of this state, was killed in a railway accident in the state of Illinois. Geo. W. Coe was duly appointed administrator of his estate in Harrison county, Iowa, and, as such administrator, he received from the railway company a certain sum as damages for causing the death of his intestate. This sum was paid in settlement of his claim against the company and without suit. The deceased left a widow, Jennie E. Coe, but no issue, and she claims the full amount secured by the administrator, as provided by the statute of Illinois. The defendants, Reuben Coe and Susan Coe, are the parents of the deceased, and claim that the fund is to be disposed of under the statute of this state, and that they are entitled to one-half of it. There was a judgment sustaining the plaintiffs' claim, and the defendants appeal.

Messrs. **Cochran & Egan,** for appellants:

Under the laws of Iowa the fund was assets of the estate, subject to distribution the same as any other personal property.

Re Cook, 126 Iowa, 158, 101 N. W. 747; Romano v. Capital City Brick & Pipe Co. 125 Iowa, 591, 68 L.R.A. 132, 106 Am. St. Rep. 323, 101 N. W. 440; Morris v. Chicago, R. I. & P. R. Co. 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 143.

Messrs. **John W. Jacobs** and **Rodifer & Arthur** for appellees.

Sherwin, J., delivered the opinion of the court:

There is but one question for determination, namely, To whom does this money belong? The statute of Illinois, under which claim was made for damages for the death of Coe. is as follows:

"Par. 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the

Case Note.—Law governing distribution of fund collected or recovered for negligent killing of a person.—It is well settled that the fund recovered in a statutory action for the negligent killing of a person is to be distributed to the persons entitled to it ac-

person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Par. 2. Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin, of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of $5,000; provided, that every such action

cording to the statute of the place where the cause of action arose, *i. e.*, the place where the accident causing the injury occurred, rather than to the persons who would be entitled according to the statute of the forum. Denver & R. G. R. Co. v. Warring (Colo.) 86 Pac. 305; Weaver v. Baltimore & O. R. Co. 21 D. C. 499; McDonald v. McDonald, 96 Ky. 209, 49 Am. St. Rep. 289, 28 S. W. 482; Stoeckman v. Terre Haute & I. R. Co. 15 Mo. App. 503; Nelson v. Chesapeake & O. R. Co. 88 Va. 971, 15 L.R.A. 583, 14 S. E. 838; Leman v. Baltimore & O. R. Co. 128 Fed. 191. This rule is also impliedly recognized by the United States Supreme Court in Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439. It is but a specific application of the general principle that the statute of the state in which the cause of action for death arises governs with respect to all matters of substance as distinguished from matters that relate to the remedy. See 2 Parmele's Wharton, Confl. L. § 480d.

So, the law of the state where the cause of action arose, assuming that the statute creates a new cause of action and does not merely keep alive a cause of action originally arising in favor of the deceased, prevails over the law of the deceased's domicil with respect to the distribution of the fund.

Thus, in Strong v. New York, L. E. & W. R. Co. 86 Hun, 390, 33 N. Y. Supp. 502, it was held that a fund received by an administrator appointed in New York, in settlement of a claim for damages on account of the negligent killing of his intestate in Ohio, should be distributed according to the law of Ohio, rather than that of Michigan, where the deceased was domiciled, or of New York, where the action was brought.

In Taylor v. Pennsylvania Co. 78 Ky. 348, 39 Am. Rep. 244, the court, in arguing against the right of an administrator appointed in Kentucky to maintain an action in that state under a statute of Indiana, said that, if he could recover he would hold the sum recovered subject to be disposed of under the laws of Kentucky; but a different view was taken in McDonald v. McDonald, *supra*, where the action was brought by the Kentucky administrator, though, as a matter of fact, the distribution would have been the same whether governed by the statute of Kentucky or by the statute of Illinois, where the cause of action arose.

The rule on this point as applied in RE COE is approved in a later case in the same court (Re Williams [Iowa] 107 N. W. 608). According to the statute of Iowa, however, the fund recovered in an action for death is to be treated as a part of the estate, and distributed to the heirs and next of kin, exempt from the debts of the deceased; and it was held in that case that such exemption would protect the fund after it had been brought into Iowa by the person entitled thereto under the law of the other state.

The general rule that the statute of the state where the cause of action arises governs in this respect is also recognized in Hartley v. Hartley (Kan.) 81 Pac. 505; but, it appearing in that case that by the statute of Iowa, where the cause of action arose, the damages are to be disposed of as personal property belonging to the estate of the deceased, it was held that, the fund having been collected by an administrator appointed in Kansas, the domicil of the deceased, it should be distributed according to the law of Kansas governing the distribution of an intestate's personalty, under the general principle that the distribution of such estate is governed by the law of the decedent's domicil. The court, in support of its decision, said that the statute of Iowa is unambiguous; that it clearly places damages recovered on account of death occasioned by wrongful act in the category of ordinary personal property belonging to the estate of the deceased; that the statute of descent and distribution of that state has no application to personal property belonging to the estate of a deceased nonresident; and therefore the fund in controversy is to be distributed according to the law of the domicil of the deceased. In other words, the rationale of this decision is that the statute of Iowa creating the liability is to be looked to in distributing the fund, but that, when looked to, it is found to refer the subject back to the law of the decedent's domicil by virtue of the general principle that the distribution of the personal property of a decedent's estate is governed by the law of his domicil. It is clear that, if the Iowa statute creating the cause of action had undertaken to designate the persons entitled to the fund, instead of merely making the fund a part of the personal estate and distributable as such, the court would have held that the fund should have been distributed according to that statute, and not according to the law of the deceased's domicil.

shall be commenced within two years after the death of such person."

Hurd's Rev. Stat. 1903, chap. 70.

The Illinois statute also provides that, if the husband die without issue, leaving a widow, the whole of his personal estate shall descend to her.

The right to recover in cases of this kind depends solely on the statute of the state where the wrongful act is committed. Hyde v. Wabash, St. L. & P. R. Co. 61 Iowa, 441, 47 Am. Rep. 820, 16 N. W. 351. And, while actions to recover damages for the death of a person are quite uniformly held to be transitory, it is nevertheless the general rule that, when the statute creating the liability limits recovery to certain persons, only the designated persons have any right to, or interest in, the amount recovered; and that a recovery in a jurisdiction, other than where the liability arises, will not justify a distribution of the fund not in accordance with the statute creating the right. This we conceive to be the sound rule. The liability being created solely by the statute, it is clear that it may also limit the beneficiaries thereunder; and, when it does so, it is equally as clear that the wrongdoer cannot be made to contribute to others, and that no one else has or can have any property interest in, or right to, the amount recovered, or any part thereof. Under the statute of Illinois, the railway company was not liable to the decedent's estate. It was only liable to his widow or next of kin, and then the damage paid is to be distributed as personal estate of the intestate, the whole of which, under the Illinois law, goes to the widow, if there be no issue.

The precise question under consideration has not heretofore been directly determined by this court, but the rule here announced finds support in the reasoning in the cases of Morris v. Chicago, R. I. & P. R. Co. 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 143, and Hyde v. Wabash, St. L. & P. R. Co. *supra*. In the latter, an action was brought in this state to recover for the death of the plaintiff's intestate, who was killed by the defendant, in Missouri. The wrongful act having been done in that state, and the plaintiff not pleading or proving a statute thereof creating liability, we held there could be no recovery under the statute of Iowa. In discussing the question, it is said: "Again, if the cause of action survives, it must survive to some person or persons. A cause of action which survives only by statute must survive to the person or persons designated by statute." It is further said therein that, if the cause of action survived to particular persons, it could not be held to have survived to the personal representative. The reasoning of the Hyde Case fully supports our conclusion here. All of the cases in other jurisdictions, deciding the point, to which our attention has been directed, support the appellee's contention. In Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439, the plaintiff brought her suit, in New York, to recover damages for the death of her husband by an accident on the defendant's railroad, in New Jersey. The statute of the latter state permitted a recovery for the benefit of the widow and next of kin, and, in answer to the contention that the administrator could only administer that which was of the estate of the deceased in his lifetime, Mr. Justice Miller said: "The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that, when the money recovered in such an action as this came to the hands of the administratrix, our courts could not compel distribution as the law directs." The question is decided in accordance herewith in the following cases: McDonald v. McDonald, 96 Ky. 209, 49 Am. St. Rep. 289, 28 S. W. 482; Hanna v. Grand Trunk R. Co. 41 Ill. App. 116; Florida C. & P. R. Co. v. Sullivan, 61 L.R.A. 410, 57 C. C. A. 167, 120 Fed. 799; Re Degarmo, 86 Hun, 390, 33 N. Y. Supp. 502; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105. Re Cook, 126 Iowa, 159, 101 N. W. 747, and Romano v. Capital City Brick & Pipe Co. 125 Iowa, 600, 68 L.R.A. 132, 106 Am. St. Rep. 323, 101 N. W. 437, do not discuss or decide this question, and are not in conflict with our conclusion.

The judgment is right, and it is affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

WILLIAM F. GRILLEY
v.
HOMER L. ATKINS, Appt.

(78 Conn. 380, 62 Atl. 337.)

Deed—escrow—passing title.

1. A deed delivered to a stranger with the intent to pass title to the grantee, with directions to deliver it to him at the grant-

Case Note.—Right of grantor to revoke deed delivered to stranger, to be delivered by him to grantee after grantor's death.—Assuming the existence of the requisites essential to uphold the delivery of a deed in this mode, in the absence of any attempt by the grantor during his lifetime to revoke the same, it follows as a necessary corollary that no such attempt can operate to defeat the delivery, since, as shown in the above

or's death, upon the second delivery relates back and passes the title as of the date of the first delivery.

Same—absence of consideration—revocation.

2. Absence of consideration for a deed delivered to a stranger, to be delivered to the grantee at the grantor's death, will not entitle the grantor to revoke the grant if it was accepted and complete before the attempted revocation.

(December 15, 1905.)

APPEAL by defendant from a judgment of the Superior Court for New Haven County in favor of complainant in a suit to cancel a deed. Affirmed.

The facts are stated in the opinion.

Mr. **Edward F. Cole**, for appellant:

A retention of control of the title is inconsistent with the validity of a deed held in custody.

Naldred v. Gilham, 1 P. Wms. 577; Unacke v. Giles, 2 Molloy, 257; Cecil v. Butcher, 2 Jac. & W. 565; Gilmore v. Whitesides, Dud. Eq. 14, 31 Am. Dec. 563; Taft v. Taft, 59 Mich. 185, 60 Am. Rep. 295, 26 N. W. 426.

The deed was held in escrow by Pierce as agent of the grantee. As the grantee's agent he could not hold this deed in escrow.

Co. Litt. 35a; Shep. Touch. 59; Darling v. Butler, 10 L.R.A. 472, 45 Fed. 332; Hubbard v. Greeley, 84 Me. 344, 17 L.R.A. 511, 24 Atl. 799.

Nor could the deed be delivered in escrow to Pierce as the attorney of the grantor.

Day v. Lacasse, 85 Me. 244, 27 Atl. 124; Porter v. Woodhouse, 59 Conn. 574, 13 L.R.A. 64, 21 Am. St. Rep. 131, 22 Atl. 299.

Not having devested herself of the title, Mrs. Atkins retained the right to convey.

Hoig v. Adrian College, 83 Ill. 267; Hale v. Joslin, 134 Mass. 310; Porter v. Woodhouse, *supra;* Welborn v. Weaver, 17 Ga. 267, 63 Am. Dec. 235; Jones v. Jones, 6 Conn. 113, 16 Am. Dec. 35.

Mr. **Charles G. Root**, for appellee:

A valid delivery may be made by delivering the deed to a third person for the grantee, with directions to deliver the deed to

opinion, and in many other cases to the same effect cited in the note to Monro v. Bowles, 54 L.R.A. 871, it is essential, in order to make this mode of delivery effective, even after the death of the grantor without having attempted to revoke the deed, that he shall have parted with all dominion and control over the same at the time of its delivery to the third person. The correctness of this conclusion, conceding the validity of the premise, is tentatively recognized in Cole v. Cole (Mich.) 108 N. W. 101, though it was held in that case that the grantor had the right to recall and destroy the deed because it was understood between the grantor and the depositary that the former might at any time withdraw it.

The cases cited in the foregoing opinion, and other cases specifically denying the right of the grantor to revoke the deed, assuming the existence of the conditions essential to a perfected delivery if the grantor had died without any attempt to revoke, are cited at page 903 of the note already referred to.

The case of Ranken v. Donovan, 46 App. Div. 225, 61 N. Y. Supp. 542 (Affirmed in 166 N. Y. 626, 60 N. E. 1119), is to the same effect.

In Foreman v. Archer (Iowa) 106 N. W. 372, in was said that a deed placed by the grantor in the hands of a third person with unconditional instructions to deliver to the grantee upon the death of the grantor, and without any reservation in the grantor of the right to revoke or recall the instrument during his lifetime, operates to vest the grantee with a present interest in the land, which the grantor cannot thereafter recall or destroy by the simple expedient of retaking possession of the deed. As pointed out at page 873 of the note above referred to, a few cases have denied the necessity of the grantor's parting with all control and dominion over the deed, and hold that, notwithstanding the reservation by the grantor at the time of the delivery to the third person of a right to control or recall the deed, the delivery will nevertheless be effectual if such right is not exercised by the grantor during his lifetime. See Lippold v. Lippold, 112 Iowa, 134, 84 Am. St. Rep. 331, 83 N. W. 809, and other cases cited in the note. These cases, of course, involve the proposition that the grantor may revoke the deed during his lifetime notwithstanding that, in the absence of any attempt to revoke, the delivery would be effectual. But, as pointed out at page 872 of that note, these cases are opposed to the very great weight of authority.

Doubtless even in those states which adhere to the weight of authority upon the strict legal proposition, the practical question whether or not the deed will operate to convey the property to the grantee may depend to a considerable extent upon the question whether or not the grantor attempted to revoke it during his lifetime,—especially if the grantee was not aware of the delivery to the third person; since the actual withdrawal of the deed by the grantor from the third person may destroy the evidence of compliance with the conditions essential to a delivery in this mode, even if it does not negative the existence of the original intention on the part of the grantor to part with all dominion and control over the deed, essential to make this mode of delivery effective. This practical possibility, however, does not affect the legal proposition that an attempt to revoke will be inoperative, assuming the existence of the conditions essential to perfect the delivery in the absence of any attempt to revoke.

the grantee upon the grantor's death, if the grantor parts with all dominion and control over the deed at the time of its delivery to the third person.

Couch v. Meeker, 2 Conn. 302, 7 Am. Dec. 274; Stewart v. Stewart, 5 Conn. 317; Alsop v. Swathel, 7 Conn. 503; Woodward v. Camp, 22 Conn. 461; Porter v. Woodhouse, 59 Conn. 574, 13 L.R.A. 64, 21 Am. St. Rep. 131, 22 Atl. 299; Munro v. Bowles, 187 Ill. 346, 54 L.R.A. 910, 58 N. E. 331.

Torrance, Ch. J., delivered the opinion of the court:

The plaintiff and the defendant are half-brothers, sons of the same mother, Eunice A. Atkins. She died in September, 1899, aged eighty-six years. The dispute between the brothers relates to the ownership of land lying in the town of Waterbury, and described in the first paragraph of the complaint. The plaintiff claims the land under a deed from his mother made in April, 1898, hereinafter for brevity called "deed A," while the defendant claims it, or a portion of it, under a deed from her made in June, 1899, hereinafter called "deed B." The controlling facts in the case are, in substance, as follows:

On April 14, 1898, Mrs. Atkins, accompanied by the plaintiff, went to the office of Wilson H. Pierce, Esquire, a practising attorney in Waterbury, and Mrs. Atkins then requested him to draw a deed, to be executed by her, conveying to the plaintiff, subject to her life use, a certain piece of land situated in Waterbury, with a dwelling house thereon, described in the first paragraph of the complaint. Pierce drew said deed, and the same was then and there duly executed by Mrs. Atkins; and thereupon, at her request and by her direction, he placed said deed in an envelope and sealed it up. The deed in said envelope was then delivered to Pierce by Mrs. Atkins, with instruction to keep and hold the same as an escrow, and to deliver the same upon her death to the plaintiff; and at the request of Mrs. Atkins Pierce then and there wrote the following words upon said envelope: "I hereby place the within deed as an escrow in the hands of Wilson H. Pierce, my attorney, to deliver the said deed upon my death to my son William F. Grilley, of Waterbury, or his heirs, to be recorded." Mrs. Atkins then placed her name and seal on said envelope under the said words, as follows: "Eunice Atkins, [L. S.]",—and Pierce then wrote upon said envelope: "April 14, 1898. Deed in my hands as an escrow, to be delivered to William F. Grilley, of Waterbury, upon the death of Eunice A. Atkins, W. H. P." Pierce had never before this time, and never thereafter, acted as the attorney of Mrs. Atkins. All that Pierce did for Mrs. Atkins on this occasion was to draw the deed and take the acknowledgment, make the indorsement upon the envelope, and place the same in his safe. At the time of the delivery of said deed to Pierce there was no intent upon the part of Mrs. Atkins to keep control of said deed, and she never in fact kept or retained control of the same. The delivery to Pierce was made by Mrs. Atkins with the intention that it should be a delivery in escrow. Said deed was left with Pierce with the knowledge and consent of the plaintiff. On or about February 20, 1899, Mrs. Atkins went to Pierce's office and demanded of him said deed left by her with him April 14, 1898, but he refused to give it to her upon the ground that he had no legal right to do so without the consent of the grantee therein. On June 29, 1899, Mrs. Atkins, accompanied by the defendant, went to an attorney in Waterbury, who drew up a deed which was duly executed by Mrs. Atkins, and which purported to convey to the defendant certain lands, including the house and a portion of the lot described in paragraph 1 of the complaint. Neither of said deeds was given upon a valuable consideration.

Mrs. Atkins died at Wolcott early in the morning of September 29, 1899. In the forenoon of said day the plaintiff and defendant were at the home of the defendant where Mrs. Atkins lay dead, and the defendant pretended to the plaintiff that he was going to Bristol, leaving the plaintiff to come to Waterbury to make some arrangements for the funeral. The plaintiff came to Waterbury, and, after making some arrangements for the funeral, went to the office of Pierce about 3:30 P. M. on said day, demanded and received from him the deed left in escrow, and took the same to the office of the town clerk of the town of Waterbury, where he left it to be recorded at 3:30 P. M., and the same was duly recorded. Instead of going to Bristol, the defendant on said day came to Waterbury and left at the town clerk's office for record said deed of June 29th, at 3:15 P. M. The defendant, before June 29, 1899, knew of the existence of said deed left in escrow, and knew that it was to be delivered to the plaintiff upon the death of Mrs. Atkins. The plaintiff had no knowledge of the defendant's deed of June 29th until after said September 29th. When Pierce delivered said deed left in escrow to the plaintiff, he wrote on the envelope containing the deed: "Received the within deed this 29th day of September, 1899, 3:30 P. M."

Upon these facts the trial court set aside deed B, and ordered the defendant to execute and deliver to the plaintiff a release deed of the land described in deed A; and

this appeal is based upon alleged errors made by the court in so doing.

Where a deed is placed in the hands of a depositary for conditional future delivery to the grantee, a distinction has by some courts been recognized between cases where the future delivery depends upon the performance of some condition, and those where it depends upon the death of the grantor. In the former case the deed does not become operative until rightfully delivered by the depositary to the grantee, while in the latter, upon delivery to the depositary, it is deemed to be the grantor's deed presently, taking effect for many, if not for most, purposes, from the time of its delivery to the depositary. The deed in either of these cases is usually called an "escrow," but perhaps more frequently and more properly that word is used to designate the deed in the former, rather than in the latter, case. In Foster v. Mansfield, 3 Met. 412, 37 Am. Dec. 154, Chief Justice Shaw states the distinction in this way: "Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to wait the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed until the second delivery; but when thus delivered it will take effect by relation from the first delivery." This distinction between a deed placed in the hands of a depositary to be "delivered" by him upon the performance of some condition, and a deed "delivered" to the depositary to be by him handed over to the grantee at the death of the grantor, is recognized quite generally throughout the United States (2 Am. & Eng. Enc. Law, p. 342; 16 Cyc. Law & Proc. p. 566, and cases there cited); but the courts are not agreed either as to the complete effect to be given to the "delivery" to the depositary, or as to the time when the title passes to the grantee. Some courts seem to hold that for many purposes the deed becomes operative and title passes when the deed is delivered to the depositary; others, that it does not become operative until the death of the grantor, and then by relation takes effect from the "delivery" to the depositary; while still others seem to hold that the "delivery" to the depositary conveys title immediately to the grantee, subject to the life interest of the grantor. Foster v. Mansfield, 3 Met. 412, 37 Am. Dec. 154; Hathaway v. Payne, 34 N. Y. 92; Haeg v. Haeg, 53 Minn. 33, 55 N. W. 1114; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; Baker v. Baker, 159 Ill. 394, 42 N. E. 867; Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 532, 66 N. W. 439; Arnegaard v Arnegaard, 7 N. D. 475, 41 L.R.A. 258, 75 N. W. 797.

To a certain extent such a distinction is recognized in our own reports. In Belden v. Carter, 4 Day, 66, 4 Am. Dec. 185, the deeds were left with a third party with directions to keep them, and, if the grantor never called for them, to deliver them after the grantor's death to the grantees, but, if the grantor called for the deeds, to deliver them to him. The grantor died without recalling the deeds. It was held that the delivery to the third person was a delivery of the grantor's deeds presently; that the depositary held them in trust for the grantees; that the title became consummate in the grantees upon the death of the grantor; and that the deeds took effect by relation from the time of the first delivery. The placing of the deeds with the depositary was held to be a delivery of the grantor's deed presently, although the grantor during his life retained full control of the deeds and could recall them at pleasure. The ruling upon this last point in the above case is opposed to the overwhelming weight of authority (see note to the case of Munro v. Bowles, 54 L.R.A. 872, and cases there cited), and it would not probably be followed in this state to-day. Porter v. Woodhouse, 59 Conn. 568, 13 L.R.A. 64, 21 Am. St. Rep. 131, 22 Atl. 299. In Stewart v. Stewart, 5 Conn. 316, James Stewart made a deed of land to his children, and delivered it to a third party to hold till the grantor's death and then to deliver to the grantees. After his death the deed was duly delivered to the grantees. It was held, following Belden v. Carter, that the deed, when placed in the depositary's hands, was the grantor's deed presently, consummate upon his death, and "efficacious to the passing of the interest conveyed, from the delivery of the deed to the trustee or agent." The instrument was held not to be a devise, "but a deed taking effect from the first and only delivery, and consummated by the death of the grantor." In Jones v. Jones, 6 Conn. 111, 113, 16 Am. Dec. 35, Chief Justice Hosmer says, in effect, that the delivery of a deed to a third party to the use of the grantees, to be delivered to them after the death of the grantor, is by legal operation a delivery to the grantees themselves; and, although this was an *obiter dictum*, it is worthy of note "as the opinion of an eminent judge." Waite, J., in Woodward v. Camp, 22 Conn. 458, 461. In the last-named case a married woman united with her husband in the execution of a deed of land, and gave it to her husband with directions to deliver it to the grantee at her death. It was held, in effect, that the delivery to the husband was a delivery *in præsenti*, vesting the title in the

grantee, to become effectual and consummated upon the death of the grantor. On the other hand, in the cases cited below, the deeds and other instruments delivered to third parties for future conditional delivery were held to be escrows, having no operative force until the second delivery. Wolcott v. Coleman, 1 Conn. 375; Huntington v. Smith, 4 Conn. 235; Turner v. Coe, 5 Conn. 94; Sparrow v. Smith, 5 Conn. 113; Raymond v. Smith, 5 Conn. 555; White v. Bailey, 14 Conn. 271.

Whether in a given case the delivery of a deed to a third party, to be delivered by him to the grantee after the grantor's death, is to be deemed a delivery *in præsenti* or not, is generally a question of fact depending upon the conduct and intention of the parties to such a transaction. Two of the essential features of such a delivery are these: (1) The grantor must deliver the deed to a third person for the benefit of the grantee ultimately, and in some way express his intention to that effect; and (2) by the very great weight of authority the grantor must, at the time of such delivery to the third person, part both with the possession of the deed and with all dominion and control over it. See the cases cited to this effect in the note to the case of Munro v. Bowles, 54 L. R.A. 871, 872; Porter v. Woodhouse, *supra*. A delivery so made and accepted by the grantee is irrevocable by the grantor, and cannot by him be recalled, or revoked, or modified, without the consent of the grantee. Arnegaard v. Arnegaard, 7 N. D. 475, 41 L.R.A. 258, 75 N. W. 797; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; Issitt v. Dewey, 47 Neb. 196, 66 N. W. 288; Everett v. Everett, 48 N. Y. 218; 16 Cyc. Law & Proc. p. 568, and cases there cited. We think the facts found in the case at bar clearly show that the delivery of deed A to Mr. Pierce was in effect a present delivery of it, to be held by him for the benefit of the grantee and subject to the life use of the grantor, and at her death to be surrendered by him to such grantee. As shown by her request to Pierce, the grantor fully intended to pass the fee of the property to the plaintiff at the date of the deed, subject only to her life use; and the transaction into which she then entered with Pierce and the plaintiff was well adapted to carry out her intent. She intended to and did, in delivering the deed to Pierce, part with the possession of the deed, and with all her dominion and control over it.

The defendant claims that the delivery to Pierce was of no effect because he was the agent and attorney of the grantor, and consequently that the deed in his hands was in her hands. If the facts found supported the above claim, the claimed consequence would undoubtedly follow; but they do not; on the contrary, they clearly show that, in taking delivery of deed A, Pierce was not the agent of the grantor in any respect. The defendant further claims that, as deed A was made without consideration, the delivery of it to Pierce could be revoked by the grantor at will; and in support of this claim he cites Belden v. Carter, 4 Day, 66, 4 Am. Dec. 185, and Hoig v. Adrian College, 83 Ill. 267. These cases do not support his claim. In Belden v. Carter the grantor expressly retained control of the deed during his life; and in the Illinois case cited it was held, merely, that a deed of land intended as a gift may be withdrawn before delivery of it is complete. In the case at bar the gift was accepted and complete before the grantor attempted to revoke the delivery of the deed, and then it was too late, as is held even in cases where the deed was made without consideration. Brown v. Austen, 35 Barb. 341; Issitt v. Dewey, *supra;* Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 532, 66 N. W. 439.

Upon the facts found in this case, we think that the delivery to Pierce was irrevocable by the grantor, without the consent of the grantee; that by such delivery the title to the fee of the land described in deed A immediately passed to the plaintiff, subject to the grantor's life use; and that such title, as against the grantor, and as against the defendant, her subsequent grantee without consideration and with knowledge of the existence and delivery of deed A, is a good and valid superior title.

There is no error.

In this opinion the other Judges concur.

KANSAS SUPREME COURT.

C. W. FINCKE et al., Plffs. in Err.,
v.
JULIA K. BUNDRICK.

(— Kan. —, 83 Pac. 403.)

Executor—fraudulent sale to surety—setting aside.

A sale of real estate belonging to the estate of a deceased testator, made by an executor to the surety on his bond under an order of the probate court procured through the fraud of the executor, may be set aside

Headnote by BURCH, J.

Case Note.—Validity of sale to surety on executor's bond.—The court, in FINCKE v. BUNDRICK, very pertinently said: "But little light is thrown upon this precise question by decided cases." The only additional case which appears to bear closely upon the

at the suit of a devisee, even although the surety was ignorant of the dishonest conduct of his principal.

(November 11, 1905.)

ERROR to the District Court for Wyandotte County to review a judgment in favor of plaintiff in an action to set aside a sale of real estate made by the executor of Julia Fincke, deceased. Affirmed.

The facts are stated in the opinion.

Mr. L. W. Keplinger, for plaintiffs in error:

All the real estate, as well as the personal property, is liable for the payment of debts and the expenses of administration.

Shoemaker v. Brown, 10 Kan. 393.

Only jurisdictional objections can be urged to the decree of the probate court.

Howbert v. Heyle, 47 Kan. 58, 27 Pac. 116; Watts v. Cook, 24 Kan. 279; Fleming v. Bale, 23 Kan. 88; Clark v. Rossier, 10 Idaho, 348, 78 Pac. 359; Van Fleet, Collateral Attack, § 61; Higgins v. Reed, 48 Kan. 280, 29 Pac. 389.

The final settlement expressly and by necessary implication established the fact that the real estate was properly sold and the proceeds properly applied, and that the items were in fact proper costs and expenses of administration.

Fudge v. Fudge, 23 Kan. 418; Snyder v. Murdock, 26 Utah, 233, 73 Pac. 23; Holden v. Spier, 65 Kan. 412, 70 Pac. 348; Ward v. Logan County, 12 Okla. 267, 70 Pac. 382; Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250; Jewell v. Pierce, 120 Cal. 79, 52 Pac. 132; McKenzie v. Budd, 125 Cal. 600, 58 Pac. 200.

Under the doctrine of conversion, the real estate became personal property at the instant of death, and the provision for charges of administration was in the nature of a legacy to the executor.

McGowan v. Tifft, 35 Misc. 603, 72 N. Y. Supp. 132.

In fact there were nothing but legacies under this will.

Fisher v. Banta, 66 N. Y. 477; Snover v. Squire (N. J. Eq.) 24 Atl. 366; Going v. Emery, 16 Pick. 107, 26 Am. Dec. 645; Shaw v. Chambers, 48 Mich. 355, 12 N. W. 486; 9 Cyc. Law & Proc. p. 833.

Mr. C. W. Trickett, for defendant in error:

Where there are no debts there is no law to sell the real estate.

Needham v. Salt Lake City, 7 Utah, 319, 26 Pac. 920; Farrar v. Dean, 24 Mo. 16; Woods v Legg, 91 Ala. 511, 8 So. 342; Davenport v. Young, 16 Ill. 548, 63 Am. Dec. 320; Rozier v. Fagan, 46 Ill. 404; Dorman v. Tost, 13 Ill. 127; Kremer v. Bull, 16 Ky. L. Rep. 183, 26 S. W. 1099; Banks v. Speers, 103 Ala. 436, 16 So. 25.

Probate courts have no power to sell for costs only.

Woerner, Am. Law of Administration, pp. 1020, 1021; Carr v. Hull, 65 Ohio St. 394, 58 L.R.A. 641, 87 Am. St. Rep. 623, 62 N. E. 439; Fitzgerald v. Glancy, 49 Ill. 465; Walker v. Diehl, 79 Ill. 473; 22 Century Dig. p. 1780; Dean v. Dean, 3 Mass. 258; Drinkwater v. Drinkwater, 4 Mass. 353; Farrar v. Dean, *supra;* Fitch v. Witbeck, 2 Barb. Ch. 161; Beadle v. Steele, 86 Ala. 413, 5 So. 171; Garrett v. Garrett, 64 Ala. 263; Sermon v. Black, 79 Ala. 507.

The charging of debts on realty does not give the power of sale.

11 Am. & Eng. Enc. Law, 2d ed. p. 1045; Owen v. Ellis, 64 Mo. 77; Den ex dem. Snedeker v. Allen, 2 N. J. L. 45; Worley v. Taylor, 21 Or. 592, 28 Am. St. Rep. 774, 28 Pac. 903; Re Fox, 52 N. Y. 530, 11 Am. Rep. 751; Smith v. Coup, 6 Dem. 45; Young v. Twigg, 27 Md. 620; General Assembly v. McElhinney, 61 Mo. 540.

Burch, J., delivered the opinion of the court:

Julia Fincke died, leaving a will in which she bequeathed her personal property in equal shares to her son, C. W. Fincke, and her daughter, Mary Bundrick, and devised her real estate, one half to Julia, the daughter of Mary Bundrick, and one half to her son, C. W. Fincke. The will also contained the following provisions:

"My said son is to have full power to handle, take charge of, and collect the rentals of said real estate until such time as it shall be ordered sold by the court of proper authority, as it shall hereafter appear in said instrument that he is appointed as executor of this, my last, will and testament.

"All costs and expenses of administration upon my estate shall be paid from the proceeds of the sale of the said above-described real estate, and the balance shall be divided as above stated."

This will was duly probated, and C. W. Fincke qualified as executor under it. His bond as such executor assured a faithful

point is that of Trimble v. Marshall, 66 Iowa, 233, 23 N. W. 645. In that case the purchaser of real estate at an administrator's sale solicited and procured the appointment of one of the heirs as the administrator, signed his bond, and assisted in procuring other signers. The administrator lived outside of the county where the estate was to be administered upon, and accepted the appointment with reluctance. In an action brought by part of the heirs of deceased to set aside the sale for fraud, the court refused to regard the foregoing facts as ground of suspicion.

administration of the estate, and was signed by Christian Schoeller. Something more than a year after his qualification the executor presented to the probate court a petition for the sale of the real estate described in the will. The terms of the will were set forth, and the statement was made that the costs and expenses of administering the estate would amount in the aggregate to the sum of $410.17. No reference was made to any debts of the testator. An order of sale was granted and further proceedings were had, resulting in a sale of the land to the executor's bondsman for the sum of $775. The sale was approved, and an executor's deed was issued and recorded. Subsequent to these proceedings the executor made a final settlement of the estate. In his final account he brought forward against the proceeds of the sale of the land items of various kinds, aggregating $799.91, but he acknowledged receiving rents from the real estate in the sum of $111.50, and therefore admitted having in his hands a balance of $86.59, one half of which, or $43,295, he said belonged to Julia Bundrick as a devisee of her grandmother's land. This accounting was approved by the probate court, but the executor did not pay to Julia her share of the money. The account states that it was deposited in court, but she has never received it. During the time covered by the administration of the estate Julia Bundrick was a minor, and, so far as the record shows, without a guardian. She was unrepresented in the proceedings in the probate court, and she was ignorant of the sale of her property until after she became of age. After reaching her majority she discovered and investigated the facts, and brought the action in the district court, from which this proceeding in error arises.

In her petition as it was finally amended she related the foregoing facts, and charged that at the time the petition for the sale of the real estate was filed the costs and expenses of administration amounted to only $64, that all other items of the $410.17 were falsely and fraudulently asserted against the land; that the order of sale was procured through the fraud and imposition of the executor upon the probate court; that the sale to the bondsman was a device by which the executor might himself acquire the entire title to the property; that the final account, by means of which the proceeds of the sale were more than consumed, was fraudulently concocted; and that the final settlement was fraudulent and void. The petition contained other attacks upon the validity of the probate proceedings, and the conduct of the executor and his bondsman; and other allegations essential to the relief demanded, were made. Such relief consisted in setting aside the probate proceedings relating to the sale of the land, canceling the executor's deed, placing the plaintiff in possession, decreeing partition, and awarding damages for rents and profits. After a trial the court granted substantially the prayer of the petition.

In this court the executor and his bondsman make the following assignments of error: "Said judgment was in favor of defendant in error, when it should have been in favor of each of plaintiffs in error. The court erred in overruling the motion of each of plaintiffs in error for a new trial." The first assignment of error amounts to nothing. It merely asserts that the judgment is wrong. The only proposition contained in the motion for a new trial which the defendants argue in their brief is that the decision of the trial court is not sustained by sufficient evidence, and is contrary to law. That, therefore, is the limit of the present inquiry.

There is evidence in the record to show that the executor began his administration by filing a false inventory, in that he failed to list a note of $800 due from himself. After citation and a trial he was ordered by the probate court to include this note among the assets of the estate, whereupon he compromised with his colegatee for her interest in the personal property on a basis confessedly below its value. He then undertook to relieve the personal property of every kind of liability, and to make the land, which has been charged with costs and expenses of administration only, bear all the obligations which the personal property alone should have paid. But apparently he was not satisfied with this. Conceiving that the surviving husband of the devisor had a one-half interest in the land, he obtained from such survivor a quitclaim deed of the real estate to himself. The deed, however, conveyed nothing, because the terms of the will had been assented to, and so he attempted to charge the sum paid therefor against the real estate. He included $100 of the amount in the "costs and expenses of administration" referred to in the petition to sell the land, and actually reimbursed himself to that extent from the proceeds of the sale. The decedent left no debts. It cost nothing to collect the assets of the estate, except those due from himself, and yet, upon his showing, the real estate—two lots appraised at $700 and $300 respectively—proved insufficient to meet the costs and expenses of administration. When the estate was finally settled, he had title to all the personal property, and his only bondsman had title to all the real estate.

The orders of the probate court by which this astonishing result was accomplished appear to have been made in reliance upon

the executor's sole oath to the truth and correctness of his accounts and proceedings. In the district court he was examined as a witness in reference to his conduct. The trial judge heard all he had to offer in his own behalf, and saw his demeanor while testifying. It is not necessary to discuss the testimony in detail. So far as he is concerned, the court had the right to conclude that the sale of the land and the final settlement of his accounts were insufferably fraudulent and utterly unsustainable.

On behalf of the bondsman, however, it is contended that he was not a party to his principal's fraud, or cognizant of it, and that the law enjoined upon him no duty to make inquiries, except to ascertain that the court had jurisdiction to grant the order of sale. The district court probably believed that the bondsman was implicated in his principal's fraud. He resided in Oklahoma at the time of the trial, and consequently his evidence appears by deposition. He was asked where he obtained the money with which to pay for the real estate, and he replied that it made no difference. He said he always had plenty of money; that he was not doing a banking business at the time of the sale; that he paid cash for his stuff, and used to carry a lot of money. He admitted that Fincke was in possession of his papers, looked after the insurance and repair of the property, and collected the rents accruing from it; but he was unable to give any accurate information as to when he had received remittances on account of rent, or the amount of such remittances. When pressed for information upon those subjects, he said, "That is my business," and "I don't remember." When an effort was made to trace the money supposed to have been derived from the sale, the executor declared that he kept it in a separate bunch, part currency and part gold, in his pocket and in his house for some years, and gave an excited account of how completely his house was equipped with burglar alarms. Under these circumstances it is difficult to say that the charge of a proceeding taking the form of a sale, but in fact manipulated by both parties for the benefit of the executor, is wholly unsupported by evidence. But, because of the view which the court takes of the nature of the relation existing between an executor and his bondsman when dealing with each other in reference to property of the estate, it is not necessary to rest a decision upon this ground alone.

By his bond the defendant Schoeller became surety to the beneficiaries of the administration proceedings for the executor's good conduct. In the language of the books he undertook that his principal should "do a particular act," *viz.*, administer his trust faithfully and without fraud. Woerner, Am. Law of Administration, 2d ed. § 255, p. 548. This promise was original and primary on the surety's part, and bound him from the beginning. 1 Brandt, Suretyship, 3d Ackley's ed. § 2. The moment the executor, by machination and deceit, obtained a fraudulent order of sale, a duty was disregarded and a breach of the bond occurred. Green v. Creighton, 23 How. 90, 108, 16 L. ed. 419, 424. Knowledge of the fraud was not necessary to make the surety responsible at law on his bond for the result. He is held to know every default of his principal (1 Brandt, Suretyship, *supra*), and, whenever a judgment establishing a devastavit against an executor is rendered, his surety is estopped to dispute it (11 Am. & Eng. Enc. Law, 2d ed. p. 901). That the liability of both the principal and surety may be determined in the same proceeding and in a court of equity, if special circumstances similar to those involved in this case exist, is now the generally accepted law of the United States. 11 Am. & Eng. Enc. Law, 2d ed. p. 902. If, therefore, the relief sought in this suit were upon the executor's bond, liability would immediately attach upon the court finding that the order to sell the land had been procured by the executor's fraud. This being true, it is difficult to perceive why a court of equity and good conscience should allow the surety to enter the breach made by his principal in the citadel of the plaintiff's rights, carry away the spoils of the fraud, and then, with the booty in his possession urge the *strictissimi* character of his contract against a demand for reparation. So long as a surety keeps aloof from the conduct of the trust whose faithful administration he has guaranteed, and seeks no personal profit from it to himself, he may well stand upon the letter of his bond, and refuse to be responsible, except in damages. But the moment he abandons such an attitude and begins to deal with his own privy in the property of the estate, he ought to be held to a knowledge of all facts vitiating the transaction of which his principal is aware, and ought to be stripped of all the fruits of any fraud perpetrated by his principal, precisely the same as the principal himself.

But little light is thrown upon this precise question by decided cases. In the case of Halsted v. Hyman, 3 Bradf. 426, decided by the surrogate's court of the county of New York in 1855, it is said that the surety on an administrator's bond may speculate in claims against the estate, provided no con-

nivance with the administrator appear. This seems to be a dangerous rule, but, granting it to be correct, it does not reach the facts of this controversy. Other cases brought to the attention of the court relate to liability on the bond. The problem involves the ancient antagonism between self-interest and integrity. Michoud v. Girod, 4 How. 503, 555, 11 L. ed. 1076, 1099. One of the purposes of the law in requiring a bond to be given is that there shall be no fraudulent conduct to repair, and every possible safeguard to this end must be erected and maintained. So long as the surety is not allowed to speculate in the assets of the estate, or is obliged to inform himself of all the facts if he does speculate, his sole interest is in the rectitude and fidelity of his principal. Open to him a prospect of gain by freely bargaining with his principal, and he at once becomes concerned in the disregard of all those austere principles which must govern the conduct of those who undertake the management of trust estates. He becomes exposed to every temptation which would beset the executor himself if he were allowed to profit from official acts, and, if he should yield, he becomes actively enlisted in the support of fraudulent conduct, against which he has engaged to save the estate harmless. No such portent should be suffered to overhang the delicate relation of trustee, surety, and beneficiary. It is not the purpose to declare in this case that a sale of land by an executor or administrator to his bondsman can be impeached merely because of the relations of the parties, if made in good faith under an order untainted by fraud. But the court is fully persuaded that a sale by an executor to his bondsman ought not to stand if made by virtue of an order procured through the fraudulent conduct of the executor, even although the surety should be ignorant of the dishonest character of the proceeding.

Since it was not possible for the plaintiff to obtain relief in the probate court, administration having been closed and the executor finally discharged, the district court had jurisdiction to entertain her suit. Gafford v. Dickinson, 37 Kan. 287, 15 Pac. 175; McAdow v. Boten, 67 Kan. 136, 72 Pac. 529. In view of the foregoing, it is not necessary to decide the questions raised by the plaintiff respecting the jurisdiction of the probate court to order a sale.

The judgment of the District Court is affirmed.

All the Justices concur.

4 L.R.A. (N.S.)

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

ISAAC W. FOWLER, Receiver of Iowa & Illinois Coal Company, Appt.,
v.
JOHN C. OSGOOD.

(141 Fed. 20.)

Receiver—suit in foreign jurisdiction.

I. A receiver in chancery of an insolvent corporation, appointed by the United States circuit court for the southern district of Iowa, being authorized thereto by the court appointing him, brought suit in equity in the United States circuit court for the district of Colorado for the recovery of a fund, from a resident of the latter state, alleged to be held in trust for the benefit of creditors of the estate. Held, that such receiver had no legal status to maintain such suit in a jurisdiction foreign to that appointing him, even though leave to institute such suit was granted by the Colorado court, and although the bill alleged that there were no creditors of the insolvent corporation in the state of Colorado.

Demurrer—judgment—scope.

2. Where a demurrer to the bill is general, and special for the want of jurisdiction, the judgment sustaining the demurrer solely on the ground of want of jurisdiction should be limited accordingly, as a decree of dismissal of the bill concludes the defendant on the merits.

(October 20, 1905.)

Headnotes by PHILIPS, District Judge.

Case Note.—Power of receiver to sue out of jurisdiction of appointment.—It is conceded on all sides that a receiver is not entitled, as a matter of right, to maintain a suit outside of the jurisdiction of his appointment. Any privilege that may be accorded him in this respect depends entirely upon the comity of the jurisdiction in which he seeks to bring the suit. The Federal courts now seem thoroughly committed to the doctrine that a receiver whose rights with respect to the property and assets depend entirely upon his powers as an officer of the court, or upon the orders of the court appointing him, and who has not been vested with the title by transfer or statute, will not, even as matter of comity, be allowed to maintain a suit in a jurisdiction other than that of his appointment. See Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770, referred to and discussed in the foregoing opinion. The doctrine laid down in that case is qualified by the following statement in the opinion: "Nor is our attention called to any statute vesting the title of the corporation in the receiver. So far, then, as the receiver is concerned, his right to prosecute the action must depend upon his powers as such officer of the court and

APPEAL by plaintiff from a decree of the Circuit Court of the United States for the District of Colorado dismissing a suit to collect assets of an insolvent corporation. Reversed.

The facts are stated in the opinion.

Argued before Sanborn, Circuit Judge, and Philips and Carland, District Judges.

Messrs. **N. T. Guernsey, J. C. Helm, and John R. Dixon,** for appellant:

Mr. Fowler, as receiver, has the right to maintain this suit.

Two things must concur to warrant the exercise of this comity, *viz.*: (1) That there be no domestic creditors who would be injured; and, (2) that such suit does not conflict with the public policy of the state in which it is brought.

Rust v. United Waterworks Co. 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 129; J. I. Case Plow Works v. Finks, 26 C. C. A. 50, note, 52 U. S. App. 253, 81 Fed. 529; Olney v. Tanner, 10 Fed. 101; Chandler v. Siddle, 3 Dill. 477, Fed. Cas. No. 2,594; The Willamette Valley, 13 C. C. A. 635, 29 U. S. App. 447, 66 Fed. 565; 23 Am. & Eng. Enc. Law, 2d ed. p. 1108; Hurd v. Elizabeth. 41 N. J. L. 1; Ex parte Norwood, 3 Biss. 504, Fed Cas. No. 10,364; Metzner v. Bauer, 98 Ind. 425; High, Receivers, 3d ed. § 241; Lycoming F. Ins. Co. v. Wright, 55 Vt. 526; Zacher v. Fidelity Trust & S. V. Co. 45 C. C. A. 480, 106 Fed. 593; Small v. Smith, 14 S. D. 621, 86 Am. St. Rep. 807, 86 N. W. 649; Hale v. Hardon, 37 C. C. A. 240, 95 Fed. 747; Howarth v. Lombard, 175 Mass. 570,

the order of the court, set forth in the statement of facts, authorizing him to bring suits against the stockholders and directors for the purpose of releasing the assets, either in his own name or that of the corporation, as may be proper."

The qualification thus introduced into the doctrine does not appear to rest upon the distinction between voluntary and involuntary transfers, but apparently operates to exclude from the doctrine not only cases in which the title and assets have been vested in the receiver by a voluntary transfer, but also where the transfer of title is effected by a statute operating *in invitum*.

The doctrine of the Federal Supreme Court is thus summarized in the case of Edwards v. National Window Glass Jobbers' Asso. 139 Fed. 795: "The distinction apparent in all cases is as to whether the receiver has title, or whether he is simply appointed an agent or officer of the court under its general equity powers. In the one case, through comity, he may be allowed to maintain a suit in a foreign jurisdiction, where such a course would not conflict with local policy or the rights of creditors in such jurisdiction; while in others his powers are limited to the jurisdiction of the court appointing him."

This qualification of the doctrine renders it difficult to determine with certainty the extent to which the doctrine itself within the limits thus set for it is supported or antagonized by the decisions of the state courts, since some of the state decisions that are apparently opposed may fall within the qualification. It may be said, however, that there has been a decided tendency, and, until recently at least, an increasing tendency, upon the part of the state courts, and to some extent on the part of the Federal courts, to extend to foreign receivers, as a matter of comity, the right to maintain suits, if no injustice would be done thereby to the citizens of the local jurisdiction, and there would otherwise be no conflict with the local policy, without, expressly at least, suggesting any distinction or qualification based upon the fact whether the foreign receiver had been formally vested by statute or otherwise with the title to the property and assets, or had been merely authorized by the order or decree of the foreign court to collect such assets and property as the agent of the court. A striking illustration of this tendency is furnished by a decision of the United States circuit court of appeals of the sixth circuit in Kirtley v. Holmes, 52 L.R.A. 738, 46 C. C. A. 102, 107 Fed. 1, in which the opinion was written by Judge Day, who subsequently, as a member of the United States Supreme Court, wrote the opinion in Great Western Min. & Mfg. Co. v. Harris, *supra*. In the Kirtley Case a receiver appointed in Ohio for an insolvent corporation was permitted, upon principles of comity, to maintain an action in the United States circuit court for the district of Kentucky to enforce the liability of stockholders. In support of this decision, Judge Day said: "A receiver's right to sue is recognized upon principles of comity, where no injustice would be done to the citizens of the local jurisdiction, or his recognition conflict with public policy." The facts in that case do not appear to bring it within the qualification of the doctrine subsequently laid down by Judge Day in Great Western Min. & Mfg. Co. v. Harris, since, so far as appears, the only right of the receiver in respect of the cause of action in question was under and by virtue of an order directing him, as receiver, to collect and receive from the stockholders the amounts assessed against them, and to commence actions in any court whenever it might be necessary to make collections from those not within the jurisdiction.

The quotation above made from the opinion of Judge Day in the Kirtley Case very fairly represents the general position taken in the following cases, though there is considerable variation in the manner of stating the general principle, and frequently a more specific statement of the qualification or exception based upon local policy. Boulware v. Davis, 90 Ala. 207, 9 L.R.A. 601, 8 So. 84; Metzner v. Bauer, 98 Ind. 425; Hallam v. Ashford, 24 Ky. L. Rep. 870, 70 S. W. 197; Castleman v. Templeman, 87 Md. 546, 41 L.R.A. 367, 67 Am. St. Rep. 363, 40 Atl.

49 L.R.A. 301, 56 N. E. 888; Howarth v. Ellwanger, 86 Fed. 54.

Messrs. **Cass E. Herrington and D. C. Beaman**, for appellee:

Appellant, a foreign receiver, has no power to sue in the United States circuit court for the district of Colorado.

Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770; Hale v. Allison, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 254; High, Receivers, 3d ed. § 2; Hilliker v. Hale, 54 C. C. A. 252, 117 Fed. 224; Wigton, v. Bosler, 102 Fed. 70; Hazard v. Durant, 19 Fed. 471; Holmes v. Sherwood, 3 McCrary, 405, 16 Fed. 727; Brigham v. Luddington, 12 Blatchf. 237, Fed. Cas. No. 1,874; Kittel v. Augusta, T. & G. R. Co. 78 Fed. 855; Great Western Min. & Mfg. Co. v. Harris, 63 C. C. A. 51, 128 Fed. 321; Hale v. Hardon, 89 Fed. 283; Bates, Fed. Eq. Proc. § 610.

Philips, District Judge, delivered the opinion of the court:

On January 23, 1900, the Atlantic Trust Company, a New York corporation, recovered judgment in the circuit court of the United States for the Northern district of Illinois against the Iowa & Illinois Coal Company, an Iowa corporation, in the sum of $341,838.22. On the 10th day of February, 1900, said trust company recovered judgment against said coal company for a like sum in the circuit court of the United States for the southern district of Iowa. Executions were issued on said judgments, and re-

275; Comstock v. Frederickson, 51 Minn. 350, 53 N. W. 713; Hurd v. Elizabeth, 41 N. J. L. 1; Sobernheimer v. Wheeler, 45 N. J. Eq. 614, 18 Atl. 234; Mabon v. Ongley Electric Co. 156 N. Y. 201, 50 N. E. 805; Howarth v. Angle, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489; Runk v. St. John, 29 Barb. 585; Barclay v. Quicksilver Min. Co. 6 Lans. 25; Pruyn v. McCreary, 105 App. Div. 302, 93 N. Y. Supp. 995; Small v. Smith, 14 S. D. 621, 86 Am. St. Rep. 807, 86 N. W. 649; Lycoming F. Ins. Co. v. Wheelock, 55 Vt. 526; Parker v. Stoughton Mill Co. 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751.

The decision of the circuit court of appeals of the ninth circuit, in Lewis v. Clark, 64 C. C. A. 138, 129 Fed. 570, also appears to be opposed to the doctrine subsequently announced by the Federal Supreme Court. In that case, the domiciliary receiver of a Minnesota building and loan association having consented that certain bonds and mortgages that had been deposited by the association with the state of Wisconsin to secure the performance of its contracts with citizens of that state should be collected by a special receiver who had been appointed in Wisconsin for that purpose, it was held that a Federal court sitting in Idaho, acting in a spirit of comity, properly permitted the Wisconsin receiver to maintain a suit therein to foreclose one of such mortgages. So far as appears, the rights of the Wisconsin receiver depended entirely upon his power as an officer of the court, and upon the order or decree of the court appointing him; and there does not appear to be anything in the case to bring him within the qualification of the doctrine as laid down by the Supreme Court. Perhaps some of the other cases above cited could, upon their facts, be brought within such qualification; but, as already intimated, they do not appear to recognize any distinction based upon the fact whether or not title to the property and assets had been vested in the foreign receiver by virtue of a statute of the foreign jurisdiction.

In entire harmony with the case just cited are a class of cases illustrated by Ward v. Pacific Mut. L. Ins. Co. 135 Cal. 235, 67 Pac. 124, and Stockbridge v. Beckwith, 6 Del. Ch. 72, 33 Atl. 62C, which have denied the right of foreign receivers to maintain suits because domestic creditors would be prejudiced thereby. As subsequently pointed out, however, decisions of this kind are really upon a matter of substantive law rather than upon the question of practice relating to the capacity of the foreign receiver to sue.

There are other cases, however, that seem to follow a doctrine at least as broad as that laid down in the Great Western Case. See Zacher v. Fidelity Trust & Safety-Vault Co. 45 C. C. A. 480, 106 Fed. 593; Edwards v. National Window Glass Jobbers' Asso. 139 Fed. 795; Homer v. Barr Pumping Engine Co. 180 Mass. 163, 91 Am. St. Rep. 269, 61 N. E. 883; Farmers' & M. Ins. Co. v. Needles, 52 Mo. 17; Commercial Nat. Bank v. Motherwell Iron & Steel Co. 95 Tenn. 172, 29 L.R.A. 164, 31 S. W. 1002.

So, in Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888, where it was held that a receiver appointed to enforce the statutory liability of stockholders may bring an action in a jurisdiction outside that of his appointment, the decision is upon the ground that, under the foreign statute, the receiver had legal title to the fund as a trustee, thus bringing the case within the qualification of the doctrine of the Great Western Case.

It seems to the annotator that there has been a general tendency upon the part of the courts, at least in the mode of stating their decisions, to confuse the question of practice relating to the capacity of a foreign receiver to sue with the question of substantive law respecting his right of title to property or assets outside of the jurisdiction of his appointment. The doctrine of the Great Western Case seems broad enough to deny to a foreign receiver, not formally vested with title, access to the local courts, even for the purpose of vindicating or enforcing rights conferred upon him by his appointment with respect to property or assets which it would not otherwise be contrary to the public policy of the forum to recognize. In many cases, however, where

turns of *nulla bona* were made prior to the 4th day of August, 1900, on which latter date the said trust company filed a creditors' bill in the circuit court of the United States for the southern district of Iowa against said coal company, alleging the rendition of said judgments and the issuance and return of said executions, the insolvency of said coal company, and that it had assets not subject to levy and sale on execution, consisting of choses in action, claims of an equitable character, which in equity should be sequestered by the court to enforce the satisfaction of said judgments. The complainant asked that the business affairs of the coal company be administered and wound up; that its assets, when collected, be applied upon said judgments; and for the appointment of a receiver to take possession and custody of its books and records, and to collect its assets. In this suit, on the 24th day of January, 1901, the said circuit court for the southern district of Iowa appointed the complainant, Isaac W. Fowler, receiver of said coal company, investing him with the usual powers of a receiver in chancery. On the 14th day of January, 1902, the said Iowa circuit court made an order authorizing the receiver to institute and prosecute, outside of the southern district of Iowa in other courts of competent jurisdiction, such action or actions at law, or suit or suits in equity, as, in the judgment of said receiver, might be necessary or expedient to institute and prosecute in order to collect and reduce to his possession all such rights, debts, equitable interests, property, and assets of said corporation, so that the proceeds of the same might be applied to the payment of the debts of said corporation. Thereafter said receiver, upon leave granted by the local court, instituted the present suit in equity in the United States circuit court for the district of Colorado, whereby he sought to recover from the defendant, Osgood, a large sum of money alleged to be in his hands in trust for the benefit of said corporation, and which in equity is liable to sequestration at the suit of the said receiver. To this suit the defendant appeared and demurred, on the ground, among others, that it appears on the face of the bill that the complainant is a foreign receiver, and as such has no power to sue in the jurisdiction of said Colorado court. The demurrer was sustained, and the bill dis-

the right of a foreign receiver to maintain a particular action or suit has been denied, the decision does not rest upon any general incapacity of the foreign receiver to sue, but upon the ground that, by reason of the existence of domestic creditors, or for some other reason, the particular right with respect to property or assets having a local situs, asserted by the foreign receiver in the action, was not one which could be properly recognized upon principles of comity. If the distinction here suggested between the capacity of the foreign receiver to sue and the recognition, upon principles of comity, of the right sought to be vindicated or enforced by him in the suit, is a sound one, it follows that, if the particular right asserted is one which can be recognized without prejudice to domestic creditors or other violence to local policy, there should be no objection, upon principles of comity, to allowing the foreign receiver access to local courts for its vindication or enforcement. There is considerable difference of opinion upon the question of substantive law as to the circumstances under which the right of a receiver appointed in one jurisdiction to property or assets which at the time of his appointment have a local situs in another jurisdiction will be recognized upon principles of comity by courts of the latter jurisdiction. But there is a substantial agreement that such right will not be recognized to the prejudice of domestic creditors. And, therefore, when it appears that there are domestic creditors who would be prejudiced by the withdrawal of the assets from the local jurisdiction, the courts very commonly refuse to recognize the foreign receiver's rights. But this is true whether the foreign receiver has brought a suit to reach such property, or has undertaken, as a defendant or intervener, to defeat an attachment or other process by domestic creditors. In the former case the decision against him is very likely to take the form of a proposition denying the right of a foreign receiver to maintain a suit in the local jurisdiction in respect of the particular property right; but that the decision is really upon the question of substantive law with respect to the recognition of his right to the property, and not upon the question of practice with respect to his capacity to sue, is apparent from the fact that the result would have been the same if he had been a defendant or an intervening party in a suit instituted by a domestic creditor.

When, however, it has clearly appeared that the right asserted by the foreign receiver in the suit was one the recognition of which was not opposed to local policy, the courts have rarely or never denied him, as a matter of comity, the right of access to the local courts for its vindication or enforcement. Thus, in Robertson v. Staed, 135 Mo. 135, 33 L.R.A. 203, 58 Am. St. Rep. 569, 36 S. W. 610, and Cagill v. Wooldridge, 8 Baxt. 580, 35 Am. Rep. 716, it was held that a foreign receiver may maintain replevin for property which was in the state of his appointment at the time of such appointment, but was subsequently removed to the state in which the suit was brought. It was, of course, clear in these cases that the recognition of the receiver's right to the possession of the property was not op-

missed. To reverse this decree, the complainant prosecutes this appeal.

The question to be decided is, Could the receiver appointed by the court of the state of Iowa maintain this suit in a court of the state of Colorado? This question was presented to the Supreme Court of the United States in 1854, in Booth v. Clark, 17 How. 322, 15 L. ed. 164. After thorough discussion, it was ruled that a receiver in chancery, appointed by a court of one jurisdiction, has no authority to sue in a jurisdiction foreign to that appointing him for the recovery of property or assets of the debtor. This for the reason that such receiver is the mere right arm of the court appointing him, to obey its orders in matters of administration within its jurisdiction, and as such is entirely subject to its control. He executes bond for the faithful performance of his duties, to account alone to the court appointing him; and the funds coming to his hands as such receiver are *in custodia legis*, held by him for distribution and application by the court whose commission he holds.

Adverting to the exception where, under statutes of the state of the domicil of the corporation, on its insolvency or dissolution the assignee in law becomes vested with the title to the property, with all the powers conferred by the charter or statute, becomes, *pro hæc*, the corporation, and can therefore recover its property wherever situate, the learned justice said that none of these alter the relation of a mere receiver in chancery to the court appointing him, empowering him to sue in his own name officially in another jurisdiction for the property or choses in action of a judgment debtor. "Indeed, whatever may be the receiver's rights, under a creditor's bill, to the possession of the property of the debtor in the state of New York [the jurisdiction where the receiver was appointed], or the permissions which may be given to him to sue for such property, we understand the decisions of that state as confining his action to the state of New York."

The doctrine of this case has been uniformly followed and steadfastly adhered to by the Supreme Court. In Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787, where the powers of such receiver were under consideration, the court quoted with approval the following language: "The ordinary chancery receiver, such as we have in this case, is

posed to the public policy of the forum, and, that being so, the courts seem to have assumed, almost as a matter of course, that the local courts should, upon principles of comity, be thrown open to him to enable him to vindicate his right with respect to such property. Other illustrations of the point that, when the right asserted in the suit is one which may be recognized as a matter of comity without violence to local policy, access to the local courts for the vindication of such right will not be denied, are afforded by the cases of Cooke v. Orange, 48 Conn. 401, holding that a foreign receiver could sue in Connecticut upon a contract made by the insolvent corporation with towns in that state, but completed by the receiver; Iglehart v. Bierce, 36 Ill. 133, holding that a receiver may have his remedy in the courts of Illinois to enforce the payment of a bond and mortgage executed to him; Oliver v. Clarke, 45 C. C. A. 360, 106 Fed. 402, holding that a receiver appointed in another state may sue in Texas for land conveyed to him as receiver. There is, of course, a clear distinction between cases of this kind, where the cause of action inures directly to the receiver, and cases where the right asserted by him was derived from the corporation or other person represented by him. But the distinction seems to bear upon the question whether the particular right will be recognized, rather than upon the general capacity of a receiver as such to sue outside the jurisdiction of his appointment. While it is clear that in the former class of cases the recognition, upon principles of comity, of the foreign receiver's rights is not opposed to local policy, yet, if there were any general rule refusing to recognize, as a matter of comity, the general capacity of a receiver as such to maintain a suit outside of the jurisdiction of his appointment, a foreign receiver would be unable to maintain even an action of this class.

The point sought to be brought out by the distinction here insisted upon is that in many, if not most, of the cases in which a suit by a foreign receiver has failed, it has not been because of any general incapacity on his part to sue, but upon the ground that the particular right asserted by him in the suit was not one which could be recognized upon principles of comity conformably to local policy. It must be conceded, however, that the soundness of this distinction is impaired by the doctrine laid down by the Federal Supreme Court in Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770, and followed in FOWLER v. OSGOOD. As pointed out in the beginning of the note, however, that doctrine, even if followed by the state courts, does not involve the general and unqualified proposition that the right of a receiver appointed in one jurisdiction to maintain a suit in another will not be recognized upon principles of comity; but the doctrine seems to be subject to a qualification in case the title to the property or assets has been vested in the receiver by a voluntary transfer, or even by operation of a statute of the jurisdiction of his appointment operating *in invitum*.

clothed with no estate in the property, but is a mere custodian of it for the court, and by special authority may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned."

In Hale v. Allinson, 188 U. S. 56–64, 47 L. ed. 380, 387, 23 Sup. Ct. Rep. 244, Mr. Justice Peckham, speaking for the court, said: "We do not think anything has been said or decided in this court which destroys or limits the controlling authority of that case." And quoted with approval the following: "He [the receiver] has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

Because of the suggestion made in the discussion by Mr. Justice Swayne, in Booth v. Clark, that to permit a foreign receiver to recover the assets of the debtor situate in another jurisdiction would contravene the rule of comity, which forbids that the assets of the debtor having a situs in the forum should thus be withdrawn from its more convenient access by the local creditors, the courts of many of the states have conceived that, if leave be first obtained from the local court to institute suit by the foreign receiver, and especially where it is averred, as in the bill here under review, that there are no local creditors, the reason of the rule denying the right of action by the foreign receiver should not apply. But the discussion in full by Mr. Justice Swayne clearly enough indicates that such was not the view of the Supreme Court. *Arguendo*, he said: "We think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver."

This question has recently undergone a thorough re-examination and discussion by the Supreme Court in Great Western Min. & Mfg. Co. v. Harris (decided May 29, 1905) 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770. Mr. Justice Day, in discussing the rule in Booth v. Clark, said that it never had been departed from by that court, and was rigidly adhered to. He said: "The decision . . . rests upon the principle that the receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought, by means of a receiver, to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court, or its approval as to the officer who shall act in the holding and distribution of the property recovered." He adverted to the conflicting decisions of the state courts upon the right of a receiver, upon principles of comity, to sue in a foreign jurisdiction, and said: "In this court, since the case of Booth v. Clark, *supra*, we deem the practice to be settled, and to limit a receiver who derives his authority from his appointment as such to actions, either in his own name or that of an insolvent corporation, to such as may be authorized within the jurisdiction wherein he was appointed."

While it is true that it does not appear that there was present in that case the allegation that the receiver obtained the consent of the court in which the suit was brought to sue, or the allegation that there were no creditors in the jurisdiction of the forum, had such fact affected the rule, presumably it would have been so stated by the court, as the divergency of decisions of some of the state courts, to which he adverted, rested upon such facts. On the contrary, it is quite

manifest from the opinion that, in so far as the Federal courts are concerned, the only method for reaching the property or assets of an insolvent corporation in a jurisdiction foreign to that where the receiver in chancery is appointed is by resort to an ancillary receivership where the property or asset sought to be recovered has its situs or where the debtor resides. The leave granted by the court in Colorado to sue in that jurisdiction determined nothing as to the power of the foreign receiver to maintain the suit when brought. It did not have the effect to control any fund by that court the receiver might recover in the suit. The receiver was under no bond of accountability to that court. The permission to sue, therefore, was, in legal effect, meaningless. Whatever may be the view of any individual as to the correctness or advisability of the rule established by the Supreme Court, it is sufficient for us to say that it is conclusive on this court.

The demurrer, for the reasons above stated, was properly sustained. But the demurrer challenged the bill on nine other grounds, some of which went to the merits of the cause of action, and the decree is a general dismissal of the bill without any statement of the reason for it. A general judgment or decree of dismissal, without more, renders all the issues in the case *res judicata*, and constitutes a bar to any subsequent suit for the same cause of action. Hence, when a court dismisses a suit upon some ground which does not go to the merits of the cause of action, but leaves them open to consideration in another court, or at another time, or in another way, the decree of dismissal must expressly adjudge that it is rendered for the specific reason upon which it is based, or must expressly provide that it is made without prejudice. Indian Land & T. Co. v. Schoenfelt, 68 C. C. A. 196, 135 Fed. 484, 487; United States v. Pine River Logging & Improv. Co. 24 C. C. A. 101, 107, 49 U. S. App. 24, 78 Fed. 319, 325; Speer v. Kearney County, 32 C. C. A. 101, 105, 60 U. S. App. 38, 88 Fed. 749, 752; Mitchell v. Dowell, 105 U. S. 430, 26 L. ed. 1142; Cecil Nat. Bank v. Thurber, 8 C. C. A. 365, 367, 8 U. S. App. 496, 59 Fed. 913, 914; Russell v. Clark, 7 Cranch, 69, 90, 3 L. ed. 271, 279; Hooven, O. & R. Co. v. John Featherstone's Sons, 49 C. C. A. 229, 233, 111 Fed. 81, 85; House v. Mullen, 22 Wall. 42, 46, 22 L. ed. 838, 839. The general decree of dismissal was therefore erroneous.

It is reversed, with costs against the appellant, and the case is remanded, with directions to the court below to enter a decree of dismissal of the suit, which shall adjudge, in the decree, that it is dismissed on the sole ground that the complainant is a foreign receiver and hence without power to sue in the court below, and that it is dismissed without prejudice to other suits and proceedings which do not involve this objection.

KENTUCKY COURT OF APPEALS.

CLEMENT LINDSEY, Appt.,
v.
HOLLERBACK & MAY CONTRACT COMPANY.

(— Ky. —, 92 S. W. 294.)

Master—assumption of risk—assurance of safety.

1. The owner of a team, who is em-

Case Note.—Servant's assumption of risk in obeying orders to perform obviously dangerous work.—The ultimate question to be determined in respect to a servant's assumption of risk when obeying orders, as in all other cases where an assumption of risk is in question, is whether the servant had knowledge, actual or constructive, of that risk, and encountered it without being subjected to what the law regards as coercion. 1 Labatt, Mast. & S. § 438. This doctrine is succinctly declared in Ferren v. Old Colony R. Co. 143 Mass. 197, 9 N. E. 608, as follows: "There is no doubt of the general rule that one who, knowing and appreciating the danger, enters upon a perilous work, even though he does so unwillingly and by order of his superior officer, must bear the risk." As shown by Labatt's work on Master and Servant, just referred to, the authorities fully support this doctrine in all cases where the danger is obvious and fully appreciated by the servant. Among the late cases declaring and illustrating this doctrine are the following: Stuart v. New Albany Mfg. Co. 15 Ind. App. 184, 43 N. E. 961; Strong v. Iowa C. R. Co. 94 Iowa, 380, 62 N. W. 799; Punkowski v. New Castle Leather Co. 4 Penn. (Del.) 544, 57 Atl. 559. The same doctrine is also clearly presented in Chicago G. W. R. Co. v. Crotty, reported herewith, see *post*, 832, and Griffith v. Lexington Terminal R. Co. *post*, 854.

As a limitation on the doctrine above declared in cases where it appears that the servant who obeyed orders to perform dangerous work did not fully appreciate the danger, see Choctaw, O. & G. R. Co. v. Jones, *post*, 837.

For an extensive collection and review of the decisions on the whole question of a servant's right of action for injuries received in obeying a direct command, see note in 48 L.R.A. 753. This note was referred to with approval in Long v. Illinois C. R. Co. 113 Ky. 812, 58 L.R.A. 239, 101 Am. St. Rep. 374, 68 S. W. 1095.

As to the effect of an order on the question of a servant's contributory negligence in obeying it, see also Tuckett v. American S. & H. L. *post*,—.

ployed to remove a rubbish dump, assumes the risk of injury to the team in attempting to drive it down a steep incline with a scraper attached, although assured by his employer that it is safe.

Same—question of law.

2. The question whether or not an employee assumed the risk of an injury from following the direction of his master need not be submitted to the jury, where the facts are admitted and the undertaking was so obviously dangerous that no prudent man would have undertaken it.

(March 29, 1906.)

APPEAL by plaintiff from a judgment of the Circuit Court for Edmonson County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. **Milton Clark** for appellant.

Mr. **M. M. Logan** for appellee.

Paynter, J., delivered the opinion of the court:

The appellee is a corporation engaged in constructing a lock and dam near Brownsville, and the appellant was employed by it with his team of mules in handling dirt during the construction of the work. There was a dump or large mound of earth, which had been thrown up on the river bank in making the excavation for the lock walls, and the appellee desired to have it removed. The appellee, through its agent, directed the appellant to remove the dirt with his team of mules and scraper. He was driving the mules, and another employee of the appellee was holding the handles of the scraper, when the agent of the appellee ordered him to drive his team hitched to the scraper down a steep place on the dump, and by reason of the steepness the scraper was jerked from the hands of the man who was holding it, without negligence on his part. The scraper struck one of the mules, and lacerated its legs, and caused the injury of which complaint is made. It is averred that the place over which he was ordered to drive was too steep to be perfectly safe; that he made complaint and objection to the agent of the appellee who was then in charge of the work that it was unsafe to drive his team down the dump; that the agent assured him that the place was safe to drive over with his team; that the agent had superior knowledge of the dangerous character of the place over which he was ordered to drive, and he relied upon the assurance of the agent for the safety of his team. The appellant seeks to recover damages for the injuries which his mule sustained. The court sustained a demurrer to the petition, and he refusing to plead further, it was dismissed.

The facts stated above as to the circumstances under which the injury was received are admitted by the demurrer. It is urged that the court properly sustained a demurrer to the petition because the dangerous character of the place was as plain and visible to the appellant as to the agent of the appellee, and, therefore, the former had equal opportunity with the master to know of the danger to be encountered in driving down the dump, and assumed the risk in doing so. For the appellant, it is contended that it was a question for the jury to determine whether the appellant had the right to rely upon the assurance of the agent of the appellee that it was safe to drive his team down the dump.

It is the duty of the master to furnish a reasonably safe place for his servant to work. He is not required to furnish a place that is absolutely safe. Frequently the work which the servant is employed to do is dangerous in itself, and of course the servant assumes the ordinary risks in performing that character of work. If a servant is ordered to do a thing that is obviously dangerous, or so much so that a prudent person would not take the risk of doing it, and the servant does so, and is injured, he is not entitled to recover. Ross-Paris Co. v. Brown, 28 Ky. L. Rep. 813, 90 S. W. 568. It is said in the case of Wilson v. Chess & W. Co. 117 Ky. 567, 78 S. W. 453: "The duty of the master to furnish a safe, or reasonably safe, place in which the laborer may do his work is frequently either misunderstood or misapplied. In the first place, the master is not required to furnish an absolutely safe place. If the work is in and of itself dangerous, the master does not insure against such danger. On the contrary, there is nothing better settled than that the servant assumes the ordinary risks and hazards incident to the character of his work. Whatever may be the moral obligation resting upon those who employ people in hazardous work to furnish them the safest possible means to protect them from injury, the law does not forbid a laborer's undertaking a hazardous employment with full knowledge of its dangers, if he wants to. If he does, the law leaves the risk upon him, for he has assumed it." In the case of Mellott v. Louisville & N. R. Co. 101 Ky. 212, 40 S. W. 696, the court said: "The turntable was in good working order, every part of it was fully exposed to view, and what risk attended its operation was open and visible. Its movement was slow, the motive power was furnished by him and his fellow servants, but a step was required to place him in absolute safety." It is said in § 326, Wood on Master and Servant: "The

servant is bound to see for himself such risks and hazards as are patent to observation, and is bound to exercise his own skill and judgment in a measure, and cannot blindly rely upon the skill and care of his master."

While the appellant states the circumstances under which the mule was injured, and alleges that the knowledge of the agent of the appellee as to the danger of performing the work which he was ordered to do was superior to his, yet the averments taken together show to the contrary. The appellant owned the mules, and was evidently familiar with their capacity for going up and down hills and performing work, and the dangers attending the execution of it. The dump was in plain view of him, likewise its declivity, and from the very nature of things he must have had the same means of calculating the danger in the performance of the work assigned him as did the appellee. It seems to us that if there could be a case where the knowledge of the master and servant were exactly the same as to the danger of the work to be performed, this is the case. If there was danger in driving the mules down the dump with a scraper attached, it was just as obvious to the one as the other. The appellant admits that he knew of the danger; he assumed the risk. It cannot be said in every case the question as to whether the danger was obvious, and whether the servant has a right to rely upon the judgment of the master in the execution of the work assigned him, must be submitted to the jury. There are cases where the facts are admitted, and it would be a question of law for the determination of the court as to whether the danger was obvious, or whether it was so dangerous that a prudent man would not have undertaken it, although ordered to do so by the master. Suppose that when a train was running 25 or 30 miles an hour, and the passenger knew that fact, and the conductor should tell him that he could alight from the train in safety, and he should attempt it and receive injuries, certainly in an action to recover for the injury a court would tell the jury to find for the defendant. Suppose a master would tell a workman to jump from an elevation of 12 or 15 feet, and he should do so, and thereby receive injuries, and a suit was brought to recover for them, a court would tell the jury to find for the defendant, because the danger of making the jump was so obvious that he took the risk himself. Here was a steep bank, a pair of mules with a scraper attached to them was driven down the bank by their owner, and injured; and before starting he was aware of the danger, and therefore did it with full knowledge of it. The agent of the appellee did not misrepresent the character of the dump; he did not make a misstatement as to the sharpness of the scraper attached to the mules, nor as to the ability of his employee at the handles to control the scraper. The appellant with full knowledge of the peril attending his act, must be held to have assumed all the risk of it.

The judgment is affirmed.

UNITED STATES CIRCUIT COURT OF APEALS, EIGHTH CIRCUIT.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Plff. in Err.,
v.
CATHERINE CROTTY, Admrx., etc., of James J. Crotty, Deceased.

(141 Fed. 913.)

Assumption of risk—contributory negligence.

1. While assumption of risk and contributory negligence rest upon different grounds and are distinct and independent defenses, they are not necessarily incompatible, but may, and sometimes do, arise out of the same facts, as where the danger is not only known or obvious, but injury therefrom is so imminent that no person of ordinary prudence would assume the risk.

Servant acting under direction.

2. Where a servant knows and appreciates the danger of the act which he undertakes, he does not any the less assume the risk of injury, or become chargeable with contributory negligence, as the case may be because he undertakes it under the direction of his superior.

Same—staking car.

3. A brakeman, who, in the absence of an emergency justifying his action, participated in staking a car with full knowledge and appreciation of the danger, assumed the risk of injury, although the conductor may have been negligent in directing that the car be staked when there was another and safe method of accomplishing the same result, and in directing the use of an engine and train in the process of staking when the use of the engine alone was reasonably possible and less dangerous; and, where the danger was so imminent that no person of ordinary prudence would have assumed the

Headnotes by Van Devanter, Circuit Judge.

Note.—The decision in this case as to the assumption by a servant of the risk of injury in obeying orders to do what is obviously dangerous, where he knows and appreciates the danger, is in harmony with that in Lindsey v. Hollerback & M. Contract, Co., reported herewith. See *ante*, 830 and the case note accompanying it.

risk, the brakeman was also guilty of contributory negligence.

Same—effect of statute.

4. The statute of Iowa (Code 1897, § 2071) abrogates, in respect of the "use and operation of any railway," the common-law rule that an employee, by his contract of employment, assumes the risk of injury from the future negligence of a fellow servant; but it does not affect the rule that, where an employee undertakes an act the danger of which is obvious or actually known to him, and is inherent in the act itself or in the particular manner in which it is to be performed, he assumes the risk of injury, and this, although the danger may have arisen from the prior negligence of a coemployee.

(October 6, 1905.)

ERROR to the Circuit Court of the United States for the Northern District of Iowa to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Argued before Sanborn and Van Devanter, Circuit Judges.

Messrs. **Healy Brothers & Kelleher, A. G. Briggs, and John L. Erdall,** for plaintiff in error:

The decedent was guilty of contributory negligence.

Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 502; Kresanowski v. Northern P. R. Co. 18 Fed. 229; Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. ed. 506; Northern P. R. Co. v. Egeland, 163 U. S. 93, 41 L. ed. 82, 16 Sup. Ct. Rep. 975; Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 542; Erie R. Co. v. Kane, 55 C. C. A. 129, 118 Fed. 234; Chicago & N. W. R. Co. v. Davis, 3 C. C. A. 429, 10 U. S. App. 422, 53 Fed. 63; Cunningham v. Chicago, M. & St. P. R. Co. 17 Fed. 882; Bunt v. Sierra Butte Gold Min. Co. 138 U. S. 483, 34 L. ed. 1031, 11 Sup. Ct. Rep. 464; Kane v. Northern C. R. Co. 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; Goodlett v. Louisville & N. R. Co. 122 U. S. 391, 30 L. ed. 1230, 7 Sup. Ct. Rep. 1254; Northern P. R. Co. v. Nickels, 1 C. C. A. 625, 4 U. S. App. 369, 50 Fed. 723.

Crotty's danger was so imminent and obvious that the direction of the conductor to him did not exonerate the decedent from the charge of contributory negligence.

Baltimore & P. R. Co. v. Jones; Kresanowski v. Northern P. R. Co.; and Northern P. R. Co. v. Egeland,—*supra;* Roul v. East Tennessee, V. & G. R. Co. 85 Ga. 197, 11 S. E. 558; Gorman v. Des Moines Brick Mfg. Co. 99 Iowa, 264, 68 N. W. 674; O'Connell v. Clark, 22 App. Div. 466, 48 N. Y. Supp. 74; Miller v. Grieme, 53 App. Div. 276, 65 N. Y. Supp. 813; Patterson v. Pittsburg & C. R. Co. 76 Pa. 389, 18 Am. Rep. 412; Alabama G. S. R. Co. v. Richie, 99 Ala. 346, 12 So. 612; Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 395; McArthur Bros. Co. v. Troutt, 88 Ill. App. 638; Davis v. Western R. Co. 107 Ala. 626, 18 So. 173; Wescott v. New York & N. E. R. Co. 153 Mass. 460, 27 N. E. 10; Wright v. Southern R. Co. 80 Fed. 260; Jones v. Galveston, H. & S. A. R. Co. 11 Tex. Civ. App. 39, 31 S. W. 706; Bradshaw v. Louisville & N. R. Co. 14 Ky. L. Rep. 688, 21 S. W. 346; Chicago, B. & Q. R. Co. v. McGraw, 22 Colo. 363, 45 Pac. 383; Atlas Engine Works v. Randall, 100 Ind. 293, 50 Am. Rep. 798; Taylor v. Carew Mfg. Co. 140 Mass. 150, 3 N. E. 21; Robinson v. Dininny, 96 Va. 41, 30 S. E. 442; Duval v. Hunt, 34 Fla. 85, 15 So. 876; Songstad v. Burlington, C. R. & N. R. Co. 5 Dak. 517, 41 N. W. 755; Novock v. Michigan C. R. Co. 63 Mich. 121, 29 N. W. 525; Last Chance Min. & Mill. Co. v. Ames, 23 Colo. 167, 47 Pac. 382; Chattanooga Electric R. Co. v. Lawson, 101 Tenn. 406, 47 S. W. 489; St. Louis Cordage Co. v. Miller, *supra.*

Decedent assumed the risk of staking the car.

St. Louis Cordage Co. v. Miller, *supra;* Fitzgerald v. Connecticut River Paper Co. 155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 464; Leary v. Boston & A. R. Co. 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; Buzzell v. Laconia Mfg. Co. 48 Me. 113, 77 Am. Dec. 212; Mundle v. Hill Mfg. Co. 86 Me. 400, 30 Atl. 16; Motey v. Pickle Marble & Granite Co. 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 155.

Messrs. **McCarthy, Kenline, & Roedell,** for defendant in error:

By entering into an employment, even though it is hazardous, the servant does not assume the risk of negligence of his principal or of his coemployees.

Phinney v. Illinois C. R. Co. 122 Iowa, 488, 98 N. W. 358; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 502.

A member of a train crew on the road is not free to go or stay as when he originally accepts employment.

Dresser, Employers' Liability, pp. 547, 548; Louisville & N. R. Co. v. Kelly, 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407; Henion v. New York, N. H. & H. R. Co. 25 C. C. A. 223, 51 U. S. App. 157, 79 Fed. 903; Kane v. Northern C. R. Co. 128 U. S. 94, 32 L. ed. 341, 9 Sup. Ct. Rep. 16; St. Louis Cordage Co. v. Miller, *supra;* Northern P. R. Co. v. Mares, 123 U. S. 720, 31 L.

ed. 301, 8 Sup. Ct. Rep. 321; Frandsen v. Chicago, R. I. & P. R. Co. 36 Iowa, 372.

The fact that the servant proceeds under the orders of the master in performing an act whereby he is exposed to unusual danger renders the master liable for a resulting injury to the servant, unless the risk was fully realized by the servant, and was so apparent that no man of ordinary prudence would have undertaken it.

Reed v. Stockmeyer, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186; Wright v. Southern R. Co. 80 Fed. 260; Shearm. & Redf. Neg. § 31; Texas & P. R. Co. v. Behymer, 189 U. S. 468, 47 L. ed. 905, 23 Sup. Ct. Rep. 622; Dresser, Employers' Liability, p. 569; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777; Mason & O. R. Co. v. Yockey, 43 C. C. A. 228, 103 Fed. 265; Valley R. Co. v. Keegan, 31 C. C. A. 255, 58 U. S. App. 377, 87 Fed. 849; Baltimore & O. R. Co. v. Camp, 13 C. C. A. 235, 31 U. S. App. 213, 65 Fed. 952; Southern P. Co. v. Yeargin, 48 C. C. A. 497, 109 Fed. 436, 183 U. S. 695, 46 L. ed. 394, 22 Sup. Ct. Rep. 932; Labatt, Mast. & S. § 279a; Mexican C. R. Co. v. Murray, 42 C. C. A. 334, 102 Fed. 264; Great Northern R. Co. v. Kasischke, 43 C. C. A. 626, 104 Fed. 440.

Plaintiff was acting under the orders of his superior, and did not waive his right of action for the injury he received.

Strong v. Iowa C. R. Co. 94 Iowa, 392, 62 N. W. 799; Harker v. Burlington, C. R. & N. R. Co. 88 Iowa, 413, 45 Am. St. Rep. 242, 55 N. W. 316; Greenleaf v. Illinois C. R. Co. 29 Iowa, 14, 4 Am. Rep. 181; Miller v. Union P. R. Co. 12 Fed. 600; English v. Chicago, M. & St. P. R. Co. 24 Fed. 906; Dallemand v. Saalfeldt, 175 Ill. 310, 48 L.R.A. 753, 67 Am. St. Rep. 214, 51 N. E. 645.

Van Devanter, Circuit Judge, delivered the opinion of the court:

This was an action to recover damages for the death of James J. Crotty, a brakeman, which occurred while he was engaged, with others, in moving a car from one of two parallel side tracks to the other over a connecting switch by the process of staking, a term which indicates that the car was being pushed toward and over the switch by means of a pole placed between the car and a moving engine or train on the other track. The only negligence charged against the defendant which the evidence tended to sustain was that staking, although known to be dangerous, was resorted to when another and entirely safe method of moving the car was reasonably open, and that an engine and train were used in the staking when the use of the engine alone was reasonably possible and was known to be attended with less danger. That this constituted actionable negligence is not questioned. The defenses were assumption of risk and contributory negligence. The defendant, conceiving that both were conclusively established by the evidence, requested that the jury be instructed to return a verdict in its favor. The request was denied, and that ruling is assigned as error.

Without conflict, the evidence, and more especially that for the plaintiff, established these facts: A train crew, in which the deceased was a brakeman, had just brought a freight train, consisting of an engine and about seven cars, from Clarion, Iowa, to one of two side tracks in the defendant's switching yards at Coulter, in that state, when the station agent requested the crew to move a loaded coal car to that side track from the other one over a connecting switch. The crew, with the aid of a section gang, pushed the car by hand until it became stalled in a frog, or by ice which had formed in places along the rails. Under the conductor's direction, the process of staking was then undertaken. The deceased procured an ordinary fence post from near by, placed one end of it against the caboose, which was the rear car in the freight train, and held the post so that the other end would come in contact with the coal car as the train moved backward toward the switch. The conductor signaled the engineer to back up, and when the post came in contact with the coal car the latter ran ahead a few feet more rapidly than the train was moving, the post slipped and fell, and the train was stopped at a signal from the conductor. In this first effort the post was applied to the corners of the cars in such manner that the deceased was not upon either track, but that was changed at the conductor's direction. One end was placed in the hollow of the coupler of the caboose, where it would not slip so easily, and the deceased took a position on the track in the rear of the caboose, or rather in front of it, considering the direction in which it was to move. The train was again put in motion, but the resistance offered by the coal car, by reason of the ice which had formed in places along the rails, was so variable that the car ran ahead a few feet every now and then, making it impossible to maintain the contact. The staking proceeded and the deceased walked along in front of the moving caboose, holding the post in position to keep it from falling as the coal car jumped from one icy place to another. By reason of the convergence of the tracks, the coal car was gradually moved over in front of the caboose, and the deceased came to occupy a position between the ends

of these moving cars, the distance between which was 7 feet, the length of the post. He remained in this exposed position, and the staking was continued, until the post slipped and fell. The cars then came together and he was crushed to death. The train was being moved backward as slowly as it well could be, and when the post slipped the engine was promptly stopped at an emergency signal from the conductor, but by reason of the slack in the train, which was not unusual, the caboose did not stop until it came in contact with the coal car. The deceased made no objection to the staking of the car, or to the part in it which was assigned to him. He was twenty-eight years of age, was intelligent and well educated, and had had seven or eight years of experience as a switchman and brakeman. The accident occurred in the daytime.

There can be no difference of opinion among candid, reasonable, and impartial men upon these facts. The dangers which inhered in the process of staking were obvious and easily capable of full appreciation; more than that, they were vividly illustrated to the deceased as the staking progressed and before he paid the awful penalty for disregarding them. He knew the particular conditions under which the staking was undertaken and continued. He saw and understood how many cars were in the train, how much slack there was in it, and how it was controlled, because he was one of the crew which brought it from the station where it was made up. He saw and understood the condition of the track which contributed to the irregular and jerky movement of the coal car. He saw and understood what character of post he was using. He saw and understood that the contact with the coal car could not be maintained, that the post was all that kept the cars from coming together, and that it was inclined to slip and fall. In short, he knew whatever of defect there was in the method adopted, or in the appliances used, to transfer the car from one track to the other, and whatever of enhancement of the risk there was in the particular conditions under which the transfer was undertaken. It is idle to say that he may not have fully appreciated the dangers of the undertaking, or of his part in it. They were so obvious that their full appreciation was unavoidable to one of his years, intelligence, and experience. Thoughtful consideration of the undisputed facts irresistibly leads to the conclusion that he participated in the staking of the car with full knowledge and appreciation of its dangers and without objection, and that thereby he voluntarily assumed the risk of injury. Worden v. Humeston & S. R. Co. 72 Iowa, 201, 207, 33 N. W. 629; Cudahy Packing Co. v. Marcan, 54 L.R.A. 258, 45 C. C. A. 515, 106 Fed. 645; King v. Morgan, 48 C. C. A. 507, 109 Fed. 446; Musser-Sauntry Land, Logging & Mfg. Co. v. Brown, 61 C. C. A. 207, 126 Fed. 141; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495; Glenmont Lumber Co. v. Roy, 61 C. C. A. 506, 126 Fed. 524.

While assumption of risk and contributory negligence rest upon different grounds and are distinct and independent defenses, they are not necessarily incompatible, but may and sometimes do arise out of the same facts, as where the danger is not only known or obvious, but injury therefrom is so imminent that no person of ordinary prudence would assume the risk. Musser-Sauntry Land, Logging, & Mfg. Co. v. Brown and St. Louis Cordage Co. v. Miller, *supra*. This case is of that character. Walking between moving cars separated by only a short distance is always attended with much and obvious danger. The deceased was walking between moving cars; more than that, he was attempting to hold in place between them an unwieldy fence post which required such use of his arms and of the strength of his body as to impair his capacity to use them quickly and freely for his protection. The irregular and jerky movement of one of the cars made his task altogether uncertain of accomplishment. If the post slipped, as it was likely to do at any moment, it would be most difficult for him to extricate himself from his position before the gap between the cars was closed, and failing in this, he would almost certainly receive serious injury if he did not lose his life. The danger was therefore imminent as well as obvious,—so much so that no person of ordinary prudence would have assumed the risk. By its assumption the deceased manifested a reckless disregard of his own safety, and was guilty of contributory negligence.

But it is said that his participation in the staking of the car was not voluntary because it was at the direction of his superior officer, the conductor. The premise is correct, but the conclusion does not follow. The deceased knew and appreciated the danger, and in that respect stood upon an equal footing with the conductor. Yet he complied with the latter's direction without objection when he could have complied or not as he chose. The law adjudges such action to be voluntary. It is well settled that where a servant knows and appreciates the danger of the act which he undertakes he does not any the less assume the risk of injury, or become chargeable with contributory negligence, as the case may be, because he undertakes it under the direction of the master's representative. Gorman v. Des Moines Brick Mfg. Co. 99 Iowa, 257, 264, 68 N. W. 674;

Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 305, 400; Toomey v. Eureka Iron & Steel Works, 89 Mich. 249, 50 N. W. 850; Showalter v. Fairbanks, M. & Co. 88 Wis. 376, 60 N. W. 257; Writt v. Girard Lumber Co. 91 Wis. 496, 65 N. W. 173; Bradshaw v. Louisville & N. R. Co. 14 Ky. L. Rep. 688, 21 S. W. 346; Linch v. Sagamore Mfg. Co. 143 Mass. 206, 9 N. E. 728; Wescott v. New York & N. E. R. Co. 153 Mass. 460, 27 N. E. 10; Reed v. Stockmeyer, 20 C. C. A. 381, 384, 388, 34 U. S. App. 727, 74 Fed. 186; Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 443, 24 L. ed. 506, 507. The last case was one in which the plaintiff was injured in a collision while riding on the pilot of a locomotive. He sought to excuse his act in occupying such an exposed position by evidence tending to show that he and other employees of the defendant were about to be conveyed from their place of work by a train consisting of a locomotive and box car, when the defendant's representative told them to jump on anywhere as they were behind and must hurry, and that, in response to this direction, the plaintiff and others took a position on the pilot of the locomotive. Of this it was said by the court: "The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter the former could not arise."

Gorman v. Des Moines Brick Mfg. Co. *supra*, was a case where the plaintiff was injured while attempting to loosen, with a wrench, a greasy burr on vibrating machinery. The wrench slipped and his hand was caught in revolving cogwheels. He sought to excuse his act in attempting to remove the burr without stopping the machinery by testimony to the effect that the defendant's representative directed him to keep the machinery running, and not to stop it. The trial court held that the plaintiff was guilty of contributory negligence, and directed a verdict for the defendant. In disposing of the claim that the plaintiff acted in obedience to the direction of his superior, it was said by the supreme court of Iowa: "But if it be conceded that the plaintiff was given specific directions to do the act in the manner he did, or that he was justified in believing that such were given him, yet we are not prepared to say that the court was in error in sustaining the defendant's motion. Plaintiff testified that when he attempted to loosen the nut, the machine was vibrating, so that the wrench he was using was likely to slip off, and that he knew that if it did slip off his hand would go into the revolving cogwheels, which were not more than 5 inches from his hand. Now, it seems to us that the danger was so manifest as to prevent a reasonable, prudent, and cautious man from risking it, even upon an order from his superiors in authority. It is well settled that while obedience to an order from a superior authority will, as a rule, relieve one from the charge of contributory negligence, yet, when the act to be done is so reckless or obviously dangerous as that no reasonably prudent man would have undertaken it, the order from the superior will be no excuse. Plaintiff was familiar with the dangers attendant upon the use of the wrench so close to the moving cogwheels, as was the defendant's superintendent, and in obeying the orders given him, if it be conceded any were given, he assumed the risks incident to the performing of his task."

The contention is also made that the deceased's participation in the staking of the car was not voluntary or negligent because he was acting in an emergency or under circumstances when he was not free to refuse obedience to the conductor's direction; and in support of this contention reference is made to Kane v. Northern C. R. Co. 128 U. S. 91, 94, 32 L. ed. 339, 341, 9 Sup. Ct. Rep. 16, 17, where it was said: "An employee upon a railroad train, likely to meet other trains, owes it to the public, as well as to his employer, not to abandon his post unnecessarily."

But, as it was an essential part of the plaintiff's case that the staking of the car was itself unnecessary, or that the use therein of more of the freight train than the engine was unnecessary; and as both of these matters are shown to have been apparent,—it is not open to the plaintiff to say that compliance with the conductor's direction was a duty owing to the public or to the defendant. Moreover, the coal car was not part of the freight train, or intended to be made so, and it is a necessary conclusion from the evidence that noncompliance with the conductor's direction would not have been an abandonment of the deceased's post as a brakeman of the freight train, would not have interfered with the progress of that train toward its destination, and would not have subjected either life or property to danger, but at most would have led to the adoption of a safer method of transferring the coal

car from one point in the defendant's yards to another.

The claim is also made that, under the statute of Iowa (Code 1897, § 2071), as interpreted by the supreme court of that state in Phinney v. Illinois C. R. Co. 122 Iowa, 488, 98 N. W. 358, the deceased did not assume the risk of injury from obedience to a negligent direction of the conductor because the latter was a fellow servant. Careful examination of the statute, the case cited, and other decisions of the same court discloses that, so far as the statute is applicable to the present case, its only effect is that of attributing the negligence of the conductor to the defendant. It abrogates, in respect of the "use and operation of any railway," the common-law rule that an employee, by his contract of employment, assumes the risk of injury from the future negligence of a fellow servant; but it does not affect the rule that, where an employee voluntarily undertakes an act, the danger of which is at the time obvious or actually known to him, and is inherent in the act itself or in the particular manner in which it is to be performed, he assumes the risk of injury therefrom. In the case cited a railroad employee was injured in a collision caused by the negligence of a train despatcher of which he neither had nor could have had any knowledge prior to the injury; while in the present case the negligence of the conductor was an existing fact or condition with knowledge and appreciation of which the deceased elected to participate in the staking of the car, and to chance the danger from which the injury ensued. This distinction is clearly recognized in the decisions of the supreme court of the state. Thus, in Pearl v. Omaha & St. L. R. Co. 115 Iowa, 535, 88 N. W. 1078, where the death of a brakeman was caused by the negligence of the conductor in failing to set the brakes upon a detached portion of his train, of which the brakeman could have had no knowledge at the time, it was held that there was no assumption of the risk, because, as was said, a railroad employee "never, under our statute, assumes the risk of the future, unanticipated negligence of his coemployee." And in Cowles v. Chicago, R. I. & P. R. Co. 102 Iowa, 507, 71 N. W. 580, where a railroad employee was injured by going in front of a moving engine to adjust a turntable, when the engine had almost reached the turntable and was moving with substantially unchecked speed, it was held that he assumed the risk of injury, although it arose primarily from the negligence of a coemployee whose duty it was to stop the engine and wait for a signal indicating that the turntable was adjusted. It was said in that case: "Under the repeated adjudications of this court, recovery cannot be had when one voluntarily exposes himself to danger of which he knows, or might have known by the exercise of ordinary care."

That the statute relied upon does not prevent an assumption of the risk in instances like the present, where the danger, though arising from negligence, is known and appreciated, is also shown in the case of Martin v. Chicago, R. I. & P. R. Co. 118 Iowa, 148, 153, 158, 59 L.R.A. 698, 96 Am. St. Rep. 371, 91 N. W. 1034.

Another Iowa statute requires that in every railroad train there shall be "a sufficient number of cars with some kind of efficient automatic or power brake to enable the engineer to control the train without requiring brakemen to go between the ends or on the top of the cars to use the hand brake," and, in respect of violations of the duty so imposed, abolishes the defense of assumption of risk. Code 1897, §§ 2082, 2083. It is now said that this statute was violated in making up the freight train, and that this contributed to or caused the injury. But no such contention appears to have been insisted upon in the circuit court, and, of course, it cannot be made in this court in the first instance. The petition contains no reference to the statute, to the absence of automatic or power brakes from any of the cars, or to any inability of the engineer to properly control the train. Some evidence was introduced respecting the number of cars equipped with such brakes, the manifest purpose of which was to show the amount of slack in the train, and nothing more; but there was no evidence as to what proportion or number of the cars should have been so equipped to enable the engineer to exercise the prescribed measure of control over the train. Whether, therefore, the statute is applicable to a case in which the injury for which recovery is sought did not result from going between or on top of the cars to use hand brakes need not be considered at this time.

As it follows from what has been said that the court erred in refusing to direct a verdict for the defendant, the judgment is reversed, with a direction to grant a new trial.

ARKANSAS SUPREME COURT.

CHOCTAW, OKLAHOMA, & GULF RAILROAD COMPANY, Appt.,
v.
EBENEZER JONES.

(—Ark. —, 92 S. W. 244.)

Master—assumed risk of injury.

1. To defeat an action for injury to a

servant on the ground of assumed risk where the danger arose from the master's negligence, the servant must be shown to have subjected himself to the new danger with full knowledge and appreciation thereof.

Same—unnoticed danger.

2. Where an employee injured because of a condition created by the negligence of the master was at the time busily engaged in work which required his attention, the jury may find that he did not know of or appreciate the danger arising from such negligence, and therefore did not, by continuing his labor, assume the risk of injury therefrom.

Same—contributory negligence.

3. A servant is not contributarily negligent in performing labor in a manner directed by the representative of the master, unless the danger is so obvious that no prudent man would incur it under like circumstances.

Same—equal knowledge.

4. Although the circumstances which render the performance of particular work in a certain manner unsafe are equally known to a laborer and to the foreman, the laborer may be found not to be equally negligent with the foreman in obeying the order to perform it in that manner, since it is the foreman's duty to consider that method of performance, while the servant has a right to rely on the foreman's exercising due care.

(January 6, 1906.)

APPEAL by defendant from a judgment of the Circuit Court for Saline County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Riddick, J.:

On the 3d of May, 1903, Ebenezer Jones was working for the Choctaw, Oklahoma, & Gulf Railway as a member of a bridge gang under a foreman named Collier. On that day Collier and his gang was ordered to assist Tillman, the foreman of another gang, in the erection of a rock crusher on the line

Case Note.—Attempting dangerous work in obedience to orders, without fully appreciating the danger.—The decision in the above case, that a laborer's obedience to orders in attempting to perform dangerous work with knowledge of the situation did not amount to an assumption of the risk, if he did not know of or fully appreciate the danger, is in harmony with the general current of the decisions. As shown in the case note to Lindsey v. Hollerback & M. Contr. Co. *ante*, 830, a servant does assume the risk of dangerous work, notwithstanding he is acting under obedience to orders, if the risks are obvious and fully appreciated. But the present case comes under a limitation of that doctrine, to the effect that, if the danger is not so absolute or imminent that injury must almost necessarily result from obedience to the order, and the servant obeys the order and is injured, the master will not be allowed to defend on the ground that the servant ought not to have obeyed the order. 1 Labatt, Mast. & S. § 439, p. 1241. Some of the considerations in support of this doctrine are: That the master and servant are not upon the same footing; that a prudent servant may, within reasonable limits, rely upon the ability and skill of his superior, and is not bound at his peril to set his own judgment above that of his superior; that the order is an implied assurance that there is no abnormal danger; and that the order also usually calls for prompt obedience. For these reasons, the courts usually hold, as in the present case, that it is for the jury to determine whether, in obeying orders, the servant knew and appreciated the danger. An extensive review of the authorities on this whole question is found in a note in 48 L.R.A. 753, as well as in 1 Labatt on Master and Servant, §§ 433 *et seq.* The note in 48 L.R.A. was referred to with approval in Long v. Illinois C. R. Co. 113 Ky. 812, 58 L. R. A. 239, 101 Am. St. Rep. 374, 68 S. W. 1095.

One of the late cases applying this doctrine is that of Kapaczynski v. Wells & F. Co. 110 Ill. App. 477, where the court held that, in obeying orders, where the amount of work to be done was small and the increase of danger was not great, an ordinarily prudent and careful servant did not assume the risk resulting from a direct command, because under the circumstances he might well believe that he could perform the work he was ordered to perform without injury.

To the same effect, it is held, in Pressed Steel Car Co. v. Herath, 110 Ill. App. 596, that attempting dangerous work in obedience to direct orders did not amount to an assumption of the risk, where the danger was not of that obvious and immediate character which no prudent man would risk. And this is held to be shown by the fact that six other fellow workmen unhesitatingly proceeded with the plaintiff to carry out the order.

So, in Barnett & R. Co. v. Schlapka, 208 Ill. 426, 70 N. E. 343, it is declared that, while a servant could not close his eyes to open and obvious dangers, the fact that he had some knowledge of the danger of obeying a command would not defeat his recovery, if he acted with the degree of care which an ordinarily prudent man would exercise under the circumstances.

To the same effect are Wurtenberger v. Metropolitan Street R. Co. 68 Kan. 642, 75 Pac. 1049; Henrietta Coal Co. v. Campbell, 211 Ill. 216, 71 N. E. 863; Illinois C. R. Co. v. Keebler, 27 Ky. L. Rep. 305, 84 S. W. 1167; Lord v. Wakefield, 185 Mass. 214, 70 N. E. 123; Bering Mfg. Co. v. Femelat, 35 Tex. Civ. App. 36, 79 S. W. 809.

of the railway. The wooden structure on which the rock crusher rested was built of heavy sawed timbers. It was located against the side of a steep hill. The top of this wooden structure next to the hill was about even with the hill. On the opposite front side it was 20 feet high. To lift the heavy iron parts of the rock crusher proper and place them in position they used what was called a "traveler" with a crane attachment operated by a steam engine. In placing the top of the crusher in position it became necessary to also use what the witnesses called a "bent." This "bent" consisted of two upright pieces and a crosspiece of heavy timbers, nailed together. These two upright pieces or legs of the bent, upon which the crosspiece rested, were nailed to the top of the wooden framework on which the crusher rested, and were further held in an upright position by two braces, one on each leg; one end of the brace being nailed to the wooden structure on which the bent rested and the other to a leg of the bent. Jones assisted two or three other men in making and putting up this "bent," working under the direction of the foreman, Tillman, who had charge and superintendence of the work. After the "bent" had served its purpose Tillman ordered the workmen to throw it down. In order to do so it was necessary to knock the braces loose and to draw the nails by which the legs of the bent were fastened to the wooden structure upon which it rested. Jones knocked the end of the brace on his side loose from the structure. He then commenced to draw the nails which fastened the leg. Collier, the other foreman, suggested that a rope be used to lower the bent gradually; but Tillman, who had charge of the work, said that it was unnecessary, and ordered the workmen to push the "bent" down. This was done just about the time Jones finished drawing the nails from the leg of the bent on his side. As the bent was pushed over towards the hill, the upper part of the leg of the bent near which Jones had been working struck the end of a bolt projecting from a part of the traveler. As the other side of the bent continued to fall, it caused the end of the leg upon which Jones had been working to kick up and back, and it struck Jones and knocked him off of the structure. He fell upon a car loaded with rock ballast, and from it rolled to the ground below, a distance of 20 feet in all. His left arm was crushed so badly that it was necessary to amputate it just below the elbow. His right arm was crushed at the wrist, and he suffered other injuries. He brought an action against the company to recover damages, alleging that the foreman, Tillman, was guilty of negligence in ordering plaintiff and the other workmen to throw the bent down without the use of a rope, and also because he ordered it thrown down without removing both ends of the brace on the side next to plaintiff. The defendant answered, and denied most of the material allegations of the complaint, and also alleged that the injuries received by plaintiff were received as a result of his own carelessness and negligence, or the carelessness and negligence of his fellow servants, and without the fault of the defendant; and that it was a risk assumed by plaintiff.

On the trial the court, among others, gave the following instruction: "(1) The court instructs the jury that a person engaged in the services of a railroad company as a bridge carpenter assumes all the risk ordinarily incident to the business; but he does not assume the risk of the negligence of the master himself, or of anyone to whom the master may see fit to intrust his superintending authority." The defendant saved its exceptions to the giving of such instruction and requested the court to modify it by adding the following words: "Unless the servant knew of such negligence, or by the use of ordinary care should have known of such negligence, and continued in the employ of the master without objection." The court refused to make such modification, to which the defendant excepted. The court gave quite a number of instructions at the request of the defendant, covering the doctrine of contributory negligence and assumed risks, but refused to give the following, to wit: "(5) If the plaintiff was a man of ordinary intelligence and understanding, and of sufficient experience to enable him to see and understand the dangers connected with the work about which he was employed in the manner in which it was conducted, then he assumed the risks of such dangers, and cannot recover for an injury caused thereby. (6) The plaintiff alleges that the defendant was negligent in failing to use a rope in throwing down said bent, and also in failing to have a brace removed from said bent before directing it to be thrown down. If you find from the testimony that plaintiff knew, or by the exercise of ordinary care and observation on his part could have known, that a rope was not to be used, and that said brace had not been removed, and continued at his work, then he assumed the risks occasioned thereby, and cannot recover in this case." Defendant excepted to the refusal to give the above instructions. The jury returned a verdict in favor of plaintiff for the sum of $4,000, and judgment was rendered for that sum. Defendant appealed.

Messrs. **E. B. Peirce** and **Thomas S. Busbee**, for appellant:

An employee assumes the risk of the em-

ployer's negligence when he knows of such negligence.

Little Rock & Ft. S. R. Co. v. Duffey, 35 Ark. 613; St. Louis, I. M. & S. R. Co. v. Davis, 54 Ark. 389, 26 Am. St. Rep. 48, 15 S. W. 895; Emma Cotton Seed Oil Co. v. Hale, 56 Ark. 232, 19 S. W. 600; Little Rock, M. R. & T. R. Co. v. Leverett, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50; Brinkley Car Works & Mfg. Co. v. Lewis, 68 Ark. 316, 57 S. W. 1108; St. Louis & S. F. R. Co. v. Marker, 41 Ark. 549; Jones v. Malvern Lumber Co. 58 Ark. 125, 23 S. W. 679; Bauer v. St. Louis, I. M. & S. R. Co. 46 Ark. 388; Arkadelphia Lumber Co. v. Bethea, 57 Ark. 76, 20 S. W. 808; Fordyce v. Stafford, 57 Ark. 503, 22 S. W. 161; Kansas City, Ft. S. & M. R. Co. v. Hammond, 58 Ark. 324, 24 S. W. 723; Grayson-McLeod Lumber Co. v. Carter (Ark.) 88 S. W. 597; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495; Chicago & E. I. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74; Meehan v. Holyoke Street R. Co. 186 Mass. 511, 72 N. E. 61; Motey v. Pickle Marble & Granite Co. 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 155.

Messrs. **N. P. Richmond** and **Wood & Henderson**, for appellee:

If the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that in fact he does not rely upon the master's opinion.

1 Shearm. & Redf. Neg. 5th ed. § 186; 2 Thomp. Neg. § 975; St. Louis, I. M. & S. R. Co. v. Rickman, 65 Ark. 138, 45 S. W. 56; Reese v. Clark, 198 Pa. 312, 47 Atl. 994; Harrison v. Denver & R. G. W. R. Co. 7 Utah, 523, 27 Pac. 728; Neves v. Green, 111 Mo. App. 634, 86 S. W. 508; Harrison v. Detroit, L. & N. R. Co. 79 Mich. 409, 7 L.R.A. 623, 19 Am. St. Rep. 180, 44 N. W. 1034; Faren v. Sellers, 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 So. 363; Stephens v. Hannibal & St. J. R. Co. 96 Mo. 207, 9 Am. St. Rep. 336, 9 S. W. 589; Shortel v. St. Joseph, 104 Mo. 114, 24 Am. St. Rep. 317, 16 S. W. 397; Lebanon v. McCoy, 12 Ind. App. 500, 40 N. E. 700; Cook v. St. Paul, M. & M. R. Co. 34 Minn. 45, 24 N. W. 311; Chicago & A. R. Co. v. May, 108 Ill. 288; Norfolk & W. R. Co. v. Ward, 90 Va. 687, 24 L.R.A. 717, 44 Am. St. Rep. 945, 19 S. E. 849; Allen v. Gilman, 127 Fed. 609; Miller v. Union P. R. Co. 4 McCrary, 115, 12 Fed. 600; Bloyd v. St. Louis & S. F. R. Co. 58 Ark. 66, 41 Am. St. Rep. 85, 22 S. W. 1089.

Riddick, J. delivered the opinion of the court:

This is an appeal by a railroad company from a judgment against it for damages for an injury to one of its employees while he was acting under the orders of a foreman in charge of the work upon which plaintiff was engaged at the time of his injury. The plaintiff and three or four other workmen were on the top of a wooden structure erected as a support for an iron rock crusher. The heavy iron part of the rock crusher was lifted into position by means of a "traveler" with a crane attached, worked by a steam engine. In placing the top of the rock crusher in position the workmen had also to use a "bent." This "bent" consisted of two upright pieces and a crosspiece some 10 or 15 feet long, connecting these two uprights, all of heavy timbers securely nailed and fastened together. The bottom of these two uprights or legs of the bent were fastened to the top of the wooden structure, on which the rock crusher rested. After the bent had served its purpose the foreman ordered it removed. When this order was given someone suggested that a rope be used, so that it could be lowered gradually. But the foreman said that it was unnecessary to use a rope, and ordered the bent to be pushed over and thrown down. As it was pushed over the top of the upright or leg of the bent next to where the plaintiff was at work caught on a bolt projecting from the "traveler." As the other side of the bent had nothing to stop or control it, it was pushed or fell forward; the side next to plaintiff catching on the projecting bolt caused the bottom of the leg on that side to kick or fly back. It struck plaintiff, knocked him to the ground, and caused him serious injury, on account of which he recovered judgment for damages: and the main question is whether the facts support the judgment.

The liability of the master for injuries to servants rests primarily on the broad principle of law that where there is fault there is liability, but where there is no fault there is no liability. 1 Beven, Neg. 734. In this case we may say that, as the foreman having charge of the work for the defendant stood in its place as its representative, if he, by negligence while acting as foreman, caused the injury, the plaintiff can recover compensation therefor from the defendant, unless the plaintiff was guilty of contributory negligence, or unless the injury resulted from a risk assumed by plaintiff. The defendant not only denies that it was guilty of negligence, but set up both contributory negligence and assumption of the risk by plaintiff as defenses to the action in this case. There is, of course, a distinction between the defense of assumed risk and that of contributory negligence. The defense of contributory negligence rests on some fault or omission of duty on the part of the plain-

tiff, and is maintainable when, though the defendant has been guilty of negligence, yet the direct or proximate cause of the injury is the negligence of the plaintiff, but for which the injury would not have happened. It applies when the plaintiff is asking damages for an injury which would not have happened but for his own carelessness. On the other hand, the defense of assumed risk is said to rest on contract, which is generally implied from the circumstances of the case; it being a term which the law imports into the contract, when nothing is said to the contrary, that the servant will assume the ordinary risks of the service for which he is paid. The defense of assumed risk comes within the principle expressed by the maxim, *Volenti non fit injuria.* This defense does not impliedly admit negligence on the part of the defendant and defeat the right of action therefor, as the defense of contributory negligence does; for, where the injury was the result of a risk assumed by the servant, no right of action arises in his favor at all, as the master owes no legal duty to the servant to protect him against dangers the risk of which he assumed as a part of his contract of service. Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298. In other words, the defense of assumed risk rests on the fact that the servant voluntarily, or at least without physical coercion, exposed himself to the danger, and thus assumed the risk thereof. Having done this of his own accord, he has no right, if an injury results, to call on another to compensate him therefor, whether he was guilty of carelessness or not. Smith v. Baker [1891] A. C. 325; opinion of Lord Bowen in Thomas v. Quartermaine, L. R. 18 Q. B. Div. 685.

But, though the defenses of contributory negligence and assumed risk are separate and distinct, yet it frequently happens that they are both available in the same case and under the same state of facts. For instance, as we have stated, a servant assumes all the risks ordinarily incident to the service in which he is employed; and it is also true that he cannot recover for an injury caused by his own negligence. Now it may turn out that the injury of which the servant complains was not only due to one of the ordinary risks which the servant assumed, but that it was also caused in part by his own negligence. In dealing with such a case it is, so far as results are concerned, immaterial whether it be disposed of by the courts on the ground of assumed risk or contributory negligence, for either of them makes out a good defense. For this reason the distinction between these two defenses is not always brought out in the reported cases; it being often unnecessary to do so. We have thought it well to point out the distinction between them in this case, to avoid any confusion of the law in its application to the facts of this case. In the application of the doctrine of assumption of risks a distinction must be also made between those cases where the injury is due to one of the ordinary risks of the service, and when it is due to some altered condition of the service, caused by the negligence of the master. The servant is presumed to know the ordinary risks. It is his duty to inform himself of them, and, if he negligently fails to do so, he will still be held to have assumed them. The decision in the recent case of Grayson-McLeod Lumber Co. v. Carter (Ark.) 88 S. W. 597, rests on that ground, as do many other cases found in the Reports. But the servant is not presumed to know of risks and dangers caused by the negligence of the master after he enters the service, which change the conditions of the service. If he is injured by such negligence he cannot be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger; for, as we have before stated, the doctrine of assumed risk rests on consent; but, if the injury was caused in part by his own negligence, he may be guilty of contributory negligence. On the other hand, if he realizes the danger, and still elects to go ahead and expose himself to it, then, although he acts with the greatest care, he may, if injured, be held to have assumed the risk. Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366; Lloyd v. Hanes, 126 N. C. 359, 35 S. E. 611; Smith v. Baker, *supra.*

Now the injury in this case did not result from one of the ordinary risks of the employment which a servant of full age and experience must be presumed to have known, whether he did so or not. But, as the jury found, it was brought about during the course of his service by the negligence of the foreman, who had charge of the work and in that respect represented the defendant. Where the condition of the service is thus altered, and the servant is brought face to face with a danger of that kind not ordinarily incident to the work, then, as before stated, new questions are presented. The plea of the master that the servant assumed the risk is met in such a case by the answer that the danger arose from the master's own negligence, which is not one of the risks assumed by the servant. This being so, the master, to make good his defense of assumed risk, must go further and show that the servant voluntarily subjected himself to the new danger with full knowledge and appreciation thereof; for such risk constitutes an addition to those ordinarily incident to the service, and there is no presumption that he had knowledge of it, or assumed it. This

question was thoroughly considered and discussed by the judges of the House of Lords of England in the case of Smith v. Baker, *supra*. In that case the plaintiff was, with other workmen of defendant, engaged in drilling holes in rock for the purpose of blasting. Another set of workmen was, by means of a movable crane operated by a steam engine, moving the stones that had been blasted. These stones were often without notice swung over the heads of plaintiff and those working with him. He was aware of the danger, but continued at work without protest, and was afterwards injured by a stone dropping upon him. In discussing the question as to whether the plaintiff assumed the risk by continuing at work under those circumstances, the judges called attention to the fact that the maxim upon which the rule of assumption of risks was based was not *Scienti non fit injuria*, but *Volenti non fit injuria*. A majority of them therefore concluded that the mere fact that the servant remained at work after discovering the danger to which he was exposed did not authorize the court to say, as a matter of law, that he consented to assume the risk. They held that whether he did so or not was, under the facts of that case, a question for the jury. The justness of this decision has been recognized by some of the American courts. Mahoney v. Dore and Lloyd v. Hanes, *supra*. But, though this decision of the highest English court seems to be logically sound, yet the law in this country, as settled by numerous decisions, is to some extent different. The rule here seems to be that one who, knowing and appreciating the danger, enters upon a perilous work, even though he does so by order of his superior, must bear the risk. In other words, even though he may perform the work unwillingly under orders from his superior, yet if there was no physical compulsion, and if he knew and appreciated the danger thereof, he will in law be treated as having elected to bear the risk, and cannot hold the employer liable if injury results. Southwestern Teleph. Co. v. Woughter, 56 Ark. 206, 19 S. W. 575; Ferren v. Old Colony R. Co. 143 Mass. 197, 9 N. E. 608; Burgess v. Davis Sulphur Ore Co. 165 Mass. 71. 42 N. E. 501; Stiller v. Bohn Mfg. Co. 80 Minn. 1, 82 N. W. 981; Mundle v. Hill Mfg. Co. 86 Me. 400, 30 Atl. 16; Fickett v. Lisbon Falls Fibre Co. 91 Me. 269, 39 Atl. 996; Texas & P. R. Co. v. Swearingen, 196 U. S. 57, 49 L. ed. 385, 25 Sup. Ct. Rep. 164; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777.

But plaintiff in this case exposed himself to the danger in obedience to an order of the foreman. As the danger was brought about by the negligence of the foreman, before it can be said, as a matter of law, that plaintiff assumed the risk thereof by the mere fact that he went ahead with his work, it must be clearly shown that when he did so he knew and appreciated the danger to which he exposed himself by doing the work. But, as plaintiff was busily engaged in work which required his attention, we think it was open for the jury to say that he did not know of, or fully appreciate, the danger, and that, therefore, he did not, by continuing at work, assume the risk of injury to which he was exposed by the carelessness of the foreman. Taking into consideration the fact that it would probably have been safe to have pushed the "bent" over without the use of a rope to control it, but for the fact that there was a nut projecting from the traveler which was liable to catch one side of the bent, that this danger escaped the attention of the foreman whose duty it was to guard against it, and that plaintiff's attention was distracted more or less by his work, we think it exceedingly probable that he not only did not assume the risk caused by the act of the foreman in ordering the bent pushed over without a rope attached to control it, but that he was not even aware of the danger until too late to escape. He knew, of course, that the order had been given to push the "bent" over without the use of a rope; but we think it was open for the jury to find that he did not know and appreciate the danger to him that this order involved, and that, therefore, he did not, by remaining at work, assume the risk. Southwestern Teleph. Co. v. Woughter, 56 Ark. 211, 19 S. W. 575; Lloyd v. Hanes; Mahoney v. Dore; Burgess v. Davis Sulphur Ore Co.; Mundle v. Hill Mfg. Co., and Stiller v. Bohn Mfg. Co.—*supra;* Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; Fickett v. Lisbon Falls Fibre Co. *supra;* Shearm. & Redf. Neg. § 214.

The next question is whether or not plaintiff was guilty of contributory negligence. Now in this case, as we have before stated, the plaintiff, when injured, was acting in obedience to an order of the foreman in charge of the work, who represented the defendant company. The order of the foreman to push the "bent" over carried with it an implied assurance that the act could be done with reasonable safety; for it is the duty of the master or his representative to use due care, and not to order the servant to perform an act that he knew to be unnecessarily dangerous. The servant has the right to rely upon the judgment of the master, unless the danger is so obvious that no prudent man would incur it under like circumstances. For this reason we do not think

that, because the plaintiff, and the foreman under whom he was working were both in a position to have discovered the danger that caused this injury, it necessarily follows that, if one was negligent, both were negligent. It is true that they were both held to the exercise of ordinary care only; but what is ordinary care may vary with the circumstances and with the duty required, and the duty required of these men and the circumstances under which they acted were different. The plaintiff was actually engaged in work under the direction of the foreman. When the "bent" was ordered pushed over, it became necessary for him to unfasten the brace by which it was held in position and to draw the nails by which the end of the leg of the brace was fastened to the structure on which it rested. This required him to look down, instead of upwards. He completed this work just as the "bent" began to fall. Up to that time his attention was necessarily directed to his work. But the foreman was doing no labor himself. He was directing the labor of the plaintiff and others. In order to do this he was standing on the side of the hill, a few yards away from the structure, where he could overlook and direct the work. It was his duty, before ordering the "bent" thrown down, to ascertain that the execution of his order involved no unnecessary danger to the men engaged in the work. When we consider that the plaintiff had the right to rely upon the performance of this duty by the foreman, and that plaintiff's attention was more or less required by the work he was doing, it seems very clear, under the facts of this case, that the jury were justified in finding that the foreman was guilty of negligence, but that the plaintiff was not. The objection to the fourth instruction or paragraph of charge, on the ground that it permitted the jury to make such a finding, must therefore be overruled. The question of whether plaintiff was guilty of contributory negligence was, we think, properly submitted, and the finding of the jury must stand; for it cannot be said, under the facts of this case, that the danger was so obvious that no prudent man would have incurred it. 'Southwestern Teleph. Co. v. Woughter, 56 Ark. 206, 19 S. W. 575; Sneda v. Libera, 65 Minn. 337, 68 N. W. 36.

Counsel for defendant raise several objections to the charge of the court. The first instruction is objected to on the ground that it told the jury that a servant does not assume the risk of the negligence of the master, or of one acting for him. This is clearly the law. The modification of this instruction asked by defendant was not correct, for the mere fact that the servant knows of the master's negligence, or could have known of it by the use of reasonable care, and continued his work without objection, does not necessarily show that the servant assumed the risk. As before stated, to have this effect it must be shown, not only that the servant was aware of the negligence, but that he also realized the danger to which he was thereby exposed.

The fifth instruction given by the court, if read by itself, would be misleading; but the court told the jury that all of the instructions must be taken together, and when so read we do not think it was prejudicial.

The refusal to give instructions 5, 6, and 7, requested by defendant, was not error. To quote from the brief of counsel for appellant, these instructions were based on the theory that, "if plaintiff was of sufficient experience to enable him to see and understand the dangers connected with the work, and if he knew, or by the exercise of ordinary care and observation could have known, that a rope was not to be used, and continued at his work without objection, then he assumed the risk." These instructions make the fact of knowledge on the part of the plaintiff that a rope was not to be used equivalent to knowledge of the increased danger to which he was thereby subjected. The servant may have known that a rope was not to be used, and yet not realize the danger to which he was thereby exposed. Without such realization there was no reason to hold that he assumed the risk of obeying the order of his foreman.

It would serve no useful purpose to take up each of the instructions given and refused by the court. Sufficient to say that we have given the objections presented by counsel thereto careful consideration and are of the opinion that no error was committed. The evidence is sufficient to sustain the judgment, and it is therefore affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

THIEL DETECTIVE SERVICE COMPANY, Plff. in Err.,
v.
HENRY D. McCLURE, Exr. of Mary H. McClure, Deceased.

(— C. C. A. —, 142 Fed. 952.)

Power of attorney—empoyment of detective.

Authority to employ a detective to investigate the affairs of a corporation is

Case Note.—Implied powers under power of attorney to transact business.—In determining the extent of the authority con-

not conferred by a power of attorney executed by one of its stockholders to manage and control all the business relating to his personal estate, to dispose of personalty, lease realty, and collect debts, sign checks, and execute and deliver all other papers that "I myself could execute relating to my personal business and my personal estate."

(January 31, 1906.)

ERROR to the Circuit Court of the United States for the Western District of Kentucky to review a judgment in favor of defendant in an action brought to recover the value of services alleged to have been rendered to defendant's testatrix under a contract executed by an attorney in fact. Affirmed.

Statement by **Lurton**, Circuit Judge:

This was an action against Henry D. McClure, individually, and Henry D. McClure, as executor of Mary H. McClure, upon an account for services rendered and moneys expended at their request. Mary H. McClure was the mother of Henry D. McClure. She was a widow and an invalid. She was a stockholder in a small corporation known as the Anchor Roller Mill, making flour at Corydon, Kentucky. Henry D. McClure was a stockholder in the same corporation. Between them they owned one half of the capital stock, which was $30,000, but how much of this one half each owned is not shown. They were both directors, but the mill was under management of C. L. King and C. E. Harness; one being president and the other

ferred by a power of attorney, it must be given a restrictive construction (Brantley v. Southern L. Ins. Co. 53 Ala. 554; Bissell v. Terry, 69 Ill. 184; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; MacDonald v. O'Neil, 21 Pa. Super. Ct. 364; Stokes v. Dewees, 24 Pa. Super. Ct. 471), the language used being taken according to its natural import (Golinsky v. Allison, 114 Cal. 458, 46 Pac. 295), and its obvious meaning not unnecessarily restricted or extended by implication (White v. Furgeson, 29 Ind. App. 144, 64 N. E. 49); the prime consideration, however, being to give effect to the intention of the parties (Holladay v. Daily, 19 Wall. 606, 22 L. ed. 187; Hemstreet v. Burdick, 90 Ill. 444; White v. Furgeson, *supra;* Marr v. Given, 23 Me. 55, 39 Am. Dec. 600; Posner v. Bayless, 59 Md. 56). The general terms contained in the power of attorney must be construed with reference to, and will not extend the authority delegated beyond, the special powers expressly given. Washburn v. Alden, 5 Cal. 463; Johnston v. Wright, 6 Cal. 373; Billings v. Morrow, 7 Cal. 171, 69 Am. Dec. 235; First Nat. Bank v. Kirkby, 43 Fla. 376, 32 So. 881; White v. Young, 122 Ga. 830, 51 S. E. 28; Geiger v. Bolles, 1 Thomp. & C. 129; Rountree v. Denson, 59 Wis. 522, 18 N. W. 518. Other instances of the application of this rule may also be noted among the ensuing cases.

A power of attorney to do and transact all manner of business in which the principal may be interested does not necessarily authorize the sale of the principal's property. Hodge v. Combs, 1 Black, 192, 17 L. ed. 157.

A power of attorney given by the heirs of a deceased member of a firm to the surviving partner, "to settle up all matters growing out of the business of the late firm," and to "settle up and divide the estate among those entitled thereto, and to do all acts which may be necessary to accomplish said result," does not impliedly authorize the sale of lands held by the partners as cotenants. Southern Cotton Oil Co. v. Henshaw, 89 Ala. 448, 7 So. 760.

A power of attorney to attend "to all business affairs appertaining to real or personal estate" is too indefinite to sustain a transfer of real estate, particularly where acquired long subsequent to its execution. Lord v. Sherman, 2 Cal. 498.

The granting of general power to an attorney in fact to represent the principal's person in all that concerns his interests, present and future, in the state, will not authorize the attorney in fact to bind the principal by a contract for the sale of lands. Treat v. De Celis, 41 Cal. 202.

A power of attorney authorizing the doing of a number of specific things, and concluding with the general words, "and generally to manage and control to my best interest and advantage all my property, real and personal, to transact all business, make, execute, acknowledge, and deliver all contracts, deeds, writings, assurances, and instruments, which may be requisite or proper to effectuate all or any of the premises, with the same power, and to all intents and purposes with the same validity, as I could if personally present," does not give by implication any power to sell, mortgage, hypothecate, or otherwise transfer, any of the principal's property. Quay v. Presidio & F. R. Co. 82 Cal. 1, 22 Pac. 925.

A power of attorney, executed for the purpose of enabling the agent to check out money deposited in a bank in the principal's name, in which the principal empowered him "to attend to any and all descriptions of business in which I . . . may be interested or concerned, in a real or personal manner; . . . and to receive for me any sum or sums of money which may be due to me, and to receipt therefor,"—authorizes the attorney to sell certificates of stock purchased by him. Blaisdell v. Bohr, 77 Ga. 381.

An authority "to attend to the business of the principal generally," or "to act for him with reference to all his business," does not authorize the agent to sell and convey real estate; nor does it allow him to sell, or otherwise dispose of, the personalty of his principal, unless as a means necessary and proper to conduct the business to which the agency applies. Coquillard v. French, 19 Ind. 274.

secretary and manager. The plaintiff is a Missouri corporation having its office in St. Louis. Its business, as shown by its charter, was "the investigation of crimes and offenses committed, or suffered to have been committed; to cause the apprehension of criminals and offenders; to prevent the commission of crime and offenses contemplated; to guard and protect personal and real property, and to look up testimony, facts, and witnesses in matters of property, in matters of personal rights, and legal proceedings."

Not being satisfied with the management and results of the corporate business of the Anchor Roller Mills, Henry D. McClure employed the services of the plaintiff to conduct an investigation into its affairs. The contention was that this employment was both for himself and his mother, the testatrix, Mary H. McClure, and there was evidence tending to show that he represented himself as acting for himself and his mother, and that he exhibited a power of attorney from his mother. That paper was in these words:

Know all men by these presents: That I, Mary H. McClure, of Henderson county, Kentucky, do hereby name, constitute, and appoint my son, Henry D. McClure, of the same county and state, my true, lawful, and only agent and attorney in fact, with full power, right, and authority for me and in my name to take charge of, manage, and control all of my business relating to my personal estate,—that is, to sell and dispose of any per-

A power of attorney by which the principal authorizes his appointee "to act in all my business, in all concerns, as if I was present myself; and to stand good in law in all my land and other business in the Missouri territory,"—does not authorize the attorney to bind his principal by a covenant to convey land. Ashley v. Bird, 1 Mo. 640, 14 Am. Dec. 313.

A general power of attorney authorizing the transaction of all the principal's business of whatever name and nature, and empowering the appointee to sign his name as such attorney for any purpose that he may deem necessary for the proper transaction of such business, confers authority to enter into a contract for the exchange of property, containing a stipulation for liquidated damages on default of performance. Sheffield v. Smith, 8 Misc. 43, 28 N. Y. Supp. 517.

A power of attorney to superintend the principal's real and personal estate, to make contracts, and generally to do all things that concern the principal's interest in any way, although insufficient to authorize the attorney to convey real estate, gives the agent power to execute a lease of real estate, giving the lessee an option to purchase during its continuation. De Rutte v. Muldrow, 16 Cal. 505.

A power of attorney to transact business with all the principal's creditors, with whom he desires to make arrangements which would enable him to continue business, will not authorize the execution of a mortgage of all the principal's stock in trade. Reeves v. Baldwin, 1 Ind. 216.

A power of attorney authorizing the attorney to do, transact, and perform all and every thing or things, act or acts, which he may deem proper in any and every species of business wherein the principal may be in any wise concerned or interested does not confer authority upon the attorney to pledge his principal's property for his own debt. Hewes v. Doddridge, 1 Rob. (Va.) 143.

A general power of attorney, authorizing the attorney to represent his principal in all his interests in a stated locality, does not empower him to embark the principal in a new and different business. Campbell v. Hastings, 29 Ark. 512.

A power of attorney "to buy and sell real estate and personal property, and to collect rents, money, and debts, and to do every act necessarily pertaining thereto," does not authorize the purchase and continuance of a merchant-tailoring business. Mills v. Carnly, 1 Bosw. 159.

A power of attorney which authorizes the agents "to transact all such business as I may not be able to attend to in person," such general words being followed by recitals of specified objects to be accomplished, gives no implied power to purchase mules and wagons and give promissory notes therefor. Born v. Simmons, 111 Ga. 869, 36 S. E. 956.

A general power of attorney to administer a plantation will not authorize the giving of a note for supplies. Robertson v. Levy, 19 La. Ann. 327.

A grant of specific powers, followed by a power to accomplish, at the attorney's discretion, a complete adjustment of all the concerns of the principal in the state, and to do any and every act in his name which he can do in person, confers no authority not relating to the business specifically mentioned, and does not authorize the giving of a promissory note. Rossiter v. Rossiter, 8 Wend. 494, 24 Am. Dec. 62.

But a power of attorney "generally to conduct in my place and stead my commercial business, and to sign my name whenever requisite or expedient in the transaction and conduct of such business as to my said attorney shall seem meet, in his good discretion," will authorize the drawing of bills of exchange, although the drawees have no funds of the principal in their hands. Dollfus v. Frosch, 1 Denio, 367.

A power of attorney to do a number of specific things, including the signing of any bond, obligation, contract, or agreement, or other paper, and to draw and indorse promissory notes, and concluding with a general authorization to conduct the principal's business, sufficiently authorizes the attorney to waive notice or protest of notes indorsed by

sonal property I may own wheresoever situated, and to collect and dispose of the proceeds thereof, to collect any and all debts due me, sign my name to checks on any bank account of mine, and execute and deliver any and all other papers for me and in my name that I myself could execute relating to my personal business and personal estate, save and except only that under this power my said agent and attorney cannot sell and convey real estate, but he may and can, under this power, rent out and lease any real estate for such term of years and upon such conditions as he may think best and to my interest; and I hereby ratify and confirm whatever my said agent and attorney may do for me and in my name in the premises.

Witness my hand this April 21, 1903.

Mary H. McClure.

Pending the rendition of plaintiff's services, which extended over a period of several months, Mrs. McClure died. For the services so rendered the plaintiff presented an account aggregating $3,533.23. Henry D. McClure confessed judgment, but at the close of all of the plaintiff's evidence the court instructed the jury to find for the estate of Mrs. Mary H. McClure. This is now assigned as error.

Argued before Lurton, Severens, and Richards, Circuit Judges.

Messrs. **George V. Triplett** and **Robert D. Vance**, for plaintiff in error:

The extent of the authority of the agent is not to be measured wholly by the written instrument. It is "to be gathered from all the facts and circumstances in evidence," and constitutes a question for the jury.

Nicholson v. Golden, 27 Mo. App. 132.

The principal is liable for the acts of the agent within the scope of the authority which the principal holds the agent out as having, or knowingly permits him to assume.

Law v. Stokes, 32 N. J. L. 249, 90 Am.

his principal. Union Bank v. Morgan, 2 La. Ann. 418.

An attorney in fact, appointed "to manage and transact all business appertaining to the business done under the firm name," though he may bind his principal by a note given for money borrowed, cannot do so by a waiver of exemptions therein. Lippman v. First Nat. Bank, 120 Ala. 123, 74 Am. St. Rep. 28, 24 So. 581.

A power of attorney to sell, convey, and dispose of any and all property, both personal and real, which the principal might have in a certain county, and to do all other matters in relation to any of his property or debts which he could do if present, sufficiently authorizes the attorney in fact to transfer the title and possession of a note. Gould v. Bowen, 26 Iowa, 77.

A power of attorney to transact all the principal's business in a particular county, without any limitation or restriction, confers authority to assign a note payable to the principal. Newland v. Oakley, 6 Yerg. 489.

A power of attorney to collect debts, execute and deliver any and all such bonds, deeds, acquittances, receipts, and discharges as the attorney shall judge expedient, to sell, assign, transfer, and convey the principal's real and personal estate and property in the United States, and to receive payment therefor, and to transact the principal's business generally within the United States, will authorize the execution of a bond for a debt owing by the principal. Hudson v. Whiting, 17 Conn. 487.

A power of attorney to conduct the principal's mercantile business during his absence, "with full, ample, and complete authority, as my said attorney, to take charge of and control my said business," concluding, after reciting certain specific powers, including power to pay all bills due, with a general authorization to perform "all and any or further act or acts that may be necessary and proper for the furtherance and carrying out of the purposes, aims, and objects of said business," does not empower the agent to surrender a large part of the stock in trade to creditors in the payment of debts not then matured. Claflin v. Continental Jersey Works, 85 Ga. 27, 11 S. E. 721.

Authority conferred by a power of attorney "to take full and absolute charge of all my business and affairs whatsoever in the state of Texas, . . . and generally to say, do, act, transact, determine, accomplish, and finish all matters and things whatsoever relating to the premises, as fully, amply, and effectually to all intents and purposes as I, the said constituent, if present, ought or might personally, although the matter should require more special authority than is herein comprised," will be limited to the particular acts therein specified; and such power will not impliedly authorize the execution of deeds in discharge of adverse claims against the principal's property. Frost v. Erath Cattle Co. 81 Tex. 505, 26 Am. St. Rep. 831, 17 S. W. 52.

A power of attorney to carry on a general mercantile business, and to do and perform all the necessary acts in the execution and promotion of such business in as full and ample a manner as the principal might do if present, confers authority to settle a claim which, if valid, would constitute a lien on cotton purchased in connection with the business. Wimberly v. Windham, 104 Ala. 409, 53 Am. St. Rep. 70, 16 So. 23.

A power of attorney to transact any or all business of any kind whatsoever in the state, which, after conferring certain specific powers, including selling, mortgaging, leasing, collecting moneys due for rents or as purchase money, and the satisfaction of mortgages given to the principal, concludes with the words, "it being the true intent and meaning of this instrument to confer . . .

Dec. 655; Abbott, Trial Ev. p. 41; Reynolds v. Collins, 78 Ala. 94; Minturn v. Burr, 16 Cal. 107; Proctor v. Tows, 115 Ill. 138, 3 N. E. 569; Indiana, B. & W. R. Co. v. Adamson, 114 Ind. 282, 15 N. E. 5; Barnett v. Gluting, 3 Ind. App. 415, 29 N. E. 154, 927.

The circumstances and apparent relation of the parties, and their treatment of each other, may be shown in the evidence.

Brown v. Prude, 97 Ala. 639, 11 So. 838; Wright v. Solomon, 19 Cal. 64, 79 Am. Dec. 196; Arthur v. Gard, 3 Colo. App. 133, 32 Pac. 343; 1 Am. & Eng. Enc. Law, 2d ed. p. 969.

Beyond the terms of the instrument, or of the verbal commission, it may be shown that the principal has held the agent out to the world in other instances as having an authority which will embrace the particular act in question.

Mechanics' Bank v. New York & N. H. R. Co. 13 N. Y. 632; Jeffrey v. Bigelow, 13 Wend. 518, 28 Am. Dec. 476; Story, Agency, 21; Star Line v. Van Vliet, 43 Mich. 364, 5 N. W. 418.

When the agent's acts affect third parties, the principal is equally bound by the authority which he actually gives, and by that which, by his own acts, he appears to give.

Webster v. Wray, 17 Neb. 579, 24 N. W. 207; Columbia Mill Co. v. National Bank, 52 Minn. 224, 53 N. W. 1061; Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78; Com. v. Hawkins, 83 Ky. 246; Cartmel v. Unverzaught, 21 Ky. L. Rep. 1282, 54 S. W. 965.

Lurton, Circuit Judge, delivered the opinion of the court:

The case must turn upon the scope of the agency of Henry D. McClure under the written letter of attorney heretofore set out. There was some evidence tending to show that Mrs. McClure had for some time prior been an invalid, and that her son, Henry D. McClure, had in a general way looked after her affairs. But for his powers when the

full and unrestricted power and authority to act . . . in all matters of every kind whatsoever arising or that may arise in the said state," although it be construed strictly with reference to the specific authority granted, confers power on the agent to agree to take lands covered by a mortgage in satisfaction of the mortgage debt. Renwick v. Wheeler, 48 Fed. 431.

A power of attorney to transact all the principal's business in the city of New York, of whatsoever name, nature, or description, does not confer upon the attorney the right to transfer all the principal's property to a trustee for the payment of his debts. Ferreira v. Depew, 17 How. Pr. 418.

A power of attorney conferring authority to buy, sell, or exchange property, receive and receipt for money, sell and dispose of property, give bills of sale thereto, sell and transfer real estate, and execute deeds thereto, or to do and perform any lawful act in or about or concerning the principal's business, confers no power upon the attorney to make an assignment for the benefit of creditors, the meaning of the general words in the instrument being restricted by the context. Gouldy v. Metcalf, 75 Tex. 455, 16 Am. St. Rep. 912, 12 S. W. 830.

But a power of attorney given for the purpose of settling up the principal's business, authorizing the attorney in fact to transact all the principal's business of every kind and description, to collect and receipt for all moneys due the principal, and to sell and dispose of all property, real and personal, was held, in view of the attendant circumstances, to authorize the execution of a deed of trust for the benefit of creditors, in Lamy v. Burr, 36 Mo. 85, 88 Am. Dec. 135.

A power of attorney, given to the maker's partner in the real-estate business, to sign his name to any instrument in any and all business pertaining to the real-estate business, or otherwise, with full power and authority to do and perform every act and thing whatsoever requisite and necessary to be done in and about the premises, will not authorize the taking of a third person into the firm. Horne v. Ingraham, 125 Ill. 198, 16 N. E. 868.

A general power of attorney authorizing the appointee to take general control of the principal's affairs and business in the states of Kansas and Colorado confers no authority to deliver a deed which the principal had executed with the intention that it should become operative at his death. McClun v. McClun, 176 Ill. 376, 52 N. E. 928.

A general power of attorney will not authorize the administration of an estate of which the principal is the administratrix. Pipes's Succession, 26 La. Ann. 203.

A power of attorney to attend to the principal's business, to collect all money and obligations due, notes, accounts, to settle and adjust any and all business matters of whatever nature, and to give receipts and acquittances, pay and settle all debts, draw checks on bank funds, and in general do any and all acts and things in the premises which the attorney might think fit and proper, does not confer authority to reloan money collected. Haynes v. Carpenter, 86 Mo. App. 30.

A general power of attorney to transact all and every kind of business, containing no restriction to any specific kind of business or species of property nor any limit of power, authorizes the attorney in fact to enter into a party-wall agreement. Maynard v. Mercer, 10 Nev. 33.

And a general power to transact all the principal's business in the city of New York, of whatsoever name, nature, or description, is sufficient to authorize the attorney in fact to release an action brought by the principal. Ferreira v. Depew, 17 How. Pr. 418.

contract here involved was made we must look to the express letter of authority executed very shortly before plaintiff's employment. Any authority he may theretofore have exercised must be regarded as limited and defined by this instrument.

The letter of attorney was exhibited to the plaintiff, and upon its sufficiency the plaintiff's claim against Mrs. McClure's estate must stand or fall; there being substantially no evidence in any wise tending to show her knowledge or approval of the agreement alleged to have been made in her behalf. A careful inspection of the power under which Henry D. McClure acted leads us to an agreement with the construction reached by the circuit judge, who concluded that the general power conferred by the opening clause was limited and defined as follows: "(1) To sell and dispose of any personal property I may own, wheresoever situated; (2) to collect and dispose of the proceeds thereof; (3) to collect any and all debts due me; (4) to sign my name to checks on any bank account of mine; (5) to execute and deliver any and all other papers for me and in my name that I myself could execute relating to my personal business and my personal estate, save and except that under this power my said agent and attorney cannot sell and convey real estate," but "(6) he may and can, under this power, rent out and lease my real estate for such use and upon such conditions as he may think best and to my interest."

The plaintiff was not employed to collect any debt. That was not its business. It is an agency for the discovery of crime and the detection of offenders. Its business also is to look up testimony, facts, and witnesses in matters of property. Its chartered powers have been set out in full. The auditing of book accounts may be one means of investigation. The very extraordinary account of $3,533.23 against Mrs. McClure for services to her as a mere shareholder in this roller-mill company is not for the mere services of a bookkeeper in straightening out the company's books. The time covered by the account extends from April to September and during much of the time two men who styled themselves "operators" or "auditors," at $12.50 per day each and all expenses, were engaged in the investigations thus set on foot. Included in the items are "cigars, drinks," etc., which the chief operator, Capt. T. H. James, says "is necessary in a certain class of our business." This we mention, not by way of criticizing the justice of the account as against those who actually set in motion the detective service company, but as tending to show that the employment was not the mere auditing of books of the mill company, but an inquisitorial affair having serious ends in view, if Mr. McClure at all understood the nature of the machinery he had set going. The employment did not involve the collection of a debt, nor the sale or disposition by mortgage, pledge, or otherwise of her shares, nor the disposition of the proceeds of any such sale. It is not a question of power to sign any check or any other paper relating to her business. The transaction does not come under any of the specific powers granted, and there is no authority which can rightfully extend the power which Mrs. McClure so specifically defined. That they are wide powers, and may include authority to do those things necessary or usually required to be done in the execution of such authority, we concede.

The conclusion we reach is that no reasonable construction of the authority conferred by the letter of attorney would cover the agreement here involved, or charge Mrs. McClure for services of the kind rendered by plaintiff, however valuable they may have been to the company in which she was a stockholder. Plaintiff knew that it was dealing with an agent. It knew that he acted only under and by virtue of written delegated authority. It was bound at its peril to see that the contract which it proposed to make came within the power under which the agent acted. The construction and meaning of this instrument was a question of law for the court, and there were no circumstances in evidence which required the submission of any question to the jury.

Judgment affirmed.

ILLINOIS SUPREME COURT.

McCORMICK HARVESTING MACHINE COMPANY, Appt.,
v.
FRANK ZAKZEWSKI.

(220 Ill. 522, 77 N. E. 147.)

Appeal—review of evidence.

1. The question whether or not the record contains evidence tending to support the cause of action is preserved for review in the appellate court by tendering a peremp-

Case Note.—Servant's assumption of obvious risks arising from the master's negligence.—The decision in the above case, that the plaintiff assumed the risk of the dangerous work where he undertook to remove a pile of lumber covered with ice and defectively piled, because the defects were plainly obvious to him, notwithstanding the fact that the defective conditions were due to the master's negligence, rests upon principles of law that are fully established. "All that the servant can require is that he shall not be exposed to unknown risks," is the gist

tory instruction at the close of the evidence to return a verdict in defendant's favor.

Master—unsafe lumber pile.

2. A pile of slippery lumber 6 or 7 feet high and only 3 or 4 feet wide, without any crosspieces, which falls upon and injures an employee, cannot be said, as matter of law, not to be defective so as to render the working place unsafe.

Same—notice of defect.

3. A master will be chargeable with notice of the defective piling of lumber which is done under the immediate supervision of his foreman.

Same—notice to servant.

4. An employee experienced in handling lumber is chargeable with notice of any defect which may exist in the manner of piling slippery lumber into a stack 6 or 7 feet high, and 3 or 4 feet wide, without any crosspieces in it.

Same—assumption of risk.

5. An employee assumes the risk of injury from departure from the master's custom to place crosspieces in lumber piles.

Same—master's negligence.

6. An employee sent to remove a pile of lumber assumes the risk of injury from its fall because the lumber is covered with ice and defectively piled, where the defects are plainly obvious to him, notwithstanding they are due to the master's negligence.

(February 21, 1905.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Scott, J.:

This is an action on the case, brought in the superior court of Cook county by Frank Zakzewski, the appellee, against the McCormick Harvesting Machine Company, appellant, to recover damages for a personal in-

of the law with respect to the servant's acceptance of the risk of his employment. 1 Labatt, Mast. & S. p. 141. It is the implied consent of the servant to undertake known risks which relieves the employer from liability for injuries incurred by reason of the risks of employment, whether this consent is based on the maxim, *Volenti non fit injuria*, or upon the theory that the servant's acceptance of, or continuance in, the employment with knowledge of the risk negatives the existence of any implied contract of the master to supply safer instrumentalities. See 1 Labatt, Mast. & S. p. 143. In addition to the authorities which are analyzed and reviewed in the treatise just quoted, particular reference is made to the following among many authorities which illustrate this doctrine: Minty v. Union P. R. Co. 2 Idaho, 471, 4 L.R.A. 709, 21 Pac. 660; Sweet v. Ohio Coal Co. 78 Wis. 127, 9 L.R.A. 861, 47 N. W. 182; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495. The authorities to this general doctrine are too numerous and too harmonious to need further citation. The proposition contended for in the present case, that the servant does not assume risks arising from the master's negligence, is unmistakably true, so far as the servant does not know of the master's negligence or of any dangers that have been caused by it. He does not assume that the master will be negligent; neither does he assume that the master has been negligent, unless that fact is known to him. But "in any case in which the presumption of ignorance, which is entertained with regard to risks caused by the master's negligence, is rebutted by positive evidence which establishes knowledge, actual or constructive, of the particular peril which caused the injury, it must at the very least be a question for the jury whether the servant did not, by continuing to expose himself to the peril thus known to him, show his intention to take upon himself the responsibility for any accident which might happen to him by reason of its existence, or, in other words, to waive any right of action which, apart from such knowledge, he would have possessed." 1 Labatt, Mast. & S. § 5, p. 6.

The same doctrine is sharply stated in Sanderson v. Panther Lumber Co. 50 W. Va. 42, 55 L.R.A. 908, 88 Am. St. Rep. 841, 40 S. E. 368, as follows: "An employee assumes not only the risk of an accident occasioned by the negligence of his fellow servants, but also of the known negligence of his employer, if he accepts or continues in such service after knowledge of such negligence."

To the same effect is the decision in Johnson v. Boston & M. R. Co. reported herewith, *post*, 856. There, also, the contention was made that the danger of the employment was caused by the negligence of the master, and consequently was not a danger assumed by the servant, but the court met this contention by showing that, while the danger resulted from the master's negligence, the servant was fully aware of the danger thereby caused, and must be held, by continuing in the service with full knowledge, to have assumed the increased hazard.

Likewise, in Griffith v. Lexington Terminal R. Co., herewith reported, *post*, 854, where the servant contended that his injuries were caused by defects in the appliances which existed by reason of the negligence of the master, the court held that the increased risk, if there was one, was accepted by him.

Such, indeed, is the necessary effect of the multitude of decisions in which employees have been held to assume the risks of known dangers arising from defects in appliances or unsafe situations of any kind, though these are caused by the employer's negligence.

jury sustained by appellee while working for appellant in its lumber yard in the city of Chicago. The original declaration consisted of two counts. Each charged, in substance, that the defendant negligently had and kept two certain stacks of lumber on its premises piled or stacked in a loose, improper, unsafe, and insecure manner; that plaintiff was in the employ of the defendant, and was ordered to remove these stacks, and, while attempting to do so, with all due care, was injured by the lumber from the stacks falling upon him. Afterwards two additional counts were added to the declaration. Each of these counts charged as negligence the failure of the master to furnish the plaintiff a reasonably safe place in which to perform his work, in that it negligently and carelessly had and kept two certain piles or stacks of lumber in said yard so loosely, carelessly, improperly, and unsafely stacked, piled, or supported that said piles might fall upon plaintiff while engaged in handling or removing the lumber. The defendant filed the general issue to the declaration, and a trial was had before a jury, which resulted in a verdict of $1,350 in favor of the plaintiff. After overruling a motion for a new trial and a motion in arrest of judgment, the superior court entered judgment upon the verdict. The defendant appealed to the appellate court for the first district, where the judgment of the superior court was affirmed, and it now prosecutes a further appeal to this court.

The facts, briefly stated, are as follows:

On February 20, 1901, appellee, who was working for the appellant in its lumber yard in the city of Chicago, was ordered by the foreman of the yard to assist two of his fellow workmen in removing two stacks of lumber near the railroad track, where they had been unloaded from a car about an hour before, to another part of the yard. There were two sizes of lumber in the car, and when taken out the lumber had been separated and the two sizes had been placed in different stacks. The lumber had been laid lengthwise from north to south. Each stack was from 3 to 4 feet in width and from 6 to 7 feet in height. They were very close together; the space between them being from 1 inch to 3 1-2 inches, according to the estimates of the various witnesses. They did not touch, however, and one did not act as a support for the other. The lumber in the stacks was to be removed and placed upon a truck which ran upon a track about 3 feet north of the stacks. The men were about to commence removing the lumber from the west stack, when Krempski, the foreman of the yard, ordered them to take the lumber from the east one first. Appellee and one of his fellow workmen got upon the east stack and removed the lumber, handing it to the third man, who remained on the truck. The lumber in both stacks was piled up without any crosspieces between the layers or tiers. Appellee and his assistant removed an entire tier before taking any from the tier below the one on which they were working. After taking off from 1 to 2 feet of the east stack they stood upon the ground and performed their work. They had reduced the height of the east stack to about 3 feet, and had just taken a piece from that stack in order to hand it to the man on the truck, when the west stack fell over towards the east. The lumber from it struck appellee, throwing him down upon the ground. He fell upon his back, and the lumber from the west stack, together with that from the east stack which it carried with it, fell upon him and broke his leg. Appellee had worked in lumber yards for a period of from thirteen to twenty years, and had performed all kinds of work connected with handling lumber. Appellant's foreman, Krempski, testified that he directed the men how to pile this lumber when it was taken from the car, and that it was stacked according to his instructions. The lumber in the two stacks was green, heavy lumber. It was slippery, and had ice on it when taken from the car. The ground near these stacks was rough and uneven, and appellant was filling low places in the yard with cinders, and the south end of the stacks rested on a pile of such cinders. The stacks appeared all right, and did not look like they would fall. The only cause assigned by any of the witnesses for the falling of the stack was that given by one of appellee's witnesses, who stated that the stack was too high and too narrow. Neither appellee nor the two men who were working with him had anything to do with making the stacks of lumber, and neither of them had seen the stacks before they were directed to remove them, and neither of them had touched the west stack before it fell over.

At the close of plaintiff's evidence in chief, and again at the close of all the evidence in the case, the defendant offered an instruction directing the jury to return a verdict for the defendant. The court refused the instruction in each instance. This action of the court is assigned as error, on the ground that the plaintiff assumed the risk of the stack of lumber falling upon him.

Mr. W. T. Underwood, for appellant:

The servant assumes not only the ordinary risks incident to his employment, but also the dangers which are obvious and apparent.

Chicago & A. R. Co. v. Munroe, 85 Ill. 25; Toledo, W. & W. R. Co. v. Black, 88 Ill. 112; Chicago, R. I & P. R. Co. v. Clark, 108 Ill.

113; Sack v. Dolese, 137 Ill. 129, 27 N. E. 62; Goldie v. Werner, 151 Ill. 551, 38 N. E. 95; Howe v. Medaris, 183 Ill. 288, 55 N. E. 724; Lake Erie & W. R. Co. v. Wilson, 189 Ill. 89, 59 N. E. 573; La Salle v. Kostka, 190 Ill. 130, 60 N. E. 72; Browne v. Siegel, C. & Co. 191 Ill. 226, 60 N. E. 815; Armour v. Brazeau, 191 Ill. 117, 60 N. E. 904; Chicago & E. I. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74; Cichowicz v. International Packing Co. 206 Ill. 346, 68 N. E. 1083; McArthur Bros. Co. v. Nordstrom, 87 Ill. App. 554; McCormick Harvesting Mach. Co. v. Wojciechowski, 111 Ill. App. 641; Beach, Contrib. Neg. 3d ed. 518; Wood, Mast. & S. § 335; Ft. Worth Stock Yards Co. v. Whittenburg, 34 Tex. Civ. App. 163, 78 S. W. 366; Weeks v. Scharer, 49 C. C. A. 372, 111 Fed. 334; Murphy v. Rockwell Engineering Co. 70 N. J. L. 374, 57 Atl. 444; Stewart v. Ohio River R. Co. 40 W. Va. 188, 20 S. E. 922; Wilson v. Chess & W. Co. 117 Ky. 567, 78 S. W. 453; Harrington v. Wabash R. Co. 104 Mo. App. 663, 78 S. W. 662; Hazlehurst v. Brunswick Lumber Co. 94 Ga. 535, 19 S. E. 756.

The general rule that it is the duty of the master to use ordinary care to provide a reasonably safe place in which the servant may do his work is not applicable at all times where the servant has been expressly engaged to do work the nature of which is destructive of the building or structure upon which he is employed.

Clark v. Liston, 54 Ill. App. 578; Mueller v. Schwecht, 62 Ill. App. 622; Richardson v. Anglo-American Provision Co. 72 Ill. App. 77; Chicago Edison Co. v. Davis, 93 Ill. App. 284, Affirmed in 195 Ill. 31, 62 N. E. 829; Western Wrecking & Lumber Co. v. O'Donnell, 101 Ill. App. 492; Moore v. Pennsylvania R. Co. 167 Pa. 495, 31 Atl. 734; Pederson v. Rushford, 41 Minn. 289, 42 N. W. 1063; Texas & P. R. Co. v. French, 86 Tex. 96, 23 S. W. 642; Glenmont Lumber Co. v. Roy, 61 C. C. A. 506, 126 Fed. 524; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495; Roccia v. Black Diamond Coal Min. Co. 57 C. C. A. 567, 121 Fed. 451; McCann v. Kennedy, 167 Mass. 23, 44 N. E. 1055; Louisville, N. A. & C. R. Co. v. Corps, 124 Ind. 427, 8 L.R.A. 636, 24 N. E. 1046; Sykes v. Packer, 99 Pa. 465; Galow v. Chicago, M. & St. P. R. Co. 65 C. C. A. 507, 131 Fed. 242; Carey v. Sellers, 41 La. Ann. 500, 6 So. 813; Pollich v. Sellers, 42 La. Ann. 623, 7 So. 786; Moon-Anchor Consol. Gold Mines v. Hopkins, 49 C. C. A. 347, 111 Fed. 298; Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314, 96 Fed. 713; Bailey, Personal Injuries Relating to Master & Servant, 692.

When the evidence given at the trial, with all legitimate inferences that may legally and justifiably be drawn therefrom, is insufficient to support a verdict for the plaintiff, so that if such a verdict be returned it must be set aside, the court is not bound to submit the case to a jury, but may and should, in such case, direct a verdict for the defendant.

Simmons v. Chicago & T. R. Co. 110 Ill. 340; Bartelott v. International Bank, 119 Ill. 259, 9 N. E. 898; Commercial Ins. Co. v. Scammon, 123 Ill. 601, 14 N. E. 666; People v. People's Ins. Exchange, 126 Ill. 466, 2 L.R.A. 340, 18 N. E. 774; Chicago & A. R. Co. v. Adler, 129 Ill. 335, 21 N. E. 846; Purdy v. Hall, 134 Ill. 298, 25 N. E. 645; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 18 L.R.A. 215, 32 N. E. 285; Gartside Coal Co. v. Turk, 147 Ill. 120, 35 N. E. 467; Goldie v. Werner, *supra;* Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 30 L.R.A. 33, 38 N. E. 773; Werk v. Illinois Steel Co. 154 Ill. 427, 40 N. E. 442; Cicero & P. Street R. Co. v. Meixner, 160 Ill. 320, 31 L.R.A. 331, 43 N. E. 823; Schuermann v. Dwelling House Ins. Co. 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1093; Wadsworth v. Laurie, 164 Ill. 42, 45 N. E. 435; Rack v. Chicago City R. Co. 173 Ill. 289, 44 L.R.A. 127, 50 N. E. 668; Offutt v. World's Columbian Exposition, 175 Ill. 472, 51 N. E. 651.

Mr. Charles V. Barrett, with Mr. George F. Barrett, for appellee.

Scott, J., delivered the opinion of the court:

In order to recover in this case it was incumbent upon appellee to establish three propositions, *viz.:* First, the existence of some defect in the construction of the west stack, which rendered the place at which he was ordered to work unsafe; second, that appellant, in the exercise of ordinary care, would have had knowledge of such defect; and, third, that appellee did not know of the defect, and did not have equal opportunities with appellant of knowing of it. Lake Erie & W. R. Co. v. Wilson, 189 Ill. 89, 59 N. E. 573; Armour v. Brazeau, 191 Ill. 117, 60 N. E. 904; Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455; Momence Stone Co. v. Turrell, 205 Ill. 515, 68 N. E. 1078.

The peremptory instruction offered by appellant in the trial court at the close of all the evidence in the case preserved the question, as one of law reviewable by this court, whether there is in this record any evidence which, with the inferences reasonably to be drawn therefrom, tends to prove the above propositions. Masonic Fraternity Temple Asso. v. Collins, 210 Ill. 482, 71 N. E. 396. Appellee offered evidence showing that each of the two piles of lumber in question was between 3 and 4 feet in width and between 6 1-2 and 7 feet in height, that the lumber

was slippery from the ice upon it, and that there were no crosspieces between the layers or tiers of lumber in the stacks. Whether the piling of slippery lumber to a height of between 6 and 7 feet without using crosspieces between the tiers, when the stack was only between 3 and 4 feet in width, constituted a defective or negligent construction of the stack, and whether that was the cause of the west stack falling over, were questions of fact for the jury; and we cannot, therefore, say that there was no evidence tending to prove the existence of some defect in the construction of the stack which rendered the place in which appellee was ordered to work unsafe. Neither can it be said that appellant did not know of such defect. The lumber was piled under the immediate supervision of appellant's foreman. Appellant, by its foreman, therefore had actual knowledge of the condition of the lumber and of the manner in which the stack was constructed. There is, however, a total failure of proof to show that appellee did not know of the defects above suggested, or that he did not have equal opportunities with appellant of knowing of them. On the contrary, it appears that he had full and complete knowledge thereof. He was about fifty years of age when injured, and had been working in lumber yards for a period of from thirteen to twenty years. During that period, and especially during the four years that he worked for appellant, he had been engaged in removing lumber from cars, stacking it when taken from cars, loading it upon wagons and trucks, piling it and removing it from piles, and, in short, doing all kinds of work connected with the handling of lumber in lumber yards. It thus appears that he was fully informed of all obvious and apparent dangers that might ordinarily arise in the handling and stacking of lumber. In addition to his testimony showing actual knowledge on his part that the two stacks were each about 4 feet in width and between 6½ and 7 feet in height, it appears from his evidence that when the foreman ordered him to remove the two stacks of lumber he first started to take down the west stack, and went around on the west side of it, where its manner of construction was plain and obvious. The foreman then ordered him to remove the east stack first. He passed around the north end of the stack over to the east side of the east stack. The height and width of the west stack were not latent defects which required inspection by appellee in order to discover them. If the stack was too high for its width, it was only necessary for a man experienced in piling and stacking lumber, as the evidence conclusively shows appellee was, to look at it to discover that defect. It would be open and apparent to him.

Appellee also knew that there were no crosspieces in either stack. His testimony shows that he had a thorough knowledge of the different ways of piling or stacking lumber. He says: "A pile has crosspieces, while a stack or story has no crosspieces. It is piled out of the cars without crosspieces. . . . When I say it has two stories, I mean that it never is a pile; that it is there only for a short time, to be taken away to an alley and piled. . . . There are piles that have a foundation and which have crosspieces. Those are piles." He referred to the two stacks of lumber as "stories," and testified that he was directed by the foreman to remove "those two stories," but to take the east one first; that they were stories, and not piles, because a pile has crosspieces, while a stack or story has none; that both stacks were constructed in the same manner; that the lumber was stacked because the car had to be emptied. From his testimony it does not appear that he was ignorant of the fact that these stacks did not have crosspieces. On the contrary, his evidence in a number of instances discloses the fact that he knew that both of the stacks were constructed without crosspieces.

It is said, however, that the evidence shows that these stacks were 7 feet in height, and that it was the uniform custom of appellant theretofore to use crosspieces in stacks 7 feet or more in height. If this be true, still appellee had actual notice of the fact that that custom had not been followed in this instance, and made no complaint or objection to working on the east stack and near the west one, and the most that could be claimed on account of the departure from the custom would be that it constituted negligence on the part of appellant, of which appellee had notice. If there had been a departure from the customary method of constructing the stack, and appellee, relying on such customary method and without notice of a change therefrom, had been injured, and if the method actually used was defective and contributed to the injury, then appellee would not have assumed the risk of the defect arising therefrom. Here, however, appellee knew of the departure from the customary method of constructing the stacks, and therefore necessarily did not rely upon such method.

The lumber in the stacks was slippery, caused by ice forming on the lumber while in the car. The accident occurred in February, 1901. Appellee had been working at this same work for four months prior to the injury. The evidence given on behalf of appellee shows that ice is always found

on green lumber taken from cars in Chicago in the winter, and that it is caused by the lumber steaming and freezing in the car. It does not appear that there was any more ice on this lumber which fell than is usually found on lumber taken from cars in the winter. The danger arising from lumber being icy or frozen was, therefore, one of the ordinary risks of his employment. Moreover, the lumber in the east pile, of which over one half had been removed by appellee prior to the injury, was in the same condition in this respect, and appellee continued working on it after having discovered that it was slippery (if he was ignorant of that fact before), although it was constructed in the same manner, of the same height and width, and of the same icy lumber as the west pile. From what we have above said, it follows that appellee failed to establish the third proposition above mentioned, *viz.*, that he did not know of the defects in the construction of the west stack of lumber which rendered the place at which he was ordered to work unsafe, or did not have equal opportunities with appellant of knowing of them. It must therefore be held, as a matter of law, that he assumed the risk arising from the defects above pointed out in the construction of the west stack of lumber.

Appellee has argued the question of assumed risk in this case on the theory that the servant does not assume risks arising from the master's negligence, and that the rule that the servant assumes the ordinary risks incident to the business presupposes that the master has performed the duties of caution, care, and vigilance which the law casts upon him, and that it is those risks only which cannot be obviated by the adoption of reasonable measures of precaution by the master that the servant assumes. The true rule in this regard is that the servant assumes not only the ordinary risks incident to his employment, but also all dangers which are obvious and apparent; and, if he voluntarily enters into, or continues in, the service, knowing, or having the means of knowing, its dangers, he is deemed to have assumed the risks, and to have waived all claims against the master for damages in case of personal injury resulting from such dangers. Browne v. Siegel, C. & Co. 191 Ill. 226, 60 N. E. 815; Cichowicz v. International Packing Co. 206 Ill. 346, 68 N. E. 1083. In Browne v. Siegel, C. & Co. *supra*, it is said that, even if the master fails in his duty to furnish the servant a place ordinarily safe in which to work, and there are, to the knowledge of the servant, defects which render the place unsafe, the servant is held to have assumed the hazard; for he cannot go on with knowledge of the danger, without complaint, until he is injured, and then hold the master liable. In Cichowicz v. International Packing Co. *supra*, this court said (page 351 of 206 Ill., page 1084 of 68 N. E.): "To say that the servant assumes no risks except such as cannot be obviated by the adoption of reasonable measures of precaution by the master is to abolish the doctrine [of assumed risk] altogether. Under such a rule, the master is liable in every case where he has been negligent, although the servant knows of the danger, and voluntarily encounters it without objection,"—and it was there held that the position taken by appellee in this case is untenable.

Appellee, in his brief and argument, says: "The pile was only 3 feet wide, and appellee maintains that common sense shows that it would be impossible for such a pile of lumber as this to be safe when it has no crosspieces to bind the tiers together. The pile was built up right alongside the railroad track, upon which heavy cars were at all times running and jarring the ground around these tracks, and a pile of lumber built high and narrow, as this was built, without crosspieces, and the lumber being icy and slippery, there can be no question but that the slightest slipping of one piece, caused by any jar, would cause the whole pile to fall down; and this is a matter of which the appellant is charged with notice." This argument applies with equal force to the appellee, and supports the theory that appellee assumed the risk under the rule above stated.

It is also said that the evidence shows that the ground on which the stacks were laid was rough and uneven, and that such condition was not apparent or known to appellee. All that is proved in this regard is that the ground near these stacks was somewhat rough and uneven, but there is no evidence whatever that this condition existed under the stacks. Proof that the ground in some other place near these stacks was rough and uneven does not tend to show that the ground under the stacks was in the same condition. There was also evidence that the south end of the stacks rested on a pile of cinders; but the size of this pile of cinders was not shown in any manner, nor was it shown that this caused the stacks to be tilted, or one side or end to be higher than the other. On the contrary, the evidence introduced by appellee shows that the stacks were level and looked all right. Without some proof of the size of the pile of cinders, or that it caused the stack to stand unevenly on the ground, it cannot be inferred that this constituted a defect in the construction of the stack, or

that it was the cause, or one of the causes, of the stack falling.

Other errors assigned are, upon the record now before us, without merit. The peremptory instruction offered at the close of all the evidence should have been given. The judgment of the Appellate Court and the judgment of the Superior Court will be reversed, and the cause will be remanded to the Superior Court.

Petition for rehearing denied April 11, 1906.

GEORGIA SUPREME COURT.

JOE GRIFFITH, Plff. in Err.,
v.
LEXINGTON TERMINAL RAILROAD COMPANY.

(124 Ga. 553, 53 S. E. 97.)

Servant—assumed risk.

1. It appearing from the plaintiff's petition that he voluntarily assumed to perform for his master duties so perilous as to subject him to imminent danger to life and limb, and no facts being alleged which support the charge that the master was responsible for a resulting injury, the defendant's demurrer was properly sustained.

Same—hazard.

2. One who knowingly engages to do what no prudent man ought to risk his life in endeavoring to accomplish cannot, if injury ensues, rely upon the law to throw around him the protection of a fiction that his employer impliedly undertook to take steps to minimize the hazard assumed,—at least to the extent of making performance possible.

(December 22, 1905.)

ERROR to the Superior Court for Oglethorpe County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Candler, J.:

The question presented for determination in this case is whether or not the trial court erred in sustaining a general demurrer to the plaintiff's petition. He alleged that he received permanent physical injuries while in the service of the defendant railroad company in the capacity of fireman and brakeman on its road, which extends from Crawford to Lexington, in this state. He further alleged that he was under the direction and subject to the control of another of the company's employees, who acted both as conductor and engineer upon the only train operated on that road, and that it was his duty to fire the engine, and also to leave it at certain points along the line in order to apply the brakes to the train, which was a train for the carrying of both freight and passengers. As to the circumstances under which he received his injuries, his petition furnishes the following account: In coming from Crawford to Lexington there is, near the latter station, a considerable down grade, which makes it necessary that the brakes on the train should be applied in order to bring it to a stop at that station without injury to, or strain on, the engine or other machinery,—especially when the train is in part made up of freight cars or cars other than the regular passenger coach; the train not being equipped with air brakes. When freight cars were attached between the engine and the passenger coach, it was the plaintiff's duty to leave the engine at this point while the train was in motion, stepping from the engine to the ground, and then to get upon the platform of the passenger coach while the train was still in motion, and there apply the brakes. He had been working on the road in the dual capacity of fireman and brakeman for several years. On the day of the injury several heavy cars were attached to the engine in front of the passenger coach, and, when the train was coming down the decline or down grade near Lexington, the plaintiff, in the performance of his aforesaid duties and in obedience to the orders of his superior, who had charge of the train and authority to give such orders, undertook to alight from the engine to get upon the platform of the passenger coach to apply the brakes. He stepped from the engine to the ground, and then attempted to get on the platform of the passenger coach as it approached, but was thrown violently to the ground, and the coach ran over one of his feet. The "train, when he undertook to board the same, was moving at an unusually high rate of speed at this point, though petitioner was not aware of such unusual or dangerous rate of speed," and "just at that time passengers came out upon the platform of said passenger coach, and even upon the bottom steps of the same, and in the way of petitioner, as he undertook to perform said duties and

Headnotes by CANDLER, J.

Note.—For the assumption of obvious risks caused by negligence of the master, see the case note to McCormick Harvesting Mach. Co. v. Zakzewski, *ante*, 848.

For authority to the effect that an order to a servant will not justify exposure to imminent and obvious peril, see case note to Choctaw O. & G. R. Co. v. Jones, *ante*, 837.

to obey said orders." The plaintiff alleged that "the failure of said company to equip said train with air brakes, the requiring of petitioner to alight from and to board a moving train, the running of such train at such dangerous rate of speed, knowing that petitioner was required to perform these duties, and the allowing of passengers to occupy the steps of the platform of the passenger coach, under such circumstances, was each gross negligence in said company; and that his said injuries are the direct result of said negligence, and due in no way to any fault or negligence on his part." Plaintiff was a strong, healthy man, thirty-two years of age.

Messrs. Haires Cloud and Joel Cloud for plaintiff in error.

Messrs. Joseph B. Cumming and Bryan Cumming, for defendant in error:

An employee assumes the risks connected with the employer's known and habitual method of carrying on its business, though there might be some safer method.

Bailey, Master's Liability for Injuries to Servant, § 143; Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; Noble v. Jones, 103 Ga. 584, 30 S. E. 535; Stubbs v. Atlanta Cotton-Seed Oil Mills, 92 Ga. 495, 17 S. E. 746; Schnibbe v. Central R. & Bkg. Co. 85 Ga. 592, 11 S. E. 876.

It was plaintiff's duty to know if his ordinary powers of observation would have enlightened him.

Worlds v. Georgia R. Co. 99 Ga. 283, 25 S. E. 646; Whatley v. Macon & N. R. Co. 104 Ga. 764, 30 S. E. 1003; Roul v. East Tennessee, V. & G. R. Co. 85 Ga. 197, 11 S. E. 558.

The proximate cause was the intervening, independent agency of the passenger, who came out on the platform of said passenger coach, even upon the bottom step of the same, and in the way of petitioner as he undertook to perform said duties and to obey said orders.

Ham v. Georgia R. & Bkg. Co. 97 Ga. 411, 24 S. E. 152; Western & A. R. Co. v. Bailey, 105 Ga. 100, 31 S. E. 547; Central R. Co. v. Price, 106 Ga. 176, 43 L.R.A. 402, 71 Am. St. Rep. 246, 32 S. E. 77; Brimberry v. Savannah, F. & W. R. Co. 78 Ga. 641, 3 S. E. 274.

Mr. Hamilton McWhorter, Jr., also for defendant in error.

Candler, J., delivered the opinion of the court:

The plaintiff, a man of mature years, had been in the service of the defendant company for a number of years, engaged in performance of the perilous duties assigned to him. If his master wrongfully called upon him "to alight from and to board a moving train" running at an obviously dangerous speed, he should have declined to obey. Having voluntarily assumed the risk incident to the discharge of services which were obviously attended with danger, he effectually cut himself off from holding the company accountable for any injury he may thus have brought upon himself. He cannot excuse his voluntary assumption of the risk on the occasion referred to in his petition by saying that a servant of the company, who was his superior in authority, ordered him to jump from the moving engine and board the passenger coach while the train was still in motion. He was merely ordered by his superior to do what he had engaged himself to the company to do. Besides, if the order was an improper one because it exposed him to imminent peril, he should have declined to execute it; the danger being as apparent to him as to his superior.

The train was not supplied with air brakes. This omission was not, as matter of law, a negligent failure of duty which the company was, relatively to him, bound to perform. A railway company is under no duty to equip its trains with the latest and most approved appliances, and the plaintiff does not undertake to assert, as matter of fact, that reasonably safe equipment necessarily includes the adoption and use of air brakes. Even were this otherwise, the petition discloses that the plaintiff knew that air brakes were not supplied by his master, and it was for this very reason that he was called on by the company to perform the perilous feat of jumping from the engine in order to apply the hand brakes upon the rear of the train. He remained in its service, well knowing of such increased risk, if any, to which the failure to equip the train with air brakes subjected him, and is therefore not now in a position to complain that the company disregarded its duty to him to furnish reasonably safe appliances. He accepted this increased risk, if there was one, instead of refusing to imperil his life by the continual use of appliances which were inadequate to the emergencies of the enterprise in which he engaged.

Passengers came out upon the platform, even occupying the bottom steps of the coach, and were in the way of the plaintiff when he attempted to board it. That the defendant company was negligent in "the allowing of passengers to occupy the steps of the platform of the passenger coach, under such circumstances," is a bare conclusion of the pleader, unsupported by the allegation of any fact or circumstance going to show wherein the company was remiss in perform-

ing any duty which it owed to the plaintiff. It is not negligence *per se* to fail to maintain such a surveillance over passengers as to render it impossible for them to get in the way of the employees whom a railway company engages to operate one of its trains What precautions in this regard were, or were not, observed by the defendant, cannot be learned from the pleadings; nor does the petition disclose that the plaintiff was not familiar with the habits of passengers, under the regulations adopted by the carrier, touching their remaining within the coach while *en route;* nor that he did not have as much reason as did his superior to apprehend that they might leave their seats and go out upon the platform, where they might get in his way when he attempted to board the moving coach. He does not even assert that he did not at the time know of their presence, or that he had no opportunity of seeing them and noting their position before he undertook to mount the steps; nor does he in any way attempt to negative want of care on his part in assuming the risk of boarding the train while they were standing on the steps in his way. For aught that appears, the company was not responsible for their presence there, and the plaintiff, though aware of their presence, deliberately took the chance of probable injury in voluntarily endeavoring to board the train under the circumstances.

It was, he explains, at that time "moving at an unusually high rate of speed," though he "was not aware of such unusual or dangerous rate of speed." Why he was unaware that the train was running at an unusual, and even a dangerous, rate of speed, is not disclosed. Accustomed, as he was daily, to performing the hazardous task of jumping off the engine and swinging onto the rear of the train while it continued its journey, he should have offered at least some excuse for not observing the speed of the train and realizing the danger of attempting to board it. If the engineer was chargeable with knowledge that the train was running at an unusual rate of speed, it would seem that the plaintiff ought as well to have known this fact. The danger present was different only in degree from that which he engaged himself to daily ignore. One who knowingly engages to do what no prudent man ought to risk his life in endeavoring to accomplish cannot, if injury ensues, rely upon the law to throw around him the protection of a fiction that his employer impliedly undertook to take steps to minimize the hazard assumed, —at least to the extent of making performance possible.

For the reasons above stated, we concur with the trial judge in the view that the plaintiff's petition did not set forth a cause of action.

Judgment affirmed.

All the Justices concur.

VERMONT SUPREME COURT.

SAMUEL JOHNSON
v.
BOSTON & MAINE RAILROAD.

(— Vt. —, 62 Atl. 1021.)

Assumption by servant of risk of master's negligence.

1. A brakeman, knowing from the beginning of a trip that the engine drawing the train is leaking steam badly, and that all the engines on the road are in bad condition in this respect, assumes the risk of being choked by the steam in passing under a low bridge of which he knows, so that he cannot hold the company liable for injuries caused by raising his head to escape such steam while passing under the bridge.

Same—low bridge.

2. A brakeman on a railroad assumes the risk of injury from a low bridge and ice hanging therefrom, which to his knowledge is a usual condition.

Fellow servant—fireman and brakeman.

3. A brakeman on a railroad cannot hold the company liable for injuries caused by the negligent act of the fireman in throwing coal into the fire box on a down grade, causing a dense cloud of smoke and gas to be emitted, so as to choke him and render him unable to avoid contact with a low bridge; since it is the act of a fellow servant.

(February 2, 1906.)

EXCEPTIONS by plaintiff to a ruling of the Windsor County Court directing a verdict in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. R. E. Stevens and Frank Plumley, for plaintiff:

The defendant company was negligent in allowing the engine to remain out of repair.

Carbine v. Bennington & R. R. Co. 61 Vt. 351, 17 Atl. 491.

A servant does not assume extraordinary risks.

Bancroft v. Boston & M. R. Co. 67 N. H.

Note.—As to the assumption of the risk of dangers caused by the negligence of the master when they are obvious to the servant, see case note to McCormick Harvesting Mach. Co. v. Zakzewski, *ante*, 848.

466, 30 Atl. 409; Young v. Boston & M. R. Co. 69 N. H. 356, 41 Atl. 268; Allen v. Boston & M. R. Co. 69 N. H. 272, 39 Atl. 978; Goldthwait v. Haverhill & G. Street R. Co. 160 Mass. 554, 36 N. E. 486; Carbine v. Bennington & R. R. Co. 61 Vt. 352, 17 Atl. 491; Story v. Concord & M. R. Co. 70 N. H. 370, 48 Atl. 288; Leazotte v. Boston & M. R. Co. 70 N. H. 6, 45 Atl. 1084; Demars v. Glen Mfg. Co. 67 N. H. 406, 40 Atl. 902; Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573; Smith v. Baker [1891] A. C. 325; Shaw v. Sheldon, 103 N. Y. 667, 9 N. E. 183.

Messrs. Hunton & Stickney, for defendant:

If, with knowledge of the danger caused by his employer's breach of duty, a servant continues to work, the increased danger becomes an incident of the service, which he assumes.

Carbine v. Bennington & R. R. Co. 61 Vt. 348, 17 Atl. 491; Gibson v. Erie R. Co. 63 N. Y. 449, 20 Am. Rep. 552; DeForest v. Jewett, 88 N. Y. 264; Buzzell v. Laconia Mfg. Co. 48 Me. 113, 77 Am. Dec. 212; Baylor v. Delaware, L. & W. R. Co. 40 N. J. L. 23, 29 Am. Rep. 208; Baltimore & O. R. Co. v. Stricker, 51 Md. 47, 34 Am. Rep. 291; Devitt v. Pacific R. Co. 50 Mo. 302; Smith v. St. Louis, K. C. & N. R. Co. 69 Mo. 32, 33 Am. Rep. 484; Cagney v. Hannibal & St. J. R. Co. 69 Mo. 416; Ladd v. New Bedford R. Co. 119 Mass. 412, 20 Am. Rep. 331; Burnham v. Concord & M. R. Co. 68 N. H. 567, 44 Atl. 750; Young v. Boston & M. R. Co. 69 N. H. 356, 41 Atl. 268; Hardy v. Boston & M. R. Co. 68 N. H. 523, 41 Atl. 179; Allen v. Boston & M. R. Co. 69 N. H. 271, 39 Atl. 978; Burnham v. Concord R. Co. 69 N. H. 280, 45 Atl. 563; Deschenes v. Concord & M. R. Co. 69 N. H. 285, 45 Atl. 467.

Powers, J., delivered the opinion of the court:

The plaintiff seeks damages for injuries sustained in the defendant's service at Lebanon, New Hampshire, on January 2, 1902. At that time he was, and for more than eleven years prior thereto had been, employed by the defendant as a freight brakeman, running usually between Concord, New Hampshire, and White River junction, Vermont. During all that time there had been maintained at Lebanon an overhead bridge spanning the defendant's track, so low as to endanger one passing under it on the top of a freight car and compel him either to descend between the cars or lie flat upon the car to escape its perils. On the day named the plaintiff's train reached Lebanon between 8 and 9 o'clock in the evening. It was a moonlight night, and freezing. From Lebanon toward White River junction the defendant's road is descending, and, agreeably to the defendant's rule, the plaintiff was at his post on top of the fourth car from the engine as the train left the station at Lebanon and approached this dangerous bridge. The plaintiff knew all about the bridge and its dangers, and being then mindful of its perils, in conformity with a custom which he had observed during the entire period of his employment on the road, as the train approached the bridge, he lay face downward prone upon the car, that he might pass under in safety. He was surrounded with a cloud of smoke and steam so dense as to completely envelop him and cut off his view of objects about him, and, being choked by the smoke, steam, and gas from the engine, he raised his head to catch breath, and came into violent contact with the bridge itself, or the ice depending therefrom, and was severely injured. A verdict was directed for the defendant in the court below, and to that direction the plaintiff excepted.

This accident happened in New Hampshire, but we need not pause to consider whether we are to apply the law of that state or our own; for, upon the questions raised by this record, their decisions are in entire accord with ours. The law of the case is found in the rule, variously stated in the different cases, but, so far as applicable here, amounting to this: The servant assumes, not only the risks ordinarily incident to his employment, but such unusual and extraordinary risks as he knows and comprehends. Skinner v. Central Vermont R. Co. 73 Vt. 336, 50 Atl. 1099; Morrisette v. Canadian P. R. Co. 74 Vt. 232, 52 Atl. 520; Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; Leazotte v. Boston & M. R. Co. 70 N. H. 6, 45 Atl. 1084; Burnham v. Concord & M. R. Co. 68 N. H. 567, 44 Atl. 750. So it is that a servant, when in the course of his employment a special and obvious risk is presented to him, —one not ordinarily incident to the business, —may, as a rule, decline to accept it; but, if he choose to encounter it, he assumes it. And this is so, though the risk arises from the negligent performance of the master's duties. Talbot v. Sims (Pa.) 62 Atl. 107; Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425. This case, then, so far as the dangers arising from the low bridge are concerned, comes within the decisions in Carbine v. Bennington & R. R. Co. 61 Vt. 348, 17 Atl. 491; Allen v. Boston & M. R. Co. 69 N. H. 271, 39 Atl. 978, and many such cases. For the plaintiff knew all about the bridge and the dangers arising from it, and by continuing in the service had assumed these as among those incident to his employment. Indeed, this proposition is not seriously questioned; but the plaintiff insists that he was at the time of the accident subjected to an unusual and extraordinary

hazard, in that the engine hauling this train was defective, and leaked steam in extraordinary volume; that this was a condition which ought not to have existed, and would not have existed but for the negligence of the defendant, and consequently was not a danger assumed by him; and that this condition was a proximate cause of the injury, and affords a legal basis for a recovery. And so it does, unless, as we have seen, the condition and its dangers were known to and voluntarily incurred by him. That the condition of this locomotive was as plaintiff claims, and that such condition resulted from the negligence of the defendant, is not denied. But the record shows that its condition had been the same in respect to leaking steam in unusual quantities all the way from Concord. Not only that, but it appears that the engines generally on the defendant's road were in bad condition in the respect indicated at the time of this accident. All this was known by the plaintiff. The risk of being blinded and choked by the usual volume of smoke and steam necessarily emitted from the locomotive while passing under the low bridge was one of the ordinary hazards of the service. Hardy v. Boston & M. R. Co. 68 N. H. 536, 41 Atl. 179. The increased danger arising from an engine leaking unusual quantities of steam was as obvious to the plaintiff as to the defendant; and it must be held that the plaintiff, by continuing in the service with full knowledge, assumed the increased hazard,—that of passing under a dangerously low bridge while enveloped in an unusual cloud of steam emitted from a leaky engine.

It is further insisted by the plaintiff that there was evidence in the case tending to show that the plaintiff was struck by the ice depending from the bridge, and that this affords evidence of the defendant's negligence sufficient to sustain a recovery. The only evidence on this subject was the statement of the plaintiff to the effect that he thought that he was struck by the ice on the bridge, and there is nothing in the record to show whether this opinion was well founded or otherwise. Nor is there anything in the record tending to show that the condition in this respect at the time of the accident was unusual. For aught that appears, it was usual for ice to form on the bridge as it had that night. It was incumbent on the plaintiff to show this,—to show an unusual condition,—for the ordinary condition in this respect was, like the others, covered by his assumption of risk. Nor would the negligence of the fireman, if any, in throwing into the boiler fresh coal on a down grade while the brakemen had to be on top of the cars, contrary to the custom of the fireman, thereby causing a dense volume of smoke and gas to be emitted, avail the plaintiff. For this would be the negligence of a fellow servant, not shown to have been incompetent, which could not form the basis of a recovery.

Judgment affirmed.

DELAWARE SUPREME COURT.

EDGE MOOR IRON COMPANY, Plff. in Err.,
v.
BROWN HOISTING MACHINERY COMPANY.

(— Del. —, 62 Atl. 1054.)

Recoupment—damages for breach of warranty of machinery.

A purchaser of machinery cannot recoup against the purchase price the amount which he has been compelled to pay for personal injuries to a servant because the machinery did not fulfil its warranty.

(January 16, 1906.)

ERROR to the Superior Court for New Castle County to review a judgment refusing to permit defendant to recoup certain damages in an action for the purchase price of machinery. Affirmed.

The facts are stated in the opinion.

Mr. William S. Hilles, for plaintiff in error:

Having warranted the crane in the contract of purchase, and the suit being founded upon that contract, the defendant in such action is entitled to recoup all damages which it can show accrued to it by reason of the breach of the warranty.

Mowbray v. Merryweather [1895] 2 Q. B. 640; Tyler v. Moody, 111 Ky. 191, 54 L.R.A. 417, 98 Am. St. Rep. 406, 63 S. W. 433; 3 Sutherland, Damages, § 675; Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696; Dunn v. Uvalde Asphalt Paving Co. 175 N. Y. 214, 67 N. E. 439; Bixby v. Parsons, 49 Conn. 483, 44 Am. Rep.

Case Note.—Sale; recoupment, in an action for purchase price of machine, of damages on account of personal injuries due to defective construction.—Diligent search has failed to reveal any other case involving the question whether, in an action for the purchase price of machinery, the defendant can, by way of recoupment, set out damages for personal injuries to himself and others caused by the defective construction of the machinery. The question of substantive law, whether a recovery can be had for personal injuries in an action for breach of warranty, is considered in Birdsinger v. McCormick Harvesting Mach. Co. 3 L.R.A.(N. S.) 1047, and the case note appended thereto.

246; Brigham v. Hawley, 17 Ill. 38; Burroughs v. Clancey, 53 Ill. 30; Scott v. Kenton, 81 Ill. 96; Smith v. Compton, 3 Barn. & Ad. 407; Tindall v. Bell, 11 Mees. & W. 228; Swansey v. Chace, 16 Gray, 303.

Messrs. Saulsbury, Ponder, & Curtis, for defendant in error:

A vendee of a machine sold and delivered, when sued for the price, cannot recoup as damages for breach of a warranty money paid to an employee of the vendee, injured by the machine while operating it.

Ovington v. M'Vicar, 2 Macph. Sc. Sess. Cas. 1066; Kiddle v. Lovett, L. R. 16 Q. B. Div. 605.

Defendant cannot recoup any sum paid on account of the injury if the defendant itself was not liable to the servant for the injury.

Roughan v. Boston & L. Block Co. 161 Mass. 24, 36 N. E. 461; Kiddle v. Lovett, *supra*.

Where the instrumentality which has injured the servant has been newly bought by the master, the master is not liable to the servant, if the seller was a reputable manufacturer and the instrument had no defects which were discernible by a reasonable inspection.

1 Labatt, Mast. & S. 153, p. 323; 2 Bailey, Personal Injuries Relating to Master & Servant, § 2656, p. 886; Reynolds v. Merchants' Woolen Co. 168 Mass. 501, 47 N. E. 406; Roughan v. Boston & L. Block Co. *supra*.

There is no implied warranty in favor of a third person not a party to the contract.

2 Benjamin, Sales, p. 659; Longmeid v. Holliday, 6 Exch. 761; Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; McCaffrey v. Mossberg & G. Mfg. Co. 23 R. I. 381, 55 L.R.A. 822, 91 Am. St. Rep. 637, 50 Atl. 651.

Boyce, J., delivered the opinion of the court:

The plaintiff brought an action of assumpsit against the defendant to recover an alleged balance due on the price of a 10-ton traveling crane, sold to the defendant, as averred, with a warranty, together with certain other items set forth in the bill of particulars filed. The defendant sought to avail itself of breach of warranty as a defense by way of recoupment. The plaintiff filed a general demurrer to the notice of recoupment. The court below sustained the demurrer as against the claim of the defendant for special damages set up in the notice of recoupment. The defendant elected to take a final judgment. And the case comes before this court on a writ of error sued out by the defendant. Briefly stated, the defendant claims that the crane, having been put in use by it at its yards, with one of its servants on it for the purpose of operating it, upset by reason of the failure to perform the service which it had been warranted to do, and killed the servant. And the defendant avers that it was forced to and did pay to the widow of the deceased servant (without suit or consent of the plaintiff) the sum of $2,734.90 as damages, and also paid other items for repairs, etc., of the crane.

The chief question raised by the assignment of errors, and the only one which we will now consider, is whether the facts set forth in the notice of recoupment respecting the special damages alleged to have been paid by the defendant to the widow of the deceased servant entitled the defendant to set up such special damages by way of recoupment in reduction of the claim sued upon by the plaintiff.

That part of the notice of recoupment which was not allowed is as follows: "The defendant further gives notice that it will, at the trial of the above-entitled cause, prove, by way of recoupment, as follows: That the said crane mentioned in the declaration was purchased by the defendant from the plaintiff, the manufacturer thereof, under an express contract. That in and by the said contract it was provided, among other things, that the said crane on a track 4 feet 8½ inches gauge would have power, strength, and stability to safely handle the following loads at the given radii, and would swing these loads through a full circle without clamping the crane to the track, and would move the same along tracks with boom in any position, to wit: At 8–14 feet radius, 20,000 lbs.; at 20 feet radius, 13,800 lbs.; at 26½ feet radius, 9,500 lbs. And that the said crane, under its own steam, would have the functions of hoisting, rotating, and track travel, which might be utilized simultaneously, with full load, within the limits of stability noted above at the following speeds: Hoisting, full load, 42½ feet per minute; rotating, full load, four complete turns per minute. That the said defendant, relying upon the said agreement and guaranty of the said plaintiff, purchased the said crane and put the same in use at its yards at Edge Moor in New Castle county, Delaware, to wit, on or about the 1st day of September, 1903. That at the time aforesaid, and place aforesaid, the said defendant, relying upon the representations and warranty contained in the said contract with the said plaintiff, told one Horace O'Day, who was then and there a servant in the employ of the said company, to get upon the said crane for the purpose of operating it. That the said Horace O'Day was unskilled and unfamiliar with the said crane and its workings, but, under the belief and reliance of this de-

fendant upon the warranty aforesaid, he was told to operate the said crane, and while operating it, with due care on his part, within the radii, weight, and speed provided in the said contract and warranty, to wit, with the weight of about 10,800 pounds, with a boom radius of about 20 feet, and at a speed of less than four rotations per minute, and while the same was being operated upon a track of 4 feet, 8½ inches, gauge, on practically level ground, the said crane upset, thereby killing the said Horace O'Day, who was then and there in the employ of the said defendant as aforesaid. That the said crane upset, and the death of the said Horace O'Day was caused by and due to the fact that the said crane would not, as aforesaid, comply and come up to the warranty contained in the said agreement between this defendant and the said plaintiff. That by reason of the premises the said defendant then and there became liable to pay, and was forced to and did pay, to ———— O'Day, widow of the said Horace O'Day, the sum of $2,734.90 as damages for the death of the said Horace O'Day, caused as aforesaid," etc.

The doctrine of recoupment was recognized and allowed at common law, and was and is applied to actions whether founded in contract or in tort, but it is limited as a defense to defeating the plaintiff's action, in whole or in part. The doctrine is recognized by the courts of this state. Tomlinson v. Quigley, 5 Houst. (Del.) 168; Shimp v. Siedel, 6 Houst. (Del.) 421, and other cases.

Recoupment rests on the principle of the desirability of avoiding circuity and multiplicity of actions by allowing the defendant, at his election, to give in evidence matters growing out of the same transaction by way of defense, instead of requiring a cross-action, when it can be done without a violation of principle or great inconvenience in practice; but, while it is the policy of our law not to compel parties to bring two actions, when, with equal convenience, their rights can be settled in one, the defendant may not set up his claim by way of recoupment unless it would be just and practicable to adjust it in the plaintiff's action. Dorr v. Fisher, 1 Cush. 271; Sawyer v. Wiswell, 9 Allen, 39; Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696; Johnson v. White Mountain Creamery Asso. 68 N. H. 437, 73 Am. St. Rep. 610, 36 Atl. 13; 1 Sutherland, Damages, §§ 172, 174.

The claim or damage to be recouped must be a valid cause of action for which a separate suit could be maintained, and must not have occurred through the fault or negligence of the defendant. 1 Sutherland, Damages, § 174. Whenever the defendant is permitted to submit his claim for damages as a subject of recoupment, he assumes the burden of proof in respect to it, and no recovery can be had for any balance or excess. And the defendant will be barred from any other suit or recoupment for such balance or excess over the plaintiff's claim. 1 Sutherland, Damages, § 172. As developed and permitted by the American courts, recoupment has attained a wider and more extended application than in England. Very generally, at least, if not altogether, the courts of this country have not restricted its application to cases where the defendant may recoup his damages for the purpose of affecting the value of the goods sold, or of the work done; but they have allowed the defendant to recoup damages suffered by him from any fraud, breach of warranty, or negligence of the plaintiff, growing out of and relating to the transaction in question, for the purpose, as we have already indicated, of avoiding needless delay and litigation. Dushane v. Benedict, *supra;* Harrington v. Stratton, 22 Pick. 510; 1 Sutherland, Damages, §§ 179, 180. It will thus be seen that a defendant is now, under the expansion of the doctrine of recoupment, permitted to allege and prove by way of defense to the plaintiff's action that which was formerly only the subject of a cross or independent action.

The defendant's claim in this action is based on the assumed liability of the maker of the crane for the personal injuries and death of the defendant's servant while in the act of operating the crane. This presents a most interesting question, and one of first impression in this state. It has arisen and has been adjudicated in other jurisdictions,—some in support of, and others against, such liability. But we have had no case cited to us, and we have found none, where the defendant in the action has sought to avail himself of special damages, such as have been set up in this case, by way of recoupment. Without intending to indicate any opinion as to the liability of a vendor for personal injuries to third persons, the vendee's servants, we will proceed to determine whether, in the judgment of the court, recoupment should be permitted in this case. Whether from the character of the defendant's defense, involving as it does, among other things, its liability to the widow of the deceased servant, it is practicable to adjust the defendant's claim in the plaintiff's action. There is in the defendant's claim for special damages the element of fault or negligence on its part. And while damages arising from negligence, where care, activity, and diligence are required, may be recouped, and very properly so, in the plaintiff's action for the price of a machine we think it will be carrying the principle of recoupment be-

yond any application heretofore allowed if permitted in this case. The claim of the widow of the deceased servant necessarily rested upon the negligence of the defendant. And whether the defendant was or was not liable for the death of its servant, we do not think, upon principle or convenience in practice, that such a question should be investigated in the plaintiff's action under a notice of recoupment. And we hold that damages in such a case, if recoverable at all, which we do not now determine, must be recovered in a separate action.

The judgment of the court below is affirmed.

LOUISIANA SUPREME COURT.

E. DENEGRE MARTIN, Appt.,

v.

NICHOLSON PUBLISHING COMPANY, Limited, Publishers of the Picayune.

(115 La. 979, 40 So. 376.)

Libel—physician—pseudo praise.

The cause is on appeal upon an exception of no cause of action.

As the record is made up at this time, the inference from the text of the article complained of, under the asserted facts and circumstances, leads to the conclusion that plaintiff should be heard on the merits.

(January 2, 1906.)

Headnote by BREAUX, Ch. J.

APPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans in defendant's favor in an action brought to recover damages for the alleged publication of a libel. Reversed.

The facts are stated in the opinion.

Messrs. **Lapeyre, Monroe, & Breazeale**, for appellant:

Defendant published an untruth for the deliberate purpose of causing damage, which untruth actually caused the damage contemplated. This is actionable.

Civil Code, art. 2315; Spotorno v. Fourichon, 40 La. Ann. 423, 4 So. 71; Harris v. Minvielle, 48 La. Ann. 915, 19 So. 925; Staub v. Van Benthuysen, 36 La. Ann. 467; Weil v. Israel, 42 La. Ann. 961, 8 So. 826; Morasse v. Brochu, 151 Mass. 567, 8 L.R.A. 526, 21 Am. St. Rep. 474, 25 N. E. 74; Sullings v. Shakespeare, 46 Mich. 408, 41 Am. Rep. 166, 9 N. W. 451; Williams v. Davenport, 42 Minn. 393, 18 Am. St. Rep. 519, 44 N. W. 311; White v. Nicholls, 3 How. 266, 11 L. ed. 591; Odgers, Libel & Slander, Bigelow's ed. 1881, ** 89–91; Elmergreen v. Horn, 115 Wis. 385, 91 N. W. 973; Bentley v. Reynolds, 1 McMull. L. 16, 36 Am. Dec. 251, Hardin v. Harshfield, 11 Ky. L Rep. 638, 12 S. W. 779, Barnes v. Trundy, 31 Me. 321; White v. Carroll, 42 N. Y. 161, 1 Am. Rep. 503; Stewart v. Swift Specific Co. 76 Ga. 284, 2 Am. St. Rep. 40; McBride v. Ellis, 9 Rich. L. 313, 67 Am. Dec. 553; Townshend, Slander & Libel, 2d ed. p. 103.

Injuries to one's feelings and social standing are a legitimate ground of action for reasonable indemnity.

Case Note.—Laudatory or ironical article as libel.—The case of MARTIN v. NICHOLSON PUB. CO. is an unusual one, and careful search has failed to discover a similar case. It is possible to see how the publication of a laudatory or commendatory article which is untrue may injure the reputation and business of a professional man, or bring him into ridicule and contempt, by leading the public to believe that he was employing the same methods to acquire notoriety as those used by persons of no professional standing at all. A false article, widely published, which to some may seem laudatory in character, may, in the eyes of others, be extremely injurious to reputation and business, owing to local conditions or prejudices, or to professional codes. It would therefore appear to be the duty of the publisher to ascertain the truthfulness of reports before using them in praise of anyone whom their publication is likely to injure; and, if they are in fact true, to refrain from the publication of them with a malicious intent to injure the subject of the article.

A case somewhat similar to MARTIN v. NICHOLSON PUB. CO. is Sullings v. Shakespeare, 46 Mich. 408, 41 Am. Rep. 166, 9 N. W. 451, in which it was held that a newspaper publisher cannot be held liable for libel by the ludicrous, but innocent, misprint of an article ostentatiously puffing the subject of it, and describing a surgical operation performed by him, where it appeared that the article was published as a result of mutual banter between the person mentioned and the publisher, and was with the former's assent.

If the language of a published article is ironical, or if the language used is obscure, ambiguous, or figurative, courts and juries will understand it according to its true meaning and import and the sense in which it was intended, to be gathered from the context and from all the facts and circumstances under which it was used. Com. v. Kneeland, 20 Pick. 206.

Thus, in Dennis v. Johnson, 42 Minn. 301, 44 N. W. 68, the language of a notice affixed to a bundle of pine chips and pieces of wooden barrel staves, to the effect that the annexed articles were all found placed under a window sill of a building intended to be fire proof, giving the name of the architect and superintendent of the building, and that this architect and superintendent is now doing business in the city and would doubtless be pleased to labor for and serve another as faithfully and honestly as he served the writer of the notice, which is

Weil v. Israel, 42 La. Ann. 956, 8 So. 826; Williams v. McManus, 38 La. Ann. 162, 58 Am. Rep. 171; Dufort v. Abadie, 23 La. Ann. 280; Miller v. Roy, 10 La. Ann. 231; Graham v. Western U. Teleg. Co. 109 La. 1074, 34 So. 91.

Messrs. Clegg & Quintero, for appellee:

Words of praise and gratulation cannot be made a basis for an action, no matter what the occasion of the publication.

If a publication does not contain a libelous charge no action will lie therefor, no matter what its author intended.

Mosier v. Stoll, 119 Ind. 244, 20 N. E. 752; Lewis v. Daily News Co. 81 Md. 466, 29 L.R.A. 60, 32 Atl. 246; Cherry v. Des Moines Leader, 114 Iowa, 298, 54 L.R.A. 855, 89 Am. St. Rep. 365, 86 N. W. 323; Reid v. Providence Journal Co. 20 R. I. 120, 37 Atl. 637; Kelly v. Partington, 5 Barn. & Ad. 650; Moore v. Meagher, 1 Taunt. 39.

In case of a physician, words do not touch him professionally, unless they impute misconduct or incapacity in the discharge of his professional duties.

Ayre v. Craven, 2 Ad. & El. 2; Clay v. Roberts, 9 Jur. N. S. 580; Stone v Cooper, 2 Denio, 299; Cooley, Torts, 2d ed. 241; Townshend, Slander & Libel, 121; Pollock, Torts, 207.

Neither Dr. Martin nor the Orleans Parish Medical Society can dictate to the defendant what it shall publish and what it shall not publish.

People ex rel. Bartlett v. Medical Soc. 32 N. Y. 195.

Breaux, Ch. J., delivered the opinion of the court:

This is an appeal by plaintiff from a judgment rendered in favor of defendant, in which the court sustained defendant's exception of no cause of action. The suit was for damages in the sum of $10,000. It having been tried on the exception of no cause of action in the district court, the averments of plaintiff are taken as true for the trial of the exception on appeal. We have the following statement of facts:

It appears that the plaintiff is a well-known and reputable physician, engaged in the practice of his profession in the city of New Orleans, and is dependent upon this practice for a livelihood. His position among the other physicians and the public is a matter of importance to him. He is opposed, he avers, to advertising in any form in the public press, as only "quacks" advertise. Defendants are publishers of a daily newspaper, also well known and influential. They published an article which plaintiff says was offensive and of which he complains. Plaintiff is a member of the Orleans Parish Medical Society. This society condemns advertising by physicians in the public press, and considers it as unethical. It adopted resolutions and appointed a committee to interview representatives of the press and request them not to publish the names of members of the regular profession of medicine, or place them by publication in the attitude of advertising in any form, as regular practitioners did not resort to advertising. As a member of the committee, Dr. Martin called upon the defendants' representative and explained, as he alleges (in substance), why it was that regular practitioners did not resort to advertising. He handed a copy of the resolutions of the society to this representative. In a few days the defendant company, he shows, published an article which he deemed injurious and damageable. The article sets forth substantially that the case of a young lady named therein was unique. She had been an invalid for years from congenital hip disease, and that now, owing to the skilful treatment of Dr. Martin, she had almost entirely recovered. That when she was four years old a dislocation of the hip developed, and from that time the ailment rapidly grew worse, but that now she had practically recovered the use of her hips and was on a fair road to recovery. That different physicians had tried their skill on the affected limb, and had not met with success, but that, under the treatment of Dr. Martin, there was every reason to believe that she would soon be in good health. The article goes on and states that when Dr.

signed by the latter, was held to be susceptible of a broader meaning,—that is, as importing a charge against the architect of dishonesty, unfaithfulness, and incompetency in his business habits and the practice of his profession; and the court further held that, from the latter part of the notice, in connection with what goes before, and the annexed specimens, the jury would be justified in the conclusion that the writer's meaning was that, if others should employ the architect in his professional capacity, he would also act unfaithfully and dishonestly with them.

A newspaper editorial in the form of a prayer to a state senator, containing the phrases, "his Majesty Bucksniff," "a legislative god," "dearly beloved Bucksniff," "divine senator, compared with whom all other senators are merely ciphers," "mighty being," "omnipotence," "beautiful senatorial god," "look with thy mighty eye alone" (the last two referring to a deformity caused by a partial paralysis on one side of the face and body), was held to be libelous, on the ground that the appellations were ironical and satirical, and were calculated to injure the subject of the article by bringing him into shame and disgrace. Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111.

Lorenz, the great specialist, visited New Orleans and treated patients, Dr. Martin had made a close study of his methods and manner of treatment, which he applied in treating the young lady named. There are other assertions in the article of about the same tenor.

The learned judge of the district court carefully analyzed plaintiff's petition. For brevity's sake, in matter of the statement of facts of the case, we have made an abstract of this analysis as follows: Reputable physicians avoid advertising. Quacks advertise. Glowing accounts of marvelous cures, given by patients or their relatives, should not be published.

The local medical society to which plaintiff owes some fealty is against such methods. Further, the analysis goes on to state at some length, after warning, defendants maliciously, and well knowing the consequent injury, published an article regarding a case which was imaginary and fabulous, and credited it to plaintiff with intent to bring him into ridicule and contempt, and the further effect of which was to place plaintiff on a level with advertising quacks. In consequence, his business was injured. He was lowered in the esteem of his friends, humiliated, irritated, and annoyed. Then comes the statement that plaintiff as a physician had achieved success where other members of his profession had failed, and that to accomplish this cure he had employed the method of a certain great and world-renowned surgeon. The story appeared to have been obtained from the patient's father, who was, the article in question stated, in substance, overjoyed, and to whom it afforded delight to say kind things of the physician, Dr. Martin. The judge's analysis sets forth that the story, if untrue, was enough to irritate and annoy. The conclusion of the district court at this point is that irritation and annoyance are not of themselves actionable; that it must appear that they are accompanied by substantial injury; that the assertion as a fact that by the use of advanced methods of celebrated surgeons and by his own skilful treatment he had achieved success were not grounds sufficient to recover damages for injury inflicted; that there was no actionable injury traceable to this publication; that the truth or falsity of the publication was immaterial to the issue.

Touching one of plaintiff's allegations, to wit, that it put the physician in the attitude of an advertising quack, thereby bringing him into contempt, the learned judge's analysis sets forth (to quote in full): "Could I satisfy myself that plaintiff meant to charge and prove that not only such was the effect of the publication, but that it was defendant's purpose to produce upon the mind of the public and of plaintiff's friends and fellow physicians the impression that plaintiff had caused such publication to be inserted in its paper for advertising purposes, I would have no hesitation in concluding that a cause of action had been set forth; for any false impression, produced intentionally and injurious to someone, is actionable libel upon him, no matter how the publication or what the purpose used to effect a purpose."

Further abstract from the analysis is, in substance: A cause of action cannot be eked out by inference. The intention to be injurious does not appear in the article in question. It should have been specifically alleged. A charge of malicious publication will not supply the missing allegation as to innuendo, though it is possible that it was meant. The court held: The falsity of the article in question was not, under the circumstances, sufficient ground of action. It must appear that "defendant meant to produce the impression that plaintiff procured this publication for the purpose of advertising himself, whilst in fact he had not done so."

The court accorded time to plaintiff to amend his petition. As he did not avail himself of the grant of time to amend, the case was dismissed.

We had two motives in inserting the foregoing epitome of facts: (1) Because the original analysis, and we trust its summary, strongly brings out the facts; (2) because of the weighty reasons stated, upon which our brother of the district court based his judgment.

We hope that the difference of opinion between ourselves and our brother will serve by reference to the foregoing statement to render more evident the theory of the case.

In considering the publication of the article we are necessarily led to consider, in view of the admissions made for the trial of the exception, whether it was calculated to injure plaintiff in his profession. Of course, we need not go further than the allegations of the petition themselves. These allegations charge injury in most positive terms, and aver a malice which expands itself into the different averments of the petition. There was no necessity in drafting the petition of repeating the word "malice" or "malicious" in every paragraph, for the word "malice" or "malicious" followed and qualified every sentence of the petition, similar in character. It was charged that the whole article was published "maliciously," and it thereby characterizes each utterance of the petition touching the asserted libel. To illustrate: As it will serve two purposes, we quote one of the sentences of

the petition, to wit: "That the feeling against such advertising is very pronounced among the regulars, and doctors who resort to it are looked upon with contempt by the regular practitioner and the public; that advertisements are confined exclusively to quacksalvers."

As to the first purpose, it appears on the face of the papers that the allegation as made places the plaintiff in the category of the "quacksalvers."

But we said that we had two purposes in quoting the sentence. We take up the second purpose, which is (to take up the proposition set forth in the judge's reason for judgment) that in order to make out a case it was necessary to allege and prove that the article meant to produce the impression that (quoting) "plaintiff had been instrumental in having his asserted cure advertised, whilst in reality he had not;" that is, whilst in reality he had not given the publication of the article his assent.

There is no question, had plaintiff amended his petition, and alleged as before mentioned, that he would have had an indisputable cause of action. But we really do not think there was downright necessity of going to that extent in order to aver a cause of action.

In our view, if the publication was malicious, and if it was injurious to plaintiff, it would afford ground for action. True, the words of the article are of praise and congratulation, and no one would seriously contend that they are in themselves actionable. True, words of praise and gratulations are not actionable. But words of praise and gratulations may—on rare occasions, fortunately—lead to injurious consequences, lose their grace and charm, and become actionable.

An illustration, though not direct in point, will, we hope, aid the discussion.

Suppose an artist, very similar in appearance to an Asiatic, a Chinaman, none the less a white man; and suppose a much admired painting is in one of the art galleries. It bears no name. Only the word "Unknown" is written in the lower margin. The public is convinced that it was painted by a Chinaman. There was no one to deny the general belief. A writer of an article to be published lauds the great artist extravagantly, and, actuated by malice, untruly states that this artist is the "unknown." He is well aware that his praise of the portrait and of this artist, with the attention called to it (generally thought to be the work of a Chinaman), will persuade the public that he is the painter and a Chinaman. He had been warned before the article was published that the artist will thereby be driven from society and denied the companionship of his friends. As the writer thus accomplishes a malicious purpose, he, the artist, should have a right of action to prove that a wrong has been committed, and to vindicate his good name.

The physician, who, by inference, finds himself classed with quacksalvers, on the same principle will be entitled to a hearing, or at any rate should not be turned out of court, unless it appears that he is in error in thus contending.

Plaintiff's contention further is that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

Civil Code, art. 2315, in which the quotation *supra* is embodied, was based upon the broad and beautiful precept laid down in the Institutes of Justinian, to wit: *Alterum non lædere*,—to hurt no one; a precept which has inspired the justice of ages; a broad provision covering injuries growing out of wrongs committed.

Carrying out that precept, this court held that technical distinctions are not entitled to favor. Spotorno v. Fourichon, 40 La. Ann. 424, 4 So. 71.

The courts have passed upon questions bearing upon some of the issues. Recently it was decided that slanderous words—and, it follows, libelous words—may be actionable, even though they do not consist of an unequivocal and positive assertion. Covington v. Roberson, 111 La. 338, 35 So. 586.

By the strongest implication the court in another case holds that a man who has used harsh and insulting language to another can be held to respond in money. Graham v. Western U. Teleg. Co. 109 La. 1074, 34 So. 91.

We pass for a few moments to a consideration of decisions rendered in other jurisdictions. In the number rendered there is frequently decided difference in the views expressed. The common-law system has not gone as far as the civil law in upholding actions for injurious words spoken or written. Yet even under that system there are decisions which uphold the principle laid down under the latter laws. The question presented for consideration in a case before us was whether the charge in itself was defamatory in words. The court held, whether the words were in themselves defamatory or not, there were circumstances which would render them actionable. Morasse v. Brochu, 151 Mass. 567, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N. E. 74.

We think that, under the circumstances here, the cause should be heard on the merits, and the right of parties determined after having heard the testimony; and that they should not be finally passed upon whilst trammeled by the admission before

mentioned. We understand that if there is a doubt it should be resolved in favor of trial upon the merits.

We will add, before concluding, that we are not inclined to fan into greatest importance an issue which cannot be thus characterized. At the same time it is evident to us that there is principle involved,—the right of privacy and its extent, for it has considerable limitations. It cannot be decided on an exception of no cause of action. It is therefore ordered, adjudged, and decreed that the judgment in this case is annulled, avoided, and reversed; the exception of no cause of action is overruled; that the case be remanded for reinstatement and it be tried in accordance with the views before expressed; appellee to pay the costs of appeal. and those of the District Court to await the final determination of the suit.

MARYLAND COURT OF APPEALS.

SAFE DEPOSIT & TRUST COMPANY of Baltimore et al., Executors, etc., of Henry Winter, Deceased, Appts.,
v.
JOHN S. GITTINGS, Executor of Annie M. Winter, Deceased.

(102 Md. 456, 62 Atl. 1030.)

Bill of review—power of trial court.

1. The trial court may grant a bill to review, because of newly discovered evidence, a decree which it has entered by the direction of the appellate court, in a case taken to the latter court for review.

Same—newly discovered evidence.

2. Facts known to, but not remembered by, defendant in a suit, by reason of which a decree is rendered against him, cannot be the ground for a bill of review on behalf of his executors on the ground of newly discovered evidence.

Same—denial—review.

3. The refusal of a bill of review because of alleged newly discovered evidence will not be reversed on appeal unless there has been an abuse of the fair discretionary power with which the trial court is invested in the matter.

(January 9, 1906.)

APPEAL by defendants from a decree in equity of the Circuit Court for Howard County refusing leave to file a bill of review in a proceeding to compel an accounting by the executors of Henry Winter, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. **Arthur W. Machen** and **Arthur W. Machen, Jr.**, for appellants:

A bill of review for newly discovered evidence will lie even after the decree has been affirmed by an appellate court.

Pinkney v. Jay, 12 Gill & J. 69; Singleton v. Singleton, 8 B. Mon. 340; Campbell v. Campbell, 22 Gratt. 649; Slason v. Cannon, 19 Vt. 219; Flower v. Lloyd, L. R. 6 Ch. Div. 297; Mitford, Eq. Pl. 88; 3 Enc. Pl. & Pr. p. 574; Bush v. Madeira, 14 B. Mon. 212; Reynolds v. Reynolds, 88 Va. 149, 13 S. E. 395, 598; Henry v. Davis, 13 W. Va. 231; Gillespie v. Allen, 37 W. Va. 675, 17 S. E. 184; Putnam v. Clark, 35 N. J. Eq. 145; Schaefer v. Wunderle, 154 Ill. 577, 39 N. E. 623; Griffin v. Griffin, 11 N. C. (4 Hawks) 403; M'Call v. Graham, 1 Hen. & M. 13; Perkins v. Lang, 1 M'Cord, Eq. 30,

Case Note.—Bill of review, because of newly discovered evidence, after affirmance or reversal by appellate court.—Although the United States Supreme Court entertains the opposite view, the majority of the state decisions on the subject hold that the trial court may grant a bill of review, on the ground of newly discovered evidence, although the case may have been carried to and decided by an appellate court, without first obtaining permission of the appellate court. Two grounds have been assigned for this holding, one being that the decree made in the case is that of the trial court, the function of the appellate court being merely to correct errors in such decree; and that therefore, where no review is sought of matters determined, or which might have been determined, by the appellate court, as is the case where a review is sought on the ground of newly discovered evidence, there is no encroachment upon the jurisdiction of the superior tribunal. The other theory is that, even though it be conceded that the decree entered is that of the appellate court, a bill of review filed on the ground of newly discovered evidence is in the nature of an original bill, and hence may be entertained only by the trial court.

Want of power in the appellate court is the ground on which it is held, in Jacks v. Adair, 33 Ark. 161, that the court of chancery may entertain such a bill after an affirmance of a decree by the appellate court.

And in Schaefer v. Wunderle, 154 Ill. 577, 39 N. E. 623, it is said that application for leave to file a bill of review upon newly discovered evidence after an affirmance of a decree must be made to the court of chancery where the decree was originally rendered.

In Singleton v. Singleton, 8 B. Mon. 340, in holding that a supplemental bill in the nature of a bill of review, bringing in new facts and parties, may be entertained by the trial court after an affirmance by the appellate court, the court says that an affirmance does not fix unalterably the rights of the parties, but only renders the decree irreversible by the party against whom it is affirmed for any errors which he assigned or might have assigned, or for any error

note; Brewer v. Bowman, 3 J. J. Marsh. 492, 20 Am. Dec. 158; Story, Eq. Pl. § 408.

The better practice is to grant the leave to file a bill of review for newly discovered evidence, as a matter of course.

Seymour v. White County, 34 C. C. A. 240, 92 Fed. 115.

When the physical and mental faculties of a party have been impaired, he is not held to the same degree of diligence in respect to hunting up evidence that would otherwise be required.

Berberich v. Louisville Bridge Co. 20 Ky. L. Rep. 467, 46 S. W. 691; Hoghton v. Fiddey, L. R. 18 Eq. 573; Skinner v. Walker, 98 Ky. 729, 34 S. W. 233; Ex parte Vandersmissen, 5 Rich. Eq. 519, 60 Am. Dec. 102; Bush v. Madeira, *supra*.

Any doubt ought to be resolved in favor of the party applying for leave.

Harris v. Edmondson, 3 Tenn. Ch. 211.

Messrs. **Julian I. Alexander** and **Bernard Carter** for appellee.

Pearce, J., delivered the opinion of the court:

This appeal is taken from an order of the circuit court for Howard county as a court of equity passed July 25, 1905, in the case of John S. Gittings, executor of Annie M. Winter, against the Safe Deposit & Trust Company of Baltimore and Arthur W. Machen, executors of Henry Winter, refusing the petition of the said executors of Henry Winter for leave to file a bill of review to review the decree of said court passed in said cause on the 1st day of July, 1905. This litigation originated in a bill filed in 1903 by John S. Gittings, executor of his mother, Annie M. Winter, against Henry Winter, her surviving husband, alleging that Mrs. Winter in the year 1869 delivered to her said husband certain securities, set out in said bill, belonging to her and of the value of about $30,000, to be sold by him and the proceeds to be reinvested as her property, the income thereof to be enjoyed by him during his life, but the corpus to revert to her, if living at his death, or, in the event of her death before him, to go to her personal representatives. The prayer of the bill was that Mr. Winter should be required to return an inventory of the investments thus to be made, and to bring the same into court to be dealt with as should be decreed, and also for general relief. Mr. Winter answered, admitting that he had received all the securities mentioned in the bill except the eight shares of Northern Central Railroad stock; but he denied that he had ever agreed to hold or reinvest the proceeds in her name or for her benefit, and alleged that she had made him an absolute gift of all the securities delivered, and that he had accordingly sold the same for his own account, and invested the proceeds in his own name and for his own benefit, together with other funds of his own, and that he could neither return an inventory of the investments of the proceeds of sale of said securities, nor bring the same into court. After testimony was

arising on facts known, and which he might have introduced in the record.

In American Bible Soc. v. Hollister, 54 N. C. (1 Jones, Eq.) 10, it was held that the supreme court was without jurisdiction to entertain a bill of review in a case decided by it, upon new proofs that had come to light after the decision was made, since to do so would be to exercise original jurisdiction.

In Slason v. Cannon, 19 Vt. 219, it is said that the powers of the supreme court are limited to the correction of errors found in decrees of the court below, and that therefore a bill of review founded upon newly discovered facts should be brought in the lower court after a decision by the appellate court.

The jurisdiction of the lower court to sustain such a bill after an affirmance of the decree by the appellate court is also recognized in Webster v. Diamond, 36 Ark. 532; Greer v. Turner, 47 Ark. 17, 14 S. W. 383; Elzas v. Elzas, 183 Ill. 132, 55 N. E. 673; Mathias v. Mathias, 104 Ill. App. 344, Affirmed in 202 Ill. 125, 66 N. E. 1042; Brewer v. Bowman, 3 J. J. Marsh. 492, 20 Am. Dec. 158; McLean v. Nixon, 18 B. Mon. 768; Pinkney v. Jay, 12 Gill & J. 69; M'Call v. Graham, 1 Hen. & M. 13; Randolph v. Randolph, 1 Hen. & M. 181; Campbell v. Campbell, 22 Gratt. 649; Connolly v. Connolly, 32 Gratt. 661; Henry v. Davis, 13 W. Va. 256. And see also Putnam v. Clark, 35 N. J. Eq. 145, and Reynolds v. Reynolds, 88 Va. 152, 13 S. E. 395, 598, a sufficiently full statement of the holdings in which may be found in the opinion in the case in hand.

In Griffin v. Griffin, 11 N. C. (4 Hawks) 403, it was held that the court below might entertain a bill of review of a decree entered in conformity with the opinion of the supreme court on points submitted.

In Hall v. Waddill, 78 Miss. 41, 27 So. 936, 28 So. 831, it is held that there is no distinction between cases affirmed and reversed, as to whether an application for leave to file a bill of review, based on newly discovered evidence, should be made to the appellate court or the trial court; and that such application must be made in the lower court.

In Bush v. Madeira, 14 B. Mon. 212, and Davis Sewing Mach. Co. v. Dunbar, 32 W. Va. 335, 9 S. E. 237, the jurisdiction of the court below over a bill of the kind under discussion, after reversal of the decree by the appellate court, was recognized.

The view of the United States Supreme Court, that such a bill will not lie unless the right is reserved in the decree of the appellate court, or permission is given on

taken and hearing had, the plaintiff's bill was dismissed by the circuit court for Howard county. From that decree the plaintiff appealed to this court, which reversed said decree on April 9, 1905 (101 Md. 205, 60 Atl. 634), and remanded the cause, "to the end that further proceedings should be had in conformity with the opinion of this court." That opinion sustained the plaintiff's claim, and declared "that, as the defendant did not invest these securities in his wife's name so that they could be easily identified, and has failed to say in his testimony in what they were actually invested, and at what price, it is but fair that he should be charged for the currency price in New York when the securities were sold; and this amount should be ascertained as $29,000." Pending these proceedings in this court, Mr. Winter died, and his executors were made parties to the case before the passage of the decree in this court. After the case was remanded to the circuit court for Howard county, that court proceeded to decree, "in conformity with the opinion and decree of the court of appeals, that the plaintiff recover against the Safe Deposit & Trust Company of Baltimore and Arthur W. Machen, executors of the last will of Henry Winter, deceased, to be paid out of the estate of said deceased, the sum of $29,000, the value, as ascertained by the said court, of the securities of the plaintiff's testatrix converted by the said Henry Winter, deceased, in his lifetime, and adjudged to have been the property of Annie M. Winter, the plaintiff's testatrix." This decree was passed July 1, 1905, and on the 6th of July the executors of Henry Winter filed in the circuit court for Howard county a petition for leave to file a bill of review, upon the ground of material evidence newly discovered since the passage of said decree. This petition alleged that Arthur W. Machen, one of the said Winter's executors, in April, 1905, being then in San Francisco, received letters testamentary from the proper authority in California to enable him to administer upon certain personal property of Mr. Winter in that state, and there learned that a firm of Parrott & Co., now out of business, had been, in 1869 and 1870, the bankers of Mr. Winter, and in charge of the investment of the proceeds of the securities delivered to him by Mrs. Winter; that Mr. Machen obtained access to the books of said firm which had been carefully preserved, and ascertained therefrom that the proceeds of sale of said securities amounted in gold to the sum of $21,027.50 and in currency to $26,310, which sum, together with the other large sums, belonging to Mr. Winter, he invested in 355 shares of the stock of the San Francisco Gas Company (now reorganized as the San Francisco Gas & Electric Company) at a cost of $30,840 in gold, all of which shares constituted a part of his estate at his death, so that such number of said shares as represented the proceeds of sale of Mrs. Winter's securities could now be restored to her estate; and that these particulars were not known to Mr. Winter at the time of the filing of the bill of complaint of

application to that court, is set forth in Southard v. Russell, 16 How. 547, 14 L. ed. 1052, the portion of the opinion in relation to this point being quoted in the case in hand. This decision was evidently due to the desire of the court to follow the English chancery practice as considered to be demonstrated in the case of Barbon v. Searle, 1 Vern. 416, a case from which, however, diametrically opposite conclusions seem to have been drawn by text writers. The decision in the Southard Case is nevertheless considered as conclusive of the question in Federal practice, and has been followed in Kimberly v. Arms, 40 Fed. 548; Franklin Sav. Bank v. Taylor, 4 C. C. A. 55, 9 U. S. App. 406, 53 Fed. 854; Re Gamewell Fire-Alarm Teleg. Co. 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 908; Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 639, 107 Fed. 781; Camp Mfg. Co. v. Parker, 121 Fed. 195.

So, also, it is said in Stafford v. Bryan, 2 Paige, 45, that it may be doubted whether a court of chancery has authority to entertain a bill in the nature of a bill of review upon the ground of newly discovered facts, unless such right is expressly reserved in the decree of the appellate court.

In Bloxham v. Florida C. & P. R. Co. 39 Fla. 243, 22 So. 697, it is held that, where the decision of the lower court is affirmed in part and reversed in part by the appellate court, the new decree which must be made is that of the appellate court; and that therefore the lower court has no jurisdiction to permit the filing of a supplementary bill in the nature of a bill of review on the ground of newly discovered facts.

And accordingly it is held, in Reynolds v. Florida C. & P. R. Co. 42 Fla. 387, 28 So. 861, that, where the appellate court grants leave to file a bill of review on newly discovered evidence, the court below has no jurisdiction or authority to permit the decree to be reviewed to any greater extent than is permitted by the appellate court.

And in Hurt v. Long, 90 Tenn. 445, 16 S. W. 968, it is said that no bill of review lies in the chancery court to review a decree of the supreme court,—a statement which is regarded in Murphy v. Johnson, 107 Tenn. 552, 64 S. W. 894, and Saunders v. Savage (Tenn. Ch. App.) 63 S. W. 218, as authority for holding that a decree entered pursuant to a mandate of the supreme court is not reviewable without leave in the chancery court for newly discovered evidence.

Mrs. Winter's executor, nor afterwards in the lifetime of Mr. Winter, nor discoverable by him by the use of any means in his power, in his then invalid and infirm condition of health. It also appeared from said petition that, while this stock was purchased at about $80 per share, its market value at the time of the discovery of these facts had declined to $57 or $58 per share. Mrs. Winter's executor answered this petition, denying that the facts alleged therein were material to the issues raised and decided in the case, and alleging that, even if material, they were obtainable before the passage of the decree of July 1, 1905, by the exercise of reasonable diligence on the part of Mr. Winter, and the petition was refused by the order of July 25th, now appealed from.

In the argument in this court it was contended by Mrs. Winter's executor that the circuit court for Howard county had no jurisdiction to grant leave to file a bill of review, to review a decree of that court passed in pursuance of a decree of this court reversing the former decree of the circuit court for Howard county; and such is the rule in the Federal courts, as shown by the cases of Southard v. Russell, 16 How. 547, 14 L. ed. 1052, and Kingsbury v. Buckner, 134 U. S. 671, 33 L. ed. 1055, 10 Sup. Ct. Rep. 638. In the former case, it was said: "The better opinion is that a bill of review will not lie at all for errors of law alleged on the face of the decree after the judgment of the appellate court. These may be corrected by a direct application to that court, which would amend, as a matter of course, any error of the kind that might have occurred in entering the decree. Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the court of chancery and House of Lords in England; and we think it founded in principles essential to the proper administration of the law and to a reasonable termination of litigation between parties to chancery suits. Barbon v. Searle, 1 Vern. 416; Stafford v. Bryan, 2 Paige, 45; Haskell v. Raoul, 1 M'Cord, Eq. 22; M'Call v. Graham, 1 Hen. & M. 13; Mitford, Eq. Pl. 88; Cooper, Eq. Pl. 92; Story, Eq. Pl. 408; Brewer v. Bowman, 3 J. J. Marsh, 492, 20 Am. Dec. 158." That case was decided in 1853, and was approved in Kingsbury v. Buckner, *supra*, decided in 1890.

Notwithstanding, however, the respect which is due and always rendered to the decisions of that tribunal, we cannot adopt that view after a careful examination of the authorities cited in Southard v. Russell. Some of these are cited in 2 Dan. Ch. Pl. & Pr. p. 1579, to sustain the opposite view. The author there says: "A bill of review, brought upon new matter, may, it seems, be permitted, even after the decree has been affirmed by the House of Lords."—and refers to Barbon v. Searle, *supra*; Cooper, Eq. Pl. 91, 92; Story, Eq. Pl. 418; and Stafford v. Bryan, *supra*. It seems quite clear from the text alone that Mr. Daniell meant the bill should be filed in the court rendering the original decree, and this is confirmed on reference to the authorities he cites. Judge Story, in § 418 of Equity Pleading, says: "A bill of review upon new discovered matter has been permitted even after an affirmance of the decree in Parliament,"—and he cites Cooper, Eq. Pl. 92. It cannot be doubted that he refers to the court of original jurisdiction, since he mentions a case where a demurrer was filed to the bill of review, and the demurrer was overruled and the defendant required to answer, which could not properly be done in the appellate tribunal. In 3 Enc. Pl. & Pr. p. 574, it is said: "After a decision has been rendered by an appellate court and the cause remanded to the court below, the latter court has no authority to entertain a bill of review for error apparent; but, where the ground of review is newly discovered matter, the jurisdiction is generally conceded." This work is regarded as high authority, and the text is supported by reference to cases from New Jersey, Arkansas, Kentucky, Virginia, West Virginia, Georgia, Illinois, North Carolina, and Maryland. In Griffin v. Griffin, 11 N. C. (4 Hawks) 403, the court said: Where a lower court has passed a decree as directed by the appellate court, an application for leave to file a bill of review for newly discovered evidence is properly addressed to the lower court. In Schaefer v. Wunderle, 154 Ill. 577, 39 N. E. 623, it is said: "An application for leave to file a bill to review a decree affirmed by the supreme court must be made to the court of chancery where the decree was originally rendered, and not to the supreme court." In Reynolds v. Reynolds, 88 Va. 152, 13 S. E. 395, 598, the court held that where the court of errors and appeals has rendered a decree after hearing on the merits, and the decree has been entered on the minutes in accordance with the views of the court, and the record has been regularly remitted to the court below, it has no further jurisdiction of the case, and therefore will not entertain an application for leave to file a bill of review. Such application is to be made

to the court in chancery." In King v. Ruckman, 22 N. J. Eq. 551, the court said: "When such judgment [of this court on appeal] has been rendered after a hearing upon the merits, and . . . the record has been regularly remitted to the inferior court, this court has no further jurisdiction in the case." In Putnam v. Clark, 35 N. J. Eq. 145, Chancellor Runyon said: Stafford v. Bryan and Southard v. Russell, *supra*, "have neither the authority of the books nor of adjudged cases for their support. The court of chancery has inherent power, without the consent of the appellate tribunal, to review, on the ground of newly discovered evidence, its decree, though it has been passed upon on appeal; and no principle or practice requires that it shall refrain from doing so until the consent or countenance of the superior court shall have been obtained. These propositions are established by the following citations: Needler v. Kendall, Finch, 468; Mitford, Eq. Pl. 88; Cooper, Eq. Pl. 92; 2 Dan. Ch. Pl. & Pr. 1579; Story, Eq. Pl. §§ 408–418; 2 Hoffm. Ch. Pr. 12; Tommey v. White, 1 H. L. Cas. 166; Flower v. Lloyd, L. R. 6 Ch. Div. 297; Haskell v. Raoul and M'Call v. Graham, *supra*." The two English cases cited by Chancellor Runyon put those courts in accord with the current of American authority. In Flower v. Lloyd plaintiff had obtained a judgment which was reversed on appeal, and he applied to have the appeal reheard with fresh evidence, but it was held, in opinions by Sir George Jessel and Lord Justice James, that the court of appeals had no jurisdiction to rehear the appeal, and the same was held in Tommey v. White, *supra*. In all these cases the strength of the position is that appellate courts, without original jurisdiction, exhaust their power in affirming the decree of the lower court, or in reversing it and remanding it for decree in conformity with its opinion, whether with or without further proceedings preliminary to decree. Moreover, our predecessors distinctly decided, in Pinkney v. Jay, 12 Gill & J. 69, that a bill of review for newly discovered evidence will lie in the lower court after affirmance on appeal, and we know of no principle which would discriminate in this regard between an affirmance and a reversal of the decree of the lower court. The reasons upon which that decision rests commend themselves to us as sound, and we must adhere to its authority, notwithstanding our deference to the views of the Supreme Court of the United States.

No question was made at the argument or in the briefs as to the right of appeal from an order refusing leave to file a bill of review; but, as it seems to be settled that the granting or refusing of such leave is left to the sound discretion of the court, the question suggests itself. In Hollingsworth v. M'Donald, 2 Harr. & J. 238, 3 Am. Dec. 545, and in Burch v. Scott, 1 Gill & J. 393, it was held that the application is addressed to the discretion of the court. There appears to be a diversity of view in the adjudged cases as to whether an appeal will lie from an order granting or refusing such leave. In Ricker v. Powell, 100 U. S. 107, 25 L. ed. 528, and in Nickle v. Stewart, 111 U. S. 776, 28 L. ed. 599, 4 Sup. Ct. Rep. 700, in both of which there was an appeal from an order refusing leave, the order was affirmed, the court declining to decide that the appeal would lie; but, in the former case, Mr. Chief Justice Waite said that, before a bill of review can be filed, the decree must first be obeyed and performed, and that, if it directs the payment of money, it ought to be paid before the bill of review was filed, though it might be afterwards ordered refunded; citing Judge Story's Equity, and Chancellor Kent in Wiser v. Blachly, 2 Johns. Ch. 488, as authority; and adding that it is only when the bill is for error of law alone that it becomes a matter of right, and not of discretion. In this case, however, the execution of an approved appeal bond should be regarded as equivalent to performance of the decree. Without intending to decide that this appeal will lie, we are of opinion that the circuit court exercised a sound discretion in refusing the leave, since the facts set forth in the petition as newly discovered, though unknown to the executors and to their counsel, were facts which were all known to Mr. Winter in his lifetime, and his failure to remember them cannot entitle his executors to insist that they were in fact newly discovered. To allow this case to be reviewed upon the facts alleged would be to make an entire new case, instead of rehearing the old case. Mr. Winter made his defense upon the issue of a gift of the securities in question, to him, and upon that issue the alleged newly discovered evidence is not material. His executors now ask to be allowed to set up a new defense, to enable them to discharge a money decree by the surrender of securities held in his own name, of a less nominal value, and which have since declined in market value about 30 per cent. In Schaefer v. Wunderle, 154 Ill. 577, 39 N. E. 623, the true rule is said to be that, unless there has been an abuse of the fair discretionary power with which the circuit court has been invested in the matter of such application, its decision should not be disturbed. This rule was adopted in Michigan in Stockley v.

Stockley, 93 Mich. 307, 53 N. W. 523; and in Craig v. Smith, 100 U. S. 226, 25 L. ed. 577, the Supreme Court said that Judge Story, in Wood v. Mann, 2 Sumn. 334, Fed. Cas. No. 17,953, stated the rule none too strongly, when he said: This discretion was "to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause."

Order affirmed, with costs to the appellee above and below.

MARYLAND COURT OF APPEALS.

ELDRIDGE C. PRICE, Appt.,
v.
MUTUAL RESERVE LIFE INSURANCE COMPANY.

(102 Md. 683, 62 Atl. 1040.)

Insurance—breach of contract—right of beneficiary.

1. The beneficiary in a life-insurance policy has no right of action because of breach by the insurer of its contract with the applicant with reference to assessments, reserve fund, and classification.

Same—cancelation of policy—right of beneficiary.

2. No action can be maintained by the beneficiary upon a life-insurance policy where the insured, because of wrongful acts on the part of the insurer, refused to pay assessments and directed the cancelation of the policy, which he acquiesced in for more than four years before his death.

Limitation of actions—fraud—discovery.

3. To prevent the barring of an action by the statute of limitations on account of fraud, it must appear that the fraud not only was not discovered, but could not have been discovered with reasonable diligence, until within the statutory period before the action was begun.

(January 9, 1906.)

APPEAL by plaintiff from a judgment of the Superior Court of Baltimore City in defendant's favor in an action brought to recover damages for breach of a life-insurance contract. Affirmed.

The facts are stated in the opinion.

Messrs. **Joseph P. Merryman** and **J. Kemp Bartlett**, for appellant:

The beneficiary is the only party who can sue for the breach of a contract of insurance made for him.

Harrison v. McConkey, 1 Md. Ch. 34; Fire Ins. Asso. v. Merchants' & M. Transp. Co. 66 Md. 339, 59 Am. Rep. 162, 7 Atl. 905; Mutual L. Ins. Co. v. Stibbe, 46 Md. 311; North America L. Ins. Co. v. Wilson, 111 Mass. 542; Maryland Mut. Benev. Soc. I. O. R. M. v. Clendinen, 44 Md. 429, 22 Am. Rep. 52; Ruppert v. Union Mut. Ins. Co. 7 Robt. 155; Hogle v. Guardian L. Ins. Co. 6 Robt. 567; Brantley, Contr. p. 64; Barbour, Parties, p. 27; Owings v. Owings, 1 Harr. & G. 489; Small v. Schaefer, 24 Md. 143; O'Neal v. School Comrs. 27 Md. 239; Seigman v. Hoffacker, 57 Md. 325; 1 Poe, Pl. & Pr. § 312; 1 Saunders, Pl. & Ev. 5th ed. p. 168; Hendrick v. Lindsay, 93 U. S. 149, 23 L. ed. 857; Eakle v. Smith, 27 Md. 480; Ripley v. Astor Ins. Co. 17 How. Pr. 444; Coates v. Pennsylvania F. Ins. Co. 58 Md. 172, 42 Am. Rep. 327; National F. Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289; Newman v. Springfield F. & M. Ins. Co. 17 Minn. 123, Gil. 98; Motley v. Manufacturers' Ins. Co. 29 Me. 337, 50 Am. Dec. 591.

Case Note.—Insurance; right of beneficiary to sue insurer for breach of contract other than failure to pay indemnity.—The holding of the case in hand, that the beneficiary of a policy of insurance has no right of action for damages for breach of contract, seems, so far as it is not based on the total lack of standing of the beneficiary to maintain any action whatever on the policy, to be unsupported by authority.

On the other hand, in Brooklyn L. Ins. Co. v. Week, 9 Ill. App. 358, it was held that the beneficiary of a life-insurance policy might maintain an action for damages for the unlawful cancelation of the contract during the life of the insured.

In Merrick v. Northwestern Nat. L. Ins. Co. 124 Wis. 221, 102 N. W. 593, it is also held that a wife, who would be entitled to the insurance on her husband's life if she survived him, might maintain an action for damages for breach of the contract by the insurer in wrongfully declaring the policy forfeited.

And in Clemmitt v. New York L. Ins. Co. 76 Va. 335, the right of a beneficiary to maintain an action for damages for breach of contract on the part of the insurer in wrongfully declaring the policy forfeited was recognized.

But where the beneficiary may be altered at will by the insured during his lifetime, the damages sustained by the beneficiary by breach of contract on the part of the insurer by wrongfully forfeiting the policy during the lifetime of the insured are too hypothetical to authorize a recovery. Knights Templar & Masons' Life Indemnity Co. v. Gravett, 49 Ill. App. 252.

Where the beneficiary, by virtue of effecting the insurance and paying the premiums, may be regarded as a party to the contract (see Cooley, Briefs on Insurance, 793), additional grounds would seem to exist for permitting such beneficiary to maintain an action for damages for its breach.

Messrs. **John Prentiss Poe** and **John M. Carter** for appellee.

Page, J., delivered the opinion of the court:

The questions in this case arise upon demurrers to the several pleadings. The *narr.* contains 13 counts, the first 4 being the ordinary money counts, the other 9 are special counts. The fifth count alleges that the Mutual Reserve Fund Life Association, now known as the Mutual Reserve Life Insurance Company, in December, 1882, insured the life of Elias C. Price, deceased, father of the appellant, for the benefit of the plaintiff, and that the said appellee failed to carry out its contract with the said Elias; that the said Elias has since died, and by his last will and testament the appellant is the sole legatee of his estate; that the said insurance company failed to comply with its said contract of insurance, in that it did the things and omitted to do the things mentioned in the *narr.* as particularly mentioned in the fifth to the thirteenth counts inclusive. To this *narr.* the appellee filed 19 pleas, wherein he pleaded by the first plea limitations, by the second and third the general issue, by several pleas, from the fourth to the eighteenth, inclusive, special traverses, of the several breaches set out in the *narr.*, and by the nineteenth plea "that, with full knowledge of all the actings and doings of the defendant on the policy of insurance, and without any concealment or misrepresentations on its part, the said Elias Price, voluntarily elected to discontinue payment on the mortuary assessments and dues, levied and assessed by the defendant, and thereby voluntarily suffered the said policy to lapse, whereby all the rights and claims of the said Elias Price wholly ceased and determined according to the express terms of said policy; and that said Elias Price, with full knowledge of all the acts and doings of the said insurance company, for more than four years fully acquiesced in and assented to all said doings, and well knew that said policy had lapsed and become null and void; wherefore, it is further alleged that the said policy was canceled and terminated during the lifetime of the said Elias, and was acquiesced in by the said life association. The appellant, by his replication to the defendant's first plea, set up to the plea of limitations as follows: That, by the false and fraudulent conduct and deceit of the defendant, his right of action was not discovered until within a period of less than three years prior to the bringing of this suit. He joined issue upon all the other pleas, except upon the nineteenth plea, to which he demurred. To this replication the defendant rejoined, setting up to the plea of limitations, first, that the defendant was not guilty of fraudulent conduct and deceit in relation to the policy, and that the said Price, with full knowledge of all the doings and acts of the said insurance company in reference to the said policy, had voluntarily refused to pay the assessment, and had directed the company to cancel the policy; and, further, that said Elias lived for more than four years thereafter, and that the said Elias, as well as the appellant, did know of said alleged causes of action, and that the appellant could have discovered by the use of ordinary diligence the alleged causes of action, four years next preceding the institution of this suit. The appellant demurred to the second, third, and fourth rejoinders, and joined issue as to the fifth, whereupon the court sustained the demurrer as to the *narr.*, overruled the rejoinders to the plea of limitations, and on the 19th of July, 1905, on motion of appellees, rendered judgment in their favor; and from this the appellant has appealed.

Without further particularity in stating the voluminous pleadings in the case, it is apparent that the real questions involved are whether or not a legal cause of action is stated in the *narr.*, and also whether the plea of limitations was properly pleaded, and, if so, whether the facts set out in the rejoinders thereto were legally effective to constitute a bar. Stripped of its verbiage, the ground of the plaintiff's right of recovery appears to be that the appellant, the son and sole legatee of Elias C. Price, bases his right to sue upon the facts that Elias in his lifetime entered into a contract with the appellee, and that the appellee failed to observe the obligations resting upon it by the terms of said contract in the several particulars specially set out in the *narr.*, notwithstanding the fact that in the lifetime of Elias the contract was, by agreement between the said Elias and the company, canceled. The appellant claims this right to sue, not because, under and by virtue of the contract itself, he has any such right, but solely because he was named as the beneficiary therein. It was laid down in Seigman v. Hoffacker, 57 Md. 321, and it seems to be well established, that "in a matter of simple contract a promise to one for the benefit of another may be enforced by the person for whose benefit the promise was made;" but, "unless the promisee has some beneficial interest himself, he cannot maintain the suit." It does not appear whether the policy mentioned in the *narr.* was under seal or not. Assuming, however, that it was not under seal, the only averments showing the interest of the appellant are that he was named therein as the beneficiary, and also that he was the sole legatee of his father. If he claims as bene-

ficiary, he can claim only as entitled to the fruits of the contract; but as beneficiary he cannot claim for wrongs inflicted by the company upon Elias Price, for the reason that he can claim by the terms of the contract only what can be realized therefrom. Here the injuries alleged are that the insurance company made illegal assessments upon Elias Price, failed to set apart a reserve fund, and did not place him in a particular class, etc., and unfairly and fraudulently took from him a large sum of money. These and the other matters set out in the declarations as breaches of the contract are matters for which the contract of insurance furnishes the appellant no ground of complaint as beneficiary. They are damages to Elias Price, which, when recovered, would inure to the estate of the deceased. An ordinary insurance upon the life of an individual is a contract by which the insurer, for a consideration, engages to pay a sum specified to the beneficiary according to the terms of the policy, if the person who is insured shall die within the period limited by the policy. 19 Am. & Eng. Enc. Law, 2d ed. p. 42, title, "Life Insurance." The interest of the appellant being that of a beneficiary, he had no interest in the policy further than that he could claim as beneficiary, and therefore no right to sue for the breach of the contract with Elias Price. If the breaches set out in the *narr.* can be recovered at all (and of this we are not to be understood as expressing any opinion), the personal representatives of Elias Price are the proper parties to sue. But, apart from this, the appellee, by his nineteenth plea, alleges that about April, 1898, Elias Price, with full knowledge of the actions of the defendant in relation to the said policy, "voluntarily elected to discontinue payment on the mortuary assessments and dues lawfully levied and assessed, and suffered the said policy to lapse," and directed the policy to be canceled, and the same was canceled, and for more than four years acquiesced in the cancelation of the policy and in the doing and acts of the defendant, and well knew that said policy had lapsed, etc., according to the express terms and conditions of the policy. The demurrer admits these facts, which are set out in the pleadings; and, further, by the second rejoinder to the said replication, that Price, with full knowledge of all the facts, failed and refused to pay the assessments then due, and directed the defendant to cancel the policy, and that, in consequence thereof, the policy was abandoned, etc. These facts are conclusive against any claim under the policy. Mutual L. Ins. Co. v. Sears, 178 U. S. 345, 44 L. ed. 1096, 20 Sup. Ct. Rep. 912; Ryan v. Mutual Reserve Fund Life Asso. 96 Fed. 796; Mutual L. Ins. Co. v. Phinney, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. Rep. 906.

The plea of limitations was set up by the appellee's first plea. It applied to all the counts in the *narr.* To this the replication was "that, by the false and fraudulent conduct and deceit of the defendant, his right of action was not discovered until within a period of less than three years prior to the bringing of this suit." This replication was insufficient, in that it is not alleged that the fraud was not discovered and could not have been discovered with ordinary diligence within a period of three years prior to the bringing of the suit. Wear v. Skinner, 46 Md. 269, 24 Am. Rep. 517. Apart from this, upon the facts alleged in the appellee's rejoinder, the appellant was not kept in ignorance of his alleged cause of action by the fraud of the defendant, and could have discovered it within three years by ordinary diligence. Inasmuch as the plea of limitations as set out by the appellee's plea went to the whole declaration, including the four first counts, the court committed no error in sustaining the demurrer to the declaration and the plea of limitations. The appellant not having asked leave to plead over, the appellee, on motion, was entitled to judgment on the pleadings.

Judgment affirmed.

COLORADO SUPREME COURT.

A. HARTMAN, Appt.,
v.
GEORGE TRESISE.

(— Colo. —, 84 Pac. 685.)

Water—public title—fishery.

1. A constitutional declaration that unappropriated water in natural streams is public property subject to appropriation does not confer a public right of fishery in streams flowing through private property.

Subject Note.—Right of way on shore.

I. Civil-law rule.
 a. In General, 872.
 b. Rule in Louisiana, 873.
II. Common-law rule, 875.
III. As appurtenant to fishery right, 879.
IV. Custom or prescription, 880.
V. Grant, 881.
VI. Legislative power, 881.
VII. Street on shore, 881.

I. Civil-law rule.

a. In general.

The question of the right to fish is fully treated in a note to State v. Shaw, 60 L.R.A. 481. Therefore, this note will be confined to

Fishery—right to.

2. The owner of the bed of a natural, fresh-water, nontidal stream has the exclusive right of fishery therein.

Same—legislative grant to public.

3. The legislature cannot give a public right of fishery in a nontidal, fresh-water stream flowing over private property where the Constitution prohibits the taking of private property for public use without compensation.

Stream—bank—right of way.

4. The legislature cannot, without compensation, create a public right of way along the banks and beds of streams to enable the public to enjoy a right of fishery, even by providing an action for any damage done to property along the bank, where the Constitution prohibits the taking of private property for public use without compensation.

(Bailey and Steele, JJ., dissent.)

(June 5, 1905.)

APPEAL by plaintiff from a judgment of the District Court for Gunnison County in defendant's favor in an action to recover damages for the breaking and injuring of plaintiff's close. Reversed.

Statement by **Campbell, J.**:

Action against defendant for breaking and entering plaintiff's close. Plaintiff is the owner, and in possession, of cultivated lands which were patented after our state government was organized. They were inclosed by a fence and posted as required by law. Defendant, a citizen of Colorado, forcibly broke and entered thereupon, knowing of the posting, and having previously been personally notified by plaintiff not to enter the same or fish in the natural stream which flowed therethrough and had been stocked with fish at the public expense. Defendant's sole purpose in making the entry was to fish in such stream, which he

a collection of the authorities governing the rights of the shore owner and public as to travel along, or use of, the bank or shore for any purpose. If, by common law, the riparian owner has a property right in the exclusive use of the banks and shores, the legislature, under the constitutional protection of property rights, cannot deprive him of it without compensation. By the civil law, the public seems to have had a right to use the banks and shores to practically the same extent as its right to use the water itself. As stated in Sandars, Justinian, p. 159, the public use of the banks of a river is part of the law of nations, just as that of the river itself. All persons, therefore, are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there as to navigate the river itself. But the banks of a river are the property of those whose land they adjoin, and consequently the trees growing on them are also the property of the same person.

Wood, Civil Law, 82, states that *res publicæ* are those things which belong to some certain people, or to those to whom the regalia appertained; but the use of them ought to be common to all men at least of that nation, as highways, ports, and rivers. And therefore the right of sailing and fishing is public in such rivers and ports, as also the use of the banks of rivers to unload burdens on them, to tie cables and ropes to the trees belonging to those to whose estates they are joined.

Since a large part of the territory of the United States was derived from nations which had adopted the civil law, that law has had some influence in determining rights in such territory; but, the states formed from them having adopted the common law as the rule of property rights, the rule of private ownership, rather than that of public use, prevails even there.

Thus, in Hunter v. Moore, 44 Ark. 184, 51 Am. Rep. 589, it is said it seems that, although in those states formed out of the former Louisiana territory, a greater freedom is allowed in the use of the banks of a navigable stream than is recognized as permissible by the general law obtaining in other states, yet, that it would not give those navigating the stream the absolute right to land at pleasure upon private property. The right to touch the bank and make fast thereto, and to use it for repairing, etc., is confined to cases of reasonable necessity, and as incidental to the right of navigation by boats passing up and down the stream, and temporarily delayed. The public has no general right to use the property of the bank owners for landing at will and for mooring boats.

In O'Fallon v. Daggett, 4 Mo. 343, 29 Am. Dec. 640, the land was claimed under a grant from the King of Spain, and the civil law was concededly applicable to the case. But, under that law, the court held that the navigators had no right to fasten to the bank of a private owner, except in case of necessity; and that they could not occupy it for a period of six weeks for the purpose of repairing, and in so doing erect a house and fix therein blacksmith's tools, and employ men and beasts in considerable numbers, merely for the reason that it was more convenient to do it at that place.

b. Rule in Louisiana.

Louisiana retained the civil law as its rule of property rights; and in that state the public has a right to use the banks and shores for purposes connected with the use of the water.

Thus, in that state the use of the banks of a navigable river is a servitude for the public use, and each riparian owner is bound to leave sufficient space for levees, streets, and other public works. Hanson v. Lafayette, 18 La. 295.

succeeded in doing. He justifies under § 5 of article 16 of the Constitution, which reads: "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided;" and under an act of the general assembly (Sess. Laws 1903, chap. 112, p. 233), which provides: "That the public shall have the right to fish in any stream in this state, stocked at public expense, subject to actions in trespass for any damage done property along the bank of any such stream." The district court dismissed the action upon the ground that citizens of this state have the constitutional and statutory right to fish in our natural streams against the wish and protest of the owner of the land through which the streams flow when the waters thereof have been stocked with fish at public expense. In announcing the decision the district judge said: "The ratification of this Constitution by the United States government amounted to a declaration on the part of the government that the state should have a perpetual easement over the public lands of the United States for the natural streams contemplated by the Constitution, of which these streams were a part, and that all persons acquiring a part of the public domain acquired the same subject to this constitutional provision and this right of the state." It was therefore held that "defendant, as one of the

So, the public has a right of way on the banks of navigable streams. Pecot v. Police Jury, 41 La. Ann. 706, 6 So. 677.

So, a riparian owner has no right to appropriate to his exclusive use the banks of a navigable river, because he has no private property in the use of them. It belongs to the public. Sweeney v. Shakspeare, 42 La. Ann. 614, 21 Am. St. Rep. 400, 7 So. 729.

And a riparian owner is not entitled exclusively to appropriate to his own use the banks of a navigable river, although the right of property is in him as proprietor of the adjacent lands. He cannot construct levees or works that will obstruct the free use of its banks to all men. Hanson v. Lafayette, *supra*.

So, a riparian owner has no right to encroach for private purposes upon that part of the river in front of his land, thereby interfering with the space allotted by the city to a ferry company for landing purposes. Pickles v. McLellan Dry Dock Co. 38 La. Ann. 412.

So, riparian proprietors have no right to appropriate to their exclusive use the banks of the Mississippi river; and they have no private property in the use thereof which is public; and they are not entitled to restrain the city of New Orleans, by injunction, from placing hitching posts, designed to furnish facilities for commerce, along the river bank in front of their property. Watson v. Turnbull, 34 La. Ann. 856.

And a mill owner permitted by the city council to erect works on the banks of the river to facilitate the bringing of timber to his mill may be thereafter required to remove them if they obstruct the free use of the banks to which the public is entitled. Shepherd v. Third Municipality, 6 Rob. (La.) 349, 41 Am. Dec. 269.

A riparian owner cannot, under La. act 333 of 1853, reduce accretions to private occupation without leaving for public use without compensation such portions thereof as may be needed for commerce and public highways. Louisiana Ice Mfg. Co. v. New Orleans, 43 La. Ann. 217, 9 So. 21.

A house placed directly upon the banks of a navigable river in such a way as to interrupt that use of the banks which is common to all men is removable as a nuisance. Natchitoches v. Coe, 3 Mart. N. S. 140.

A corporation can maintain a petitory action to remove nuisances and clear the banks of rivers, by showing that the land occupied is destined to public use. Gleisse v. Winter, 9 La. 149.

Wharves, buildings, and mills erected on the banks of the Mississippi river in such a way as to obstruct the public right of passage along the banks are nuisances; and the city of New Orleans may abate or destroy them as such. Henderson v. New Orleans, 3 La. 563.

One who, by the erection of a building, obstructs the public right of passage along the banks of a navigable stream, is not justified in doing so, although the place was originally a swamp which he filled up; nor is it material that the stream was not originally navigable. Allard v. Lobau, 3 Mart. N. S. 293.

The servitude imposed upon lands by La. Code, art. 446, declaring that the use of the banks of navigable rivers or streams is public, is not for the use of the public at large for all purposes, but only such as are incident to the nature and navigable character of the stream. Lyons v. Hinckley, 12 La. Ann. 655.

But the property of the banks of the Mississippi river is in those who possess the adjacent lands, and they have the right to prevent an unlawful use of them by the agents of the public. De Ben v. Gerard, 4 La. Ann. 30.

Therefore, a city is not entitled to permit the construction of permanent structures upon the banks and batture of a river to the detriment of the riparian owner or to the injury of the public; but it may construct those of public utility and advantage. Leonard v. Baton Rouge, 39 La. Ann. 275, 4 So. 241.

So, a municipality has no right to lease the batture in front of the property of individuals for use as a wood yard or any other private purpose. The municipal control of the river bank must be in furtherance of

citizens of this state, was only exercising the right granted to him by the general assembly under the Constitution."

Mr. **Sprigg Shackleford**, for appellant:

The power to regulate the method of issuing and to define the force of the patents issued by the government must and does always abide in the United States.

Wilcox v. Jackson, 13 Pet. 517, 10 L. ed. 273; 3 Washb. Real Prop. p. 187; 26 Am. & Eng. Enc. Law, 2d ed. pp. 217, 218.

The legislature could not authorize the trespass.

New England Trout & Salmon Club v. Mather, 68 Vt. 338, 33 L.R.A. 569, 35 Atl. 323; Albright v. Cortright, 64 N. J. L. 330, 48 L.R.A. 616, 81 Am. St. Rep. 504, 45 Atl. 634; Rockefeller v. Lamora, 85 App. Div. 254, 83 N. Y. Supp. 289; Griffith v. Holman, 23 Wash. 347, 54 L.R.A. 178, 83 Am. St. Rep. 821, 63 Pac. 239.

Mr. **Dexter T. Sapp** for appellee.

Messrs. **N. C. Miller**, Attorney General, and **I. B. Melville**, for intervener:

Any streams on whose waters logs and timbers can be floated to market, or upon which row boats or skiffs can be used, although the beds thereof are owned by riparian owners, are navigable: and the right of fishing follows the right of navigation.

Willow River Club v. Wade, 100 Wis. 86, 42 L.R.A. 305, 76 N. W. 273; Shaw v. Oswego Iron Co. 10 Or. 371, 45 Am. Rep. 146; Heyward v. Farmers' Min. Co. 42 S. C. 138, 28 L.R.A. 42, 46 Am. St. Rep. 702,

some public use. Carrollton R. Co. v. Winthrop, 5 La. Ann. 36.

Mere possession of battures and river banks for the public use can in no case form a basis of prescription, because such a basis is not incompatible with a right of ownership in a riparian proprietor. Remy v. Municipality No. 2, 11 La. Ann. 148.

It is unnecessary to condemn the portion of an accretion needed for public use, such as levees, highways, and streets; but the riparian owner can seek for a reduction if more is taken than is required. Louisiana Ice Mfg. Co. v. New Orleans, 43 La. Ann. 217, 9 So. 21.

The use of land lying between the levee and the river is in the public, and adjacent property cannot be assessed for opening a street thereon. But, if the levee be advanced nearer the river, the batture becomes private property, which, if taken for public use, should be paid for; and an assessment for that purpose is valid. Re Municipality No. 2, 7 La. Ann. 76.

A purchaser at public sale of land fronting on a bayou is chargeable with knowledge that the law requires a space to be left for public use as a road along the bank of navigable streams, and cannot, because a part of the premises is subject to such servitude, refuse to pay the stipulated price. Bourg v. Niles, 6 La. Ann. 77.

II. Common-law rule.

During the formative period of the common law, before the question of the right to the shores and banks had been settled by the courts, the text writers were inclined to state the rule of the civil law as prevailing in England. See Farnham, Waters, chap. 4. But the courts declined to follow this rule so far as the river banks were concerned. The ocean having been set apart for the common use of mankind, it became necessary to recognize a public right to the use of the shore for purposes connected with navigation and fishery, whether the title was in the public or in the riparian owner. The perils of navigating the ocean are such that the common principles of humanity demand that imperiled sailors shall have a right to land for safety, and make their way along the shore to a public highway.

And Hall, Seashores, 177, says that at times of high water there must be a right of way along the dry land to the nearest highway, or at that time no man can embark or disembark at other places than where the inland road meets the sea.

But, except in cases of peril, the necessity of embarking or disembarking at other than a public landing place is somewhat remote, so that that contention is largely academic.

The seashore is not a highway for public travel upon foot or with vehicles. Anyone can, however, unless the public authorities by lawful action interfere, go upon the seashore between high and low water mark to fish, bathe, or for any other lawful purpose; but he must use the shore as he finds it. Murphy v. Brooklyn, 98 N. Y. 642.

The necessity for public use of the banks of inland streams is much less than of the shores of the sea; and, although there was an inclination among the early decisions to recognize such right, the courts finally decided against it.

In regard to banks, Callis, Sewers, 74, adopts the civil-law rule, that the title is in the owner of the adjacent soil, and the use is in the public to tie ships and boats to the trees, to tow them back and forth upon the banks, to lade and unlade merchandise and dry fish nets thereon. He compares the bank to a highway, for that the property thereof is in him whose ground is next adjoining, and the use thereof is common to all men, and the power thereof the King has by his laws.

So, in Young v. ————, 1 Ld. Raym. 725, it is stated that the public are entitled to towing paths along the banks of navigable rivers; and, if the banks become impaired by the action of the water, they may go over the adjoining fields the same as where the way over an open field becomes founderous.

But in Ball v. Herbert, 3 T. R. 263, where it was held that the public had no right at common law to tow on the banks of naviga

19 S. E. 963, 20 S. E. 64; Gaston v. Mace, 33 W. Va. 14, 5 L.R.A. 392, 25 Am. St. Rep. 848, 10 S. E. 60; Burke County v. Catawba Lumber Co. 115 N. C. 590, 20 S. E. 707, 847; Walker v. Allen, 72 Ala. 456; Goodin v. Kentucky Lumber Co. 90 Ky. 625, 14 S. W. 775; Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Veazie v. Dwinel, 50 Me. 479; Thunder Bay River Boom Co. v. Speechly, 31 Mich. 342, 18 Am. Rep. 184; Morgan v. King, 30 Barb. 9; Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584; Little Rock, M. R. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; New England Trout & Salmon Club v. Mather, 68 Vt. 338, 33 L.R.A. 569, 35 Atl. 323.

The public right of fishing in the natural streams of this state has existed from the begining of its history. Each person takes his lands subject to the local laws and customs of the state where located.

Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662; Cole v. Eastham, 133 Mass. 65; Lake v. Tolles, 8 Nev. 285; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Covington v. Becker, 5 Nev. 281; Kenyon v. Knipe, 46 Fed. 309.

The right to the use of the waters of the state is in the people, and the control thereof in the state legislature.

Re Adjudication of Water Rights in

ble rivers, the above case was referred to as a very loose and inaccurate note.

So, in Queen v. Cluworth, 6 Mod. 163, an indictment for failure to repair a common footway, Holt, Ch. J., said that everyone using a navigable river has a right of way by the brink of the water over the adjoining land.

And in Ball v. Herbert, 3 T. R. 262, the court, in discussing the question as to the common-law right of the public to tow on the banks of ancient navigable rivers, said: "From what passed in the case of Vernon v. Prior, it seems as if Lord Chief Justice Willes entertained a wish that the public should have this right, and yet he could find no legal ground on which to support it; for the application to Parliament in 1748 is said to have been made with his approbation."

In Blundell v. Catterall, 5 Barn. & Ald. 268, Best, J., says that Bracton, in stating that anyone may fasten vessels with ropes to the trees on the banks to unload cargoes on the banks was speaking of inland streams which were always navigable, and the banks of which had been as open to the public as their waters. This I take to be the law with all inland navigations in the reign of Henry III. These, like the sea and its shores, were then the property of the public; and the right of the public in them was not acquired by any compromise with the interest of any individual.

But the question came squarely before the court in Ball v. Herbert, 3 T. R. 255, and the court held that the public are not entitled, at common law, to tow on the banks of ancient navigable rivers.

In that case Lord Kenyon, Ch. J., said that some of the passages in Lord Hale which seemed to favor the common-law right are rather applicable to banks of the sea, and to ports which it is a part of the King's prerogative to create; that wherever such a right has been exercised it has been founded solely on the custom of particular places, and it does not exist as a common-law right which would necessarily extend to every bank of every navigable river throughout the Kingdom.

That case settled the law upon the question, even to the extent of preventing the public use of the stream if it could not be used without towing on the banks. For in Zangers v. Wiskard, cited in the case, it was pleaded that the stream of the river was so weak in the Lea that one wishing to navigate it could not pass with his boat without towing.

With respect to the space between high and low water mark, the right of public use will largely depend on the title to the soil. If the title is in the public as far as high-water mark, the riparian owner will have no standing to complain of a public use which does not interfere with his riparian rights. But, if the title is in the riparian owner, the public rights are limited to those of navigation; and, although the public may use the entire channel when it is filled with water for purposes of navigation, its use is limited to the water, except possibly for necessary uses connected with navigation which must from the nature of the case be few.

In the Magnolia v. Marshall, 39 Miss. 109, it is said that a riparian owner upon a fresh-water, navigable stream has exclusive dominion over the shore between high and low water mark, and is entitled to recover wharfage for the privilege of loading or unloading vessels thereon, if he gives notice of his intention to make such charge.

So, a riparian owner is not liable for a nuisance by building and dumping cinders and slag between his high and low water lines, if navigation is not impeded thereby. Zug v. Com. 70 Pa. 138.

So, the owner of land bordering on water where the tide does not ebb and flow has the right to possess and occupy the land between high and low water mark, subject to the rights of the state to take the land for its own use and authorize it to be taken for public use, and also subject to the right of the public to use it in aid of navigation. Sisson v. Cummings, 35 Hun, 22, Reversed in 106 N. Y. 56, 12 N. E. 345.

But in Castner v. The Dr. Franklin, 1 Minn. 73, Gil. 51, it was held that navigators on the Mississippi river are entitled to land freight and passengers and receive the same on its banks; and this privilege extends to

Dist. No. 33. 1 Denver Leg. Adv. 300; Wheeler v. Northern Colorado Irrig. Co. 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; Combs v. Agricultural Ditch Co. 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; Wyatt v. Larimer & W. Irrig. Co. 1 Colo. App. 480, 29 Pac. 906.

The right of fishing has always been governed by the question of the public or private ownership of the waters; and the public or private ownership of waters, so-called, is simply another term for navigable or nonnavigable waters.

Lamprey v. State, *supra*.

Messrs. **Charles D. Hayt, John A. Gordon, Ralph Talbot, Thomas Ward, Jr., and Ethelbert Ward,** *amici curiæ:*

The natural streams in this state are public highways on which anyone has a right to go in a boat, raft, or by wading in the bed of the stream.

Sherlock v. Bainbridge, 41 Ind. 35, 13 Am. Rep. 302; Thompson v. Androscoggin River Improv. Co. 54 N. H. 549; Scott v. Willson, 3 N. H. 321; Porter v. Allen, 8 Ind. 1, 65 Am. Dec. 750.

It is the policy of this state to stock the public streams of the state with fish, and to make appropriations therefor at each biennial session of the legislature; and, unless the citizens of this state may fish in such streams, all such appropriations are in violation of a fundamental principle of taxation, and for this reason unconstitutional.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

high-water mark. As this, however, is in derogation of private right, it should be strictly confined to the purposes for which it is designed, so as not to interfere with the legal rights of individuals.

Above high-water mark, however, the great weight of authority is that the public possesses no rights; and the few cases which recognize any right do so only to a limited extent.

The rule of the civil law giving the public the privilege of towing on the banks of navigable rivers is at variance with the principles of American constitutional law and of the common law, which recognize such right only on the principle of compensation to riparian owners. Reimold v. Moore, 2 Mich. N. P. 15.

The banks of public rivers are private property of the adjacent owners as fully as their other land; and the public has no right to land upon them or upon the shore adjacent thereto. Wetmore v. Atlantic White Lead Co. 37 Barb. 70.

The public has no right of way along the margin of lakes and navigable rivers in this country, unless the same has been acquired by express grant or prescription. Ledyard v. Ten Eyck, 36 Barb. 102.

While the bed of a navigable river is presumed to belong to the state, the right to the adjoining land rests in the owner of the soil, so that there is no right of public use of the banks. Chambers v. Furry, 1 Yeates, 167.

It is said in Olson v. Merrill, 42 Wis. 203, that one floating his property down a stream has no right without license to use the banks of the stream to aid him.

The right of rafting logs down a stream does not include the right of booming them, for safe-keeping, on private property. Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435.

The banks of a river are not subject to the servitude of use by navigators: so that they cannot land on the banks against the will of the owner, except in case of peril, when vessels may no doubt land either boat or cargo at any point that safety may require. Ensminger v. People, 47 Ill. 384, 95 Am. Dec. 495.

The acts of Congress declaring the Mississippi river to be a common highway and forever free secure its free navigation to all citizens, but do not appropriate the banks of the river to public use. Morgan v. Reading, 3 Smedes & M. 366.

Where a person owns land on a river, and operates a ferry and has a landing on his own property, he may recover damages in trespass from another who operates a ferry and lands his boats on such landing. Butt v. Colbert, 24 Tex. 355.

The right to raft timber does not imply or carry with it the right to deposit it upon private property preparatory to being rafted. Compton v. Hankins, 90 Ala. 411, 9 L.R.A. 387, 24 Am. St. Rep. 823, 8 So. 75.

The right to the use of a navigable river as a highway for passage is distinct from the right to land for the purpose of receiving and discharging freight and passengers. The former is secured to the public; the latter must be exercised with reference to the rights of riparian owners; and, except in cases of peril or emergency of navigation, a navigator cannot land without the consent of the riparian owner; and, in return for the privilege of landing, a reasonable compensation may be demanded. Bainbridge v. Sherlock, 29 Ind. 364, 95 Am. Dec. 644.

The right to the use of public stream above the ebb and flow of tide as a highway, and to land for purposes of receiving and discharging freight and passengers, are distinct; and those navigating the river have no right, as incident to the right of navigation, to land upon and use the bank for the purpose of loading and unloading vessels without the consent of the owner, unless in cases of necessity. Compton v. Hankins, *supra*.

Where lines are carried to the shore from vessels moored in front of a riparian owner's banks, and anchored to his land by stakes or piles driven into the same, such acts are outside the incidents of navigation and commerce, and the acts complained of constitute trespass; and an injunction will be issued forbidding a continuance thereof, even though no real damage is shown. Pollock v.

He who owns the water has the right of fishing therein, although another may own the land under the bed of the water.

Lee v. Mallard, 116 Ga. 18, 42 S. E. 372.

Campbell, J., delivered the opinion of the court:

The conclusion reached by the trial court is not tenable. The section of the Constitution relied upon declares the unappropriated waters of our natural streams to be the property of the public, and dedicates the same to the use of the people of the state, subject to appropriation, as in that instrument provided; and the following section provides that the right to divert the same to beneficial uses shall never be denied. It is this right of appropriation which the general government has recognized and confirmed, and subject to which its grants of public lands in the arid states since 1866 have been made. But neither in this, nor in any other clause of our Constitution, nor in any act of Congress, is the right of fishery in the natural streams of this state, or an easement over the public domain for its enjoyment, declared to be, or recognized as vested, in the state; nor has any authority to grant the same to its citizens been conferred upon the state, or claimed by it, except in the statute cited. This does assume to grant such right, and it is upon this alone, if at all, that defendant can justify. That this act is void for at least two reasons, we proceed to show.

If the state, when formed, might have ex-

Cleveland Ship Bldg. Co. 56 Ohio St. 655, 47 N. E. 582.

The public right of navigation upon a fresh-water, navigable river does not include the right to use the shore for the taking on or discharging cargo, or entitle the public to pass over the lands of the riparian owner to reach the shore. The Magnolia v. Marshall, 39 Miss. 109.

In Haines v. Hall, 17 Or. 165, 3 L.R.A. 609, 20 Pac. 831, it is said that, even if the defendant had the right to use the waters of the creek for floating logs, which is denied, he had no right to station his men along its banks to float logs, or allow the logs to go on respondent's land, or injure the banks of the creek, or turn the stream out of its banks onto the land.

The right of floatage can only be used with due regard to the rights of the owners of the banks through which the stream flows. The right to float logs down a stream gives no right to run them upon the land, nor cause the water to overflow its banks to the injury of the riparian owner. The one attempting to run the logs will be liable in case the logs run out of the channel, or lodge in the channel, or cause the water to dam and flow over upon the land of a riparian owner to his injury. Negligence is not necessary to give a right of action. Haines v. Welch, 14 Or. 319, 12 Pac. 502.

One commits trespass who habitually ties rafts to the bank of a public stream during the spring freshets, which become stranded during the summer by the fall of the water; such mooring not being from necessity nor incidental to the right of navigation. Bigler v. O'Connor, 2 W. N. C. 180.

It seems that riparian owners on a navigable stream have the right to the exclusive use of the banks and shores as against every stranger who is not navigating the river or exercising some public privilege that pertains to everyone in the use of the navigable stream, and that the riparian owners may maintain trespass against anyone who cuts trees there, or takes drift wood, sand, gravel, or earth, or other valuable thing, therefrom. Ravenswood v. Fleming, 22 W. Va. 52, 46 Am. Rep. 485.

But it has been held that a preliminary injunction should not be granted to restrain persons navigating a stream from using the shore as a towing path, although the defendant would be unable to answer in damages, where there is no such pressing injury or danger in delay as calls for such relief. Murray v. Knapp, 62 Barb. 566.

The decisions in the states which have recognized some public right to use the banks are not entirely harmonious. In Kentucky it was held, in Harvie v. Cammack, 6 Dana, 242, that the banks of a river navigable with vessels are subject to the *jus publicum* of a common transit and landing, so that a ferry franchise may be given to a third person with right to land on the banks, without interfering with any of the rights of the riparian owner.

But in Thurman v. Morrison, 14 B. Mon. 371, it was held that the public and common right of navigating a river, whether it flows over public or private land, does not give the navigator the right, at pleasure, to land upon and use the adjacent banks for such purposes and for such length of time as he may choose.

But on a subsequent appeal it was held that a navigator who makes fast his boat to a tree upon a woodland shore can hardly be deemed guilty of wrong. And certainly he has a right, in circumstances of difficulty and danger incident to navigation in which he is engaged, to provide for the safety of his vessel by mooring it at any vacant part of the shore, using as much caution to avoid injury as circumstances will allow, and being responsible for actual injury which may arise from his positive acts or his want of proper skill or care. 17 B. Mon. 249, 66 Am. Dec. 153.

And it was held that the navigator of a boat will not be liable for damages to the owner of the adjacent bank, where he moors his boat opposite such bank, and fastens it to the same by a cable out of considerations of safety, or even convenience; and does not interfere with or interrupt the actual current use such owner is at that time making of the adjacent portion of the river; or moves his boat with reasonable despatch,

ercised authority in disposing of the public domain therein situate, it was relinquished, for in our enabling act (1 Mills's Anno. Stat. pp. 90, 91, 109) it was specifically provided, as one of the conditions precedent to the right of the people of our territory to form a state, that they should, and complying therewith they did, by irrevocable ordinance, disclaim all right and title to public lands within the territory and expressly recognized the exclusive right of Congress to dispose of the same. That Congress has such exclusive right has been expressly decided. Wilcox v. Jackson, 13 Pet. 517, 10 L. ed. 273. When our Constitution was adopted, the United States owned the lands which, after ratification, it conveyed to the plaintiff. Whatever rights and title therein it owned passed to the plaintiff, unless excepted or reserved in the instrument of conveyance, or by some act of Congress. Plaintiff took and held the same subject, of course, to the right of appropriation just noted, and he holds it subject, also, to the state taxation law, the laws of eminent domain, and other statutory regulations to which the owners of all property are amenable. But the power of the state is not so comprehensive as to enable it, without compensation to the owner of lands, to take any part of them from him and give them to another citizen, and no act of Congress authorized, nor did plaintiff's patent contain, any reservation of any public right of fishery, or of any easement over his lands to enable the public to enjoy such right.

where the same can be done without exposing it to increased dangers, upon being notified by such owner that its present position interferes with his use of such river; and does not commit any actual present damage to the property of such owner. Morrison v. Thurman, 17 B. Mon. 249, 66 Am. Dec. 153.

So, damages for trespasses committed on the lands of a riparian owner by the mooring of rafts at his river bank cannot be recovered in an action of assumpsit upon an implied promise to pay for the use and occupation of such land, where the circumstances of the use imply neither the relation of landlord and tenant, nor a contract to pay rent. Hall v. Jacobs, 7 Bush, 595.

And an implied promise to pay for the privilege and convenience of mooring rafts at a river bank belonging to a riparian owner will not be presumed by such use where such bank is not improved as a wharf, or provided with the means of fastening boats or rafts, or any act done to subserve the convenience of boatmen or raftsmen. Ibid.

But in a late case it was held that the rights of the public in the use of a stream extend only to the bed, and do not give it a right to fasten log booms to the bank to the injury of the owner. Smith v. Atkins, 110 Ky. 119, 53 L.R.A. 790, 96 Am. St. Rep. 424, 60 S. W. 930.

In Oregon it has been held that the right of an owner of logs to attach a boom to the lands of a riparian proprietor, where necessary to the exercise of his right of navigation, includes the right to keep it attached for a reasonable time, what is a reasonable time being a question for the jury. Weise v. Smith, 3 Or. 445, 8 Am. Rep. 621.

But it will be a trespass, by a person running logs in a river, to attach a boom to the land of a riparian owner if there is no necessity for so doing; but, if the act is necessary in order to enable him to exercise his right of navigation, no action will lie against him for doing so, as there is a right to use the shore so far as it is necessary. Ibid.

In Tennessee it has been held that the banks of a river, so far as they are necessary to the exercise of the right of passage and navigation, are subject to the public easement. Memphis v. Overton, 3 Yerg. 387.

III. As appurtenant to fishery right.

From the note in 60 L.R.A. 481, it appears that, except where the King had granted exclusive rights before his power to do so had been curtailed, there is a common right of fishery in all waters the title to the beds of which is in the Crown. This being true, the question arises whether or not the fisherman has the same right with respect to the banks and shores that the navigator has. From the fact that the fishing industry is more or less localized, the establishment of a right in favor of the fisherman would subject the bank to a much greater servitude than does the navigator's right. On this account the decisions, as far as they go, seem disinclined to recognize such right. In an early case it is stated that those who are fishers in the sea may justify going on the land adjoining the sea; for a fishery is for the commonwealth and for the sustenance of all the realm, and this is common law. 8 Edw. IV. pl. 30.

And the rule is so stated in Fitzherbert, Abr. Lib. Barre, 93.

So, Choke said, in 8 Edw. IV. pl. 30: If I have land adjoining the sea where the sea ebbs and flows over the land, when it flows, everyone may fish in the water which has flowed on my land, for then it is parcel of the sea, and, in the sea, everyone may fish of common right. So, when the sea has ebbed then in the land which was before flowed by it, he may justify his digging, for this land is not much advantage to me. Holroyd says (5 Barn. & Ald. 268), this doctrine may be true where there is such a custom, and such a custom confined to the seashore may be good.

But, as shown in the next subdivision, it seems to be assumed that trespass on private property cannot be justified; and it is held that a custom so to trespass is not good.

Woolrych, Waters, p. 167, says there is not of necessity any right to land on the neighboring shores after the taking of fish

Defendant concedes that at the common law, and the authorities so hold, the owner of lands which border on a navigable river, above the ebb and flow of the tide, and the owner of lands along a nonnavigable freshwater stream, as an incident of such ownership, owns the bed of the stream, and the exclusive right of fishery therein to the middle thereof; and if he owns the land bordering upon both sides, he has the exclusive right of fishing in the entire stream, to the extent that it flows through his lands. Holyoke Water-Power Co. v. Lyman, 15 Wall. 500, 21 L. ed. 133; 13 Am. & Eng. Enc. Law, 2d ed. pp. 565 et seq.; New England Trout & Salmon Club v. Mather, 68 Vt. 338, 33 L.R.A. 569, 35 Atl. 323; Albright v. Cortright, 64 N. J. L. 330, 48 L.R.A. 616, 81 Am. St. Rep. 504, 45 Atl. 634; Rockefeller v. Lamora, 85 App. Div. 254, 83 N. Y. Supp. 289; Griffith v. Holman, 23 Wash. 347, 54 L.R.A. 178, 83 Am. St. Rep. 821, 63 Pac. 239; 3 Washb. Real Prop. 4th ed. 187, 191, and authorities cited.

As between those claiming a right of the same character,—that is, a public right of fishery and a private right of fishery,—this doctrine of the common law, being of a general nature, is just as applicable in Colorado as elsewhere. Necessity does not furnish a basis for the right of public fishery upon which, it is said in Yunker v. Nichols, 1 Colo. 551, rests the dominant right of one landowner in this state to build a conduit over the lands of another in order to get water from the stream to irrigate agricul-

And Parker v. Elliott, 1 U. C. C. P. 470, holds that the right of fishery in navigable water does not include, as an incident, a right to land or use the bank (being private property) above high-water mark in the pursuit of fishing, and much less to dig holes or erect buildings thereon.

But an incorporeal right to walk along the bank of a stream for the purpose of fishing therein is not so incongruous to an incorporeal right of fishing in the river that it cannot be appurtenant to it. Hanbury v. Jenkins [1901] 2 Ch. 401.

IV. Custom or prescription.

In 8 Edw. IV. folio 18, certain fishermen proceeded against as trespassers for digging holes on the shore to put stakes in for drying nets pleaded a custom to do so, which was held bad, Choke saying there could be no custom to dig my land.

So, it is not a good custom for fishermen to dig in the land of a riparian owner to set stakes to dry their nets. 8 Edw. IV. pl. 30.

A custom in the public to fish in the water adjoining a close, and to use and occupy the shore for that purpose, is not sufficient to justify the erection of a hut upon the shore by the fishermen. Cortelyou v. Van Brundt, 2 Johns. 357, 3 Am. Dec. 439.

One having the right to a free fishery cannot claim a prescriptive right to land nets on the adjoining land under the statute relating to prescriptions, as it does not apply to easements in gross. Shuttleworth v. LeFleming, 19 C. B. N. S. 687.

On the south side of the river Wissey there is a regular towing path, and, for the convenient navigation of the river, it is frequently necessary to change the horses from one side to the other, and the owners of boats and vessels navigating the said river have from time immemorial been accustomed to use it. Simpson v. Scales, 2 Bos. & P. 496.

A prescriptive right to a public towing path on the banks of a navigable tide river is not destroyed in consequence of that part of the river adjoining the towing path having been converted by act of Parliament into a floating harbor, thereby subjecting the towing path to use at all times of the tide, where before it had been used only at high tide. King v. Tippett, 3 Barn. & Ald. 193.

The public has established by prescription a right of way on the bank of the Clyde. Harvie v. Rogers, 3 Bligh, N. R. 440.

It will be presumed that the acts of lessees of a fishery in landing their nets on a certain part of the banks of the river for more than twenty years, during which time they had occasionally sloped and leveled such landing places, were done with the knowledge of the owners of the land, and that a grant of such right had previously been made. Gray v. Bond, 5 J. B. Moore, 527.

Raftsmen may not establish a custom among themselves to anchor their rafts regardless of the wishes or convenience of the proprietors of adjoining lands, and thus override the common-law right of access of riparian owners. Harrington v. Edwards, 17 Wis. 586, 84 Am. Dec. 768.

However, the court will take judicial notice of a custom allowing the navigator of a public stream the right of necessity to land boats, rafts, and other water crafts along the shores without the consent and contrary to the will of the riparian proprietor; but he cannot retain them there for an unreasonable time, nor longer than the necessity exists, and, if he does so, he is a trespasser *ab initio*. O'Connor v. Bigler, 2 Pearson (Pa.) 219, Affirmed in 32 Phila. Leg. Int. 355.

In Atty. Gen. ex rel. Moore v. Wright [1897] 2 Q. B. 318, where a number of fishermen and yacht owners claimed the right, as against the lessee of the soil to the foreshore of the river Thames, to moor their boats at such place by means of moorings attached to the soil, and supplied with a chain and buoy which indicated its position, such right was sustained by the court, though upon various grounds. Lord Esher, M. R., and A. L. Smith, L. J., claimed that the right could be supported as an ordinary incident of the navigation of such waters, such moorings constituting a permanent mode of anchoring and being justified as such; they also held

tural lands. Of course, as between those claiming either a public or private right of fishery in our natural streams, and those asserting the superior constitutional right of appropriation, the latter, in case of conflict, must prevail. But the rights here in controversy are both of the same character and subject to the common-law rule of decision. Gen. Stat. 1883, § 197. Plaintiff owns lands bordering on both banks of natural streams. As between him and the defendant, he owns the right of fishery in their waters within his outer boundaries. As between them, plaintiff also owns the beds of the streams just as much as he owns the adjacent banks or the soil anywhere within his surface lines. It necessarily follows that defendant has no right of fishery within plaintiff's inclosure.

But, if he does, he certainly has no easement over any portion of plaintiff's property, either in the beds of the streams or the adjacent soil, for the purpose of reaching the streams. In the enjoyment of his private property plaintiff is protected, both by Federal law and the state Constitution, against encroachment by defendant. Neither the state, nor an individual, nor a corporation to whom the right of eminent domain is delegated, can take private property for public use without just compensation; much less can the state, without any compensation at all, take the private property of one, and give it to another citizen to be enjoyed by the latter for a mere private

that, that having been exercised from time immemorial, it might be presumed that the grant of the foreshore from the Crown was made subject to such user, or that there had been a concession by the former owner of the foreshore to persons navigating the waters so to use it. Rigby, L. J., while stating that he did not wish to express any doubt as to what had been said by the master of the rolls and the lords justices, placed his decision upon the ground that from the immemorial user it could be presumed that such a method of mooring had a legal origin in some regulations prescribed by the port authority of that port, which was the port of London.

The proprietors of land adjoining a harbor upon which fishermen had been immemorially accustomed to beach their boats in winter, soliciting and receiving an act of Parliament authorizing the levy of a yearly toll for each boat beached, must provide the condition mentioned in the act, and cannot exclude fishermen tendering the toll without assigning to them other ground equally adapted to the purpose. Aiton v. Stephen, L. R. 1 App. Cas. 456.

V. Grant.

A reservation in a deed by a boom company, of free and unobstructed passage along the banks of streams and across the lands conveyed, entitles it to enter upon the premises with men and teams to remove saw logs which have floated out of the river upon adjacent land. Bradley v. Tittabawassee Boom Co. 82 Mich. 9, 46 N. W. 24.

A boom company which, in conveying property, reserved the right to go upon the banks and remove logs, is not affected by a statute subsequently passed, which requires the payment of damages for injury caused by so doing. Ibid.

By the Massachusetts colonial ordinance, the owner of flats could not hinder the mooring of vessels at the shore, and the discharging and taking on of cargo there. State v. Wilson, 42 Me. 9.

VI. Legislative power.

A boom company cannot be given the right to use the banks belonging to a riparian owner without making compensation. Cohn v. Wausau Boom Co. 47 Wis. 314, 2 N. W. 546.

A municipal corporation has no power to take and appropriate the natural and permanent banks of a navigable stream within the municipality without paying the owner therefor, so that it cannot require the cutting down of the beds and banks to facilitate the flow of water to avoid the creation of a nuisance. Schenectady v. Furman, 145 N. Y. 482, 45 Am. St. Rep. 624, 40 N. E. 221, Affirming 78 Hun, 87, 29 N. Y. Supp. 269.

In Ball v. Herbert, 3 T. R. 253, the court, in deciding that the public have no common-law right to tow on the banks of a stream, did not pass upon the contention that the right might be supported on making a reasonable compensation to the owner of the land. The possibility of the existence of this right was suggested by a statement of Lord Hale that the right of towage cannot be enjoyed without compensation being made to the parties injured.

VII. Street on shore.

The establishment of a street on the shore of the stream may change the rights of the parties. If the street touches the water there could be no question that the easement of way would include uses incident to the enjoyment of the water. In some cases the establishment of the road is held to cut off the individual rights entirely.

Thus, a landowner cannot maintain an action for a diversion of water from a stream when his land is separated therefrom by a road allowance, so that his land does not touch the stream, and therefore he is not a riparian proprietor. Hamilton v. Gould, 24 U. C. Q. B. 58.

But, in Doe ex dem. Seebkristo v. East India Co. 10 Moore, P. C. C. 140, it is held that accretions forming in a tidal river next to a road belong to the proprietors of the

use. The legislature cannot make lawful a trespass by one man upon the lands of another by providing that, if any damage is thereby done, a recovery therefor may be had. That is just what our general assembly by its statute has attempted. But the act contravenes the provisions of § 15 of article 2 of our state Constitution, and is clearly in conflict with the laws of Congress relating to the disposition of the public domain.

The judgment of the District Court is reversed, and the cause remanded, with instructions to the District Court to enter a judgment favorable to plaintiff.

Gabbert, Ch. J., and **Goddard** and **Maxwell**, JJ., concur.

Gunter, J., concurring specially:

I think the judgment below should be reversed, and to this extent concur in the majority opinion. I do not, however, think it necessary, in reaching this conclusion, to go into the important question of riparian rights upon which the court divides. It is said by our attorney general, who appears as an *amicus curiæ*, also by other *amici curiæ*, all of whom are of counsel in the case now pending between this commonwealth and the state of Kansas in our national Supreme Court, that the questions considered in the majority and minority opinions are to some extent involved in that case. It would seem to be wise to avoid discussing unnecessarily here any question that may be ruled there.

The facts involved herein are simple: Plaintiff was the owner in fee of certain lands which were inclosed, and through which ran a section of Tumiche creek; defendant standing in the bed of this section of the stream frequently fished therein, and when requested to desist refused to do so, and asserted his right to continue the alleged trespasses. I think, as stated by one of *amici curiæ*, the simple question here is: Has a fisherman the right to fish where the game law says he shall not?

The question involved arises under the game law of 1899 (chapter 98, p. 184, Laws 1899); the amendments of 1903 not affecting them when the proviso of that year, found in subdivision 7, § 7, p. 233, Laws 1903, discussed in the main opinion and held therein to be unconstitutional, is eliminated. Section 16, div. "a," chap. 98, p. 188, Laws 1899, reads as follows: "All game and fish now or hereafter within this state, not held by private ownership, legally acquired, and which for the purposes of this act shall include all the quadrupeds, birds, and fish mentioned in this act, are hereby declared to be the property of the state, and no right, title, interest, or property therein can be acquired or transferred, or possession thereof had or maintained, except as herein expressly provided." Illinois has a similar statute, and in Meul v. People, 198 Ill. 258, 64 N. E. 1106, it is said: "Prior to this enactment the state had general ownership of animals *feræ naturæ;* not, however, as a proprietor, but in its sovereign capacity, as the representative of the people, and for the benefit of all the people in common. Section 11 places the title and ownership in the state as a proprietor, and the individual may no longer acquire ownership by capturing, killing, or reclaiming such animals, except in so far as permitted so to do by other provisions of the act." In Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, perhaps the leading game case in this country, it is said: "From the earliest traditions the right to reduce animals *feræ naturæ* to possession has been subject to the control of the law-giving power. . . . In most of the states laws have been passed for the protection and preservation of game. We have been referred to no case where the power to so legislate has been so questioned, although the books contain cases involving controversies as to the meaning of some of the statutes." In Magner v. People, 97 Ill. 320, the court said: "The ownership being in the people of the state, the repository of the sovereign authority, and no individual having any property rights to be affected, it necessarily results that the legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game or qualify and restrict it, as, in the opinions

road who have the title to the soil, and not to the owners of the land which the road separates from the river, and from whom the proprietors of the road acquired title to it.

The location of a road on land bordering on a stream does ont deprive the owner of the land of his riparian rights, which are not necessarily invaded by the use of the road by the public; and the operator of a private ferry, without license from the proper commissioner's court, cannot land his boat on property condemned under statute for a public road without the consent of the riparian proprietor of the land so condemned; and the riparian owner is entitled to an injunction enjoining the ferry operator from landing on property. Buford v. Smith, 2 Tex. Civ. App. 178, 21 S. W. 168.

For a fuller collection of authorities as to the effect of opening a street on the shore, see note to Freeland v. Pennsylvania R. Co. 58 L.R.A. 208. H. P. F.

of its members, will best subserve the public welfare." These authorities are approved in Hornbeke v. White, 20 Colo. App. 13, 76 Pac. 926. The statutes of Colorado, read in the light of these decisions, vest the ownership of game in the state as a proprietor, and take away the "right to capture and kill unless prohibited" as it existed at common law; leaving under these statutes no right to capture and kill except as permitted. In the language of counsel: In other words, the game without such statute was like the water of the streams, ordinarily open to the first appropriator, except as prohibited by law, while under these statutes, like the land and timber of the state, it can be pursued, and appropriated to use, or held in possession only as permitted by law.

Section 2, div. "b," p. 191, Laws 1899, so far as pertinent, is: "No person shall shoot from a public highway at game, or fish, or hunt game in any inclosure not public land, without the consent of the owner or persons in charge of the same." This section prohibiting fishing within the inclosure of another without his consent was in force at the time of the alleged trespasses of defendant, unless repealed by said subdivision 7, § 7, p. 233, Laws 1903. This latter section reads: "That the public shall have the right to fish in any stream in this state stocked at public expense, subject to actions in trespass for any damage done property along the bank of any such stream." If this section be unconstitutional, as the main opinion holds it to be, and as I think it to be, then said § 2 of division "b" of the game law of 1899 is in existence. Said subdivision 7, § 7, Laws 1903, purports to give the public a right of way over the land of another, "subject to actions in trespass for any damage done property along the bank of any such stream." The right of way, so attempted to be given, is not confined to the bed of the stream. It purports to give the public such ways over the lands of an owner as may be convenient or necessary to exercising the right of fishery. This section attempts to make lawful a trespass upon the lands of another by providing that, if any damage is done, a recovery therefor may be had. It was an attempt to take private property for private use without just compensation. I think it clearly violates § 15 of article 2 of our Constitution in prohibiting the taking of private property for public or private use without just compensation. New England Trout & Salmon Club v. Mather, 68 Vt. 338, 38 L.R.A. 569, 35 Atl. 323; Rockefeller v. Lamora, 85 App. Div. 254, 83 N. Y. Supp. 289. We conclude, therefore, that said § 2 of division "b," Laws 1899, was in force prohibiting fishing within any inclosure without the consent of the owner.

To sum up, it was competent for the legislature to say that defendant should not fish within the inclosure of plaintiff without his consent. The legislature has so said. Defendant was fishing within the inclosure of plaintiff without his consent, therefore, was there in violation of the law. The defendant was unlawfully on the premises of the plaintiff, and, as the lower court held otherwise, its judgment should be reversed.

Bailey, J., dissenting:

After the former opinion of the court was announced the attorney general, on behalf of the state, was permitted to intervene; and upon reargument, I am convinced that the opinion announced by the majority of the court is erroneous, for the following reasons: The Angles and Saxons, who, in company with the Jutes, invaded and conquered England in the latter part of the fifth and earlier portion of the sixth centuries, were an energetic, freedom-loving people, excessively fond of outdoor sports, hunting, and fishing. These characteristics were accentuated and emphasized by the Norsemen occasionally making war upon the Anglo-Saxons and in their raids leaving a portion of their people, who remained and mingled with the Britons. Until the advent of the Normans, such a thing as regulations concerning the right of fishery was unknown. The waters of the streams, and the fish within the waters, were common property. They were as free as the air was free and as the birds which flew in the air were free. The Normans were a different class of people. They strove for individual power and dominion. The great barons demanded, and William and his successors conceded to them, great landed estates. Then it was, for the first time, that the right of fishery was vested in individuals, instead of the common people. The King, however, reserved the sea, the arms thereof, and the rivers entering therein, so far as the tide ebbed and flowed, because it was necessary to have access to the bays and rivers for navigation purposes. These were called public waters, and the right of the public to fish therein was conceded because they were public waters. There then grew up a series of distinctions of the right of fishery. These were divided into the "several right of fishery," the "free right of fishery" and the "public" or "common right of fishery." The public right of fishery was the common right to take fish from the waters over which the King held dominion.

There arose in England much litigation over these rights and their alleged violation.

It is unnecessary in this opinion to follow the erudition of the judges and lawyers concerning those matters, except to say that, among other principles which were established, it was held that in a free fishery a man had a property in the fish before they were caught; in a common of piscary, or public fishery, and in a several fishery, not until afterwards; that a public river is a public highway, and this is its distinguishing characteristic; that the right to common of fishery was vested in the people in all public rivers. These are the principles which are deduced from the learning of the English courts and jurists as they existed at common law. 2 Bl. Com. 39; Co. Litt. 122, Hargraves Note, 181; Hale, De Jure Maris, 11. At that time what were called public rivers were only the rivers affected, and to the extent that they were affected, by the tides, because that was the extent to which they were used for navigation.

In the United States the right of public fishery was acquiesced in for many years. At any rate, the books are silent as to any question concerning it being raised for many years; until the landed proprietors, in imitation of their Norman ancestors, began to exclude the public from the streams running through private lands. It was then determined, in this country, that the right of fishery existed in all public rivers and streams, and rivers were public which were navigable under the then existing conditions. It was no longer limited to that portion of the stream which was affected by the tide, but, so far as a boat could travel, the right of fishery existed. This right of public fishery was based upon the fact that the stream was a public stream, and that the public had the right of way. It has never been held that in these public streams the landed proprietors had any property in the fish before they were caught. The doctrine was next extended to all streams upon which logs or ties or the like could be floated, even though it was necessary by use of physical strength to force the logs or ties over the shallows and riffles; and the doctrine was still announced that the right of fishery existed because the people had the right of way along the stream, and that the right of fishery went with the right of way.

The case of Schulte v. Warren, 218 Ill. 108, 75 N. E. 783, decided by the supreme court of Illinois in October last, is strenuously argued as being of great force in this contention. Rightly viewed, the Schulte Case should have but little influence in this matter for at least two reasons:

First. The matter before the court and the principles involved in a determination of that matter were entirely different from that which is here involved, and the principles necessary for a determination of the same. In the Schulte Case it appeared that the plaintiff owned a large tract of land situate in the Illinois river bottom. It was bounded on the west side by the river. This land was swamp and overflow land, and was subject to overflow in times of high water from natural causes. Previous to the construction of a certain lock and dam, and the opening of a certain canal, the lands were valuable for pasturage during the late summer and early fall, when the high waters had subsided. Part of the land had been under cultivation. By the construction of this dam and lock, and the canal, the water in the river was so raised as to overflow the lands and render them worthless for agricultural purposes. These swamps and overflowed lands became the resort of large flocks of wild fowl. This gave the lands a market value for hunting purposes. It also appeared that the plaintiff, in order to render these lands more attractive, had seeded certain portions to grasses and other vegetation seductive to the wild fowl. The defendants, who were insolvent (there is no allegation of insolvency here), had repeatedly trespassed upon the lands and hunted over the same, and threatened to continue to hunt thereon. An injunction was prayed for. Defendants contended that because of the construction of the dam, lock, and canal, the waters had been raised and covered the lands to a depth sufficient for navigation, and that therefore the public acquired the right of hunting and fishing in said navigable waters. It will be observed that these lands were private lands, and the waters outside of the bed of the stream were not navigable in their natural condition, but that the lands were available for agricultural purposes. The public, either rightfully or wrongfully, caused the river to overflow its banks permanently so that which had theretofore been agricultural land became covered with water to such a depth that it was possible to navigate it. This made of it artificial water, and it was apparent that the only question properly before the court was as to whether the taking of the lands for one purpose, to wit, the maintenance of the dam, lock, and canal, made of the waters standing thereon public waters for all purposes. With us, as we shall presently see, waters of the natural streams of this state are made public waters for all purposes, subject only, however, to the condition that the right of appropriation is a privileged right. Conse-

quently, the principles involved in the determination of the Schulte Case are entirely foreign to the principles involved in the determination of this case.

Second. The doctrine as announced in the Schulte Case is not in harmony with the great weight of authority in the United States. While, as above stated, the sole question which was properly before the Illinois court was as to whether the taking of the lands of plaintiff by the state for one purpose gave the citizens of the state the right to use them for other purposes, yet the court, in its opinion, goes learnedly into the entire question of the right of hunting and fishing in navigable waters, and determines, *obiter dicta*, that waters which are capable of floating logs are not navigable; that they must be capable of bearing up and floating vessels for the transportation of property; and the fact that there is water enough for row boats or launches does not render the waters navigable. It is further determined that the right to hunt and fish in waters is not incident to a right of navigation in such waters. The owner of the land has the exclusive right to hunt and fish on his own land, irrespective as to whether the waters are navigable or not.

In rendering this *obiter dictum* opinion, the court simply announced what has long been the rule in Illinois. Beckmen v. Kreamer, 43 Ill. 447, 92 Am. Dec. 146. But it is entirely at variance with the great weight of authority. In Willow River Club v. Wade, 100 Wis. 86, 42 L.R.A. 305, 76 N. W. 273, and Lincoln v. Davis, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103, it is held that the public use of a stream for floating timbers or for small boats is on the same principle as the use of highways by land for similar purposes; that one, in passing along a stream, may stop and fish, or he may go into or upon the stream for the express purpose of fishing.

This doctrine is also announced in People v. Horling, 137 Mich. 406, 100 N. W. 691; Lamprey v. State, 52 Minn. 181, 18 L. R. A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139, and New England Trout & Salmon Club v. Mather, 68 Vt. 338, 33 L.R.A. 569, 35 Atl. 323. Similar rules were announced in Pennsylvania, South Carolina, North Carolina, and Louisiana. In Gould on Waters, 166, it is said that the purpose of navigation is immaterial, and those who pass upon the water for the purpose of pleasure, fishing, and fowling have equal rights with those who navigate for business, trade, or agriculture. "If fishery at a particular place is of such importance to the public that the public shall have the right to exercise it, it would be within the true line or development of the law to hold that such use was within the original purpose of the highway, so that the public right would extend to it." Farnham, Waters, p. 171. Again, it is well settled in this country, as well as in England, that, where the title to the bed of a river is in one owner and the title to the water is in another, the right of fishery follows the title to the water. Washb. Easements & Servitudes, 566; Jackson ex Dem. Teed v. Halstead, 5 Cow. 216; Holford v. Bailey, 8 Q. B. 1000; Malcolmson v. O'Dea, 10 H. L. Cas. 593; Lee v. Mallard, 116 Ga. 18, 42 S. E. 372. While we have not gone to great length in reviewing the many cases bearing upon the right of fishery, a careful study of them will demonstrate two things: That, where the land belongs to one party and the water to another, the right of fishery follows the ownership of the water; and where the public has an easement in the water for the purpose of navigation, fishing goes with the easement as an incident thereto, for the reason that the waters are public.

Now, let us endeavor to determine whether or not the natural streams of this state are public or private property. Public property may be defined as that which is dedicated to the public use and over which the state exercises control and dominion. With this definition in mind, we will examine the Constitution and various acts of the legislature with some care. The Constitution of this state provides: "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." Section 5, art. 16. This makes the waters of every natural stream public. They are dedicated to the use of the people, to be used by them in such manner as they see fit, subject only to one condition,—that of the right of appropriation for beneficial purposes. Until the waters are appropriated and diverted from the stream, they belong to the public. No stronger words could have been used by the people than are used in this declaration. It is idle to say that the waters of the streams are dedicated to the public for the purpose of appropriation, because those are not the words of the Constitution. It is a grant made subject to that right. The moment that water is appropriated, it ceases to belong to the public, but becomes the property of the appropriator. The individual who makes the diversion, and the appropriation, has the exclusive right to its use, and the public is barred from interfer-

ing with it. The contention that the water of a stream is dedicated to the people for the purpose of appropriating it must fall of its own weight, because, immediately upon its being appropriated, it no longer belongs to the people. The appropriated water belongs to the appropriator. If the dedication to the people was for the sole purpose of appropriation, there is no dedication; the dedication does not go into effect until the appropriation is made, and the moment it is made the water ceases to belong to the people, but becomes the property of the appropriator. So, the right does not exist until the appropriation is made, and it ceases to exist the moment the appropriation is made. It has therefore no existence at all.

Inasmuch as the right of public fishery has always existed in streams known as public streams, the right of fishery exists in the natural streams of Colorado, because, the water being dedicated to the public, makes the streams in which that water flows, public streams. It is scarcely correct to say that the right of fishery existed in navigable streams, simply because they were navigable. The act of fishing is not necessarily connected with the act of navigation. Their being navigable made them public, and their being public gave the right of fishery. So that, it ought not to be said that fishing is limited to navigable streams. Navigation is only one of the ways by which a stream may be made public. There is no higher authority for making a stream public than the declaration of the people themselves, in their compact of organization dedicating it to the use of the people.

The grant made by the Constitution is the fundamental law of the land. It is one of the sacred rights of the people, and the courts, being, to a large extent, the guardians of these rights, should see to it that they are not annulled, violated, or abridged. When, by the Constitution, the water of the natural streams of the state was declared to be the property of the public, and was dedicated to the use of the people, there was also dedicated to their use a right of way through the channel of every natural stream of the state, because such right of way is a necessary incident to the full and complete use and enjoyment of the grant, and no private ownership can defeat such right of way. The legislation of this state has always assumed, not only public ownership of the water, but also the right to direct and control the use of the channel or bed of the stream. In 1872, before Colorado became a state, the legislature passed an act which provided: "That it shall and may be lawful for any person or persons to float any and all kinds of timber, such as saw logs, ties, fencing poles or posts, and firewood down any of the streams of this state." If, as has been frequently determined by courts of last resort, the floating of logs or ties is an act of navigation, then the floating of poles or posts or firewood is navigation; and here, by a legislative grant, the right of way was given to the public down and through these streams and they were made public streams. Then came the adoption of the Constitution, which reiterated the doctrine that these were public streams. Again, in 1879, the legislature passed an act providing that the owners of reservoirs may conduct the water from the reservoirs into and along any of the natural streams of the state, thus emphasizing the doctrine that these were public streams. In 1881 the legislature recognized the right to construct dams in the public streams of the state, but made the condition that in the construction of such dams fishways should be made, providing for the passage of the fish. This was reiterated in 1897 and again in 1899, and in the act of 1899 it is provided that no ties or timber shall be driven or floated down any streams containing fish. Upon this last provision great stress is laid by some of the friends of the court, because it is said that it directly repeals the law of 1872, making provision for the floating of logs and other timber down the public streams.

The conclusion to be drawn from the act of 1899 is favorable to the defendant, rather than otherwise, because, while it prohibits the floating of timber on the streams containing fish, it reiterates and emphasizes the fact that the state assumes absolute control over these streams, it having in effect theretofore declared that they were public highways. It now declares that such use shall not be made of the public highway as to be injurious or detrimental to the fishing interests. In 1897, the legislature passed an act which permitted any person or company to divert water from one public stream and turn it into another public stream and take out the same amount of water again, making provision for loss by seepage and evaporation. So, here, again, is a solemn declaration that these are public streams. By the act of 1897 the people were given the right to increase the flow of the stream, the exercise of which right might easily injure adjoining property. In this case it is contended that the right to wade in the stream, which could not possibly injure the property, could not be given. Then came the act which is in question here,

approved in 1903. This provides that the public shall have the right to fish in any streams in this state, stocked at public extrine as first announced in 1872, that these streams are public. For more then thirty years they have been treated by the people, and by the representatives of the people at each general assembly, as public streams. It is asserted that this act is in violation of § 15, article 2, of the Constitution, in that it pense, which is but a reiteration of the doc- is an attempt to take property without due process of law. I fail to see the force of this assertion. The same Constitution provides that these streams are public, the waters are dedicated to the use of the people, and, as we have seen, if the streams themselves are public, and the water belongs to the people, the people have the right of way in the bed of the stream for all purposes not inconsistent with the constitutional grant; and he who comes into the state and settles here and takes land must take it according to the local usages and customs, and under the provisions of the laws of the state. Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662.

Riparian rights in the several states are dependent upon the state laws. Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139; Kenyon v. Knipe, 46 Fed. 309. In the opinion of the majority of the court it is stated that this land was filed upon and taken subsequent to the adoption of the Constitution, and therefore it was taken subject to the constitutional provisions; and, if that is true, the right of way in the bed of the stream never did belong to the proprietor of the estate, except subject to the right of the public; and, inasmuch as it never belonged to the plaintiff, it could not be taken from him. The people have, at all times since the adoption of the Constitution, acted along the belief that the right of public fishery existed in all of the streams of the state. They have established hatcheries for the propagation of fish wherewith the streams might be stocked, so that the supply would not be exhausted. They have established a department of the government of the state for the purpose of guarding, controlling, and protecting the fish in these public streams. In the establishment of the fish hatcheries they expended, since the year 1881, $52,900. In the payment of expenses for the fish and game department, for salaries and the maintenance and protection of these fish, they have expended, since the adoption of the Constitution, $258,600, making the princely sum of $311,500, which the people have paid that they and their children and their guests might enjoy the privilege of a few months' recreation in the summer season, by fishing and the like.

Can it be said that the construction placed upon the Constitution by the representatives of the people, practically contemporaneous therewith and continuously down to the present time, shall have no influence with the court? Can it be said that the constant and repeated declarations of the legislature since the territorial days, to the effect that these waters and these streams are public waters and public streams, and the filling of them with fish propagated and cultivated at great expense, should have no weight in determining the matters here involved? Can it be said that the representatives of the people have done these things for the advantage and profit of the landed proprietors, and not for the benefit of the people themselves? It is fully recognized that the paramount right to the use of the waters of this state shall be for irrigation, mechanical and domestic purposes; yet, this right must be exercised as far as possible so as not to interfere with the right of fishing. If the contention of the plaintiff and some of the friends of the court is correct, how vain have been the acts of the people and of their representatives in legislature assembled! For more than thirty years they have made the most elaborate provision for the cultivation and preservation of the fish in the natural streams of this state; yet it is said that the people at whose expense this has all been done shall neither have profit nor pleasure therefrom, but it all inures to the benefit of the adjacent proprietor.

One of the friends of the court, in his elaborate brief, goes outside of the record to state that many portions of the public streams are not owned by private individuals, but still remain a part of the public domain. The learned counsel says that this may be outside of the record, but that it may fairly be considered as a matter of public knowledge. We are willing to take it upon that ground, but it may be fairly stated, as a matter of fact, that counsel is mistaken. For example, take the principal fishing streams of this state, for instance, the Laramie, the Cache la Poudre, the Big Thompson, the Platte, the Gunnison, and the Grand rivers. There is scarcely a foot of any of these streams that is not owned or claimed by settlers, except those portions which flow through rugged and inaccessible gorges and cañons, where fishing is impracticable. However, this is but begging the question. If one man may acquire the land through which a few miles of a stream flows and thereby prevent fishing, he, or any number of men, may acquire all of the land

through which the stream flows, and thus absolutely destroy the right of public fishery.

This action is unconscionable and should not be tolerated, even though it might be maintained upon technical grounds, because there is no allegation, claim, or pretense that the defendant was in any way injuring the property of the plaintiff. There is no contention that the property of the plaintiff was not in as good condition after the defendant had ceased his fishing operations as it was before. He was not walking upon the banks of the stream; he was not treading down the grass of the plaintiff; he was not breaking the twigs of the trees that grew along the banks. In no way was he interfering with the right of possession, nor was he injuring the freehold. He was simply walking upon the ground which was covered with water, and which ground was of no benefit or use to the plaintiff, except for the purpose of supporting his other ground. It is not contended that the disturbance of the gravel or boulders which lie in the bottom of the stream and which might be trampled upon by the defendant, would be of any injury to the plaintiff. All that is complained of is that he stepped his foot upon the plaintiff's barren soil, or boulders and gravel, and this is made the basis of an action. The doctrine of *de minimis non curat lex* ought to apply with striking force in a case so barren of right, equity, or justice as this. If not, it may be well inquired as to when, and under what circumstances, the court will cease to take cognizance of trifles.

If it is determined that the right of public fishery does not exist in this state, the court, by a judicial act, will have confiscated nearly $500,000 of the people's money and diverted it to the use and benefit of a few landed proprietors, country clubs, and fishing associations. That which belongs to the whole people will be given to a few, and, in that event, the only consistent thing for the legislature to do will be to pass an act authorizing the dismantling of these fish hatcheries and abolishing the offices of the fish warden and his deputies, and refuse to make further appropriations for the purpose of maintaining establishments which are to be used solely to afford the means of enjoyment to those who are enabled, by reason of their wealth or other fortunate condition, to acquire by purchase, lease, or otherwise, the right of fishery from the ranchmen who live upon these streams. That which has heretofore been free will become an object of barter and sale. The poor, to whom work is a necessity and recreation a blessing, will be deprived of a constitutional right so that the pleasure of the clubmen and the landholders may be increased. It having been declared by the people in their Constitution that the waters of the state belong to the people, and everything necessary to the complete enjoyment of those waters perforce going with the constitutional grant, and the people having exercised the right of way through these streams for every conceivable purpose since the territorial days, and the streams having been stocked with fish belonging to the people, and the representatives of the people, in legislature assembled, having frequently declared, in effect, the existence of this right of way, and prohibited by legislative enactment the right of the freeholder to interfere with the flow of the water,—I, for one, am not willing to consent that this property and these rights may be taken by judicial repeal from the people in whom they are vested by constitutional grant, and given to the individual proprietors and the club lessees by judicial enactment.

Since the foregoing was prepared, Mr. Justice Gunter has written his concurring opinion, in which he agrees with the conclusion arrived at by the majority of the court, but arrives at the same conclusion by a different mode of reasoning which in my opinion is also untenable. The question in this case is not: "Has a fisherman the right to fish where the game law says he shall not?" But it is: May a fisherman fish where the game law says he may? Suppose this proviso of the act of 1903 is unconstitutional, it does not necessarily follow that the contention of the learned justice is correct, for, as I have shown, in the absence of a statute in this state, the fisherman would have the right to fish in the waters flowing over the land of another, provided this could be accomplished without damaging the property of the proprietor; and it is a grave question as to whether the act of 1899 is not repealed by the repealing clause of the act of 1903. It is unnecessary to investigate that matter, because, in order to declare this act unconstitutional, it is necessary to read into it words which are not there. The words of the statute are that the "public shall have the right to fish in any stream in this state, stocked at public expense, subject to actions for trespass for any damage done the property along the bank of any such stream." I am unable by any process of reasoning to read into this statute a permission to damage the property along the bank of the stream or elsewhere. The right that is given is only of fishing, and, if that right can be exercised without damaging the adjoining property, then no property has been taken or damaged in

violation of the statute. To say that this act violates the Constitution because it permits the public to take or damage private property is to say that the act authorized the taking or injuring of the property; and, with all due deference to the learned jurists who have written the foregoing opinions, I must say that it is impossible for me to find anything in the words of the statute which warrant such a construction. The statute gives the right to fish in the stream, and that is all that it gives. If the right may be exercised without damaging or injuring the property of another, then it does not violate the provisions of the Constitution. The statute should be so construed as to permit these things which the law says may be done, if by so doing the constitutional rights of others are not impaired. That fishing may be engaged in without damaging the property of the adjoining proprietor, is apparent from this case. Here, the defendant was standing in the stream without damaging, injuring, or molesting the property of another, and this the law says that he may do, and the Constitution does not prohibit it. The provision of the statute which gives the right to maintain an action to recover for damage done to the property under the banks cannot be construed as authorizing the commission of a trespass. The fair construction to be placed upon those words is simply that the statute shall not be so construed as to permit the commission of damage.

It is a fundamental doctrine that, where a statute is capable of two constructions, that must be adopted which will render the statute constitutional; and this is true even though it be not the most obvious construction. Sedgw. Stat. & Const. Law, 266, and note A; Iowa Homestead Co. v. Webster County, 21 Iowa, 221; Colwell v. May's Landing Water Power Co. 19 N. J. Eq. 245; Bigelow v. West Wisconsin R. Co. 27 Wis. 478. "When courts are called upon to pronounce the invalidity of an act of legislation passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, and examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained." Cooley, Const. Lim. 252. And again, the same author, at page 255, says: "The duty of the court to uphold a statute when the conflict between it and the Constitution is not clear, and the implication which must always exist that no violation has been intended by the legislature, may require it in some cases where the meaning of the Constitution is not in doubt to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. For, as a conflict between the statute and the Constitution is not to be implied, it would seem to follow that the court if possible must give the statute such a construction as will enable it to have effect."

There is no necessity to further multiply words or add authorities upon propositions which appear to be fundamental. In order to declare this statute unconstitutional, the court must say that the legislature intended to give the right to take or damage private property and avoid the law, not because of what the legislature did, but because of what the court thinks it intended to do, and must add to the law words which are not there, and which by fair construction cannot be presumed to be there. The courts have sometimes given a forced construction to a law in order to maintain it, but that this should be done in order to destroy it is contrary to the authorities. It is rather anomalous to assume that the legislature intended to say what it did not, and then declare what it did unconstitutional because of such assumed intention. As to whether or not a fisherman would have the right to walk along the banks of the stream and tread down the grass of the proprietor by virtue of the terms of this statute, is a question not before the court. The question here determined is as to whether or not the legislature can give the right to fish in streams flowing over the land of another when that right is exercised without damage, injury, or detriment to the estate of the adjoining proprietor. I am firmly convinced that the construction placed upon this statute, in order that the same may be declared unconstitutional, is a violent one and unwarranted by the terms of the act.

My excuse, if any be needed, for the filing of this dissenting opinion is the grave danger to the agricultural interests of the state by the announcement of the doctrine that the state has not full and absolute control of the unappropriated waters of the state, and the fear I have that such a ruling will plunge the people into interminable litigation.

Steele, J., concurs.

OKLAHOMA SUPREME COURT.

EDWARD L. BLINCOE, Plff. in Err.,
v.
CHOCTAW, OKLAHOMA, & WESTERN RAILROAD COMPANY.

(— Okla. —, 83 Pac. 903.)

Eminent domain—damages for consequential injuries.

1. In the exercise of the right of eminent domain under the statute of Oklahoma, which provides for the appointment of commissioners to assess the injuries sustained by individuals because of the exercise of such right, which statute contains a provision with reference to the duties of such commissioners, as follows: "And they shall inspect said real property and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which said owner will sustain by such appropriation of his land."—damages to be allowed are not limited to the real estate taken and injured, but may be such damages as the owner actually sustains to either his real or personal property by such appropriation of his land.

Headnotes by GILLETT, J.

Case Note.—Injury to, or expense of removing, personalty, as element of damage for taking real estate.—The case of BLINCOE v. CHOCTAW, O. & W. R. Co. holds that the general rule, that damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating compensation to be paid where real estate is taken under the right of eminent domain, does not apply in that state where the statute provides that the commissioners "shall assess the damages which said owner will sustain by such appropriation of his land."

But in Edmands v. Boston, 108 Mass. 535, it was held that where property was taken for public use no damages were to be assessed for losses in respect to personal property, although the statute reads: "All damages sustained by any person or persons shall be estimated;" and to the same effect is the decision in Cobb v. Boston, 109 Mass. 408, and in Williams v. Com. 168 Mass. 364, 47 N. E. 115, where the decision is based on Edmands v. Boston, *supra*, it was held that where realty was taken by the commonwealth for public use, improvements thereon made by the tenant for life, so far as they consisted of personal property, were not to be taken as elements of damages for losses in respect to the taking.

In Re Public Parks, 53 Hun, 280, 6 N. Y. Supp. 750, it was held that, under the laws of New York, the commissioner of appraisal in condemnation proceedings had no right, in estimating damages, to make any award for the value of certain personal property consisting of mill machinery; and in Re New York, W. S. & B. R. Co. 35 Hun, 575, it was held that the law permitting condemnation proceedings excluded the expense of removing personal property from the premises in determining the damages to be assessed; and to the same effect was the decision in New York C. & H. R. R. Co. v. Pierce, 35 Hun, 307.

In a number of cases the general rule that injury to, or the cost of removal of, personal property, is not to be considered as an element of damages, is followed, although the wording of the statute is not set forth.

In Missouri P. R. Co. v. Porter, 112 Mo. 361, 20 S. W. 568, it was held that, where the defendant's land, upon which he had erected an ice house, had been taken by the plaintiff, the court erred in admitting evidence that defendant had in the ice house a large amount of ice; and the court rendered this decision upon the ground that the ice was personal property and could have been removed.

In Becker v. Philadelphia & R. Terminal R. Co. 177 Pa. 252, 35 L.R.A. 583, 35 Atl. 617, it was held that, where the owner of property taken by a railroad offered proof as to the expense of the removal of his personal property, such proof was properly rejected; and that the removal of personal property could not be considered as an item in the taking of real estate.

In Ranlet v. Concord R. Corp. 62 N. H. 561, where a claim was made by the plaintiff for the removal of his coal sheds and the coal in them, in an action for the taking of real estate for public use, it was held that a landowner is not entitled to the expense of removing personal property from the land taken; the court saying that the inconvenience and expense incident to the surrender of the possession are not elements to be considered in determining the damages to which the owner is entitled.

Some cases, however, hold that the cost of removal is a proper element of damages. In Philadelphia & R. R. Co. v. Getz, 113 Pa. 214, 6 Atl. 356, it was held that where land, upon which a building had been erected and was being used by a tenant as a marble mill, and in which the tenant had set up costly machinery, had been taken by a railroad, it was proper to consider as an element of damage the cost of removing the tenant's machinery and other personal property; and the court appears to have based the decision upon general principles rather than upon statutory provisions.

And in Atchison, T. & S. F. R. Co. v. Schneider, 127 Ill. 144, 2 L.R.A. 422, 20 N. E. 41, the cost of removal of personal property from land condemned by a railroad was discussed, together with other elements of damage; and, while the decision of the lower court awarding damages for the personal property was reversed, it was upon the ground that the award was contrary to the proof, and not that the expense of moving personal property was an improper element in the consideration for compensation.

Same—instructions—"boom" values.

2. An instruction of the court as follows: "The law does not permit you to fix speculative, boom, or fancy values upon the property in controversy; but the law requires you to determine the reasonable market, salable value of the property if the owner was offering to sell on usual terms and a purchaser desired to pay,"—is not erroneous because of the use of the word "boom" as here used; the court having in this and other instructions been careful to advise and instruct the jury that the market value, as contradistinguished from a purely imaginative or speculative value, must be their basis for the assessment of damages.

Same—offers for neighboring property.

3. It is not error in the trial court, where a question of damages under the law of eminent domain is being tried, to reject evidence of offers to purchase other property in the neighborhood of the land in question, about the time condemnation proceedings were instituted.

Same—inspection by jury.

4. In the trial of such case, an instruction to the jury as follows: "All these matters are proper for your consideration in determining the reasonable market value of the property, at the time it was taken, and the damages, if any, to the remaining lot; but you are not bound by this evidence alone. You have been permitted to make a view and inspection of the property in question; and you have a right to exercise your own judgment, based upon your inspection and observation, together with all the evidence which has been permitted to go to you during the trial. Remember, all this evidence and your own observation is for the purpose of enabling you to form a correct judgment as to the reasonable market value, if any, of the remaining lot, caused by the excavation made by the railroad company on the lots that it took from Mr. Blincoe; and in your deliberation you must consider all the evidence that you believe credible and give it such weight as in your judgment you deem it entitled to,"—is not error.

(September 8, 1905.)

ERROR to the District Court for Logan County to review a judgment fixing the compensation in a condemnation proceeding. Reversed.

Statement by Gillette, J.:

This is a proceeding instituted by the defendant in error in the district court of Logan county, to condemn lots 3 and 4 in block 63, East Guthrie, for a right of way and terminals for the defendant in error. At the time said condemnation proceedings were instituted, plaintiff was the owner and in the actual possession of lots 3, 4, and 5 in said block 63, and at that time and for several years prior thereto had been making use of said lots as and for the purpose of a lumber yard, in which business of retailing lumber he was then and had been for several years engaged. Commissioners were duly appointed by the judge of the district court to appraise the damages to said lots 3 and 4 in said block 63, upon and across which the line of said railroad was projected, and on the 21st day of March, 1902, filed their report as to these two lots in the words and figures following, to wit:

Value of land taken.....	$5,500 00
Value of improvements taken....	2,200 00
Moving lumber	250 00
Total	$7,950 00

The commissioners in their said report also state "that the said Choctaw, Oklahoma, & Gulf Railroad Company has appropriated all of said described lots and tract of land," etc. To this award both parties excepted and demanded a trial by jury, and the cause was duly certified to the district court of said Logan county for trial. At the March term, 1903, the cause came on for trial before a jury, and, after the same had been concluded, and after the jury had deliberated upon their verdict, they returned into court and announced that they were unable to agree, and were therefore discharged. On the 21st of December, 1903, the cause again came regularly on for trial in said court before a jury, and during the course of this trial the following facts were developed, *viz.:* Lot 5 in the same block lies immediately contiguous to lots 3 and 4, and was owned and being made use of by Blincoe in connection with his lumber yard, and as a part thereof. Also at the time of the condemnation Blincoe had a large stock of lumber in the yard, and that the defendant in error immediately took possession of said lots 3 and 4 and the buildings and improvements thereon, removed the buildings and improvements, and excavated the ground to a considerable depth covering the whole of lots 3 and 4 and up to the line of lot 5, thereby making a retaining or supporting wall necessary to preserve the integrity of that lot. The action of the railroad company also made it necessary for Blincoe to remove the stock of lumber and other building material then on hand, from said lots 3 and 4. The evidence disclosed that from January, 1902, up to and after the time these premises were condemned, there was a very marked increase or appreciation in the value of all real estate in the vicinity of the premises condemned. At the conclusion of the evidence the jury were permitted, under the charge of a bailiff, to view the premises, and after their return into court were instructed by the court.

The jury returned their verdict in the cause in the following form: "We, the jury in the above-entitled cause do, upon our oaths, find the issues in favor of the defendant, and assess the amount of his recovery at the sum of $7,500."

Ten special questions were also submitted to the jury, among them the following:

Q. 1. What was the fair market value of the two lots of the defendant taken by the railroad company for right of way at the time of the condemnation?

A. Six thousand five hundred dollars. . . .

Q. 3. What was the value of lot 5 in block 63 at the time lots 3 and 4 were condemned by the plaintiff railway company?

A. Twenty-five hundred. . . .

Q. 9. What was the value of lot 5 immediately after the railroad company completed its excavation on lots 3 and 4?

A. Fifteen hundred dollars.

Messrs. **Joseph Wisby, J. C. Strang,** and **John Devereux,** for plaintiff in error:

If the personal property is so connected and linked with the land that the land cannot be taken without damaging the personal property, then the owner is entitled to be compensated in damages for such.

M'Intire v. State, 5 Blackf. 384; Bangor & P. R. Co. v. McComb, 60 Me. 290; Bigelow v. West Wisconsin R. Co. 27 Wis. 478; Waddy v. Johnson, 27 N. C. (5 Ired. L.) 333; Grand Rapids & I. R. Co. v. Weiden, 70 Mich. 390, 38 N. W. 294; Parks & Boulevards Comrs. v. Moesta, 91 Mich. 149, 51 N. W. 903; Chicago. M. & St. P. R. Co. v. Hock, 118 Ill. 587, 9 N. E. 205; Atchison, T. & S. F. R. Co. v. Schneider, 127 Ill. 144, 2 L.R.A. 422, 20 N. E. 41; Ehret v. Schuylkill River East Side R. Co. 151 Pa. 158, 24 Atl. 1068; Covington Short-Route Transfer R. Co. v. Piel, 87 Ky. 267, 8 S. W. 449; Cameron v. Charing Cross R. Co. 16 C. B. N. S. 447; Western Pennsylvania R. Co. v. Hill, 56 Pa. 460; Pittsburgh, V. & C. R. Co. v. Vance, 115 Pa. 325, 8 Atl. 764; Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; Chicago, K. & W. R. Co. v. Parsons, 51 Kan. 414, 32 Pac. 1083.

Evidence of offers to purchase other property in the neighborhood of the land in question was admissible.

Muller v. Southern Pacific Branch R. Co. 83 Cal. 240, 23 Pac. 265; Harrison v. Glover, 72 N. Y. 451.

The facts learned by the jury on such view are not to be used as substantive evidence, but only in order that they may understand and apply the evidence given on the stand.

Washburn v. Milwaukee & L. W. R. Co. 59 Wis. 364, 18 N. W. 328; 1 Thompson, Trials, § 895; Close v. Samm, 27 Iowa, 503; Flower v. Baltimore & P. R. Co. 132 Pa. 524, 19 Atl. 274; Wright v. Carpenter, 49 Cal. 607; Heady v. Vevay, Mt. S. & V. Turnp. Co. 52 Ind. 117; Jeffersonville, M. & I. R. Co. v. Bowen, 40 Ind. 545; Seefeld v. Chicago, M. & St. P. R. Co. 67 Wis. 96, 29 N. W. 904; Grand Rapids v. Perkins, 78 Mich. 93, 43 N. W. 1037; Kansas v. Hill, 80 Mo. 523; Burrows v. Delta Transp. Co. 106 Mich. 582, 29 L.R.A. 468, 64 N. W. 501; Gibson v. Carreker, 91 Ga. 617, 17 S. E. 965; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 94 Am. St. Rep. 864, 70 Pac. 503; Jenney Electric Co. v. Branham, 145 Ind. 314, 33 L.R.A. 395, 41 N. E. 448; DeGray v. New York & N. J. Teleph. Co. 68 N. J. L. 454, 53 Atl. 200; Douglass v. Trask, 77 Me. 35; Brakken v. Minneapolis & St. L. R. Co. 29 Minn. 41, 11 N. W. 124; Schmidt v. New York Union Mut. F. Ins. Co. 1 Gray, 529; Anderson v. Barnes, 1 N. J. L. 203.

Messrs. **Dale & Bierer** for defendant in error.

Gillette, J., delivered the opinion of the court:

Four assignments of error are set out in the petition in error herein, *viz.*: First, that the court erred in receiving incompetent evidence over the objection of the plaintiff in error; second, that the court erred in overruling a motion for a new trial; third, because the said judgment of the said district court is contrary to law and not sustained by the evidence; fourth, for error committed by the court in its charge to the jury, which was duly excepted to at the time by the plaintiff in error. These alleged errors will be discussed in the order in which plaintiff in error has presented them in his brief.

The first and principal proposition involved in this case arises on the rejection of evidence offered on the part of plaintiff in error tending to prove the necessary expense of moving his lumber yard from the lots 3 and 4, and in giving instructions No. 10. During the examination of plaintiff in error he was asked the following question: "I want to ask you, Mr. Blincoe, about the removal of your lumber; what did it cost you, or what was it worth to remove your lumber from those lots?" Which question was objected to, and the objection sustained. The tenth instruction to the jury is as follows: "Tenth. You are instructed that you cannot allow the defendant lot owner anything for injury to his business, or for removing his business from the property in controversy, or for any depreciation, if that existed, in the value of his stock of material by reason of having to move the same from the premises and to conduct his business elsewhere.

The law does not allow a railroad company to acquire a mercantile business, or to take personal property by condemnation. All that the railway company has a right to take is the land with the improvements thereon; that is, the land with the buildings and improvements that were affixed to the lots. A railroad company has no authority to take anything else, and consequently cannot be charged for anything else than the real estate taken, and any damages to the remaining portion not taken belonging to the same owner." It is to be observed that at the time of the condemnation the plaintiff in error had a large stock of lumber in the yard embracing lots 3 and 4 and 5, which he was forced to move. and, as a part of his damages, plaintiff in error offered to show what was the reasonable expense of making such removal of his lumber from the location taken by the railroad company, to another. This offer was refused, and this, together with the tenth instruction above set out, constituted the ground of error now being considered.

In the ruling upon the admission of testimony objected to, and in giving instruction No. 10, Chief Justice Burford, before whom the case was tried in the court below, manifestly followed the plain and unequivocal declaration of Lewis on Eminent Domain (vol. 2, 2d ed. § 488), an authority quoted by nearly all the text writers and liberally cited by the courts in determining questions pertaining to eminent domain. That authority says: "But damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid."—citing Central P. R. Co. v. Pearson, 35 Cal. 247, and many other authorities, a number of which we have carefully examined. Upon investigation of this subject we are of the opinion that the above paragraph from Lewis on Eminent Domain, general in its terms and apparently laying down a universal rule, cannot be sustained as the law of this case, and the ruling of the court and instruction given pursuant thereto must be held to be erroneous under the law of this territory. In the absence of constitutional provision, or statutory authority, or in a case where a constitutional provision or statute limits liability in the exercise of the right of eminent domain to the property actually taken, the limit of liability would be fixed by the value of what is taken, and consequential damages could not be considered. This is substantially the declaration of the supreme court of California in Central P. R. Co. v. Pearson, *supra*. The statute of that state then under consideration governing the action of commissioners appointed to condemn a right of way for a railway says: "They shall ascertain and assess the compensation for the land sought to be appropriated, to be paid by said company to the person or persons," etc. Commenting upon this provision of the statute, the court says: "The item of $700 allowed Pearson for the supposed cost of removing his personal property from the premises was improperly allowed by the commissioners, and should have been stricken out by the court below. In cases of this character the landowner is entitled only to such damages, over and above the value of the land sought to be appropriated, as the statute gives. Whether the statute gives only the cost of fencing, over and above the value of the land taken, as claimed by the appellant, it is unnecessary to decide for the purposes of this case. Upon that question the statute is by no means clear, but we are satisfied that it does not, in any event, allow compensation over and above the value of the land actually taken, the cost of fencing and cattle guards, and such damages as may accrue to that portion, if any, of the land of the landowner which is not taken, by reason of its severance from the part taken, and the construction of the railroad in the manner proposed. The cost of removal from the premises is not included." And in Selden v. Jacksonville, 28 Fla. 558, 14 L.R.A. 370, 29 Am. St. Rep. 278, 10 So. 457, it was held that a constitutional guaranty that private property shall not be "taken" or "appropriated" without compensation did not embrace mere consequential damages resulting to property abutting on a street from a change of grade of the street or other improvements thereof, but only to a trespass upon or physical invasion of the property. The reverse of this, however, is held by courts determining like questions under different constitutional and statutory provisions.

Under the first Constitution of Illinois (1848), which provided that no man's property shall "be taken or applied to public use without . . . just compensation being made to him," the Supreme Court of the United States, in Northern Transp. Co. v. Chicago, 99 U. S. 635, 641, 25 L. ed. 336, 338, held that "persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction." In 1870 the Constitution of Illinois was changed so as to read, "Private property shall not be taken or damaged for public use without just compensation;" and under this provision the supreme court of Illinois, in Rigney v. Chicago, 102 Ill. 64, said that the framers of that instrument (Constitution of 1870) evidently had in view the giving of greater security to private rights by giving

relief in cases of hardship not covered by the preceding Constitution, and that the new rule required compensation in all cases where it appeared "there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value; and that, by reason of such disturbance, he has sustained a special damage with respect to his property in excess of that sustained by the public generally." This determination of the supreme court of Illinois was commented upon by the Supreme Court of the United States in Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820, and was by that court approved. The supreme court of the state of Washington (Brown v. Seattle, 5 Wash. 35, 18 L.R.A. 161, 31 Pac. 313, 32 Pac. 214), citing the change in the Illinois Constitution, says the action of that state "has since been followed by West Virginia, Alabama, Missouri, Nebraska, Arkansas, Texas, Georgia, California, Colorado, Kentucky, Montana, and the Dakotas," and cites numerous decisions sustaining the construction given by the supreme court of Illinois to the language of its Constitution of 1870, and then says: "Every court in which the point has been raised has decided in favor of the private citizen, but. were it now presented to us for the first time in the history of the phrase, we should not be disposed to view it in any way different from that expressed in the cases we have cited. If private property is damaged for the public benefit, the public should make good the loss to the individual. Such always was the equity of the case, and the Constitution makes the hitherto disregarded equity now the law of it." The supreme court of Colorado, in Pueblo v. Strait, 20 Colo. 13, 24 L.R.A. 392, 46 Am. St. Rep. 273, 36 Pac. 789, quotes with approval the foregoing language of the Washington court.

From these cases it will appear that there is no general rule governing the manner in which damage to private property, when taken for public use, is to be measured. Such measurements must depend upon the constitutional or statutory law authorizing the taking, and consequential damages will be allowed when justified by such provisions. Is the taking and damage to personal property, under the law of eminent domain within the foregoing rule, applicable to real estate? If so, the exercise of this power over or upon the property of a citizen should carry with it the right of the citizen to recover all the damages he has suffered by reason of its exercise, whether to his real or personal property. The taking of private property for public use is said to be the exercise of the right of eminent domain, and with reference to it Redfield, on the Law of Railways (vol. 1, p. 229), under the title of "eminent domain," says: It is a distinct right from that of public domain, which is the land belonging to the sovereign. This is a superior right which the sovereign possesses in all property of the citizen or subject, whether real or personal, and whether the title were originally derived from the sovereign or not."

The tenth instruction of the court is not in harmony with the foregoing definition of eminent domain as set out in the above quotation from Redfield on the Law of Railways. This instruction, in harmony with the ruling of the court upon the introduction of testimony, instructs and advises the jury as the law in this case, where real estate is condemned and personal property injured and damaged because thereof, such injury and damage cannot be recovered in this action; and this, we have attempted to show, cannot be upheld unless it is in accord with the statute of the territory and the Constitution of the United States. We do not think it is. The statute under which these condemnation proceedings were had reads as follows: "The commissioners shall be duly sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which said owner will sustain by such appropriation of his land." The language of our statute above quoted would seem to leave it immaterial whether or not a railroad company can "take personal property" by condemnation proceedings. If damage to personal property is incident and necessarily caused by the exercise of the power of eminent domain in taking land, then the "owner" is injured "by reason of such railroad." That the owner, "by reason of such railroad," has been put to the expense of removing the stock of lumber then on hand, is not disputed; neither can it be denied that the cost of such removal was made necessary by the condemnation of the real estate, and is an injury and damage to the owner to the extent of the cost of such removal. In other words, this ruling would permit the railroad to take the owner's land and thereby compel him to bear whatever expense may be consequent upon preserving his personal property, and yet be remediless therefor. If this shall be held to be the law, then the constitutional provision, "nor shall private property be taken for public use without just compensation," becomes almost as much a sword as a shield to the private citizen, for the compulsory addition to the cost of the personal property of the citizen is as much a taking as the absorption of the real estate itself.

Nor is this conclusion relieved, or its result modified, to the citizen, by the fact that the agency thus arbitrarily adding to the cost of his property cannot carry on the business in which he is engaged. The result to the citizen in this case is the same whether the railroad company is benefited by the expenditure or not. In either event the cost of removing the lumber is dead loss to him, occasioned by this taking of his real estate under the power of eminent domain.

In Grand Rapids, L. & D. R. Co. v. Cheseboro, 74 Mich. 466, 42 N. W. 69, the court, by Mr. Justice Campbell, says: "The damages in such a case must be such as to fully make good all that results, directly or indirectly, to the injury of the owners in the whole premises and interests affected, and not merely the strip taken,"—citing a large number of cases, among them Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393, 11 N. W. 215, where the court again says: "It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good a condition as he would have been in if the injury had not occurred. Nothing short of this is adequate compensation. . . . And in Jubb v. Hull Dock Co. 9 Q. B. 443, it was held that, where the property taken was a brewery in operation, the damages included the necessary loss in finding another place of business." And then says: "The following are cases where the damage done was, as in this case, distinct from the actual taking of property from the party injured,"—citing a number of English cases. In Chicago, M. & St. P. R. Co. v. Hock, 118 Ill. 587, 9 N. E. 205, the court says: "The inconvenience and cost of removal of the business from the premises condemned are mentioned as elements of damage proper for consideration. This, however, is in harmony with the ruling in St. Louis, V. & T. H. R. Co. v. Capps, 67 Ill. 607." In the case of Atchison, T. & S. F. R. Co. v. Schneider, 127 Ill. 144, 2 L.R.A. 422, 20 N. E. 41, the following instruction to the jury was upheld, *viz.*: "The jury are further instructed that, in determining the amount of compensation to be awarded to the defendants respectively in this case, they may properly take into consideration all evidence tending to show the actual value of the leasehold interest to the respective defendants of which it is proposed to deprive them; the actual loss to be suffered by these defendants respectively from the loss, destruction, or depreciation of the improvements placed by them in the properties specially adapted to the conduct of their business, if any, shown by their evidence; the reasonable costs of removal, and of refitting in other localities for the further conduct of business, as shown by the evidence." In Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582, it was held: Under a statute requiring the commissioners in condemnation proceedings to assess the damages which the owner of the land may sustain by reason of such appropriation, consequential damages resulting from the appropriation may be allowed. The assessment is not confined to the land actually taken. This statute differs from the Oklahoma act chiefly in the use of the word "damages," where our statute contains the word "injury." Both statutes were doubtless intended to cover the same ground and protect the same interests, and to the same extent, and neither one has any reference to speculative, imaginative, or hypothetical damages, but both were intended to and do refer to and include all the actual damages capable of exact or approximate measurement which the owner may sustain by reason of such railroad. The expense of moving the stock of lumber in the yard at the time of the condemnation and appropriation is a direct loss to the owner, and an added burden not shared by other members of the public.

In Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622, Mr. Justice Brewer, speaking for the court of the concluding clause of the 5th Amendment to the Constitution of the United States, which says: "Nor shall private property be taken for public use without just compensation,"—holds as follows: "It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government." And he further says: "When he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him. . . . The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages; the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that, if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of these two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken." In that case a private corporation had obtained a charter and franchise

from the state of Pennsylvania for the erection of a dam and lock in the Monongahela river for the passage of boats on that stream, with the right to take tolls for the passage of the same. The United States, under this power of eminent domain, condemned and took from the corporation the dam and lock by it constructed, and the trial court held the corporation was entitled to compensation for the dam and lock, but to nothing for the franchise or right to take tolls. In that case, as in this, it was urged that the government was liable for what it obtained, *viz.*, the dam and lock, but for nothing more. To this argument Justice Brewer replied as follows: "It is also suggested that the government does not take this franchise; that it does not need any authority from the state for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, etc. . . . But this franchise goes with the property; and the navigation company, which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when, by the taking of the tangible property, the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

It may be suggested that in that case the franchise was an inseparable part of the property taken, and therefore was inevitably swept away by the taking of the tangible property. Likely that is so, but it was no more an inevitable loss to the owner than is the necessary cost of moving the lumber in the case at bar; nor can it be said to be any more capable of ascertainment. A franchise may be valuable in one place, and of no value in another. It may be of value to-day and because of climatic conditions of little or no value to-morrow. In any event, it is at best a matter of computation to be made from the testimony in the case, and not susceptible of that degree of certainty which can reasonably be expected in reference to the expense of moving a given quantity of lumber. The fact that it inheres to or grows out of some right in other property, real or personal, can make little difference to the owner, who is called upon to alone bear the burden of its loss. To him the loss is the same whether it is the questionable value of a franchise, or the direct compulsory taking of the money necessarily expended in removing a stock of lumber. And, as said by Justice Brewer above, the loss to him is measured, not by the use the taker may make of it, but by the burden thus cast upon him.

Second. It is next objected that the court erred in its sixth instruction to the jury, which reads as follows: "(6) Several witnesses have been permitted to give their opinions as to the value of the property in question, and the amount of depreciation in value of lot 5. These opinions have been varied and conflicting, and are not controlling on your judgment. They must be considered and given just such weight as the conditions entitle them to. The value of this class of testimony depends upon the intelligence, fairness, and impartiality of the witness, his knowledge and experience in determining values, and whether he is prejudiced, biased, or influenced by like interests. The law does not permit you to fix speculative, boom, or fancy values upon the property in controversy; but the law requires you to determine the reasonable market, salable value of the property, if the owner was offering to sell on usual terms and the purchaser desired to buy." The particular objection to this instruction is the use of the word "boom" as used. On a careful reading of this instruction it will be seen that the court made use of the three words "speculative," "fancy," and "boom," as nearly equivalents of each other, and did not intend by the use of the word "boom" to extend the ordinary meaning of the other words made use of. Undoubtedly a railroad company, when it invokes the aid of the power of eminent domain to condemn the property of a private citizen for its use, must be required to make full and just compensation to him, and it has done so when it has paid the fair market value of the property on the day it was taken, without reference to how or when that market value came into existence. But it must be its market value, as contradistinguished from a purely imaginative or speculative value which does not in fact exist; and this we think is what the court intended to, and did in fact, instruct the jury in the language complained of. The court said: "The law does not permit you to fix speculative, boom, or fancy values upon the property in controversy; but the law requires you to determine the reasonable market, salable value of the property, if the owner was offering to sell on the usual terms and the purchaser desired to buy." In this the jury were instructed that, under the law, they were required to fix the damages at such a sum as the owner, desiring to sell, could at the time secure from a purchaser who desired to buy, and informed them that they could not allow or fix speculative, boom, or fancy value. This is the law as we understand it, and we

think the jury could not have been misled by the language used. While in the abstract this court does not approve of the word "boom" as a word descriptive of values which should not be considered by a jury in estimating values arising under the law of eminent domain, yet, as the word was used in the instruction complained of, we are unable to determine that there was error committed justifying a reversal of this case, and especially where, as in this case, other instructions, particularly the second, makes the meaning of the court clear that the fair market value of the property at the time should be made the basis of the jury's consideration of damages, and uses language easily comprehended by them.

Third. The third assignment of error is that the court erred in rejecting the evidence of offers to purchase other property in the neighborhood of the land in question about the time of the condemnation proceedings. We do not think the evidence offered in this case brought it within the rule applicable to that class of evidence. Actual sales of adjoining or abutting property at or about the time of the taking by condemnation is a widely different proposition, and even this class of evidence is received with very great caution. In Keller v. Paine, 34 Hun, 177, cited in 10 Am. & Eng. Enc. Law, 2d ed. p. 1154, it is said: "If evidence of offers is to be received, it will be important to know whether the offer was made in good faith, by a man of good judgment, acquainted with the value of the article, and of sufficient ability to pay; also whether the offer was cash, for credit, in exchange, and whether made with reference to the market value of the article or to supply a particular need or to gratify a fancy." The evidence failed to show the existence of any of these conditions, and we think the evidence was rightfully rejected.

Fourth. It is further contended by the plaintiff in error that the court erred in the fourth instruction, in which said instruction the court permitted the jury to exercise their judgment, based upon their inspection of the premises and the evidence submitted upon the trial. We are unable to agree with counsel in this contention. In instruction No. 4 the court, after adverting to the evidence before the jury, and the elements which entered into a correct determination of the elements of damage in the case, then proceeds: "All these matters are proper for your consideration in determining the reasonable market value of the property, at the time it was taken, and the damages if any, to the remaining lot; but you are not bound by this evidence alone. You have been permitted to make a view and inspection of the property in question, and you have a right to exercise your own judgment, based upon your inspection and observation, together with all the evidence which has been permitted to go to you during the trial. Remember, all this evidence and your own observation is for the purpose of enabling you to form a correct judgment as to the reasonable market value of these lots March 21, 1902, and the depreciation in value, if any, of the remaining lot, caused by the excavation made by the railroad company on the lots that it took from Mr. Blincoe, and in your deliberations you must consider all the evidence that you believe credible, and give it such weight as, in your judgment, you deem it entitled to." Counsel for both plaintiff and defendant have examined and discussed this subject with commendable energy and zeal, and have collected and presented the conflicting decisions of the courts to such extent that there is little left for this court to do further than to announce the guiding principle which seems to run through the great mass of authority on the subject. Extreme views have been expressed upon both sides, but we think the great weight of authority has adopted the medium ground followed by the court in this case, *viz.:* Not to permit the jury to view the premises and therefrom determine all the questions involved in the case, to the exclusion of the sworn testimony of all the witnesses in the case; nor, on the other hand, to shut their eyes to, and their consciousness of, all the physical facts plainly before them, but rather that they make use of their vision to more clearly and certainly understand the physical facts testified to by the witnesses, and thus the better be able to weigh and assign to each the measure of truth to which he intended to testify, and thereby, in that respect, assign to the several witnesses the measure of credence which they thus find their evidence entitled to. We have spoken of physical facts because we believe it is only as to physical facts that this view of the jury is permitted. The jurors are generally strangers to both parties and to the premises involved, and, certainly a stranger wholly unacquainted with the value of property in that vicinity, and seeing only the physical effect upon the premises in the way of cuts or fills, could not be permitted to indulge his own arbitrary whim or notion of the value of the premises thus affected, and the measure or amount of damages thus occasioned; but it does not follow that they may not correct an erroneous impression or false statement of a witness as to a physical fact by their own personal observation. As illustrated by some of the authorities, suppose a witness testified that a certain cut made by a railroad is 18 feet deep, and the jury, viewing the premises and standing in

the cut, are yet able to overlook the bank, and thus know that the cut is less than the height of an ordinary person; must the jury in such case disregard the evidence of their eyes and still believe that the cut is 18 feet deep? If such were the law, it is pretty safe to assume that no jury of intelligent American citizens would ever administer the law. It is assumed that the instruction given warrants the jurors in basing their verdict on the knowledge gained at the view, in disregard of the testimony given in court, if they so desire. This assumption is unwarranted by the language employed. The language of the instruction is: "And you have a right to exercise your own judgment, based upon your inspection and observation, together with all the evidence which has been permitted to go to you during the trial." We think the instruction was not erroneous.

In reaching this conclusion, it is not necessary to hold or indorse the theory that the jury are not bound by the testimony of the witnesses, but may rest their verdict entirely upon the information obtained at the view; neither are we inclined to go to the other extreme and hold that the jury are not to take into consideration, in any degree, the evidence of their own senses. We incline rather to accept the middle ground adopted by the supreme court of Kansas and Wisconsin, and other authorities, in which it is said: "The evident theory and intention of the legislature was that cases would arise in which it would be necessary and proper that the evidence offered in the court should be supplemented by the knowledge gained by the jury from a view. It would be impracticable and foolish to require a court, after having sent a jury to view the property or place, to direct them not to consider what they had there observed, and what was obvious to all who might look." Topeka v. Martineau, 42 Kan. 387, 5 L.R.A. 775, 22 Pac. 419. And in Washburn v. Milwaukee & L. W. R. Co. 59 Wis. 364, 18 N. W. 328, the supreme court of Wisconsin says: "We understand that the object of a view is to acquaint the jury with the physical situation, condition, and surroundings of the thing viewed. What they see, they know absolutely. If a witness testify to anything, which they know by the evidence of their senses, on the view, is false, they are not bound to believe, indeed cannot believe, the witness; and they may disregard his testimony, although no other witness has testified on the stand to the fact as the jury know it to be. For example, if a witness testify that a certain farm is hilly and rugged, when the view has disclosed to the jury and to every juror alike that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned, no contrary testimony of witnesses on the stand is required to authorize the jury to find the fact as it is, in disregard of the testimony given in court." We therefore conclude that the information obtained at the view, as to these mere physical facts, is evidence to be considered in connection with all that is offered in court; but, "the evidence which the jury may acquire from making the view is not to be elevated to the character of exclusive or predominating evidence," but simply give it place along with the other evidence in the case in their deliberations. Chicago, K. & W. R. Co. v. Parsons, 51 Kan. 414, 32 Pac. 1083.

For the error in refusing evidence in reference to the expense of moving the lumber, and repeated in instruction No. 10, wherein the jury are told they must not allow the plaintiff in error anything for the expense of removing the lumber from lots 3 and 4, the judgment of the court below must be reversed, and the cause remanded for a new trial therein; the costs of this court to be taxed to defendant in error.

All the Justices concur, except Burford, Ch. J., who tried the case in the court below, not sitting.

GEORGIA SUPREME COURT.

CENTRAL OF GEORGIA RAILWAY COMPANY
v.
J. S. HALL et al.

(124 Ga. 322, 52 S. E. 679.)

Carrier—limitation of liability.

1. A common carrier cannot limit his legal liability by any notice given, either by publication, or by entry on receipts given or tickets sold. By special contract, he may relieve himself of his common-law liability as an insurer, and may contract against lia-

Headnotes by LUMPKIN, J.

Case Note.—Insanity or illness as act of God.—In Wolfe v. Howes, 24 Barb. 174, and Fenton v. Clark, 11 Vt. 560, it was held that sickness was an act of God, which discharged plaintiff from the further performance of his contract to render for a definite period service of a personal character; and, for services performed before overtaken by sickness, he could recover upon a *quantum meruit*.

In Boast v. Firth, L. R. 4 C. P. 1, it was held that permanent illness, arising after the making of an indenture of apprenticeship, was an act of God, and therefore an excuse for the nonperformance of the contract.

bility arising from certain losses which do not involve negligence of the carrier or his servants; but he cannot, even by special contract, exempt himself from liability for loss of goods intrusted to him, where the loss arises from his negligence or that of his servants.

Same—of live stock.

2. A common carrier of goods which transports live stock, is, as to the latter property, also a common carrier. There are, however, certain inherent differences between live stock and inanimate property offered for transportation.

Same—limitation of liability.

3. A carrier of live stock may, by special contract, so limit its liability for loss or damages that it will be liable only in the event that it is guilty of gross negligence.

Same—contract as to value.

4. A railway company, in its capacity as a common carrier, may, as a basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment, embracing an actual and bona fide agreement as to the value of the property to be transported; and in such case the latter, when loss, damage, or destruction occurs, will be bound by the agreed valuation. But a mere general limitation as to the value, expressed in a bill of lading and amounting to no more than an arbitrary preadjustment of the measure of damages, will not, though the shipper assent in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value.

Same—question for jury.

5. Where there is an issue of fact as to whether there was an actual, bona fide valuation, or a mere arbitrary effort to limit liability, the question is one for the jury; but, where the written contract shows that it falls within the latter description, and there is no issue of fact on that subject, it is proper for the court to construe the contract.

Evidence—sufficiency.

6. The evidence in this case was not sufficient to show the perpetration of any fraud by the shipper on the company.

Carrier—insanity of engineer.

7. Where the common-law rule applies, under which no excuse avails a common carrier in cases of loss, unless it was occasioned by the act of God or the public enemies of the state, if a locomotive engineer desired to leave his train and proceed with the engine some distance to a water tank for the purpose of obtaining water, and thereupon caused the flagman to uncouple the engine from the cars, which were left standing on the track while the engineer, in company with the conductor (who had authority to

In Robinson v. Davison, L. R. 6 Exch. 269, defendant contracted that his wife should play the piano at a concert to be given by the plaintiff, but, on account of illness on the day specified for the concert, she was unable to perform. It was held that this was a valid excuse; and Cleasby, B., added: "It is, moreover, a duty which could not be done by a deputy, but only by the lady herself, and, that being so, I think that disability or incapacity, caused by the act of God, excuses the defendant."

In Dickey v. Linscott, 20 Me. 453, 37 Am. Dec. 66, it was conceded by counsel that sickness was an act of God; and the court held that, where the sickness lasted during the greater portion of the term for which defendant contracted to perform personal manual labor, it defeated plaintiff's right to recover damages for the breach.

In Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444, plaintiff brought suit for breach of promise to marry, and defendant answered that, a few days after entering into the agreement, he was advised by his physician that he was so diseased as to be unfit to marry. The court said: "It is now generally conceded that, if the performance of a contract be rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance; and such a stipulation will be understood to be an inherent part of every contract."

This latter proposition of law is repeated in Sanders v. Coleman, 97 Va. 690, 47 L.R.A. 581, 34 S. E. 621; and it is also said that illness, being beyond the power of man to control or prevent, is an act of God. The court then held that a man is excused for breach of a contract of marriage when, after it was made, he, without fault on his part, developed a grave malady of such a character that marriage would endanger his life or health.

In People v. Manning, 8 Cow. 297, a sheriff arrested on an attachment gave bond to appear on a day fixed. Having failed to appear, action was brought on the recognizance, and defendants pleaded that before the day fixed the sheriff was taken violently sick, confined to his house and bed, and could not be removed therefrom, and continued sick till his death, about one month after the appearance day. It was held that the sickness and death were acts of God rendering compliance with the condition of the bond impossible, and therefore constituted a legal defense to the action.

And in Scully v. Kirkpatrick, 79 Pa. 324, 21 Am. Rep. 62, the principal in a bond for appearance failed to appear on the day named because stricken down by sickness at his home. In an action on the bond, it was held that illness which prevented his appearing was an act of God and a valid excuse in equity; and his appearance at a subsequent term as soon as he was able to attend, saved the bond.

But in Ringeman v. State, 136 Ala. 131, 34 So. 351, it was said that, while death of the principal would be an act of God which would relieve the sureties on his bail bond for his failure to appear, illness, however severe and critical, is not an act of God in legal contemplation; and a plea setting up such defense is bad on demurrer.

control him) and the fireman, proceeded on the engine to the water tank, obtained the water, and returned to where the cars were; but the engineer caused the engine to run at such a rate of speed as to be evidently dangerous and to result in wrecking one of the cars, and causing the loss of property being transported,—even if he was insane at the time, the loss could not be attributed to the act of God, within the meaning of the rule of law referred to, so as to excuse the carrier.

Act of God.

8. The meaning of "the act of God" falling within the rule discussed.

Same—burden of proof.

9. In this state it is the general rule that, in order to avail himself of the act of God as an excuse, the burden is upon the common carrier to establish not only that the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto.

Carrier—modified liability—insanity of engineer.

10. Where, under a special contract for the shipment of live stock, the common-law liability of the common carrier was so modified that the carrier was liable for injuries arising only from fraud or gross negligence, it was admissible to defend by pleading and proving that its engineer upon the train on which the goods were shipped suddenly became insane at the time of the transaction complained of; and it would be for the jury to say whether the carrier did not know, or could not by the exercise of proper care have known, of it, and whether it exercised due diligence in view of the situation and circumstances disclosed by the evidence.

Trial—comment by counsel.

11. Where an action was brought against a railroad company for loss alleged to have arisen from negligence, and the defendant, in its answer, denied the negligence and, some two years thereafter, pending the trial of the case, amended its pleadings by setting up that the engineer in charge of its engine became suddenly insane at the time of the transaction complained of, and that it was thereby relieved from liability, counsel for the plaintiff could legitimately comment upon the time when this amendment was made and this defense set up.

Damages—interest.

12. Where a suit is brought for damages arising from the destruction of property, and there is a basis of calculation as to the value, interest is not recoverable *eo nomine*. But the jury may consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may, in their discretion, increase the amount of damages by adding to the value of the property destroyed a sum equal to the interest on such value; the entire sum found being returned as damages, and not exceeding the amount sued for.

(November 20, 1905.)

CROSS-WRITS of error to the Superior Court for Morgan County to review a judgment in favor of plaintiffs in an action brought to recover damages for negligently killing their horse; defendant excepting to the overruling of its motion for new trial after verdict in plaintiffs' favor; and plaintiffs excepting to the rulings permitting defendant to set up the insanity of its engineer in defense. Affirmed.

Defendant having undertaken to transport plaintiffs' horse for hire, it became necessary, in the performance of the transportation contract, to secure water for the engine, which was uncoupled from the train and run forward to the water tank for that purpose. The conductor and fireman accompanied the engineer on this trip. On the return trip the engineer ran the engine at what seemed to be an excessive speed, and, upon being warned by the conductor, replied that he knew where the train was. The train had been left without lights to mark its location, and the engine collided with it so violently that the horse was killed. Among other defenses, the railroad company set up the sudden insanity of its engineer.

Further facts appear in the opinion.

Mr. Samuel H. Sibley, for plaintiffs:

Insanity is no defense to a tort feasor.

The unanticipated insanity of an agent pending the execution of his work is not an act of God.

Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; 6 Cyc. Law & Proc. p. 377; Williams v. Hays, 143 N. Y. 442, 26 L.R.A. 153, 42 Am. St. Rep. 743, 38 N. E. 449.

Messrs. Dessau, Harris, & Harris for defendant.

Lumpkin, J., delivered the opinion of the court:

1-3. In cases of loss the presumption of law is against a common carrier, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state. "A common carrier cannot limit his legal liability by any notice given, either by publication, or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby." Civil Code 1895, §§ 2264, 2276. Construing these two sections together, the latter does not intend to permit a common carrier to relieve himself of the duty of exercising diligence, but by special contract to relieve himself of his common-law liability as an insurer, and to contract against liability arising from certain losses which do not involve

negligence of the carrier or his servants. The requirement of diligence on the part of a common carrier is one involving public policy, and it would be contrary to such policy to allow him to relieve himself from his duty in this regard by contract. A common carrier cannot, therefore, by special contract, exempt himself from liability for loss of goods intrusted to him, where the loss arises from his own negligence. Berry v. Cooper, 28 Ga. 543; Purcell v. Southern Exp. Co. 34 Ga. 315; Southern Exp. Co. v. Purcell, 37 Ga. 103 (2), 92 Am. Dec. 53; Western & A. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 2 L.R.A. 102, 7 S. E. 916; Georgia R. Co. v. Gann, 68 Ga. 350; Central R. Co. v. Pickett, 87 Ga. 734, 13 S. E. 750. In Savannah, F. & W. R. Co. v. Sloat, 93 Ga. 803, 20 S. E. 219, it was said that the question as to how far a shipper might, by express agreement signed by him, contract against liability on the part of a common carrier for injuries arising from negligence, was still an open question. But in the next case reported in the same volume it was said: "But carriers cannot by any special contract exempt themselves from liability for loss occasioned by their negligence." Georgia R. & Bkg. Co. v. Keener, 93 Ga. 808, 44 Am. St. Rep. 197, 21 S. E. 287. The carrier referred to was a common carrier. See also Wood v. Southern Exp. Co. 95 Ga. 451, 452, 22 S. E. 535; Central R. Co. v. Murphey, 113 Ga. 514, 53 L.R.A. 720, 38 S. E. 970. This ruling is not dependent upon our statute, but accords with the decisions of other courts, though it is not universally so held. 6 Cyc. Law & Proc. pp. 387, 388. A common carrier of goods, which transports live stock, is as to the latter property also a common carrier. Hutchinson, Carr. 2d ed. § 221; 5 Am. & Eng. Enc. Law, 2d ed. p. 428. It has nevertheless been held that a carrier of live stock may, by special contract, so limit its liability for loss or damage that it will be liable only in the event it is guilty of gross negligence. Cooper v. Raleigh & G. R. Co. 110 Ga. 659, 36 S. E. 240; Georgia R. Co. v. Spears, 66 Ga. 485, 42 Am. Rep. 81; Central R. Co. v. Bryant, 73 Ga. 722; Cincinnati, N. O. & T. P. R. Co. v. Disbrow, 76 Ga. 253. If it were an original question, it might well be argued that it is somewhat anomalous to hold that such a carrier is a common carrier of live stock, that extraordinary diligence is required of it, now so declared in the statutes of this state, and that it is contrary to public policy to allow a common carrier to contract against liability resulting from its own negligence, and yet to say that in regard to live stock it may contract against such liability except as to gross negligence. See 6 Cyc. Law & Proc. pp. 391, 392, and citations; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; East Tennessee, V. & G. R. Co. v. Johnston, 75 Ala. 596-605, 51 Am. Rep. 489. But the ruling seems to be established in this state. Perhaps the difference between live stock and inanimate freight may furnish the basis for this holding. In the case at bar the contract provided that the owner or shipper assumed and released the railroad from "all other damages incident to railroad transportation which shall not have been caused by fraud or gross negligence of said company." This became the measure of the negligence which would render it liable. The presiding judge, in effect, so charged, and we do not think his charge, taken as a whole, was subject to the criticisms made upon it as to this point.

4. It was contended that, under the contract, the defendant was not liable for the value of the horse beyond the sum of $125. Was the contract relied on by the defendant an actual, bona fide agreement as to the value of the property lost, or was it a mere general limitation as to the value, amounting to an arbitrary preadjustment of damages? The former would be valid; the latter not. Central R. Co. v. Murphey and Georgia R. & Bkg. Co. v. Keener, *supra;* Georgia Southern R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807. The contract, which was included in the bill of affreightment and signed by the agent of the owner and the agent of the company, contained the following provisions: "And it is further agreed that, should any damage occur for which the company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack, $200, for a horse or mule, $125, cattle $40, other animals, $20." This was upon a printed blank containing these amounts already prepared. It did not purport to put a valuation upon the particular horse or horses shipped, but limited the amount to be claimed for any horse, regardless of its real or estimated value, to $125. It had a prearranged amount to which its liability should be limited as to various animals. If this could be treated as a bona fide estimate or valuation as to the horse which was killed, it might equally be said to be a valuation of every possible horse which might be shipped, before it was ever seen or heard of by the company's agent. The expression "other animals, $20" would thus be treated as being a bona fide valuation of any other animal, regardless of what was its nature, character, or actual value. A rabbit, a hog, or an elephant might equally fall under the designation of "other animals," and the arbitrary limitation of $20 would apply equally to each of them. Moreover, it will be noticed that, in

case of loss, the company does not agree that the value of the horse shall be fixed at $125. but the agreement is that "the amount claimed shall not exceed" that sum. This was clearly an attempt to limit the liability, not to determine value. As was said in the opinion in Central R. Co. v. Murphey, *supra:* "Could any fair and reasonable mind ever reach the conclusion that there was between the plaintiffs and the defendant any agreement at all respecting the value of this particular car load of grapes, or that there was even a remote intention to make such an agreement?"

5. Should the presiding judge have submitted the question to the jury to decide as to whether this contract amounted to an actual, bona fide valuation? On its face, it did not do so. Outside of the paper, there was no evidence of any actual valuation of this particular horse. It, with several others, was delivered to the railroad company together with certain sulkies, which seemed to have indicated that the horses were to be used otherwise than as common draft animals. Eight horses were also shipped in two cars, and an attendant went with them. No inquiry was made as to their nature or value. The company had two kinds of blanks, one for use where live stock was shipped "released," the other where it was not. An agent of the defendant asked the plaintiff's agent if he wished to ship the horses "released," and, upon receiving an affirmative answer, filled one of the blanks, except as to the rate, which was filled in by the rate clerk. There is only one "release rate" for horses. The rate clerk has the classification of the state railroad commission, and fills in the rate that belongs to that agreement. A witness for the defendant testified that the rate was fixed at $27 per car between the points included in the transportation, "based on the valuation of $125;" but he admitted that nothing was said to the shipper as to valuation. This was the entire transaction. True, the shipper admitted that he knew that, if he had named a higher valuation on the horses, he would have had to have paid a higher rate, and that, if he had not shipped "released," the rate would have been much higher. But there was nothing in what transpired between the parties to show a bona fide effort to fix a value on the horse which was killed, or on any one or all of the horses. Every shipper who is asked whether he will ship "released" probably knows that if he does not do so the rate will be higher. But this does not change an effort to limit liability into an actual valuation of property.

The construction of the contract made in this case is controlled by the decisions in Georgia R. & Bkg. Co. v. Keener and Central R. Co. v. Murphey, *supra*. The decision in Southern R. Co. v. Horner, 115 Ga. 381, 41 S. E. 649, is cited to sustain the contention that the case should have been submitted to the jury. In that case it is stated, in the report of facts, that "the testimony was in direct conflict as to the making of a special contract of shipment, . . . and that Lee [the defendant's agent] gave him a rate based on a valuation of $100 for the horse, and explained to him that the tariff required an addition of 50 per cent for each additional $100 of valuation." The contract contained the following terms: "The said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of — per —, which is the lower published tariff rate, based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event. . . . If horses or mules, not exceeding 100, $100 each." It was held that, under the terms of this contract and the evidence introduced, an issue was made as to whether in fact there was a valuation or an arbitrary preadjustment of damages, and that this was properly submitted to the jury. The difference between submitting to the jury to determine, under the evidence, whether terms of this character inserted in a contract of affreightment constituted a bona fide and actual valuation or a mere preadjustment of damages, and, on the other hand, submitting to the jury the construction of the contract alone, which plainly on its face was not a valuation, but an effort to limit damages, is clear. The case of Central R. Co. v. Glascock, 117 Ga. 938, 43 S. E. 981, is also cited as authority to show that the present case should have been submitted to the jury. On a casual inspection, it might appear to be so; but an examination of the record in that case shows that the contract contained language somewhat similar to that considered in the case of Southern R. Co. v. Horner, *supra*. After stating that, if the carrier should be liable, the value at the place and date of shipment should govern the settlement, in which the amount claimed should not exceed certain specified sums, it was added: "Which amounts, it is agreed, are as much as such animals as are herein agreed to be transported are reasonably worth," and stamped across the face of the contract was the statement: "The attention of shippers has been called to the terms, conditions, values, etc., herein named." These facts do not appear

as fully in the printed report as in the record of file in this court. This made a question for submission to the jury. In the case at bar there was nothing to show that there had been an actual valuation.

6. It was contended that the evidence in this case was sufficient to show fraud on the part of the shipper, and that the question of its existence should have been submitted to the jury. We cannot concur in this view. There is nothing to show that there was any misrepresentation, concealment, or artifice which would deceive the agent of the carrier as to the nature or character of the property. It appears to have been openly shipped, and, as already mentioned, in such a way as to indicate that the horses were not mere common animals shipped in carload lots. They were open to the inspection of the agent. He took no precaution, and asked no questions as to their value. He asked alone as to whether they should be shipped "released." He relied on the making of the contract, which, as to this point, was not binding under the law. The Civil Code of 1895 (§ 2290) reads as follows: "The carrier may require the nature and value of the goods delivered to him to be made known, and any fraudulent acts, sayings, or concealment by his customers will release him from liability." In Southern Exp. Co. v. Everett, 37 Ga. 688, it was held that if a shipper at the time of the delivery of the goods for shipment practices any fraudulent acts, sayings, or concealment upon the carrier as to the value of the parcel, or resorts to any artifice to give a box containing a valuable diamond breastpin a mean appearance, and thereby to induce the carrier to think it of trifling value, and so prevent him from making inquiries, this would operate as a fraud, and relieve him from liability. In Green v. Southern Exp. Co. 45 Ga. 305, the evidence for the defendant was to the effect that the plaintiff valued the property involved in the controversy at $100. He testified that he shipped a trunk, and was asked its value, but failed to give it. In Savannah, F. & W. R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416, the property was shipped as a bundle of bedding, nothing being said about wearing apparel, and after loss the shipper sought to recover the value of certain wearing apparel claimed to have been wrapped up in the bedding. In Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436, the conduct of the shipper was calculated to mislead the agent of the railroad, and conceal the true character of the contents of the package delivered for transportation. In Georgia S. & F. R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807, the shippers sent candy to a railroad for transportation. It was in boxes, and the contents of the packages were unknown to the company. Candy could be shipped in either of two classes, having different freight rates. The shipper classified the candy as of the lower grade, and thus prepared shipping tickets, using a form containing the words, "candy released, six cts. per pound valuation," and obtained a lower rate of freight. On this the railroad received the goods. It was held that, upon damage or loss occurring, the shippers could not recover at a higher valuation than that so fixed. In the case under consideration there was nothing to mislead the carrier, or prevent its agents from making inquiries as to its value.

7, 8. The defendant pleaded that its engineer in charge of its train became suddenly insane, and lost his power of mental control and discretion; that this was unknown to the defendant, or any of its agents or employees, until after said transaction, and could not have been known to it by the exercise of all the diligence required of it by law; and that all the acts of the engineer complained of were due to the sudden insanity, which developed at the time and while the transaction was going on, unmixed with any negligence of the defendant. The plaintiff demurred to this plea, and the demurrer was overruled. The court charged, in effect, that if the engineer suddenly became insane, and thereby became demented to such an extent as to lose his reason, and render him totally irresponsible for his act, such insanity, and acts growing out of it, would, in a legal sense, be the act of God. To this charge the defendant excepted. The determination of the defendant's liability in the present case does not rest upon the common-law liability of common carriers as insurers, but upon a special contract; but as the judge charged as above stated, and the question has been argued before us, the writer deems it not improper to discuss the case as it would stand at common law, in the absence of a limiting contract.

Much learning and ability has been expended on the subject of what constitutes an "act of God" which will relieve a common carrier. Lord Coke made frequent use of the expression, applying it to death, sudden tempests, and the like. In Forward v. Pittard, 1 T. R. 27–33, Lord Mansfield used the following oft-quoted language: "Now what is the act of God? I consider it to mean something in opposition to the act of man, for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows it was done by the King's enemies, or by such act as could not happen by the inter-

vention of man, as storms, lightning, and tempests." Some courts have held that the terms "act of God" and "inevitable accident" are synonymous, but others have held that there was a distinction. For interesting discussions and illustrations of acts which fall within the designation "acts of God" see Pandorf v. Hamilton, L. R. 17 Q. B. Div. 670; Nugent v. Smith, L. R. 1. C. P. Div. 423 *et seq.;* Hays v. Kennedy, 41 Pa. 378, 80 Am. Dec. 627. In an elaborate and able note to Coggs v. Bernard, 1 Smith, Lead. Cas. 8th ed. 422 *et seq.*, the cases are reviewed, and it is said: "Upon the whole, it would seem that an act of God signifies the extraordinary violence of nature; . . . and these cases now express the more commonly recognized law,—that the act of God which excuses the carrier must be a direct and violent act of nature." In these authorities are also discussed the terms "unavoidable accident," "inevitable accident," "perils of the sea," and similar expressions, frequently used in bills of affreightment. See also Stroud. Judicial Dict.; Bouvier, Law Dict.; Black, Law Dict.; Anderson, Law Dict.;—words "act of God," "common carrier." and citations; 3 Wood, Railway Law, 1574; 2 Kent, Com. 598; 5 Thomp. Neg. 6456; Story, Bailm. 9th ed. § 25. In Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393, the liability of common carriers and their right of defense on the ground that the injury was occasioned by the "act of God" was considered. Nisbet, J., in the opinion used the following language: "Unavoidable accidents are, in our opinion, the acts of God. The latter words express the same acts, and no more than the former; the two phrases mean the same thing. See Story, Bailm. §§ 25, 511; 2 Kent, Com. 597. What, then, are acts of God or unavoidable accidents? For it is from these only that this party is protected. By the act of God is meant any accident produced by physical causes which are irresistible, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness. Story, Bailm. § 25; 2 Kent, Com. 597. The act of God excludes all idea of human agency. McArthur v. Sears, 21 Wend. 190. In this case it is said: 'No matter what degree of prudence may be exercised by the carrier or his servants, although the delusion by which it is baffled or the force by which it is overcome be inevitable, yet, if it be the result of human means, the carrier is responsible.' See also Backhouse v. Sneed, 5 N. C. (1 Murph.) 173; Ewart v. Street, 2 Bail. L. 157, 23 Am. Dec. 131; Smyrl v. Niolon, 2 Bail. L. 421, 23 Am. Dec. 146." In Central Line of Boats v. Lowe, 50 Ga. 509, Judge McCay, delivering the opinion, said: "There is, doubtless, a distinction between an 'act of God' and an 'unavoidable accident.' The former covers only natural accidents, such as lightning, earthquakes, tempests, and the like, and not accidents arising from the negligence or act of man." In Doster v. Brown, 25 Ga. 24–26, 71 Am. Dec. 153, McDonald, J., delivering the opinion, said: "While every shower of rain that falls upon the earth is the act of God in contradistinction to the act of man, yet an ordinary freshet is not the act of God, in the legal sense which protects a man against responsibility for the nonperformance of a contract like that made by this plaintiff." See also Cannon v. Hunt, 113 Ga. 501–509, 38 S. E. 983; Young v. Waldrip, 91 Ga. 765, 18 S. E. 23; Richmond & D. R. Co. v. White, 88 Ga. 805, 15 S. E. 802; Carr v. Houston Guano & Warehouse Co. 105 Ga. 268, 31 S. E. 178. In the case of McArthur v. Sears, *supra*, which is cited as authority in the case of Fish v. Chapman, *supra*, a steamboat had been driven on shore by a previous gale. As a second steamboat later approached the harbor at night, the weather was hazy and snow was falling. Those in charge were misled by the light of the boat on shore, and the second boat struck the shoal. It was held not to excuse the carrier. In Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292, it is said: "By the . . . 'act of God' is meant something which operates without any aid or interference from man; and when the loss is occasioned or is the result in any degree of human aid or interference, the case does not fall within the exception to the carrier's liability." See also New Brunswick S. B. & Canal Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394. The maxim that "the act of God is so treated by the law as to affect no one injuriously" (*Actus Dei nemini facit injuriam*) has a general application, and is not limited to cases affecting common carriers. Broom, Legal Maxims, 8th ed. 229, 230. Nevertheless, in 16 Am. & Eng. Enc. Law, 2d ed. p. 622, it is said: "A lunatic is not responsible for crime, because he is not a free agent, capable of intelligent, voluntary action, and therefore is incapable of a guilty intent; but in a civil action for an injury done to the person or property of another, the intent is generally immaterial, and the rule is that an insane person is liable for his torts the same as a sane person, except for those torts in which malice, and therefore intention, is a necessary ingredient. . . . In respect to this liability, there is no distinction between torts of nonfeasance and of misfeasance, and consequently an insane person is liable for injuries caused by his tortious negligence. Insane persons are held to this liability on the principle that where a loss must be borne by one of two innocent persons, it shall be

borne by him who occasioned it." This position is sustained by a number of authorities. Cooley, Torts, 2d ed. 115, **99 *et seq.*; Cross v. Kent, 32 Md. 581; White v. Farley, 81 Ala. 563, 8 So. 215; Behrens v. McKenzie, 23 Iowa, 333, 92 Am. Dec. 428; Avery v. Wilson, 20 Fed. 856; Krom v. Schoonmaker, 3 Barb. 647; Jewell v. Colby, 66 N. H. 399, 24 Atl. 902 (holding that the damages recoverable are limited to compensation for actual loss sustained by the injured party); Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349; Williams v. Hays, 143 N. Y. 442, 26 L.R.A. 153, 42 Am. St. Rep. 743, 38 N. E. 449, 157 N. Y. 541, 43 L.R.A. 253, 68 Am. St. Rep. 797, 52 N. E. 589.

When the case of Williams v. Hays was first before the court of appeals of New York, it was decided that, "if one of several owners of a ship is in charge thereof under a contract with the others as lessee or bailee, and, upon his attention being called to its peril, refuses to believe in such peril, though apparent, or to take any measures to avert it, and thereby the ship is lost, he is answerable to his co-owners for his negligence, though it was induced by his insanity at the time." Earl, J., delivered a learned opinion, citing many authorities on the subject. In the course of it he made use of this expression: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with." When the case was before the court of appeals for the second time, it was held that this question should be submitted to the jury; Bartlett, J., dissenting. Indeed, a little reflection will suffice to show that the injury in this case could not fairly be considered as arising from the act of God. For this defense to be available as an excuse to a common carrier, the act of God must be proximate cause of the loss or injury. Hutchinson, Carr. 2d ed. §§ 179, 180 (a). If insanity were to be analogized to sudden or overpowering illness, which renders it impossible for a person to perform an act or discharge a duty, nevertheless in this case the act of God was not the immediate or proximate cause of the loss, unaffected by human agency. If insanity be treated as an act of God, it was not insanity alone which killed the horse. The engineer, conductor, and the flagman were all concerned in separating the engine from the cars, and leaving them apparently without light or warning signal upon the track. The engineer, the fireman, and the conductor all went together to the water tank. The engineer set the engine in motion at a rapid speed while returning to the cars. It is not pretended that he was stricken with illness, or even insanity, after he did this, so as to prevent his stopping the engine; but the contention is that, because of unsoundness of mind, he did careless or reckless acts. Suppose that, instead of having killed the horse by the collision, the engineer had stolen the horse, would it be contended that, by showing insanity on his part, the taking became the act of God? Or, if the agent of the company had made a mistake, and delivered the plaintiff's horse to some other person, whereby it was lost to the plaintiff, would it be urged that, if the agent were insane, the delivery of the horse to the wrong person was an act of God? Surely not. Sudden death or sickness of such character as to render action impossible may sometimes excuse non-action; but tortious action does not become the act of God because the person acting may be sick.

9. There is a further reason why, under the evidence in this case, this defense could not avail the defendant. In Richmond & D. R. Co. v. White, 88 Ga. 805, 15 S. E. 802, it was said: "And generally, in order for the carrier to avail himself of the act of God as an excuse, the burden of proof is upon him to establish not only that the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto, for 'in cases of loss the presumption of law is against him.'" Central R. Co. v. Hasselkus, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. 838; (3), Civil Code 1895, § 2265. Here the presiding judge charged that gross negligence took the place of negligence in stating the rule.

10. The present case, however, does not rest on the common-law liability of common carriers. A special contract in regard to the shipment of live stock was made, which exempted the carrier from all liability incidental to railroad transportation, except for fraud or gross negligence on its part. Under such facts, does the rule that a tort feasor is not generally excused from liability for actual damages by reason of insanity apply also to an insane agent, so that the principal is liable for an injury committed by such an agent if the latter becomes suddenly and totally insane, and the principal and his other agents are without fault? The reasoning that, if the loss must be borne by one of two innocent parties, it should be borne by him who occasioned it, is not to be carried to the extreme of holding that the mere fact of the occurrence of loss necessitates a recovery in all cases, regardless of whether there was negligence or any violation of legal duty. On the general subject, see Brown v. Collins, 53 N. H. 443, 16 Am. Rep. 372.

This is not a case of a physical injury to the person, and does not fall within the principle of law codified in Civil Code 1895,

§ 3826, which declares as follows: "A physical injury done to another gives a right of action, whatever may be the intention of the actor, unless he is justified under some rule of law. The intention should be considered in the assessment of damages." But even this was held not to create liability for a personal injury resulting from falling into an elevator shaft, in the absence of negligence of the owner. Whatley v. Block, 95 Ga. 15, 21 S. E. 985. Nor is the present action for conversion. It is a suit for damages claimed to have resulted from gross negligence. Aside from the common-law liability of carriers, or any statutory provision, the general rule is stated in Angell & Ames, Corp. 11th ed. § 310, thus: "As natural persons are liable for the wrongful acts and neglects of their servants and agents, done in the course and within the scope of their employment, so are corporations upon the same grounds, in the same manner, and to the same extent." See also §§ 382, 383; Morawetz, Priv. Corp. §§ 725, 730. Suppose that the agent of an individual should become suddenly and wholly insane without the knowledge of the principal, would the latter be responsible for all his acts, both of omission and commission, in the absence of any wrongful act or failure of duty on his own part or that of his other agents? In such examination as I have been able to make, I have found no case which extends the doctrine of liability of a person for his own torts, regardless of his insanity, to liability of a principal for the negligent torts of an insane agent, unless the principal commanded or assented to the act, or knew of the insanity, or he or his other agents failed in some respect in their duty. In Buswell on Insanity, §§ 355, 356, the author recognizes the rule that, "although a lunatic may not be punishable criminally, he is liable in a civil action for any tort he may commit." Yet he says (§ 357): "It would seem that if one knowingly employs an insane person as his servant or agent, he will be liable for damages to innocent third parties resulting from acts done by the insane person in the scope of his employment." By analogy to this principle, it was held in Cole v. Nashville, 4 Sneed, 162, that if a municipal corporation, "knowing a person to be lunatic, commission him by its license to follow within its limits a dangerous avocation, the exercise whereof requires great caution and circumspection, and while such person is so engaged under said license any injury be done to an individual by the act of such person in the pursuit of his business, the corporation is liable in damages to the injured party." In Christian v. Columbus & R. R. Co. 79 Ga. 460, 7 S. E. 216, the declaration alleged that the railroad company knowingly employed an insane agent, who committed a homicide while in charge of its office. In the opinion it was said: "We think, also, that if the homicide was the result of insanity, and the railroad company was faultless in regard to employing the agent, anything that would excuse the agent criminally for the act would excuse the railroad company civilly." As it was alleged that the company employed the agent knowing of his insanity, the point now being considered was not directly involved, nor was this a conclusive holding that the test of criminal and civil liability is the same (see discussion in Berkner v. Dannenberg, 116 Ga. 954, 60 L.R.A. 559, 43 S. E. 463; but it is cited to show that this court did not treat the principal as at all events liable for the conduct of an insane agent. Insane persons are generally declared incompetent to be agents. Story, Agency, § 7; 1 Am. & Eng. Enc. Law, 2d ed. p. 945. The Civil Code of 1895 (§ 3001) says: "Any person may be appointed an agent who is of sound mind." If a principal selects a sane agent, he takes the risk of the possible negligence or tortious conduct of such agent acting within the scope of his agency; but becoming insane is an abnormal condition, and is not ordinarily one of the risks in contemplation. Of course, if the principal knowingly appoints an insane person as his agent, or permits such a one to act for him after knowledge of the insanity, he will not be excused by reason of it.

We concur with the trial judge in holding that to be an excuse the insanity must be so sudden that the principal was not charged with notice of it, or with want of proper care after its discovery, and total in character, so as to practically make the agent incapable of committing a voluntary act. So long as it is merely a partial derangement, he remains to some extent a sentient agent, acting for his principal; and it would involve a maze of uncertainty to undertake to hold the principal partially liable and partially not. Indeed, Prof. Wharton contends that an irresponsible man is not to be considered as a juridical cause, but rather like a weapon of wood or stone, incapable of intelligent choice, and acting only as it is employed or compelled. Wharton, Neg. 2d ed. § 88. Under the law of this state, on proof of the loss a presumption of negligence arose against the railroad company, and the burden was on it to show, not only the insanity of the engineer, but also that it or its agents were not charge-

able with gross negligence contributing to the injury. If they were so, the defense would fail.

From a careful examination of the evidence, we are of the opinion that it failed to show a sufficient defense. There was no evidence of any sudden insanity coming on the engineer in the midst of this transaction. So far as the evidence tended to show insanity at all at that time, it indicated that certain symptoms, such as irritability, moodiness at times, etc., had been observed before the occurrence. The engineer was not discharged because he was insane, but because he was at fault. He continued to run an engine for months after this transaction, and a considerable time had elapsed before a physician advised that he was insane, and should be sent to the asylum. Moreover, the conductor was on the engine with him, and had authority to compel him to obey orders, and spoke to him of the danger, but permitted him to proceed, when he said that he knew where the other cars were. The presiding judge submitted the issue to the jury, and they found the defendant liable.

11. Complaint is made that the court permitted counsel for the plaintiff to comment upon the fact that no defense of insanity was set up when the action was originally brought in 1902, but was brought in by way of amendment to the defendant's answer pending the trial of the case in September, 1904. While an amendment, when allowed, generally relates back to the filing of the pleading amended, it is nevertheless legitimate for counsel to comment on the occurrence during the trial of the case, including the setting up of the defense of insanity, which was not originally referred to in the pleadings. Inman v. State, 72 Ga. 269; McBride v. Macon Teleg. Pub. Co. 102 Ga. 422, 30 S. E. 999.

12. The headnote sufficiently states our ruling on the subject of adding interest to the value of the property destroyed. Western & A. R. Co. v. McCauley, 68 Ga. 818; Central R. Co. v. Sears, 66 Ga. 499; Western & A. R. Co. v. Brown, 102 Ga. 13, 29 S. E. 130. Where the damages found are discretionary or punitive, this rule does not apply. Western & A. R. Co. v. Young, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912; Ratteree v. Chapman, 79 Ga. 574, 4 S. E. 684.

A consideration of all the grounds of the motion for a new trial satisfies us that there were no errors requiring a reversal.

Judgment on the main bill of exceptions affirmed; cross bill dismissed.

All the Justices concur, except **Beck**, J., not presiding.

4 L.R.A.(N.S.)

CONNECTICUT SUPREME COURT OF ERRORS.

WILLIAM W. HANNA
v.
JOHN F. SWEENEY, Appt.

(78 Conn. 492, 62 Atl. 785.)

Battery—punitive damages.

1. Punitive damages may be awarded for an unprovoked and malicious assault.

Same—amount.

2. The punitive damages which may be awarded for a malicious assault and battery cannot exceed the expenses of the litigation in the suit less taxable costs.

(January 26, 1906.)

APPEAL by defendant from a judgment of the Superior Court for Hartford County in plaintiff's favor in an action brought to recover damages for assault and battery. Reversed.

The facts are stated in the opinion.

Mr. William F. Henney, for appellant:

Punitive damages are limited to and measured by the expenses of litigation, less the taxable costs.

Maisenbacker v. Society Concordia, 71 Conn. 369, 71 Am. St. Rep. 213, 42 Atl. 67; Burr v. Plymouth, 48 Conn. 473.

Messrs. Walsh & Roche, for appellee:

The object is to limit relief to compensation as that term is generally understood. But in actions of this character there is no rule of damages fixed by law. Shall a defendant who has refused redress for an unprovoked and severe personal injury, and thus driven the plaintiff to seek redress in the courts of law, be permitted to say that the trouble and expense of the remedy were

Case Note.—Expense of litigation as element, or as limit, of punitive or exemplary damages.—It has been held in actions for wanton, wilful, and malicious torts that it is proper for the jury to take into consideration plaintiff's expenses of litigation as an element of punitive damages. Winters v. Cowen, 90 Fed. 99, Affirmed in 37 C. C. A. 628, 96 Fed. 929; Titus v. Corkins, 21 Kan. 722; New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

In Finney v. Smith, 31 Ohio St. 529, 27 Am. Rep. 524; Stevenson v. Morris, 37 Ohio St. 10, 41 Am. Rep. 481, and Peckham Iron Co. v. Harper, 41 Ohio St. 100, it was said that in cases where exemplary damages are allowable the jury, in estimating the damages, may include the expenses of litigation as an item of compensation.

But in Earl v. Tupper, 45 Vt. 275, and Hoadley v. Watson, 45 Vt. 289, 12 Am. Rep. 197, it was held that the expenses of litigation, not taxable as costs, are not a proper element of exemplary damages.

So, in Falk v. Waterman, 49 Cal. 224, and

unnecessary, and were not the necessary result of his own acts, connected with his refusal to do justice?

Linsley v. Bushnell, 15 Conn. 235, 38 Am. Dec. 79.

The small amount of the verdict would tend to show that punitive damages to any amount were not awarded, and that only compensatory damages were found.

Smith v. King, 62 Conn. 525, 26 Atl. 1059; City Bank's Appeal, 54 Conn. 271, 7 Atl. 548; Munson v. Derby, 37 Conn. 309, 9 Am. Rep. 332.

Torrance, Ch. J., delivered the opinion of the court:

In the trial court the evidence for the plaintiff tended to prove that the defendant committed upon him a violent, unprovoked, and malicious assault and battery, whereby the plaintiff was greatly injured in mind, body, and estate. Upon that evidence the plaintiff claimed to be entitled, if the jury found in his favor, not only to full compensation for all his actual injuries, but also to damages, in excess of such compensation, variously termed exemplary, punitive, or vindictive; and the court correctly charged the jury in accordance with the tenor of this claim. St. Peter's Church v. Beach, 26 Conn. 355; Burr v. Plymouth, 48 Conn. 460; Maisenbacker v. Society Concordia, 71 Conn. 369, 71 Am. St. Rep. 213; 42 Atl. 67; Welch v. Durand, 36 Conn. 182, 4 Am. Rep. 55.

The court, however, further charged the jury with reference to such damages that, if they found in favor of the plaintiff, they might, "in addition to actual or compensatory damages, award punitive damages or 'smart money,' as it is sometimes called, proportionate to the degree of malice or wantonness evinced by the defendant." It is of this part of the charge that the defendant chiefly complains. He says that by it the amount of "exemplary" damages which the jury might award to the plaintiff was erroneously left entirely at large to the discretion of the jury, and we think he is right in this claim. At common law, in certain actions of tort, the jury were at liberty to award damages, "not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." Pratt, L. Ch. J., in Wilkes v. Wood, Lofft, 1, 18, 19; Huckle v. Money, 2 Wils. 205; Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261; Goddard v. Grand Trunk R. Co. 57 Me. 202, 2 Am. Rep. 39; Day v. Woodworth, 13 How. 363, 14 L. ed. 181; Dalton v. Beers, 38 Conn. 529.

Moreover, at common law, the amount of punitive damages that might be awarded was left almost entirely to the discretion of the jury; for the courts generally refused to grant a new trial for excessive damages of this kind. In Huckle v. Money, *supra*, the actual damages appeared to be about £20 sterling, but the verdict was for £300; and the court, in refusing to grant a new trial, said: "It must be a glaring case, indeed, of outrageous damages in a tort, and

in Fairbanks v. Witter, 18 Wis. 288, 86 Am. Dec. 765, it was held that, in assessing punitive damages, the jury must not take into consideration plaintiff's expenses growing out of the litigation.

It seems that HANNA v. SWEENEY, and the later case of Hull v. Douglass (Conn.) 64 Atl. 351, are the only cases which have directly decided that punitive damages should be limited to the expense of the litigation.

Upon the other hand, in Day v. Woodworth, 13 How. 363, 14 L. ed. 181, it was held that in cases where exemplary, punitive, or vindictive damages are allowable, defendant's punishment for his delinquency cannot be measured by plaintiff's expenses in prosecuting his suit; nor can the amount of plaintiff's counsel fees be taken as the measure of punishment, or a necessary element in its infliction.

And in Kelly v. Rogers, 21 Minn. 146, it was held that the quantum of punishment which defendant deserved should not be measured by the expenses of the prosecution.

And the doctrine of HANNA v. SWEENEY, which limits the punitive damages to the expenses of litigation over and above taxable costs, is impliedly antagonized by the cases which sustain the general rule that the amount of punitive or exemplary damages to be assessed for wilful and malicious torts is properly left to the discretion of the jury in the first instance (Russell v. Bradley, 50 Fed. 515; Doremus v. Hennessy, 62 Ill. App. 391; Grant v. McDonogh, 7 La. Ann. 447; Brushaber v. Stegemann, 22 Mich. 266; Yazoo & M. Valley R. Co. v. Mitchell, 83 Miss. 179, 35 So. 339; Yazoo & M. Valley R. Co. v. Williams [Miss.] 39 So. 489; Canfield v. Chicago, R. I. & P. R. Co. 59 Mo. App. 354); as well as by those cases holding that if the verdict assessing punitive or exemplary damages is grossly excessive, or indicates passion or prejudice, the court may set it aside (Flannery v. Baltimore & O. R. Co. 4 Mackey, 111; Cutler v. Smith, 57 Ill. 252; Saunders v. Mullen, 66 Iowa, 728, 24 N. W. 529; Louisville Southern R. Co. v. Minogue, 90 Ky. 369, 29 Am. St. Rep. 378, 14 S. W. 357; Burkett v. Lanata, 15 La. Ann. 337; Brushaber v. Stegemann, and Canfield v. Chicago, R. I. & P. R. Co. *supra*; Willis v. McNeill, 57 Tex. 465; International & G. N. R. Co. v. Telephone & Teleg. Co. 69 Tex. 277, 5 Am. St. Rep. 45, 5 S. W. 517; Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152.)

which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages." In Day v. Woodworth, *supra*, in speaking of the discretion of the jury in such cases, Justice Grier says: "This [*i. e.*, the amount of 'smart money'] has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend upon the peculiar circumstances of each case. It must be evident, also, that, as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages assessed by way of example may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction." That the amount of punitive damages, in cases where such damages may be awarded, is generally left to the discretion of the jury, see also 13 Cyc. Law & Proc. p. 119, and cases there cited, and Hale on Damages, chap. 7, ¶ 83, and Sedgwick's Elements of Damages, p. 85.

This power of a jury, at common law in certain actions of tort, to award damages beyond mere compensation, and practically of such an amount as they, in their discretion, may determine, has resulted in the doctrine of punitive damages, which has been called "a sort of hybrid between a display of righteous indignation and the imposition of a criminal fine." Haines v. Schultz, 50 N. J. L. 481, 14 Atl. 488. This doctrine has been said to be exceptional, anomalous, logically wrong, and at variance with the general rule of compensation in civil cases; but, notwithstanding the objections urged against it, it prevails in many, if not in most, of the states. Sedgwick, Elements of Damages, pp. 86, 87. In this state the common-law doctrine of punitive damages, as above outlined, if it ever did prevail, prevails no longer. In certain actions of tort the jury here may award what are called punitive damages, because nominally not compensatory; but in fact and effect they are compensatory, and their amount cannot exceed the amount of the plaintiff's expenses of litigation in the suit, less his taxable costs. "Such expenses in excess of taxable costs . . . limit the amount of punitive damages which can be awarded." Maisenbacker v. Concordia Society, 71 Conn. 369–378, 71 Am. St. Rep. 213, 42 Atl. 67, and cases these cited.

The court, it is true, told the jury that, in estimating punitive damages, they might consider counsel fees and other expenses of the plaintiff to which he had been put in attempting to get compensation; but, probably by an oversight, they were not told that the amount of the punitive damages which they might award was limited by the amount of those expenses less the taxable costs in the suit; and afterwards they were told, in effect, that the amount of punitive damages was a matter that rested in their discretion, dependent upon "the degree of malice or wantonness evinced by the defendant."

There is error, and a new trial is granted.

The other Judges concur.

KENTUCKY COURT OF APPEALS.

JOSEPH MUIR
v.
MARY E. MUIR.

(— Ky. —, 92 S. W. 314.)

Alimony—future wealth.

1. Probable accretions of wealth to the husband from any source may be considered in fixing the amount to be allowed the wife on granting her a divorce.

Same—possessory right in real estate.

2. A wife, upon obtaining a divorce, may be allowed as alimony a share in a possession of real estate held by the husband with the consent of the owner.

Same—amount.

3. When a wife is granted a divorce for the fault of her husband she is entitled as alimony to enough of his estate, including earnings, to make an equivalent of the support to which she was entitled as his wife;

Case Note.—Husband's prospects as basis for alimony.—One of the elements of the rule applied in determining the amount of alimony a husband should pay his wife is the ability and opportunity of the former to earn money and to pay. Read v. Read, 28 Utah, 297, 78 Pac. 675; Halferty v. Halferty, 6 Pa. Dist. R. 613; Ex parte Spencer, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395.

From this it would appear that contemplated probable earnings and accretions of wealth may be considered in fixing the amount.

Thus, in Cralle v. Cralle, 84 Va. 198, 6 S. E. 12, the court held that, in estimating the value of a husband's estate as the basis for an allowance of a yearly sum to be paid by him as alimony, it is proper to include a legacy bequeathed to the husband, and for which a decree has been rendered in his favor by the highest court of the state.

And in Cox v. Cox, 20 Ohio St. 439, on the hearing of a petition for alimony, the court said that, in a proper case, there is no good reason why the court may not, among other things, look to and regard what the husband has in expectancy as well as what he has in possession. In this case, however,

and this should equal at least her dower interest in the estate.

Same

4. Five thousand dollars should be allowed as alimony to a woman without property, who has been contaminated with syphilis by her husband, and who is given the custody of her children, one of whom is also affected with the disease, where the husband is worth at least $15,000.

Husband and wife—divorce—syphilis—condonation.

5. Continued cohabitation does not condone the communication of syphilis by a man to his wife.

(March 22, 1906.)

CROSS-APPEALS from a decree of the Circuit Court for Nelson County granting cross-complainant a divorce; complainant appealing from the granting of the divorce, and cross-complainant appealing from the portion fixing the alimony. Reversed on cross-complainant's appeal.

The facts are stated in the opinion.

Mr. John D. Wickliffe for appellant.

Mr. John S. Kelley, for appellee:

There was no condonation.

Dunlop v. Dunlop, 3 Ky. L. Rep. 25.

O'Rear, J., delivered the opinion of the court:

Appellant, a member of a rich and distinguished family, was married at the age of twenty to appellee, who was about the same age. She was of honorable parentage, who were in modest circumstances. The parties are now about twenty-eight years old. Within a year after their marriage appellant developed the disease of syphilis. Whether contracted before or after his marriage is not shown. He continued to live with his wife, by whom there were born to him two children, there being less than two years' difference in their ages. Appellee claims that she contracted the disease from her husband before she knew he had it, and that one of the children, the elder, has also shown symptoms of the taint in his blood of this dread malady. Appellee did not then leave her husband. She says that she was humiliated by the knowledge of their affliction, but was willing to bear it in silence rather than make it public by an abandonment on that account. In the meantime appellant's conduct toward her became such as to indicate a settled aversion to her, and was so habitually cruel as to put her in fear of life or great bodily harm. She sued him for divorce on this last-named ground: but the action was dismissed on her motion before trial for reasons not affecting this case. Thereafter appellant sued her for a divorce upon the ground of abandonment. She defended, justifying her abandonment under the reasons first stated, and made them, furthermore, a ground for her claim for divorce, which she prayed for in her answer. She also prayed for support and alimony. The chancellor dismissed appellant's petition, granted appellee's prayer for divorce, and adjudged her $1,000 as alimony, and $10 per month toward the support of her children. The custody of the children was awarded the mother, and no provision

the expectancy had been realized and become a part of the husband's estate.

In computing the value of his estate for the purpose of determining the amount of alimony he should pay, the husband's interest in a profitable lumber contract which it will require several years to complete should be taken into consideration. Horning v. Horning, 107 Mich. 587, 65 N. W. 555.

The future probable gross income from the husband's real estate, which is mortgaged for less than one third of its estimated value, may be considered in estimating the value of this property for the same purpose, although it appears that he has designedly omitted to pay the interest upon the mortgages, and so brought about foreclosure expressly in order that he may thus be enabled to get the proceeds of the sale of the property after payment of the encumbrances, and so facilitate his escape from the obligation to support his family. Holmes v. Holmes, 29 N. J. Eq. 9.

The fact that a husband has little or no means of support is no ground for refusing to grant alimony to the wife he has abandoned if he is strong and healthy, and competent to work. Snedager v. Kincaid, 22 Ky. L. Rep. 1347, 60 S. W. 522; Furth v. Furth (N. J. Eq.) 39 Atl. 128.

In Canine v. Canine, 13 Ky. L. Rep. 124, 16 S. W. 367, the court held that a husband who is about thirty years of age, strong and healthy, and educated in a profitable profession, but who has no property, should be compelled to pay alimony.

In Gaston v. Gaston, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609, the court said that it is not essential, to warrant a decree for future maintenance of a wife who has obtained a divorce from her husband, that the latter shall have either separate or community property, to which resort may be had to enforce payment thereof.

In Stutsman v. Stutsman, 30 Ind. App. 645, 66 N. E. 908, it was held that a judgment against the husband for $1,000 alimony was excessive, where it appeared that at the time the husband left his wife he owned real estate worth about $50 and was earning from $40 to $50 per month, but at the time of trial he still owned the real estate and was earning but $15 per month, on the average, as a substitute letter carrier, and was in line of promotion to the place of letter carrier, which paid a salary of $50 per month.

made, though requested by appellant, for him to see them, or have them visit him. He has appealed from the decree, except that part adjudging the divorce, from which no appeal lies.

He contends that his wife was in fault, wherefore it was erroneous to allow her alimony at all. The proof, in our opinion, sustains the conclusion of the chancellor. It tended to show that appellant had, for some years before his wife quit him, spent most of his nights, or rather a great part of most of his nights, in the town of Bardstown, leaving her and her child, or children, at their home in the country, unattended frequently, and occasionally by a negress servant only. He had no business away from home on many of these occasions, but spent his time loafing about barrooms, and in company sometimes, it was shown, of dissolute women of notorious character. His treatment of his wife was unfeeling and harsh. Witnesses said he assaulted her, struck her, cursed her, abused her, and threatened her. The record leaves no doubt that he had such a settled aversion for her as to indicate a complete alienation of affection. On all the grounds charged by her including infidelity, the proof amply sustains the chancellor's finding in behalf of appellee.

Appellant's father is a rich man. As his sons reached manhood, and were married, he advanced them each about $10,000, or settled them in substantial business. After appellant's marriage, his father bought a farm of about 200 acres, known as the "Holtshouser farm," paying $10,000 for it. He took the title to himself, but put appellant in possession of it. Appellant bought another place near by, known as the "Johnson farm," for which his father paid. It is worth about $4,000. The title to it was taken to appellant. His father gave him live stock, such as horses, cows, and stock cattle, and farming implements. There was evidence that appellant's father has said that he gave all this property, except the stock cattle, to his son as an advancement, and had so charged it to him on his book of advancements. The witness further testified that appellant's father showed him the book and entries to that effect. Appellant at the time of the separation was in possession of all his property; but has since sold some of it. The lands he is yet in possession of, and has rented the farms from year to year, collecting and using the rents. He claims, though, that he is insolvent; that the Holtshouser farm does not belong to him, but belongs to his father; that the Johnson farm he has not paid for, but yet owes his father the purchase money advanced by him to buy it; that he yet owes for the personal property. His father, after the separation and after this suit was brought, was partially paralyzed, so that he ceased to attend to his business affairs, and it was also said he was unable to give his deposition in this case. During this condition, appellant, at the instance of his brother and some other relatives, executed a mortgage to his father and brother, to the bank of which his father and brother were officers and large stockholders, and to his other creditors generally, upon all his property, to secure an alleged indebtedness of about $10,000. The elder Muir did not know of this arrangement, did not authorize it, and so far as this record shows did not approve it. Other creditors named in the mortgage are shown to have been equally ignorant of its execution. Appellant is a man not lacking in understanding or education. Barring the ailment referred to, he is in good health, and is able to work, but, it seems, is not, or has not been, a successful business man. This, however, is probably due more to his habits than lack of ability. Appellee has no property, no means of support. Her father is a poor man. Her mother has no property. With this situation, what relief should the chancellor have decreed? Appellant contends nothing. Appellee, dissatisfied with the decree fixing her alimony, has prayed a cross-appeal to have it increased.

The statute is (§ 2122, Ky. Stat. 1903): "If the wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable." But this does not mean that, if the husband have no present estate, his wife shall not be entitled to alimony. His contemplated probable earnings may be the basis for such allowance. Canine v. Canine, 13 Ky. L. Rep. 124, 16 S. W. 367. Nor do we perceive why, if probable earnings, as a reasonable expectation, may properly be considered, probable accretions of wealth from any other source may not also be considered. But, before discussing that feature to a conclusion, we will take up what appellant did own, or was possessed of, at the time of the separation and of the decree. He certainly owned the Johnson farm, worth about $4,000. He owned a half dozen or more horses, a number of cows and hogs, a quantity of corn, a lot of farming implements, buggies, etc., about 15 head of stock cattle, and some household furniture. The value of all this property is not satisfactorily shown, but it is no stretch to assume from the evidence that the personal property alone was worth $1,500 or more. It was probably worth more. The Holtshouser place, worth $10,000, he had in possession. It was not rented

to him. The use of it, at least, had been given to him by his father. It is not essential that the husband should own the fee-simple title to the land in order to have the value of his interest considered in fixing alimony. Alimony is not necessarily carved out of the same estate as dower. If he owned it, or was in possession of it under even an invalid gift, so long as that possession was undisturbed, his wife's right to have the use of a part of it set apart to her as alimony is not less than if he owned it in fee simple. She would simply get less in the former than in the latter event, because her possession would in that case be as unstable as his title, but no less so. If she ought to have had the use of say one third or one half his land as part of her alimony, if he had owned it in fee simple, no less than an equal quantity of the same land should be set apart to her, if he owned a less estate in it than a fee simple. Suppose his was a life estate, or any freehold estate, she would nevertheless be as much entitled to support from it as if it were a greater.

Alimony is that provision which the law makes for the support of the wife, or of her who was the wife, out of the estate of the husband after separation, in lieu of his common-law obligation to support her as wife if they should have continued living together. She was entitled to and had his support out of all he possessed, including earnings. When he has broken up that relation, so that she can no longer partake jointly with him of such support, the law sets apart to her enough of his estate, including earnings, to make an equivalent of what she is denied by his fault. Less than that would be to put a pecuniary premium upon the husband's abandonment of his wife (which would be the highest impolicy in society), as where he saw that he was about to come into the possession of an inheritance as heir apparent, if he could get the matter of divorce over with before the inheritance was cast upon him, he would have succeeded in defeating his wife of the enjoyment of her anticipated interest in the property, which he had in prospect. Marriage, as it affects property rights, rightfully affects in some degree all that the husband then has and all that he has in prospect. For, as by experience, their mutual economy and helpfulness, the foundation of a future competency may be laid, many of the early privations undertaken and endured by young married people are in the not unreasonable expectation of future benefits, measurably certain of attainment. Many of these are admittedly too intangible to lay hold on in estimating a precipitated adjustment between the parties. But where they are reasonably certain, and particularly where they have been in a manner realized, though but tentatively, they can be and should be carried into consideration, and such a decree entered as will protect the wife, who is then cut off from the future participation, by a present allowance as nearly the equivalent of what she has been deprived, and which she rightfully would have come into the enjoyment of, as the circumstances of the case will admit. Alimony given upon a decree of divorce becomes the wife's portion in lieu of dower. McKean v. Brown, 83 Ky. 208; Hawkins v. Ragsdale, 80 Ky. 353, 44 Am. Rep. 483. Where she is entitled to alimony, it would seem to be improper to give her less, in any event, than what her dower interest in her husband's estate would have been. It would not be too much to say, in this case, that appellant's estate, out of which the alimony should be set apart to appellee, should be reckoned at at least $15,000. It may shrink upon realization, it it true. In that event, appellee would probably be unable to collect what may be finally set apart to her. The size of the allowance is not so material as what part of it is realized.

In estimating the allowance of alimony, there is no fixed standard. The matter is within the sound judicial discretion of the chancellor. It will be regulated by a number of circumstances that properly enter into the consideration. Among them is the size of the estate of the husband, and its productiveness; his income and earning capacity; his age, health, and ability to labor; the age, health, and station of the wife; and it may be added that the particular cause of the divorce may properly enter into the consideration, as will be illustrated further along. We have already discussed the estate of the husband and something of his ability to earn money and to labor to make a support for a family. It has been seen, too, that the wife is without means or other prospects. She has been subjected to a contamination by the fault of appellant that will forever be to her a burning shame, and will doubtless be a perpetual menace to her health and future usefulness. Her children, whose charge and care she has, likewise are the victims of a curse that may, and it seems in one instance now does, threaten their health. This dire calamity, an irremediable tragedy in the life of this young wife, is one, as it was caused by the fault of appellant, he should help her to bear. His share of the burden, in so far as it can be measured in money, should reasonably extend beyond the bare necessities of existence. It should go to maintain the wife and children in as good station, and with equal comforts, as they would have probably

enjoyed but for this enforced separation. Her alimony should be fixed at not less than $5,000. As part of it, she should be given the use of at least one half of the real estate of appellant, and more if necessary.

The mortgage to Muir and Wilson and others should be set aside or ignored. Section 2126, Ky. Stat. 1903, pertaining to divorce and alimony, reads: "Sales and conveyances made to a purchaser, with notice, or for the benefit of any religious society, in fraud or hindrance of the right of wife or child to maintenance, shall be void as against them." This suit was pending when this mortgage was executed. The mortgagees had notice of appellee's claim, and the pending of the action to enforce it.

As to the custody of the children, and the right of appellant to have them visit him, for the present that order will not be disturbed; but the court may reserve control of that feature of the case, so as to regulate it in the future should it be deemed advisable and proper.

Appellant contends that the offense of his disease was condoned by appellee's voluntarily cohabiting with him after she had knowledge of his condition. The statute allows cohabitation to operate as a condonement of lewdness or adultery. § 2120. But the offense is aggravated, it seems to us, for a diseased spouse to inoculate the other with a dreadful venereal ailment, possibly curable, possibly not, and then claim a condonement because further cohabitation was indulged after that fact. Dunlop v. Dunlop, 3 Ky. L. Rep. 20. A condonement is not shown here. This case is hard. The erring young man undoubtedly suffers, and will suffer, greatly. Nothing is set down here in harshness against him. This result is the law's retribution from him to her whom he has most grievously wronged.

The judgment on the original appeal is affirmed, on the cross-appeal the judgment is reversed, and the cause is remanded for judgment in conformity herewith.

Hobson, Ch. J., did not sit.

NEW JERSEY COURT OF ERRORS AND APPEALS.

KAZMIR ANDRECSIK, Plff. in Err.,
v.
NEW JERSEY TUBE COMPANY.

(— N. J. —, 63 Atl. 719.)

Master—promise to repair—assumption of risk.

1. The plaintiff complained to the superintendent at 10 o'clock in the forenoon that the machine upon which he was working was out of order. The defect was obvious. The superintendent said: "You go right ahead with the work. We are overloaded with work, and noon hour I will fix this for you." The repair was not made at the noon hour. Nevertheless, the plaintiff resumed work upon the obviously defective machine, and at 3 o'clock was injured by reason of the defect complained of.

Held, that the promise to repair was definite and specific as to time of performance, that there was no question for the jury, that the plaintiff was properly nonsuited.

Same—time of repair.

2. The servant assumes not only the ordinary risks incidental to employment, but as well all risks arising and becoming known to him during his service. The master, by promising to amend a defect complained of, as an inducement to the servant to continue, forthwith takes from the servant the risk, and thereafter, and during the period for repair, assumes it. Where the promise is general and indefinite the master's undertaking runs for a reasonable time. Approving Dowd v. Erie R. Co. 70 N. J. L. 451, 57 Atl. 248. Where it is to repair at a fixed time, it runs until the termination of the time fixed.

Same—general promise.

3. When the agreement to repair is general, *i. e.*, inferential, as to the time of its performance, if the master's promise is not performed within reasonable time for its fulfilment, and the servant continues to incur the danger in the employment after the lapse of such reasonable time, the servant assumes the risk of injuries occurring thereafter. In such case, there may be a question for the jury of reasonable time.

Same—specific promise.

4. When the agreement to repair is not indefinite, but specific as to the time of its performance, if the promise is not performed within the time specified for its fulfilment, and the servant continues in the employment after a manifest breach of the master's promise to repair, the assumption of risk by the master ceases, and the servant reassumes the risk of subsequent injuries therefrom. Where the time of performance is clearly fixed by the agreement of the parties, there is no question for the jury of a reasonable time for performance.

Same—question for court.

5. It does not follow that, whenever it

Headnotes by DILL, J.

Case Note.—Effect of master's failure to repair defects within a definite time promised, where the servant continues to work.—The above case presents with unusual clearness the distinction between a specific promise to repair a defect within a definite time and a more general and indefinite promise to repair. It also, by sustaining the nonsuit in the case, establishes that the effect of continued work after the failure to make the

is proved that a promise to repair was made and acted upon, the case is prima facie for the jury.

(June 18, 1906.)

ERROR to the Supreme Court to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Samuel Kalisch, Jr.,** and **Samuel Kalisch,** for plaintiff in error:

The master's continuing the use of the machine after notice of its defective condition constituted negligence.

Nord Deutscher Lloyd, S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 51 Am. St. Rep. 604, 31 Atl. 619; Comben v. Belleville Stone Co. 59 N. J. L. 226, 36 Atl. 473; Belleville Stone Co. v. Mooney, 60 N. J. L. 323, 38 Atl. 835, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764; Hustis v. James A. Banister Co. 63 N. J. L. 465, 43 Atl. 651; Maurer v. Gould (N. J. L.) 59 Atl. 28; Dowd v. Erie R. Co. 70 N. J. L. 451, 57 Atl. 248; Dunkerley v. Webendorfer Mach. Co. 71 N. J. L. 60, 58 Atl. 95.

When the servant shows that he relied upon a promise made to him to remedy the defect, he negatives the inference of willingness to incur the risk.

Dowd v. Erie R. Co. 70 N. J. L. 455, 57 Atl. 248.

The testimony as to the time when the superintendent said he would repair the machine was conflicting. It was therefore a question of fact for the jury to settle, and not for the court.

Kaufman v. Bush, 69 N. J. L. 645, 56 Atl. 291.

If the master failed to use reasonable care in remedying the defect, or failed in properly making the repairs, he is guilty of a breach of duty which he owed to the servant.

Maurer v. Gould and Dunkerley v. Webendorfer Mach. Co. *supra.*

Mr. **Sherrerd Depue,** for defendant in error:

The risk of the operation of this machine at the time of the plaintiff's injury was assumed by him.

Dillenberger v. Weingartner, 64 N. J. L. 292, 45 Atl. 638; Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56; Webber v. Piper, 38 Hun, 353; Hannigan v. Smith, 28 App. Div. 176, 50 N. Y. Supp. 845; Spencer v. Worthington, 44 App. Div. 496, 60 N. Y. Supp. 873; Mull v. Curtice Bros. Co. 74 App. Div. 561, 77 N. Y. Supp. 813; McCarthy v. Washburn, 42 App. Div. 252, 58 N. Y. Supp. 1125; Rice v. Eureka Paper Co. 70 App. Div. 336, 75 N. Y. Supp. 49.

The exception to the general rule regarding assumption of risks extends only during the time fixed for the performance of the promise.

Eureka Co. v. Bass, 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216; Louisville Hotel Co. v. Kaltenbrun, 26 Ky. L. Rep. 208, 80 S. W. 1163; Trotter v. Chattanooga Furniture Co. 101 Tenn. 257, 47 S. W. 425.

Dill, J., delivered the opinion of the court:

This action is brought to recover damages for personal injuries sustained by the plaintiff, while in the defendant's employ, through the defendant's alleged negligence. The plaintiff, a man twenty-eight years of age, had been employed in the defendant's mill for about two years prior to the accident,—eighteen months as helper, about two months as an assistant upon the machine, and about three months prior to the injury in charge of the machine at which he was injured. When placed in charge of the machine he was instructed as to its workings. Prior to 10 o'clock in the morning of November 11, 1903, the day upon which he was injured, the plaintiff discovered that the machine upon which he was working was out of order. He testified that this was very easy to see. About 10 o'clock he complained of this to the superintendent.

promised repairs within the definite time promised is for the court, and not for the jury, to decide. In the case of Counsell v. Hall, 145 Mass. 470, 14 N. E. 530, Holmes, J., writing the opinion of the court, sustained an exception to a refusal to give instructions to the effect that the master's promise to repair dangerous machinery entitles the servant to recover, as matter of law, if injured before the defect is remedied, and while he is reasonably expecting the promise to be performed. But in that case the promise was indefinite as to time, and the instruction rejected ignored the question of the servant's assumption of the risk after the time for performing the promise had expired. As to this the court said that in such a case "there is a very strong argument that the servant is no longer relying on the promise, but has decided to take the risk."

The whole subject of the rights of a servant who continues to work on the faith of his master's promise to remove a specific cause of danger is elaborately treated in a note in 40 L.R.A. 781 (referred to with approval in Dempsey v. Sawyer, 95 Me. 302, 49 Atl. 1035), as well as in 1 Labatt on Master and Servant, §§ 418–432. But on the exact question presented in the ANDRECSIK CASE as to the risk after the expiration of the definite time within which the master had promised to repair, there does not seem to have been much direct authority. The decisions most nearly in point are reviewed at length in the opinion of the court.

who replied: "You go right ahead with the work. We are overloaded with work, and noon hour I will fix this for you." What a third party understood the superintendent to say is not material to this decision. The foregoing is what the plaintiff asserts the superintendent promised him and was the agreement to repair upon which the plaintiff relied in resuming work. The plaintiff continued to work on the machine until the noon hour, quitting at 12 o'clock without injury. He ate his lunch near the machine, in sight of it, and was in and about the place during the noon hour. During the noon hour, from 12 o'clock to 1 o'clock, the machine was not repaired, and this was apparent to plaintiff. The defective condition of the machine when the plaintiff resumed work was obvious. At 1 o'clock the plaintiff resumed work and continued until 3 o'clock, when he was injured by this defective machine. No evidence was offered in behalf of the defense. The chief justice, who tried the case below, nonsuited the plaintiff, and, holding the promise to be definite as to the time of performance, laid down this rule: "Where the master says that he will repair the machine, or have it repaired, at a specific time, the employee is entitled to continue to operate the defective machine at the master's risk until that time has elapsed; but if, after that time, the master has not made good his word, and made the repairs, and the employee still continues to operate the machine, the risk shifts, and the employee assumes it, relieving the master." The plaintiff in error seeks to review this ruling, and for that purpose this writ of error is prosecuted.

We are of the opinion that the rule laid down by the chief justice was correct, and that the nonsuit was proper. The questions of law decisive of the case at bar have not been heretofore passed upon by this court. The plaintiff was engaged in operating a machine which was obviously defective. He was aware of the danger incident to such defective condition. The servant, by accepting employment, or voluntarily continuing therein, with the knowledge or means of knowing the dangers involved, is deemed to have assumed the risk. This rule the plaintiff seeks to avoid by proof that he notified the master of the defect, and that the master, for the purpose of inducing the plaintiff to continue in his employment, promised to remedy it. The question presented is whether the servant was chargeable, in spite of the promise, with the assumption of the risk in question and as a conclusion of law. The decision must, in the first place, depend upon the character of the promise to repair. Was it express or inferential as to time of fulfilment? If inferential, there may have been a question for the jury. If express, there was no question for the jury on that point. The words "noon hour" are definite terms: "Noon—Midday; and in exact use 12 o'clock." Century Dictionary. "Hour—a particular time; a fixed or appointed time." Century Dictionary. "Noon" designated the beginning of the period, *i. e.*, 12 o'clock; "hour," the duration of the period. It is clearly shown by the evidence that the term "noon hour" was in common use, and was well understood by both parties to mean from 12 o'clock noon to 1 o'clock P. M. The plaintiff says he quit work at 12 o'clock and went to work at 1 o'clock. Again, he was asked if he worked "before the noon hour" on the day on which he was injured. "Yes, sir," he answered, "I started at 7 and worked until 12." The words "noon hour" are used by the plaintiff and his witnesses, and always, as meaning from 12 o'clock noon to 1 o'clock P. M. In King-Ryder Lumber Co. v. Cochran, 71 Ark. 55, 70 S. W. 606, the plaintiff, who was running an edging machine in a lumber mill, discovered a defect in the machine in the morning and informed the foreman, who told him "to go on and run it until noon, when he would have it repaired." The court treated this as a promise to repair at a definite time, and it is cited by subsequent authorities as a definite promise. Otherwise the case is not in point. In the case before us, we are of the opinion that the promise to repair was not general, but specific, as to time of performance. The time when the promise to repair should have been fulfilled is too clear for reasonable controversy. There was no need of submitting that question to the jury, or any other question bearing upon the subject.

In discussing the further questions involved, it should be noted that in this case: (1) The promise to repair, made after the work was begun, was definite as to the time of performance; (2) the accident did not occur between the time of the making of the promise and before the end of the period fixed for its fulfilment; (3) the injury was subsequent to (a) the complaint, (b) the promise, (c) the agreed time of performance, and (d) the master's default. In resuming work under these circumstances, was the risk the servant's or the master's?

The two recent cases in the supreme court (Dowd v. Erie R. Co. 70 N. J. L. 451, 57 Atl. 248, and Dunkerley v. Webendorfer Mach. Co. 71 N. J. L. 60, 58 Atl. 94) have not heretofore been before this court. In both the master's agreement was indefinite as to the time when the repair was to be made. In the Dowd Case the promise

was to have it attended to "as soon as he could." In the Dunkerley Case the agreement was to remedy the fault "at the first opportunity." In the Dowd Case Mr. Justice Swayze states the law to be as follows: "The rule that the servant assumes not only the ordinary risks incident to the employment, but also such special features of danger as are plain and obvious, and also such as he would discover by the exercise of ordinary care for his personal safety, is well established in this state. [Citing cases.] The servant assumes, as well, those risks which arise or become known to him during the service as those in contemplation at the original hiring. Dillenberger v. Weingartner (1899, Err. & App.) 64 N. J. L. 292, 45 Atl. 638. To the rule that the servant assumes the obvious risks of the employment, an exception is made where the master has promised to amend the defect or to make the place safe, and the servant continues the work in reliance upon the promise. . . . The master is exempted from liability in the case of obvious risks for the reason that the servant, by continuing in the employment with knowledge of the danger, evinces a willingness to incur the risk, and upon the principle *volenti non fit injuria*. But when the servant shows that he relied upon a promise made to him to remedy the defect, he negatives the inference of willingness to incur the risk. In such a case this inference can only be drawn when the servant continues the work, although the promise is not performed within a reasonable time." 70 N. J. L. 451, at page 455, 57 Atl. 248, at page 250. We are referred to the decision of the supreme court of the state of New York in Rice v. Eureka Paper Co. 70 App. Div. 336, 75 N. Y. Supp. 49, as the leading authority for the insistment that the Dowd Case should not be approved by this court. The answer to this argument and the citation in its support is twofold. In the first place, the decision of the New York supreme court in the Rice Case is not in conflict with the Dowd Case. In the Dowd Case the promise to repair was indefinite as to time of performance by the master. The court construed it to be a general promise. In the Rice Case the New York supreme court construed the promise to repair as specific, and based its conclusion upon that construction of the promise. 70 App. Div., at pages 342 *et seq.*, 75 N. Y. Supp., at page 53. It held that, in a case where the promise was to repair at a definite time, the risk in the interim, between the time of the making of the promise and the time set for its performance, was that of the servant, and not of the master. 70 App. Div. 354, 75 N. Y. Supp. 62. In the second place, the court of appeals of New York reversed the supreme court. Rice v. Eureka Paper Co. 174 N. Y. 385, 62 L.R.A. 611, 95 Am. St. Rep. 585, 66 N. E. 979, Reversing 70 App. Div. 336, 75 N. Y. Supp. 49. The court of appeals overruled the holding below as to the character of the promise to repair, declared that it was not specific as to time of performance (174 N. Y., at page 397, 62 L.R.A. 611, 95 Am. St. Rep. 585, 66 N. E., at page 983), construed it as a promise to repair generally, indefinite as to the time of its performance (page 398 of 174 N. Y., 62 L.R.A. 611, 95 Am. St. Rep. 585, page 983 of 66 N. E.), and, proceeding upon that construction, established the law of that state in harmony with the doctrine of the Dowd Case. The doctrine of the Dowd Case is supported by the authorities cited by Mr. Justice Swayze. by the decision of the court of appeals of New York in the Rice Case, by the eminent text writers and the leading cases ably marshaled in the opinion therein, and, in addition, by the following authorities: Ray v. Diamond State Steel Co. 2 Penn. (Del.) 525, 47 Atl. 1017; Boyd v. Blumenthal, 3 Penn. (Del.) 564, 52 Atl. 330; Belair v. Chicago & N. W. R. Co. 43 Iowa, 662; Buehner v. Creamery Package Mfg. Co. 124 Iowa, 445, 104 Am. St. Rep. 354, 100 N. W. 345; Foster v. Chicago, R. I. & P. R. Co. 127 Iowa, 84, 102 N. W. 422; Brown v. Levy, 108 Ky. 163, 55 S. W. 1079; Taylor v. Nevada-California-Oregon R. Co. 26 Nev. 415, 69 Pac. 858; Pleasants v. Raleigh & A. Air-Line R. Co. 95 N. C. 195; Barney Dumping Boat Co. v. Clark, 50 C. C. A. 616, 112 Fed. 921; 1 Labatt, Mast. & S. § 427 (b) p. 1209. The rule of the Dowd Case is so generally recognized as a part of the jurisprudence of this country, and is so strongly supported by reason and justice, as to justify its adoption. We accordingly approve the decision of the supreme court of this state in Dowd v. Erie R. Co. *supra*. The approval of Dunkerley v. Webendorfer Mach. Co. *supra*, follows as a matter of course.

Thus far we have dealt with those cases where the master's promise to repair was general, and not specific, as to time of performance. We come now to consider the application of the rule to those cases where, as in this case, the time of performance is definitely fixed by the agreement of the parties. The authorities where the promise has been of this character are comparatively few. Two questions arise in a case where the promise to perform is definite:

(1) Is the *ad interim* risk between the making of the promise and the termination of the period fixed therein for its performance the master's or the servant's? It has

been held by authorities of repute that during the interim the servant assumes the risk, on the ground that, before the time definitely agreed upon for the making of the repairs, he can have had no expectation that such repairs would meanwhile be made, and therefore cannot, in the interim, have continued his service because of such expectation. Standard Oil Co. v. Helmick, 148 Ind. 457, 47 N. E. 14, and Rice v. Eureka Paper Co. 70 App. Div. 336, 75 N. Y. Supp. 49, are generally cited in support of this theory. These decisions are dependent upon facts and supported by principles not involved here. Their conclusions are reached by divergent, and not harmonious, lines of reasoning. The supreme court of Indiana subsequently, in McFarlan Carriage Co. v. Potter, 153 Ind. 107, 53 N. E. 465, disavowed this doctrine of the Helmick Case. The Rice Case was reversed by the court of appeals of New York, although upon another point. We do not agree with the rule in support of which these cases are cited, and decline to adopt it. It has also been held, and with better reason, that, as in the case of a general promise, carrying with it an implication of performance within a reasonable time, so also in the case of a promise to remedy a defect at a definite and agreed time, the master *eo instante* assumes the risk from the time of the making of the promise up to and including the expiration of the time specified for its fulfilment. Louisville Hotel Co. v. Kaltenbrun, 26 Ky. L. Rep. 208, 80 S. W. 1163, upon application for rehearing, 26 Ky. L. Rep. 669, 82 S. W. 378; King-Ryder Lumber Co. v. Cochran, 71 Ark. 55, 70 S. W. 606; Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521; McFarlan Carriage Co. v. Potter, 153 Ind. 107, 114, 116, 53 N. E. 465, 467, 468, Overruling on this point Standard Oil Co. v. Helmick, *supra*. The rule that a promise to repair, made by the master, acted upon by the servant, creates an assumption of risk by the master, beginning *instanter* upon the making of the promise and continuing thereafter to the end of the period named for the repair, is supported by sound reason, by the weight of authority, and is in accord with the reasoning of the Dowd Case.

(2) At whose risk does the servant continue his work after the lapse of the time specified for the making of the repair, and after the master has obviously defaulted in the performance of such promise? Upon this point we are referred to the following cases: Louisville Hotel Co. v. Kaltenbrun, 26 Ky. L. Rep. 208, 80 S. W. 1163; Eureka Co. v. Bass (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216; Trotter v. Chattanooga Furniture Co. (1898) 101 Tenn. 257, 47 S. W. 425. The facts in the Louisville Hotel Case differ from those in the case at bar, since the injury there occurred between the making of the promise and the time set for its performance. That case does not decide that the master's assumption of risk terminates with the time set for the performance of the promise, which is the question before us. The case goes no further than to hold that, upon the making of the promise, the master *instanter* assumes the risk and is responsible for an injury occurring between the time of the making of the promise and the time appointed for its fulfilment. In the Bass Case the complaint of the servant was of a defective fuse, and the master promised "to get other fuse" and told him to "do the best he could with what he had." The court treated this as a general promise involving the question of a reasonable time, but in arriving at its conclusion it used the following language pertinent to the question before us: "The injury, in other words, must have occurred within the time at which the defects were promised to be removed. If the employee continues to expose himself to the danger by remaining in the service longer than this, he does so in face of the fact that the promise of the employer is violated, and that he has no reasonable expectation of its fulfilment. He can no longer, therefore, rely upon the promise, and must know that his continuance in service under such circumstances is equally as hazardous and hopeless of remedy as if no assurance or promise had ever been made. A promise already broken can afford no reasonable guaranty of the fulfilment of any expectation based on its disappointed assurances." In the recent case of Gunning System v. Lapointe (1904) 212 Ill. 274, 72 N. E. 393, there is a *dictum—dictum* because the promise in the case was a general one—that, "if the promise is to repair by a fixed time, then, after the expiration of the time fixed, the servant assumes the risk from the defects complained of." Trotter v. Chattanooga Furniture Co. is the only one of the three cases cited which is in point. In that case the promise was definite to repair "in the morning." The promise was not kept, but the servant continued his work, and the injury occurred ten days after the time set for the performance of the promise. The court held that the servant had reassumed the risk, citing in support of its decision the Bass Case, relying upon the language of that case already quoted. In the Trotter Case the court, affirming the judgment below, nonsuiting the plaintiff, said: "We do not

think it would have been proper, in this case, to have submitted to the jury the question as to what was reasonable time. The promise fixed the time."

A well-reasoned authority in point is the decision of the supreme court of Wisconsin (1901) in Albrecht v. Chicago & N. W. R. Co. 108 Wis. 530, 53 L.R.A. 653, 84 N. W. 882. In that case a locomotive fireman was ordered about 5 o'clock in the afternoon to go on a trip, which was subsequently made at 10 o'clock P. M. At 7:15 P. M. he went on board the engine and performed various duties. At 8 o'clock P. M. he complained to the engineer of the absence of a shield over the glass indicating the oil supply, stating that he had searched for the shield and failed to find it, adding, "You must get a shield for this lubricator;" to which the engineer replied, "All right, I will get one." The engineer did not keep his promise. The fireman was in and about the cab from 8 o'clock to 10 o'clock P. M., and then went on the trip in spite of the fact that the engineer had not kept his promise, and although the fireman saw that the shield was not in its place. At 1 o'clock in the morning the glass burst, and he was injured by reason of the absence of the shield. The court below held the engineer's undertaking to be a general promise and left it to the jury to determine the question of reasonable time. The supreme court, reversing the holding below, construed the promise made at 8 o'clock P. M. to be a promise on the part of the engineer to furnish the shield before the trip was made at 10 o'clock P. M., and held the promise to be definite as to time of performance, and that there was no question to be submitted to the jury, saying: "When the time expired for the engineer to redeem his promise, under the circumstances indicated, respondent was no longer protected thereby in his right to hold defendant responsible for the consequences of the danger. . . . In proceeding thereafter in defendant's service he voluntarily assumed the risk of which he had complained as a part of his contract of employment, and is remediless for what followed."

We agree with Mr. Labatt, in his recent work on Master and Servant, that "the only rational view seems to be that, as soon as the period contemplated for the removal of the dangerous conditions terminated, the servant's position is precisely what it would have been if no promise had been given; that is to say, he reassumes the risk." Vol. 1, § 425, p. 1204. Upon the point of the termination of the master's liability, Mr. Justice Swayze, in the Dowd Case, says: "The failure to perform the promise [to repair 'as soon as he could'] within a reasonable time indicates that it will not be performed, and the continuance in the work thereafter justifies the inference that the servant did not rely upon performance of the promise, but was willing to take the risk. He is therefore in such case held to have assumed the risk, notwithstanding the promise." 70 N. J. L. at page 456, 57 Atl., at page 250. This proposition relating to a general promise is supported by the following authorities: Eureka Co. v. Bass, *supra;* Illinois Steel Co. v. Mann, 170 Ill. 200, 40 L.R.A. 781, 62 Am. St. Rep. 370, 48 N. E. 417; Gunning System v. Lapointe, *supra;* Burns v. Windfall Mfg. Co. 146 Ind. 261, 45 N. E. 188; Breckenridge Co. v. Hicks, 94 Ky. 362, 42 Am. St. Rep. 361, 22 S. W. 554; Stalzer v. Jacob Dold Packing Co. 84 Mo. App. 565; Gulf, C. & S. F. R. Co. v. Brentford, 79 Tex. 619, 23 Am. St. Rep. 377, 15 S. W. 561; Stephenson v. Duncan, 73 Wis. 404, 9 Am. St. Rep. 806, 41 N. W. 337; Corcoran v. Milwaukee Gaslight Co. 81 Wis. 191, 51 N. W. 328; Ferriss v. Berlin Mach. Works, 90 Wis. 541, 63 N. W. 234.

Similarly, where the agreement as to the time of performance is by the parties clearly defined, the failure to perform the promise within the agreed time indicates that it will not be performed; and a continuance of the work thereafter justifies the inference that the servant no longer relied upon the performance of the promise, but was willing to take the risk. In such case, also, the servant must be held, where there is a manifest breach of the agreement to repair, to have reassumed the risk at the expiration of the time fixed for the performance of the master's promise. The principle applicable to both classes of cases is that, when the time appointed for the removal of the conditions giving rise to the danger expires, whether that period be expressly or impliedly fixed, the servant's relation to the master is precisely the same as if no promise had been made. He is relegated back to his original position and reassumes the risk. After the master has manifestly defaulted in his promise to repair, the servant reassumes work with no existing contract on the part of the master to assume the risk, and therefore continues at his (the servant's) risk. In the present case, where the promise was to repair the defect at a specified time, and where the master had manifestly failed to make the repair within the time specified, the servant, in resuming work thereafter, brought himself again within the original rule, and assumed not only such special features of danger as were plain and obvious, but such as he would discover by

the exercise of ordinary care for his personal safety.

The conclusions which we have reached negative the proposition that, whether it is proved that a promise to repair was made and acted upon, the case is prima facie for the jury. The master in the making of the promise, and the servant in acting upon it, fix their mutual relation. Where the promise to make the repair is indefinite or inferential as to the time of the performance, there may arise a question for the jury of reasonable time,—on the part of the master for performance, and consequently on the part of the servant for continuing to incur the risk in the expectation that the master will perform. Where, however, the promise is express as to time of performance, the rule is otherwise. A promise made by the master, acted upon by the servant, to repair a specified defect at a definite time thereafter, creates an assumption of the risk by the master. This assumption of risk begins forthwith upon the making of the promise, and continues thereafter and throughout the period fixed for the making of the repair; but this undertaking of the master terminates and his liability thereunder ceases at the end of that period. The termination of the master's undertaking and the termination of the period fixed for repair are identical. In such case, it would be error to submit to the jury any question relating thereto which would enable the jury to find, in conflict with the terms of the contract, that the responsibility on the part of the master still existed after the expiration of the period during which the master had agreed to undertake it. As a rule, whether the promise is general or definite is a question for the court.

It follows, therefore, both on principle and by authority, that the nonsuit below was proper.

The judgment of the Supreme Court is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

MICHAEL O'CONNELL, et al., Plffs. in Err.,
v.
PINNACLE GOLD MINES COMPANY.

(— C. C. A. —, 140 Fed. 854.)

Mine—right of locator's heirs.

The possessory right of the locator of a mining claim, who has not applied for a patent, does not, under the Federal law giving locators, their heirs and assigns, the right of possession, go directly to the heirs of the locator upon his death, as beneficiaries of the government, but they take by descent from the locator; so that the estate is subject to the jurisdiction of the probate court.

(October 2, 1905.)

ERROR to the Circuit Court of the United States for the Northern Division of the District of Washington to review a judgment in defendant's favor in an action brought to recover possession of a mining claim. Affirmed.

The facts are stated in the opinion.

Argued before Gilbert, Ross, and Morrow, Circuit Judges.

Messrs. **Victor E. Palmer, G. Ward Kemp,** and **Will H. Thompson,** for plaintiffs in error:

A court must have jurisdiction not only of the parties, but of the *res*, in order to render a judgment that will be binding.

Herman, Estoppel & Res Judicata, § 104; Stewart v. Lohr, 1 Wash. 341, 22 Am. St. Rep. 150, 25 Pac. 457; Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 234.

The heir takes direct from the United States as its designated donee, and not by descent from the deceased settlers or locator.

Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; Hershberger v. Blewett, 55 Fed. 180; Cooper v. Wilder, 111 Cal. 195, 52 Am. St. Rep. 165, 43 Pac. 591; Wittenbrock v. Wheadon, *supra;* Brown v. Belmarde, 3 Kan. 41; Hutchinson Invest. Co. v. Caldwell, 152 U. S. 66, 38 L. ed. 356, 14 Sup. Ct. Rep. 504; McCune v. Essig, 118 Fed. 273; Horsky v. Moran, 21 Mont. 345, 53 Pac. 1064.

The interest in a mining claim prior to the payment of any money for the granting of a patent for the land is nothing more than a right to the exclusive possession of the land, based upon conditions subsequent, a failure to fulfil which forfeits the locator's interests in the claim.

Black v. Elkhorn Min. Co. 163 U. S. 450, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101; McCune v. Essig; Hershberger v. Blewett; and Cooper v. Wilder,—*supra;* Rogers v. Clemmans, 26 Kan. 522; Wittenbrock v. Wheadon, *supra.*

As the right of possession given by the

Case Note.—Descent of unpatented mining claim.—In Barringer & Adams on the Law of Mines and Mining, p. 318, it is stated that the possessory title, or title before patent, of a mining claim, is a vested interest in real estate, and will be protected by law, and cannot be devested by anyone except the United States, which can do so by a re-

statute is a pure bounty, or gratuity, and not based on any previous legal right in the locator as against the government, it is, under no circumstances, subject to the debts of the locator after his death.

Emerson v. Hall, 13 Pet. 409, 10 L. ed. 223; Todd v. Masterson, 61 Tex. 618; Blagge v. Balch, 162 U. S. 458, 40 L. ed. 1036, 16 Sup. Ct. Rep. 853; United States v. Realty Co. 163 U. S. 441, 41 L. ed. 219, 16 Sup. Ct. Rep. 1120.

Messrs. J. B. Metcalfe, James B. Howe, and John S. Jurey, for defendant in error:

Mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States.

1 Lindley, Mines, 2d ed. § 535; 1 Snyder, Mines, 1st ed. § 450; 20 Am. & Eng. Enc. Law, 2d ed. pp. 724-726; Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313; Manuel v. Wulff, 152 U. S. 505, 38 L. ed. 532, 14 Sup. Ct. Rep. 651; Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735; Gwillim v. Donnellan, 115 U. S. 49, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110; Noyes v. Mantle, 127 U. S. 348, 32 L. ed. 168, 8 Sup. Ct. Rep. 1132; Billings v. Aspen Min. & Smelting Co. 2 C. C. A. 252, 10 U. S. App. 1, 51 Fed. 338; St. Louis Min. & Mill. Co. v. Montana Min. Co. 171 U. S. 650, 43 L. ed. 320, 19 Sup. Ct. Rep. 61; Lohmann v. Helmer, 104 Fed. 178; Oscamp v. Crystal River Min. Co. 7 C. C. A. 233, 19 U. S. App. 18, 58 Fed. 293; Harris v. Equator Min. & Smelting Co. 3 McCrary, 14, 8 Fed. 863; Gillis v. Downey, 29 C. C. A. 286, 56 U. S. App. 567, 85 Fed. 483; Hale & N. Gold & S. Min. Co. v. Stoney County, 1 Nev. 104; People v. Taylor, 1 Nev. 109; Phœnix Min. & Mill. Co. v. Scott, 20 Wash. 48, 54 Pac. 777; McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076; Merriett v. Judd, 14 Cal. 60; Spencer v. Winselman, 42 Cal. 479; Hughes v. Devlin, 23 Cal. 502; Watts v. White, 13 Cal. 321; Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1; Robertson v. Smith, 1 Mont. 410; Melton v. Lambard, 51 Cal. 258.

The estate and property of a locator of an unpatented claim, dying intestate, descend to his heirs, under the law of descent, the same as any other real property, or interest in real property.

Manuel v. Wulff; Gwillim v. Donnellan; and Billings v. Aspen Min. & Smelting Co., —*supra;* 1 Snyder, Mines, 1st ed. § 450.

Gilbert, Circuit Judge, delivered the opinion of the court:

Ejectment was brought by the plaintiffs in error, as heirs at law of James O'Connell, deceased, to establish title to and recover possession of an undivided five-sixths inter-

peal of the law creating it or by any other legislative revocation of the grant; and, as such an interest, it is an estate in fee, inheritable, and subject to the laws of descent and distribution of realty.

In addition to the cases cited by the court in O'Connell v. Pinnacle Gold Mines Co., the following authorities bear on the question:

In Suessenbach v. First Nat. Bank, 5 Dak. 477, 41 N. W. 662, the court said that it is now believed to be settled law that a mining claim, concerning which all the laws, rules, regulations, and customs governing the same have been complied with, prior to the issuance of the patent, is property, and capable of being transferred, mortgaged, and inherited.

The possessory and usufructuary interest of a miner in a mining claim and ditch property on the public lands was held to be an estate of inheritance, in Hughes v. Devlin, 23 Cal. 502.

In Keeler v. Trueman, 15 Colo. 143, 25 Pac. 311, it was held that the interest in a mining claim which has not been patented is deemed and treated as an interest in real estate, which descends to the claimant's heirs; and the administrator of the estate of the claimant cannot maintain an action to quiet the title to the claim.

And in Carrhart v. Montana Mineral Land & Min. Co. 1 Mont. 245, it was held that a claim to a quartz lode is real estate under the laws of the territory of Montana, and descends to the heirs of a claimant; and his administrator cannot maintain an action of ejectment for the possession of the claim.

With reference to dower interest in unpatented mining claims, 1 Snyder on Mines & Mining, § 470, says: "While the general rule at common law was that dower attached to open and improved mines and quarries, and that rule is recognized in this country, so far as it relates to mining and mines elsewhere than on the public domain of the United States, wherever the right of dower exists, nevertheless it did not attach to copyhold lands at the common law; and, for reasons equally cogent, it may be considered as settled that no dower attaches to unpatented mines in this country."

Practically the only authority on the subject of dower in such claims is Black v. Elkhorn Min. Co. 163 U. S. 445, 41 L. ed 221, 16 Sup. Ct. Rep. 1101, which is discussed by the court in O'Connell v. Pinnacle Gold Mines Co.

Black v. Elkhorn Min. Co. *supra*, was relied on in Phœnix Min. & Mill. Co. v. Scott, 20 Wash. 48, 54 Pac. 777, in which it was held that the possessory right which the locator of a mining claim has under U. S. Rev. Stat. § 2322, U. S. Comp. Stat. 1901, p. 1425, is not community property.

But in Jacobson v. Bunker Hill & S. Min. & Concentrating Co. 3 Idaho, 126, 28 Pac. 396, such a right was held to be community property under the laws of the territory of Idaho. This decision, however, was rendered prior to that in Black v. Elkhorn Min. Co. *supra*.

est in certain unpatented quartz mining claims situated in Okanogan county, state of Washington, located by said James O'Connell, who died intestate in March, 1899. The defendants in error claimed title under an administrator's sale of the estate of said decedent and a deed from Alice O'Connell O'Neil, a surviving sister of James O'Connell, who, by the decree of the probate court, was adjudged to be the sole heir at law of said decedent. The circuit court gave judgment on the pleadings for the defendants in error.

The sole question presented in this court is whether the possessory rights of a locator of a mining claim, who has not applied for a patent or paid the purchase price therefor, and has done nothing to perfect title, other than to do the annual assessment work required by law, pass upon the death of the locator directly to his heirs as the designated donees or beneficiaries of the United States under the mining laws, and not by descent from the deceased locator. The plaintiffs in error contend that the rule applied to the construction of each of the other land laws should be applied in construing the mining laws, that the possessory rights of James O'Connell to his unpatented mining claims never formed a part of his estate, and that therefore the probate court of Okanogan county never had jurisdiction to dispose of the same.

It is true that, in construing the law relative to pre-emption, homestead, timber culture, and donation land claims, it is uniformly held that the heirs of a settler or claimant, where the word "heirs" is used in such statutes, take directly from the United States as its donees, and not by descent. This construction is based upon the peculiar wording of the statutes. Thus, the pre-emption law provides that, in case of the death of the pre-emptor before consummating his claim, patent shall issue to his heirs. In the homestead law, the provision is that in case of the death of the entryman his widow, and in case of her death his heirs or devisee, shall be entitled to the patent. In the donation land law it is provided that, in case of the death of donation settlers, their children or heirs shall be entitled to the patent. In all these laws the grant is to the children or heirs only in case of the death of the settler before the issuance of the patent. But in the mining laws the grant is different. Section 2322, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1425), gives to the locators, their heirs and assigns, the exclusive right of possession and enjoyment of the surface of the claim and of the veins apexing therein; and in § 2324 (U. S. Comp. Stat. 1901, p. 1426) it is provided that a claim on which the necessary work has not been done for one year shall be open to relocation unless the original locators, their heirs, assigns, or legal representatives, shall resume work before relocation. In addition to this, the locator of a mining claim is given a higher estate than is given to the settler or locator under any other of the land laws. He is given the right to extract and convert to his own use all the ores and precious metals which may be found within the borders of his claim without buying or paying for the land. His claim may be assigned, conveyed, mortgaged, and taken under execution.

In Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313, the court said of unpatented mining claims: "They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the states and the Federal government. This claim may be sold, transferred, mortgaged, and inherited without infringing the title of the United States."

In Belk v. Meagher, 104 U. S. 279–283, 26 L. ed. 735–737, it was said: "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent."

That language was quoted with approval in Noyes v. Mantle, 127 U. S. 353, 32 L. ed. 170, 8 Sup. Ct. Rep. 1132, and in Sullivan v. Iron Silver Min. Co. 143 U. S. 434, 36 L. ed. 214, 12 Sup. Ct. Rep. 555, and other cases.

In Manuel v. Wulff, 152 U. S. 505–510, 38 L. ed. 532–534, 14 Sup. Ct. Rep. 651, 653, the court said: "And by § 2322, Rev. Stat. [U. S. Comp. Stat. 1901, p. 1425], it is provided that, when such qualified persons have made discovery of mineral lands and complied with the law, they shall have the exclusive right to possession and enjoyment of the same. It has therefore been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States, and that, when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession."

It is said, against the force of these quotations from the decisions of the Supreme Court, that the remarks of the court in regard to the nature of the mining locator's estate and its descent by inheritance were in the nature of *dicta*, since no question of the right of heirs was presented. We think, however, that they are more than mere *dicta*, and that they must be regarded, reiterated, as they have been, in so many decisions, as having been intended to express affirmatively the recognition by that court of the nature of such an estate as it has been

settled and defined by the uniform rulings of the courts of the states in the mining country. In Billings v. Aspen Min. & Smelting Co. 2 C. C. A. 252, 10 U. S. App. 1, 51 Fed. 338, the circuit court of appeals for the eighth circuit held that an unpatented mining claim passes by descent to the heirs at law of the deceased locator.

The plaintiffs in error cite the case of Black v. Elkhorn Min. Co. 163 U. S. 445, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101, as authority for their contention. That case goes no further than to hold that a dower right is not attached to the locator's estate in an unpatented mining claim. That conclusion was reached upon a consideration of the terms of the grant to the locator in which, the court said, there was no grant of any right to the wife, but that the right was granted to the locator and to his heirs and assigns, "coupled with no condition that hampers the right to convey by encumbering it with an inchoate right of dower." The court reasoned that if a locator could, of his own act, abandon his claim, so as to cause it to revert to the United States, he might assign his right to another, without the consent or signature of his wife. That decision does not affect the question here presented.

The judgment of the Circuit Court is affirmed.

MISSOURI SUPREME COURT.

SUE I. BALDWIN O'DAY, Exrx., etc., of John O'Day, Deceased, et al., Appts.,
v.
JOHN O'DAY et al.

(193 Mo. 62, 91 S. W. 921.)

Insufficiency of estate—contribution by devisees.

1. Where a testator directs the payment of his debts, and then makes specific devises and bequests among the natural subjects of his bounty, undertaking to make them as equal as practicable, the court should not, in case the estate proves insufficient to pay the debts and satisfy the devises and bequests in full, make a distinction between the recipients of testator's bounty, but all should be required to contribute ratably so as to preserve the equality.

Specific devise.

2. A bequest of a certain amount, with power to select all or any part of it in notes belonging to the testator, becomes, upon the exercise of the power of selection, specific.

Demonstrative legacy—abatement.

3. If the fund out of which a demonstrative legacy is to be paid is ample to satisfy it, it will stand on the same footing as specific legacies, with respect to abatement in case the residue of the estate is not sufficient to pay the debts.

Charging realty with payment of legacies.

4. The blending of real and personal estate in the residuary clause of a will is of itself sufficient to charge the residuary real estate with the payment of legacies.

Executory devise—power to destroy.

5. A provision in a will that, in case of the death before majority of either of two of testator's children, his share should go to the other, is not defeated by a provision vesting the control of such shares in trustees, with the expressed desire that the real estate should not be disposed of unless absolutely necessary; since such provision does not confer a power of sale.

(January 31, 1906.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Greene County in defendants' favor in an action brought to secure a construction of and establish rights under the will of John O'Day, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Delaney & Delaney and E. W. Banister, for appellants:

The debts of the estate must be paid primarily out of the residuary personal estate.

Case Note.—Order of abatement to pay debts, as between demonstrative legacies and specific legacies or devises.—The repugnance of the courts to specific legacies, and their partiality for general ones, have created a third class styled demonstrative, which call for a specified amount payable out of a particularly designated fund or piece of property belonging to the testator. These partake to some extent of the attributes of both the other classes. They are so far like general legacies that they are not liable to ademption when the testator parts with the fund or property out of which they are to be paid, in which event resort may be had to the general assets of the estate; and they then become general legacies in fact, and are subject to abatement with such legacies. On the other hand, if this fund or property at the time of the testator's death still exists and belongs to him, the legacy is primarily payable out of it; it then approaches a specific legacy in its nature, and will not suffer abatement with the general legacies upon a failure of the general assets to discharge the testator's debts. Page, Wills, § 774; Pom. Eq. Jur. § 1133; Redf. Wills, 137; 1 Underhill, Wills, § 406; Giddings v. Seward, 16 N. Y. 365; Crawford v. McCarthy, 159 N. Y. 514, 54 N. E. 277; Morriss v. Garland, 78 Va. 223; Mullins v. Smith, 1 Drew & S. 210.

The cases are few in which the question of precedence in abatement has arisen between specific and demonstrative legacies, which is somewhat surprising in view of the

If this proves insufficient, then the entire personal estate is liable,—general legacies first contributing ratably, and then specific legacies, and, if necessary, next, residuary real estate, and, next, real estate specifically devised.

Bootle v. Blundell, 1 Meriv. 193; M'Kay v. Green, 3 Johns. Ch. 56; Livingston v. Newkirk, 3 Johns. Ch. 312; Rogers v. Rogers, 1 Paige, 188, 3 Wend. 506, 20 Am. Dec. 716; French v. Mastin, 19 Mo. App. 614; Beck v. Kallmeyer, 42 Mo. App. 576; McQueen v. Lilly, 131 Mo. 9, 31 S. W. 1043; Chinn v. Stout, 10 Mo. 709; Stokes v. O'Fallon, 2 Mo. 32; Brant v. Brant, 40 Mo. 278; 2 Woerner, Am. Law of Administration, § 489: 3 Jarman, Wills, p. 449.

Except for the provisions of the statute, real estate, whether specifically devised or devised in residuary clause, cannot be charged with payment of debts, unless expressly charged by the terms of the will; or unless charged by necessary implication; or unless the intention of the testator so to charge is manifest from all the terms of the will taken together.

Wright v. Denn, 10 Wheat. 205, 6 L. ed. 203; Archer v. Deneale, 1 Pet. 585, 7 L. ed. 272; Harmon v. Smith, 38 Fed. 482; Lupton v. Lupton, 2 Johns. Ch. 614; Thompson's Appeal, 7 Sadler (Pa.) 220, 11 Atl. 455.

The residuary clause does not expressly, or by implication, charge the real estate with the payment of debts. The language does not blend the two kinds of property, but is used distributively.

Lupton v. Lupton, 2 Johns. Ch. 625; Riley's Appeal, 34 Pa. 291; Brill v. Wright, 112 N. Y. 129, 8 Am. St. Rep. 717, 19 N. E. 628; McCorn v. McCorn, 100 N. Y. 511, 3 N. E. 480; Briggs v. Carroll, 117 N. Y. 289,

numerous cases where the abatement of general legacies is involved. No hard and fast rule can be formulated as to which of these two classes should abate first, since the courts strive to give effect to what they think would have been the intention of the testator could he have foreseen the contingency causing the difficulty. The question, therefore, is always one of the interpretation of the will. Recourse must be had to it and other proper circumstances to discover what preference the testator would probably have had with reference to his legatees in order to apply that preference to the abatement of the legacies. It is not a surprising matter, therefore, to find demonstrative legacies abating sometimes with specific legacies and sometimes before them.

Thus, it has been held that, to the extent of the value of the property out of which it is payable, when this is not greater than the legacy, a demonstrative legacy is to be treated in some respects as specific, and is liable to abate with specific legacies in the payment of debts; and, where certain bank stock charged with the payment of a demonstrative legacy was applied to the discharge of the testator's debts, the legatees of such stock were entitled to ratable contribution from all the specific legacies not so applied. Dugan v. Hollins, 11 Md. 41.

Where the testator devised specific portions of land to his sons, and bequeathed to one daughter so much of the proceeds of the sale of his mill property, bank stock, and other personalty, as to make her share equal to what he had advanced to another daughter, and the personal estate was insufficient to pay both the legacy and the testator's debts, it was held that the daughter's legacy was a demonstrative one, and that it and the devises to the sons should abate ratably. Armstrong's Appeal, 63 Pa. 312. The court said: A demonstrative legacy "differs from a general legacy in this,—that it does not abate in that class, but in the class of specific legacies (citing 1 Roper, Legacies, 153). . . . In the marshaling of assets for the payment of the debts of a testator, specific devises of land abate proportionably with specific and demonstrative legacies,"—citing Re Barklay, 10 Pa. 387; Hallowell's Estate, 23 Pa. 223.

Where a testator devised land to his oldest son subject to the payment of a specified sum of money, and the residue of the estate was bequeathed to his other children, and the will expressly stated that the oldest son was to have no portion of the residue, adding that he was made equal with the other children "in the devise of my plantation to him,—that is to say, in the consideration he pays for the same,"—it was held that, upon the insufficiency of the personal estate to pay the testator's debts, the legacy to the other children was demonstrative, and was chargeable on the land devised, and must abate *pro rata* with the devise according to the value of each. Knecht's Appeal, 71 Pa. 333.

Where a testator devised a specified parcel of land and certain personalty to one son, and directed his executors to sell certain other land at such time as, in their judgment, it would bring the largest price, and out of the proceeds thereof to discharge certain indebtedness of another son, and to pay a specified sum to the last-mentioned son's wife; and the land, after a time, was sold, and produced just enough to discharge the said indebtedness and to pay the said legacy,—it was held that the daughter-in-law's legacy, though demonstrative, must abate to the extent necessary to reimburse the executors for the money they had expended in paying the taxes upon the land between the date of the testator's death and the sale of the land; and that the first-named son's legacy was a specific one, and not subject to abatement with the daughter-in-law's demonstrative legacy. Dunn v. Renick, 40 W. Va. 349, 22 S. E. 66.

22 N. E. 1054; Re Rochester, 110 N. Y. 159, 17 N. E. 740.

General legacies and demonstrative legacies, which cannot be paid in full out of the corpus designated, are not chargeable on residuary real estate, unless expressly charged by the will; or unless the intention of the testator so to charge the realty is manifest from all the provisions of the will; or unless such intention appears by necessary implication.

13 Am. & Eng. Enc. Law, p. 110; Wright v. Denn, 10 Wheat. 204, 220, 6 L. ed. 303, 308; Laurens v. Read, 14 Rich. Eq. 259; Mathewson's Petition, 12 R. I. 146; DeFreest v. DeFreest, 19 N. Y. Week. Dig. 97; Re Rochester; Brill v. Wright; McCorn v. McCorn; and Briggs v. Carroll,—*supra;* Clift v. Moses, 116 N. Y. 144, 22 N. E. 393.

Even if the language of the will shows that testator intended to make John and Allie O'Day equal with Sue I. B. O'Day and her children, it will not be inferred that he intended to charge real estate to accomplish such purpose.

Okeson's Appeal, 59 Pa. 99; 2 Woerner, Am. Law of Administration, 491; Morris v. Sickly, 133 N. Y. 456, 31 N. E. 332; Turner v. Gibb, 48 N. J. Eq. 526, 22 Atl. 580; Duvall's Estate, 146 Pa. 176, 23 Atl. 231; Dickerman v. Eddinger, 168 Pa. 240, 32 Atl. 41; Duncan v. Wallace, 114 Ind. 169, 16 N. E. 137.

The residuary personalty being insufficient to pay debts, and the personalty being primarily liable for the payment of debts, the general legacies are adeemed first.

3 Jarman, Wills, 449; 2 Woerner, Am. Law of Administration, § 449; 1 Redf. Wills, p. 868; Wallace v. Wallace, 23 N. H. 154; Humes v. Wood, 8 Pick. 478; Wms. Exrs. p. 437.

The bequest to John O'Day and A. C. O'Day is a general legacy.

Bradford v. Haynes, 20 Me. 105; Wallace v. Wallace, 23 N. H. 149; Re Salmon, 3 Dem. 270; Maybury v. Grady, 67 Ala. 147; McFadden v. Hefley, 28 S. C. 317, 13 Am. St. Rep. 675, 5 S. E. 812; Everitt v. Lane, 37 N. C. (2 Ired. Eq.) 548; Tomlinson v. Bury, 145 Mass. 346, 1 Am. St. Rep. 464, 14 N. E. 137; Dickin v. Edwards, 4 Hare, 276; Hancock v. Abbey, 11 Ves. Jr. 179; Martin v. Osborne, 85 Tenn. 420, 3 S. W. 647; 1 Roper, Legacies, 218.

The power of selection merely empowers legatees to convert the general into a demonstrative legacy.

Gilmer v. Gilmer, 42 Ala. 9; Walton v. Walton, 7 Johns. Ch. 258, 11 Am. Dec. 456; Martin v. Osborne, *supra;* Gelbach v. Shively, 67 Md. 498, 10 Atl. 247; Additon v. Smith, 83 Me. 551, 22 Atl. 470; Byrne v. Hume, 86 Mich. 546, 49 N. W. 576; Re Newcomb, 98 Iowa, 175, 67 N. W. 587; Smith v. Fellows, 131 Mass. 20.

The bequest of the 75 bonds to Sue I. B. O'Day and her children is specific.

Ashburner v. Macguire, 2 Bro. Ch. 108, 2 White & T. Lead. Cas. in Eq. 4th Am. ed. 672; Spencer v. Higgins, 22 Conn. 521; Gardner v. Printup, 2 Barb. 88; Langdon v. Astor, 3 Duer, 478; Corbin v. Mills, 19 Gratt. 438; Re Salmon, *supra;* Towle v. Swasey, 106 Mass. 100; Hayes v. Hayes, 45 N. J. Eq. 461, 17 Atl. 634; Stout v. Hart, 8 N. J. L. 414; Georgia Infirmary v. Jones, 37 Fed. 750; Starbuck v. Starbuck, 93 N. C. 183; Gilbreath v. Alban, 10 Ohio, 64; Gelbach v. Shively, *supra;* Bradford v. Brinley, 145 Mass. 81, 15 N. E. 1.

Mr. J. T. White, for respondent Thomas K. O'Day:

If the same instrument that creates the executory devise gives an absolute power of disposition to the first taker, this power creates an irreconcilable repugnancy and inconsistency between it and the executory devise.

In case of such repugnancy it is the executory devise that is destroyed, and not the power.

4 Kent, Com. 4th ed. § 270; Jackson ex dem. Livingston v. Robins, 16 Johns. 538; Jackson ex dem. Brewster v. Bull, 10 Johns. 19; Ide v. Ide, 5 Mass. 500; Burbank v. Whitney, 24 Pick. 146, 35 Am. Dec. 312; McRee v. Means, 34 Ala. 369; Johnson v. Com. 82 Ky. 117; Hoxsey v. Hoxsey, 37 N. J. Eq. 21; Van Horne v. Campbell, 100 N. Y. 287, 53 Am. Rep. 166, 3 N. E. 316, 771; McKenzie's Appeal, 41 Conn. 607, 19 Am. Rep. 525; Kelley v. Meins, 135 Mass. 231; Armstrong v. Kent, 21 N. J. L. 509; Newland v. Newland, 46 N. C. (1 Jones, L.) 463; Ramsdell v. Ramsdell, 21 Me. 288; Ferris v. Gibson, 4 Edw. Ch. 710; Melson v. Doe, 4 Leigh, 408; Riddick v. Cohoon, 4 Rand. (Va.) 547; Wolfer v. Hemmer, 144 Ill. 554, 33 N. E. 751; Fisher v. Wister, 154 Pa. 65, 25 Atl. 1009; Randall v. Josselyn, 59 Vt. 557, 10 Atl. 577; Jones v. Bacon, 68 Me. 34, 28 Am. Rep. 1; Rona v. Meier, 47 Iowa, 607, 29 Am. Rep. 493; Howard v. Carusi, 109 U. S. 725, 27 L. ed. 1089, 3 Sup. Ct. Rep. 575; Wead v. Gray, 78 Mo. 59; Roth v. Rauschenbusch, 173 Mo. 582, 61 L.R.A. 455, 73 S. W. 664; Gannon v. Albright, 183 Mo. 252, 67 L.R.A. 97, 105 Am. St. Rep. 471, 81 S. W. 1162; Holmes v. Godson, 8 De G. M. & G. 152.

Messrs. Tatlow & Mitchell, for other respondents:

Where the testator bequeaths pecuniary legacies without providing a special fund for their payment, and subsequently mingles all his property, real and personal, in one common fund, which he disposes of as a residue,

it will be presumed that he intends the legacies shall be paid out of the real property comprising the residue in case the personal estate proves insufficient.

1 Underhill, Wills, § 397, p. 542; Showalter v. Showalter, 38 Ill. App. 208; Corrigan v. Reid, 40 Ill. App. 404, (Ill.) 30 N. E. 444, 143 Ill. 402, 32 N. E. 387; American Cannel Coal Co. v. Clemens, 132 Ind. 163, 31 N. E. 786; Hill v. Bean, 86 Me. 200, 29 Atl. 986; Wilcox v. Wilcox, 13 Allen, 252; Blaney v. Blaney, 1 Cush. 107; Peebles v. Acker, 70 Miss. 356, 12 So. 248; McQueen v. Lilly, 131 Mo. 9, 31 S. W. 1043; 3 Pom. Eq. Jur. 2d ed. § 1247a; Massaker v. Massaker, 13 N. J. Eq. 264; Dey v. Dey, 19 N. J. Eq. 137; Corwine v. Corwine, 24 N. J. Eq. 582; Paxson v. Potts, 3 N. J. Eq. 313; Turner v. Gibb, 48 N. J. Eq. 526, 22 Atl. 580; First Baptist Church v. Syms, 51 N. J. Eq. 363, 28 Atl. 580; Price v. Price, 52 N. J. Eq. 326, 29 Atl. 679; Lassiter v. Wood, 63 N. C. 360; Perkins v. Caldwell, 79 N. C. 441; Robinson v. McIver, 63 N. C. 645; Moore v. Beckwith, 14 Ohio St. 129; English v. Harvey, 2 Rawle, 305; Hackadorn's Appeal, 11 Pa. 89; McCredy's Appeal, 47 Pa. 442; Blake's Estate, 134 Pa. 240, 19 Atl. 850; Collins's Appeal, 148 Pa. 139, 23 Atl. 1108; Markley's Estate, 148 Pa. 538, 24 Atl. 75; Weiler's Estate, 169 Pa. 66, 32 Atl. 101; Mathewson's Petition, 12 R. I. 145; Moore v. Davidson, 22 S. C. 94; Jaudon v. Ducker, 27 S. C. 295, 3 S. E. 465; Jamieson's Petition, 18 R. I. 385, 28 Atl. 333; Hutchinson v. Gilbert, 86 Tenn. 464, 7 S. W. 126; Bird v. Stout, 40 W. Va. 43, 20 S. E. 852; Lewis v. Darling, 16 How. 1, 14 L. ed. 819.

After all of the personal estate not specifically bequeathed has been exhausted, specific legacies and devises abate *pro rata*, and demonstrative legacies, so far as the fund upon which they are charged will extend for their payment, abate ratably with specific legacies.

1 Am. & Eng. Enc. Law, 2d ed. p. 56, Abatement of Legacies; Pom. Eq. Jur. 1138; Roper, Legacies, 2d Am. ed. 410; Wms. Exrs. 7th ed. 1371; Roberts v. Pocock, 4 Ves. Jr. 150; Lambert v. Lambert, 11 Ves. Jr. 607; Acton v. Acton, 1 Meriv. 178; Creed v. Creed, 11 Clark & F. 509; Florence v. Sands, 4 Redf. 206; Armstrong's Appeal, 63 Pa. 312; Cryder's Appeal, 11 Pa. 72; Dugan v. Hollins, 11 Md. 41; Gelbach v. Shively, 67 Md. 501, 10 Atl. 247; Myers v. Myers, 88 Va. 131, 13 S. E. 346; Gaw v. Huffman, 12 Gratt. 628; Alsop v. Bowers, 76 N. C. 168; Crawford v. McCarthy, 159 N. Y. 519, 54 N. E. 277; Walls v. Stewart, 16 Pa. 275; Morriss v. Garland, 78 Va. 215.

The legacy to the respondents John and A. C. O'Day is a specific legacy.

18 Am. & Eng. Enc. Law, p. 716; Everitt v. Lane, 37 N. C. (2 Ired. Eq.) 548; Perry v. Maxwell, 17 N. C. (2 Dev. Eq.) 488; 1 Underhill, Wills, § 414; Pratt v. Pratt, L. R. 1 Ch. Div. 491; Blundell v. Pope (N. J. Eq.) 21 Atl. 456; Waters v. Hatch, 181 Mo. 262, 79 S. W. 916.

Burgess, P. J., delivered the opinion of the court:

John O'Day on the 8th day of June, 1901, executed his last will, and the plaintiffs herein were appointed therein to execute said will. This suit is for the purpose of having said will construed, and it was filed in the circuit court of Greene county, Missouri, on the ——— day of August, 1902, by said Sue I. B. O'Day and said E. W. Banister, and John Baldwin O'Day, Catherine O'Day, and Thomas K. O'Day, infants, and children of the marriage of deceased testator with Sue I. B. O'Day, were made parties defendant. John O'Day and A. C. O'Day, children by a former marriage, were also joined as defendants. After the institution of the suit, at her personal request, Sue I. B. O'Day was also made a party defendant. The infants, John Baldwin O'Day, Catherine O'Day, and Thomas K. O'Day, were duly served with process, and T. J. Delaney was thereupon appointed guardian *ad litem* for said infant defendants. It being apparent to said T. J. Delaney that a conflict of interest might arise between said John Baldwin O'Day and Catherine O'Day named in the will, on the one side, and the posthumous child, T. K. O'Day, on the other, the appointment of said T. J. Delaney as guardian *ad litem* for Thomas K. O'Day was, at his own suggestion, set aside, and J. T. White, Esquire, was appointed guardian *ad litem* in his stead. The testator died seised of a number of tracts of real estate and possessed of a large amount of money and notes.

Only such parts of the will as seem to be necessary to a proper understanding and solution of the questions involved in this suit will be recited, and such are as follows:

"First. I will and direct that all my just debts and funeral expenses be paid by my executors, hereinafter named, as soon as practicable after my death.

"Second. I give, devise, and bequeath to my wife, Sue I. B. O'Day, and to my children, John Baldwin and Catherine, who are minors, as tenants in common, and not as joint tenants, all the following described real estate. . . . To have and to hold all of said several tracts or parcels of land, with all of the buildings, structures and improvements thereon or appertaining thereto, as such tenants in common, and to their heirs and assigns forever. I also give and bequeath to my wife, Sue I. B. O'Day, and said two minor children, John Baldwin and

Catherine, the seventy-five thousand dollars (par value) of railroad bonds which are in the hands of E. W. Banister, as agent for me, and in the event that I shall sell any or all of said bonds, then in lieu of the said bonds so sold I give to said three persons above mentioned the proceeds of said bonds, or a sum equal to such proceeds of said bonds so sold, said $75,000 of bonds, or the proceeds of any or all thereof, to be divided equally among said three persons. And in case either of said children, John Baldwin or Catherine, shall die before I do, or at any time before he or she reaches the age of majority, it is my will that the share of the child so dying, whether of the property hereinbefore or hereinafter devised or bequeathed, shall go to the survivor of said children.

"Third. I give, devise, and bequeath to my sons, Allie and John (both of whom are of age), the following described real estate: . . . To have and to hold all of said several tracts or parcels of land, with all the buildings and improvements thereon or thereto appertaining, as tenants in common, and not as joint tenants, to them and their heirs and assigns forever. I also give to my said sons, John and Allie, one hundred thousand dollars in cash, or at their option they may take all or any part of said amount in notes belonging to me at the time of my death, at the face value thereof, said sum of one hundred thousand dollars, whether in cash or notes, or part cash and part notes, to be divided equally between them, share and share alike."

"Sixth. All the residue and remainder of my estate, real and personal, and wherever the same is situated, whether now owned or hereafter acquired by me, I give, devise, and bequeath to my wife, Sue I. B. O'Day, and my four children, Allie, John, John Baldwin, and Catherine, share and share alike, so that none of said five persons shall receive or have any preference over the others, or either of them, as to said residuary estate. It is my wish that my estate shall be divided as herein provided for, without the necessity for any partition or other suit or suits, and I direct and request that my wife and children make an earnest effort to divide said residuary estate among themselves without resorting to any outside aid; and in order to facilitate and make such division possible, in case said John Baldwin O'Day and Catherine O'Day, or either of them, shall not have arrived at the age of majority at the time such division is undertaken, I hereby authorize, empower and direct the executor or executors of this will to act for said minor children, or either of them, in making the division of said residuary estate; and I do for that purpose invest said executor or executors with full power and authority to act for said minor children, or either of them, and to make such division, including the right, authority and power to make, execute and deliver any deed, deeds or other instruments, writing or assurances of any kind which may be necessary or proper to effectuate and carry out a division of said residuary estate as herein contemplated, and I do hereby direct that any deed or other instrument in writing made, executed and delivered by my said executors or executor in charge of my estate, in the name of and for and on behalf of said minor children, or either of them, in order to effectuate such division of said residuary estate, shall have the same force and effect as if the same were executed and delivered by said children, or either of them, for whom said instrument is so made, and they, or either of them, were at the time of its execution and delivery of full age and capacity to execute the same."

By the seventh clause of said will it is provided as follows: "I desire that my wife, Sue I. B. O'Day, shall after my death have the care, charge, custody, and control of the estates of my two minor children, John Baldwin and Catherine, so long as she remains a widow, but in case she shall remarry, as soon as that event occurs I direct that all the estates of said two minor children shall vest in and be transferred to said E. W. Banister, in trust for said children, until their respective majority. And whether the said estates be under the care and charge of my wife or of said Banister, I vest them, and each of them, while acting as such trustee, with full power to manage and control the same, but it is my desire that the real estate which forms a part of the estate of said minors be preserved and not disposed of unless it is absolutely necessary or unquestionably advisable. And I direct that neither my wife nor said Banister be required to give bond while holding, controlling or handling said estate as executor, trustee or curator."

By the will specific devises of real estate were made to Sue I. B. O'Day and to her two children then living, and specific devises were also made to John O'Day and A. C. O'Day, children aforesaid; but no provision whatever was made for the posthumous child, nor was any reference made to said child in the will.

The testator died seised of a large number of tracts of real estate not specifically devised, and died possessed of $55,131.40 in cash, which sum was on deposit in his name in the bank of the Holland Banking Company, also possessed of 32 bonds of the St. Louis & San Francisco Railroad Company, also the sum of $31,669.93, which was on deposit in the National Exchange Bank, also a

large amount of notes of the face value of about $260,000, and other personal property. The $55,131.40 on deposit with the Holland Banking Company was the proceeds of the $43,775 bonds of the St. Louis & San Francisco Railway Company mentioned in the will, and especially bequeathed to Sue I. B. O'Day and her two children. Many of the notes owned by O'Day at the time of his death were worthless. The estate proved insufficient to pay the debts and satisfy the legacy of $100,000 to John O'Day and Allie C. O'Day, children by a former marriage, and one of the questions involved in this litigation is how this shortage should be met and out of what property paid. At the time of executing his will said testator owned $75,000 of bonds (par value) and other personal property, consisting mainly of notes and bonds. A short time before his death he sold 43 of his bonds, to wit, $43,000, par value, and realized thereon the sum of $51,730.44, and this sum was converted into a draft and deposited in the bank of the Holland Banking Company, at Springfield, to the credit of the testator, and was not mingled with any other fund, nor was any sum added to or taken therefrom by him; and from the time of such sale to the time of his death such sum was carried intact and separate and distinct from all other moneys owned by him. The evidence showed that such sum was, by the direction of said testator, placed on deposit with the Holland Banking Company, and that no other account was carried by said testator at said bank, but that all the rest of his bank dealings were had with the National Exchange Bank of Springfield, Missouri. The evidence further shows that the testator died possessed of other personal property, consisting, as stated, mainly of notes and cash, and that the real value thereof did not exceed $100,000, of which $31,669.93 was cash, exclusive of said deposit aforesaid. It appears that debts amounting to several thousand dollars were standing against O'Day's estate and paid, so that after such payment there was not sufficient personal estate, besides the $75,000 of bonds, above mentioned, to pay the $100,000 legacy to John O'Day and Allie C. O'Day. Before the institution of this suit the executors had paid said Sue I. B. O'Day the said sum of $51,730.44 realized from the sale of $43,000 (par value) of said bonds; and they had paid to John O'Day and Allie C. O'Day the sum of $25,000 out of the cash on hand in the National Exchange Bank at the time of the testator's death and out of moneys collected since the death of the testator. Before the rendition of the judgment in this suit John O'Day and Allie C. O'Day filed suit against the posthumous child, Thomas K. O'Day, to partition the lands to them specifically devised, and all of said lands, except the tract known as the old "O'Day homestead," were partitioned, and the interests of said parties were adjusted, the share of said Thomas K. O'Day being decreed as one-sixth interest in all of said lands; and said Thomas K. O'Day was also decreed entitled to one sixth of all the personal property of which testator died possessed and which was bequeathed to others; and he was also decreed entitled to one sixth of all the residuary estate, real and personal.

The evidence shows that the executors advanced to John O'Day and Allie C. O'Day the sum of $25,000, that this sum was paid out of the general fund of $31,669.93, and that the debts were also paid out of this fund and out of money collected after the death of the testator. It appears that at the time the testator made his will he had on hand about $260,000 of notes, and that he thought at least $165,000 of said notes were good, and that he believed at the time of making said will that his estate was ample to meet the legacy of $100,000 to his sons. There was some evidence tending to show that defendants John O'Day and A. C. O'Day made an election to take certain of the notes in lieu of the cash bequest, or as part of said bequest; but on this the evidence is conflicting and unsatisfactory. Over the objection of plaintiffs, defendants John and A. C. O'Day were permitted to introduce evidence tending to show that by the provisions of the will the properties, by value, aggregated about three fifths for Sue I. B. O'Day and her children, and two fifths for John and A. C. O'Day.

On the evidence adduced the court made and entered the following decree:

"Now comes on this cause to be heard, and the plaintiffs appearing in person, and the defendants John O'Day and Allie C. O'Day appearing in person and by attorney, W. D. Tatlow, and the defendant Sue I. B. O'Day appearing by attorney, Thos. J. Delaney, by consent of parties and request of said defendant and the defendant minors, John Baldwin O'Day and Catherine O'Day, appearing by their guardian *ad litem*, T. J. Delaney, and the defendant minor, Thomas K. O'Day, appearing by his guardian *ad litem*, J. T. White, and this being a petition by the said executor and executrix, praying for the construction of the last will of the said John O'Day, deceased, the court doth find: That the said John O'Day, deceased, died on July 30, 1901, and left a last will and testament, which has been duly probated in the probate court of Greene county; that the plaintiffs are executor and executrix of the said last will and testament, duly qualified and acting as such; that the said John O'Day, deceased, left surviving him his widow, the said Sue I.

B. O'Day, and children, John O'Day and Allie C. O'Day, who are of age, and John Baldwin O'Day, Catherine O'Day, and Thomas K. O'Day, who are minors; that the said T. J. Delaney has been duly appointed the guardian *ad litem* by this court for the minors, John Baldwin O'Day, and Catherine O'Day, and that the said J. T. White has been duly appointed by this court as guardian *ad litem* for the said minor Thomas K. O'Day; and that the said guardians *ad litem* have filed their several answers for the said minors herein. The court doth further find that the minor defendant Thomas K. O'Day was born after the death of said John O'Day, deceased, and was not mentioned, or in any manner provided for, in said will. The court doth further find that the said John O'Day, deceased, by the said will, intended to dispose of all his property, and by one clause of the said will he made the following provision: 'I also give to my sons, John and Allie, $100,000 in cash, or, at their option, they may take all or part of said amount in notes belonging to me at the time of my death at the face value thereof, said sum of $100,000, whether in cash or notes, or part cash and part notes, to be divided equally between them, share and share alike.' That said last will and testament contains, also, the further following provisions: 'I also give and bequeath to my wife, Sue I. B. O'Day, and said two minor children, John Baldwin O'Day and Catherine O'Day, the $75,000 (par value) of railroad bonds which are now in the hands of E. W. Banister as agent for me, and in the event that I should sell any or all of said bonds, then in lieu of the said bonds so sold I give to the said three persons above mentioned the proceeds of the said bonds so sold, the said $75,000 of bonds, or the proceeds of any or all thereof, to be equally divided among said three persons.' That by the two said clauses and by the other provisions of said will said testator intended to give said John O'Day and Allie C. O'Day two fifths of his estate and said Sue I. B. O'Day and said John Baldwin and said Catherine O'Day three fifths of his said estate. That the said John O'Day, by other provisions of the said will, devised a portion of his real estate, hereinafter described, to the said Sue I. B. O'Day and John Baldwin O'Day and Catherine O'Day, and also a portion of his real estate, described in said will, to the said John O'Day and Allie C. O'Day.

"The court doth further find that the said John O'Day, deceased, at the time of his death owned the real estate above mentioned and devised as aforesaid, and, in addition thereto, a large amount of real estate not specifically devised, which last-mentioned real estate is not particularly described in said will, and that said John O'Day at the time of his decease owned the $75,000 of bonds above mentioned, and that there has been inventoried by the executors other personal property consisting mainly of cash and notes, which other personal property the court finds to be of the value of not more than $100,000, and that debts have been allowed against the said estate amounting to several thousand dollars, so that there is not sufficient personal estate besides the bonds above mentioned to pay the $100,000 legacy to John and Allie C. O'Day and the said debts. The court doth further find that by the residuary clause of the said will that the said John O'Day, testator, left all his estate, real and personal, not specially devised as above set forth, to the five persons named in the said will, Sue I. B. O'Day, John Baldwin O'Day, Catherine O'Day, John O'Day, and Allie C. O'Day. The court doth further find that the $43,000 (par value) of the aforesaid bonds were sold by the said John O'Day, testator, during his lifetime, and the proceeds thereof were deposited in the bank of the Holland Banking Company and kept and maintained by the said John O'Day, testator, intact and separate from all other money owned by him as a distinct fund; that he left at the time of his death cash on hand and in bank $31,669.93. The court doth further find that it was the intention of the said John O'Day, testator, by the said last will, to give to the said Sue I. B. O'Day, John Baldwin O'Day, and Catherine O'Day the said $75,000 bonds or the proceeds thereof as a specific legacy, and that it was the intention of the said testator, by the said will, to give to said John O'Day and Allie C. O'Day the sum of $100,000 as a general legacy, with the power in said John and Allie C. to select said amount in cash on hand at time of his death, or notes, or part cash and part notes, thereby making the same a specific legacy. The court doth further find that the executor and executrix have paid over to said Sue I. B. O'Day, for herself and for the said John Baldwin and Catherine O'Day, the sum of $51,730.44, the proceeds of the $43,000 bonds deposited in Holland's Bank as aforesaid, and that the said executor and executrix have paid over to the said John O'Day and Allie C. O'Day the sum of $25,000 in part payment of their said legacy of $100,000, which amount was paid out of the cash left on hand by the said John O'Day, testator, at the time of his decease and moneys collected since his death. The court doth further find that the real estate mentioned in the said will and specifically devised to the said John O'Day and Allie C. O'Day has been, by partition proceedings in this court, partitioned between the said John O'Day and Allie C. O'Day and the said

infant, Thomas K. O'Day, and the interest of the said Thomas K. O'Day has been set off to him under the order of this court in and to the real estate last above mentioned, with the exception of one tract thereof, known as the 'O'Day homestead,' and hereinafter more particularly described. The court doth further find that the said Thomas K. O'Day is entitled to an undivided one-sixth interest in all the real estate specifically devised to the said Sue I. B. O'Day, John Baldwin O'Day, and Catherine O'Day, and also entitled to an undivided one-sixth interest in the real estate devised to John O'Day and Allie C. O'Day and not partitioned as above set forth; and that the said infant is also entitled to a one-sixth of all the personal property left by the said testator at the time of his decease after the payment of the debts of said deceased and expenses of administration, and also entitled to an undivided one-sixth interest in all the real estate left by the said testator at the time of his death, and not specifically devised, as above mentioned.

"It further appearing to the court that the said Thomas K. O'Day, minor, by his guardian *ad litem*, T. J. White, has prayed for a partition of the real estate last above mentioned, belonging to the residuary estate of the said John O'Day, testator, and all the parties interested or having any claim or interest in the said residuary real estate being now before this court, it is therefore considered, ordered, and adjudged as follows: That the $75,000 of railroad bonds above mentioned, or the proceeds thereof, be and is adjudged to be a specific legacy. That the $100,000 bequeathed by the said will to the said John O'Day and Allie C. O'Day be, and is hereby, adjudged a general legacy. But if said John O'Day and Allie C. O'Day shall select of the notes and cash on hand at the time of the testator's death amounting to $31,669.93 the sum of $100,000, less the $25,000 already received by them, taking the said notes at their face value, in the payment of the said legacy, then the same shall become and be a specific legacy, and the said executor and executrix are hereby ordered to exhibit to the said John O'Day and Allie C. O'Day all the notes which were in their hands at the time of the making of the inventory of the said estate (except the proceeds of the bonds above mentioned), and the proceeds of such notes as have been collected may be selected in lieu of the above notes themselves; a reasonable time being allowed for such selection after such exhibition. And if the said John and Allie C. O'Day, from the said cash and from the said notes and the proceeds thereof, at the face value of the said notes, such face value being the amount thereof, with accrued interest at the time of such selection, shall select the sum of $75,000 (they having already received the sum of $25,000 in cash as aforesaid), then the said $100,000 legacy by such act and selection shall be and become a specific legacy of the same class and on the same footing as the other specific legacies of personal property mentioned in the said will; and such of the proceeds of said notes and such cash as was on hand at the time of the making of the said inventory as has been applied and used in the payment of debts and expenses of said estate shall be replaced and refunded out of the proceeds of said residuary estate, and, if there be not enough of such proceeds for that purpose, then the said Sue I. B. O'Day, John Baldwin O'Day, and Catherine O'Day shall contribute their proportional part in the proportions hereinafter provided. It is further ordered and adjudged that the residuary real estate above mentioned, and hereinafter more particularly described, shall be sold for the purpose of paying the debts allowed against the said estate and the said general legacy; and, if the said residuary real estate shall be insufficient to pay all the debts which are allowed, or may hereafter be allowed, against the said estate and the expense of administering the said estate, then the same shall be paid out of the personal property not specifically devised, and the said legacy of $100,000 shall abate, if necessary, in an amount sufficient to pay the remainder of the said debts and expenses of administering the said estate. But if said John O'Day and Allie C. O'Day should select as above set forth the sum of $75,000 in cash and notes, then their said general legacy shall become a specific legacy; and in such case it is ordered and adjudged that, if the residuary real estate, as aforesaid, be insufficient to pay the said debts and costs of administration, and there be insufficient personal property not selected by the said John O'Day and Allie C. O'Day, as aforesaid, to pay the said debts, then, in that case, the said specific legacy of $100,000 to the said John O'Day and Allie C. O'Day, and the said specific legacy of $75,000 in railroad bonds to the said Sue I. B. O'Day and the said John Baldwin O'Day and the said Catherine O'Day shall abate, so as to pay said debts and expenses of administering the said estate; that is to say, the legacy of $100,000 shall abate to make up two fifths of such deficiency, and the legacy of railroad bonds shall abate to make up three fifths of such deficiency. It is further ordered, adjudged, and decreed that the said residuary real estate, in accordance with the prayer of the answer filed by the said J. T. White, guardian *ad litem* for the said Thomas K. O'Day, be partitioned among the

several parties according to their several interests; that is to say, one-sixth interest to said Thomas K. O'Day, one-sixth interest to the said Sue I. B. O'Day, a one-sixth interest to the said John Baldwin O'Day, a one-sixth interest to the said Catherine O'Day, a one-sixth interest to the said John O'Day, and a one-sixth interest to the said Allie C. O'Day.

"It being apparent to the court that the last-mentioned real estate, from its character and location and from the nature and amount of the property sought to be divided and the number of owners thereof, cannot be partitioned in kind without great prejudice to the owners, it is therefore ordered and adjudged that the said real estate, which is described as follows, to wit: . . . That the same be sold, and one sixth of the proceeds thereof belonging to the said minor Thomas K. O'Day be paid to him, and that the remaining proceeds of such sale be held for the purpose above provided by the terms of this decree. It is further ordered and adjudged that the said executor and executrix be, and are hereby, appointed commissioners of this court to sell the said real estate under this order during the session of the circuit court in the several counties where the same is situate as soon as practicable, and report their proceeding at the next term of this court after such sales. It is further ordered, adjudged, and decreed that the said Thomas K. O'Day be and is entitled to an undivided one-sixth interest in all the real estate above mentioned, devised by the said will to the said Sue I. B. O'Day, John Baldwin O'Day, and Catherine O'Day, all of which real estate is situated in Greene county and state of Missouri, to wit: The said Thomas K. O'Day may maintain an action in partition for the division of the same, and may have immediate possession of the same; and an order of this court may issue therefor upon application of the said guardian *ad litem* or the general guardian of said minor, if such should hereafter be appointed.

"The court doth further order, adjudge, and decree that the said Sue I. B. O'Day shall pay to the duly appointed curator of the said minor Thomas K. O'Day a one-sixth of all rents which have been collected by her from the real estate specifically devised to the said Sue I. B. O'Day, John Baldwin O'Day, and Catherine O'Day, and the said Sue I. B. O'Day and the said E. W. Banister be ordered to pay over to the duly appointed curator of the said minor all the rents which have been collected by them from the real estate set apart to the said minor Thomas K. O'Day, in the partition proceedings between the said John O'Day and Allie C. O'Day and the said Thomas K. O'Day, which real estate consists of the property known as the 'Gott hotel property,' in the city of Springfield, Greene county, Missouri. That the said Sue I. B. O'Day and said E. W. Banister, as executor and executrix, and in their own proper person, are hereby ordered to make an accounting for such rents as they have received, as aforesaid, with the duly appointed curator of the said minor, and such curator, on motion in this cause, may procure such accounting. It is further ordered, adjudged, and decreed that the said executor and executrix, in making distribution of the personal estate in their hands shall pay and deliver to the duly appointed curator of the said minor a one-sixth of all the personal property and money which has come or may hereafter come into their hands as such executor and executrix, including a one-sixth of the said bonds and proceeds thereof and a one-sixth of the cash and notes and other personal property belonging to the said estate after the payment of all debts and the expenses of administering the said estate,—that is to say, that all the debts of the said estate shall be first paid, and after such payment a one-sixth of all the said personal property shall be paid over and delivered to the duly appointed curator of the said infant, Thomas K. O'Day, and after the residuary real estate above mentioned shall have been sold, and the proceeds thereof appropriated to the payment of the debts, except the one-sixth interest of the said minor, the said minor shall be charged with a sum and amount out of his share in the said personal estate equal to his share of said proceeds of said residuary real estate; and such amount shall be deducted from the personal property delivered to him."

On the rendition of this decree the plaintiffs, Sue I. B. O'Day, as executrix, and E. W. Banister, as executor, the defendants John Baldwin O'Day and Catherine O'Day, by their guardian *ad litem*, T. J. Delaney, the defendants John O'Day and Allie C. O'Day, and the defendant Sue I. B. O'Day, in her individual capacity, filed their several motions for a new trial, and filed their several motions in arrest of judgment, and the same were by the court overruled, and exceptions to such rulings were duly made by the respective parties at the time. Thereupon applications for appeal were made by all said parties, duly verified by affidavits, and appeals were allowed, and leave was given to all said parties to file a bill or bills of exceptions within and including the first day of the following term, to wit, January term, 1903, and a bill of exceptions, concurred in by all appellants and for all appellants, was on said first day of said term duly presented to the judge of said Greene county circuit court for allowance, and on said day the same was signed

by said judge and allowed, and on said day the same was filed with the clerk of said circuit court.

The plaintiffs, Sue I. B. O'Day, executrix, and E. W. Banister, executor, and John Baldwin O'Day and Catherine O'Day, minors, defendants, and Sue I. B. O'Day, in her individual capacity, assign the following errors: "The court erred in admitting incompetent, irrelevant, and immaterial testimony offered by defendants John O'Day and A. C. O'Day. The court erred in excluding competent, relevant, and material testimony offered by plaintiffs, and offered by the minor defendants, and offered by Sue I. B. O'Day in her individual capacity. The finding of facts by the court is not warranted by the evidence. The conclusion of law reached by the court in said decree is not the law, and is not sustained by the facts found. The construction placed upon said will is against the law and against the manifest intention of the testator. The court erred in declaring that said will charged the residuary real estate with the payment of debts. The court erred in declaring that said will charged the residuary real estate with the payment of the legacy to John and Allie O'Day. The court erred in declaring that the right of selection was a subsisting right in John O'Day and Allie C. O'Day. The court erred in declaring the law to be that such selection, when made, would convert said bequest into a specific legacy. The court erred in declaring the law to be that under the terms of the will the specific bequest to Sue I. B. O'Day and her children abated ratably with the bequest to John and Allie O'Day. The court erred in declaring the law to be that the specific devises abated ratably to make good the legacy to John and Allie O'Day. Under the testimony the bequest to John and Allie O'Day is a general one, or, at best, a demonstrative one, so far as notes are concerned (if right of selection subsists), and adeems for the payment of debts if residuary property be insufficient to pay debts and such legacy of $100,000."

It is insisted by plaintiffs that the debts of the estate must be paid out of the residuary personal estate, and that, if this prove to be insufficient, the entire personal estate is liable; general legacies first contributing ratably, and then specific legacies, next, if necessary, residuary real estate, and next, real estate specifically devised; because, under our statute, debts cannot be defeated by the provisions of a will. Upon the other hand, it is contended that where the testator directs the executors to pay off and discharge the debts out of the estate and follows this direction by disposing of his property, real and personal, among his children, in substantially equal parts, by separate devises or bequests, and charges no specific property, either real or personal, with the payment of his debts, the rule in this state is that all devisees and legatees are to contribute equally toward the payment of such debts,—that the debts are not to be paid entirely out of the real estate, nor are specific legacies to have preference over general legacies in the order of abatement of such debts, but that all legacies and devises are required to contribute ratably. In Brant v. Brant, 40 Mo. 266, the testator directed his executors to pay off and discharge all of his debts out of his estate as soon as it could conveniently be done after his decease. He then bequeathed and devised his estate, by specific legacies and devises, to his wife and his children in nearly equal parts. The debts were paid off by the executors from the rents collected from the real estate. Upon a bill to marshal assets, it was held, as the testator had designated no specific fund from which the debts were to be paid, it was his intention that the devisees and legatees should contribute ratably to the abatement of the encumbrance, and that the whole burden of the debts could not be thrown upon the personal estate. The rule contended for by respondents John and Allie C. O'Day seems to be announced in Brant's Will Case, *supra*, wherein it is said: "If a man dies intestate, owing debts, payment will be made in the regular order pointed out by the statute commencing with the personalty; but, if he devises and bequeaths his whole property specifically, both real and personal, it is an indication that the objects or recipients of his bounty shall have the estate in the proportion designated in the will. Where, therefore, the testator makes various specific gifts of movable and immovable property, and large amounts of debts resulting from contingent liability perhaps, which were unexpected and not contemplated by him at the time of his decease, are proved up against the estate, will it be believed or considered that it was intended by him that that part of the property which consisted wholly of the realty should be entirely indemnified from his debts by the rest; or, in other words, that the law should step in and make a distinction where he had made none, and where he had made equal provision for all and each and every specific devisee and legatee, it should be held that one set of beneficiaries should hold their estate intact, whilst another set should be thrown upon the world destitute and beggared? Yet the enforcement of the rule pressed in the argument for the plaintiff would lead precisely to this result. The just and equitable manner of construing the will is to give it such an application as, in the arrangement for

the payment of debts, the plan of the testator in the distribution of the property shall fairly be carried out, and no disappointment shall happen to those who appear to have been equally the subjects of his bounty and affection. Of course, this opinion as to the true construction of the will must be considered as applying to the specific devises and legacies, and not to any residuary clauses that may be contained in the instrument."

A will is always to be construed in accordance with the intent of the testator, which is to be arrived at, not from single words or clauses or sentences, but from a consideration of the whole will, its general design and scope; and, in order to a proper and practical construction of a will, technical rules must yield to the obvious intent of the testator, as gathered from all parts of the instrument. Such being the rule observed by this court in the construction of wills, there is no escape from the conclusion that the testator in this case intended, in the distribution of his property among his wife and four children, to make them as nearly equal as practicable; and, this being the case, the court should make no distinction between the parties who are the recipients of his bounty where the testator made none. This view is in accord witth the principle announced in Brant's Will Case, *supra*, and, while that case is not in line with authorities cited by counsel for appellants, it is to be commended for its sound logic and the equitable principles promulgated by it. And although forty years have elapsed since it was decided, it has never been overruled, or even criticized, and, having for so long a time been recognized as the law of this state, should not at this late date be interfered with.

But it is claimed by plaintiffs that the will passed upon in Brant's Case is to be differentiated from the will in the case at bar, in that the testator, O'Day, in his will did not specifically dispose of his whole estate, as was done by the will in Brant's Case; that the concluding sentence in that case, "Of course, this opinion as to the true construction of the will must be considered as applying to the specific devises and legacies, and not to any residuary clauses that may be contained in the instrument,"—means any will with specific dispositions of property followed by a residuary clause; and that, as it is manifest, not only from the will, but from the evidence adduced, that the testator thought he had ample personal property to liquidate all of his debts and pay all legacies, specific and general, he could not have intended to charge his real estate. But it is apparent from the reading of the will in that case that it contained no residuary clause, so that there was nothing to call for such observations, and should not be regarded as in any way detracting from or nullifying the opinion in that case. Defendants do not contend that the rule announced in that case applies to the residuary property, but their position is that there can be no such thing as residuary property until after all previous devises, bequests, and debts have been paid. By the residuary clause of the will, it is expressly provided that all the residue and remainder of the testator's estate is devised and bequeathed to his wife and four children, share and share alike, and whether or not the residuary real estate is exempt from the payment of debts until all of the personal property is exhausted is entirely immaterial in so far as the rights of the parties are concerned, for practically the same result would follow if the personal estate should be first exhausted. Nor can the Brant Case be distinguished from this upon the ground that all of the legacies in that case were specific; and this is manifest by a comparison of the second clause of the Brant will with the concluding part of the third clause of the will involved in this controversy. In that part of Brant's will to which reference has just been made the testator, after giving to his wife various articles of property and stocks in different corporations, bequeathed to her all money due him in any bank or banks or from any corporation or institution, or any individual, all notes or credits, and also all debts due or to become due to him, and not otherwise disposed of by his will, to have and to hold the same to her and her heirs and assigns forever; while, by the last clause in the third paragraph of the O'Day will, the testator bequeathed to his sons John and Allie $100,000 in cash; or, at their option, they might take all or any part of said amount in notes belonging to said testator at the time of his death at the face value thereof. These bequests are substantially similar, and it must follow that, if the bequest to Mrs. Brant was specific, so is also the bequest to these respondents. The decree left it optional with John and Allie C. O'Day to exercise the right of selection conferred upon them by the will; but, if they failed to select, then all of the debts were to be paid out of the residuary fund and the legacy to them. But, as the residuary estate was insufficient to pay the debts, they chose to exercise the right of selection.

As there was ample personal property to pay the debts, the question with which we are confronted is whether the specific legacy is entitled to priority over the legacy of respondents in order of abatement in payment of the debts. It is said for appellants that the legacy to John and Allie C. O'Day is not specific, for the reason that the right to se-

lect cash or notes on hand at the time of the death of the testator to pay such legacy only makes it demonstrative. Conceding that the legacy under discussion is a demonstrative legacy, do not specific and demonstrative legacies occupy the same plane with reference to ademption for the payment of debts in case of a deficiency of assets to pay them? Upon this question it is said: "After all the personal estate not specifically bequeathed has been exhausted, specific legacies and devises abate *pro rata*, and demonstrative legacies, so far as the fund upon which they are charged will extend for their payment, abate ratably with specific legacies; but in so far as it may be necessary to resort to the general estate, by reason of the total or partial failure of the fund, they are to be regarded as general legacies, in which event they contribute *pro rata* with other general legacies." 1 Am. & Eng. Enc. Law, 2d ed. p. 56. In Armstrong's Appeal, 63 Pa. 312, it is held that a demonstrative legacy is the bequest of a certain sum of money to be paid out of a particular fund, and when there is a deficiency of assets to pay both debts and legacies specific devises and specific legacies shall abate proportionally. In Dugan v. Hollins, 11 Md. 41, it was ruled that, when a fund upon which a demonstrative legacy is chargeable does not exceed it in amount, it is to be treated in some respects as specific. It is liable to abate with specific legacies in the payment of debts, and liable to contribution from them, if the fund demonstrated has been so applied to the exemption of specific legacies. In Pomeroy's Equity Jurisprudence with reference to the abatement of demonstrative legacies, it is said: "If the fund out of which they are primarily made payable exists as a part of the testator's estate at his death, demonstrative legacies are governed by the same rules as specific legacies, and abate only with them ratably; but, if the fund does not so exist, they become, in effect, general legacies, and must contribute *pro rata* with all the other general legacies." 3 Pom. Eq. Jur. 3d ed. § 1138; Mullins v. Smith, 1 Drew. & S. 204; Florence v. Sands, 4 Redf. 210; Gelbach v. Shively, 67 Md. 501, 10 Atl. 247.

There is no question in this case but that the fund out of which the legacy in question was to be paid was amply sufficient for that purpose, and was not, therefore, liable to abate other than *pro rata* with the legacy of appellants; so that, whether the legacy in question was demonstrative or specific, as held by the trial court, the result is the same. It is plain from the provisions of the will that it was not the intention of the testator that there should be any residuary estate until the debts were paid. The testator first directs the payment of the debts; then, by the sixth clause of the will, he gives to his wife and four children all the residue and remainder of his estate, clearly meaning what was left remaining after the payment of his debts and the devises and bequests mentioned in the will. The language used can bear no other construction. It will not be contended that the authorities are in harmony upon the question as to whether the blending of real and personal property in the residuary clause of a will is of itself sufficient to charge the residuary real estate with the payment of legacies; but the weight of authority seems to be decidedly that way. Among other courts of high authority which announce a contrary view is the court of appeals of New York. Briggs v. Carroll, 117 N. Y. 288, 22 N. E. 1054. The personal property of the testator, O'Day, which passed under the residuary clause of his will, was only about $600, which he must have known was insufficient to pay his debts, which he unquestionably knew were largely in excess of that amount. Nor does the fact that he was mistaken with respect to the amount of solvent notes which he owned at the time of the execution of the will alter the case, for he specifically charged these notes with the payment of the legacy to John and Allie C. O'Day, which would seem to be inconsistent with the idea that these notes or cash on hand must be applied to the payment of his debts in preference to the payment of the legacy to respondents.

A point is made by the guardian *ad litem* of Thomas K. O'Day with reference to the effect upon the property devised and bequeathed to Catherine O'Day, deceased, of that part of the seventh clause of the will which says: "I desire that my wife, Sue I. B. O'Day, shall after my death have the care, charge, custody and control of the estates of my two minor children, John Baldwin and Catherine, so long as she remains a widow, but in case she shall remarry, as soon as that event occurs I direct that all the estates of said two minor children shall vest in and be transferred to said E. W. Banister, in trust for said children, until their respective majority. And whether the said estates be under the care and charge of my wife or of said Banister, I vest them and each of them, while acting as such trustee, with full power to manage and control the same, but it is my desire that the real estate which forms a part of the estate of said minors be preserved and not disposed of unless it is absolutely necessary or unquestionably advisable. And I direct that neither my wife nor said Banister be required to give bond while holding, controlling or handling said estate as executor, trustee or curator." The contention is that that clause of the will, limiting the estate which Cather-

ine and John Baldwin O'Day acquired under the will of the survivor in case of the death of either of them, gives a power of disposition of their interest to Sue I. B. O'Day and E. W. Banister, which power is inconsistent with the executory devise, and renders the executory devise invalid by reason of repugnancy; and that therefore the interest which the minor Catherine O'Day acquired under the will would descend one fourth to Sue I. B. O'Day, one fourth to Thomas K. O'Day, one fourth to John Baldwin O'Day, and one eighth each to Allie C. and John O'Day; the last two persons named being brothers of the half blood. It was unquestionably the purpose and intention of the testator, as expressly provided in the will, that in the event of the death of either John Baldwin or Catherine O'Day before the testator, or at any time before he or she reached the age of majority, the share of the child so dying in all of the property devised or bequeathed to them should go to the survivor of said children. His intention could not well have been expressed in stronger or more certain terms, and before his purpose should be thwarted by any power of disposition in others the authority to do so should be expressed in equally as emphatic and unambiguous language. It is clear that no such power is expressly given to Sue I. B. O'Day or E. W. Banister by the clause of the will quoted, and it would require a very strained construction of the language used to find or infer any such power; for in no event, if ever, is such power to be exercised unless absolutely necessary or unquestionably advisable, but that such real estate, which forms a part of the estate of said minors, is to be preserved and not disposed of except under the circumstances and conditions which we have indicated. They are designated as trustees, and each of them while acting as such is vested with full power to manage and control the estates of said minors until their respective majority; but there was no intention on the part of the testator to vest the title to the land in them, or to confer upon them the power to sell it, but merely to look after it and to manage and control it for said minors. To hold otherwise would be to do so in contravention of the provisions of the will and the intention of the testator, and in violation of the provisions of the statute which says that "all courts and others concerned in the execution of last wills shall have due regard to the directions of the will and the true intent and meaning of the testator in all matters brought before them." Rev. Stat. 1899, § 4650. We do not think the case of Gannon v. Albright, 183 Mo. 238, 67 L.R.A. 97, 105 Am. St. Rep. 471, 81 S. W. 1162, or any of the cases cited by the guardian *ad litem* of Thomas K. O'Day, which announce the same doctrine, are controlling in the case at bar, for the reason that in those cases the wills were construed as giving to some particular person or persons express power to sell the lands, while to construe the will in this case as conferring absolute power upon said trustees to convey the land devised to said Catherine O'Day and John Baldwin O'Day would be contrary to the intent and will of the testator.

Our conclusion is that the judgment should be affirmed. It is so ordered.

All concur.

GEORGIA SUPREME COURT.

AMANDA MANN, Plff. in Err.,
v.
STATE OF GEORGIA.

(124 Ga. 760, 53 S. E. 324.)

Homicide—malice—jury.

1. In the trial of one indicted for murder, where the evidence adduced to establish the homicide presents two conflicting theories of fact, one based upon circumstances indicating malice and the other upon warranted inferences which negative its existence, then it becomes a question of fact, to be decided by the jury, as to which one of these inconsistent theories is in accord with the real truth of the occurrence.

Same—burden of proof.

2. In such a case it is proper to charge the jury that the law presumes every homi-

Headnotes by EVANS, J.

Case Note.—Presumption of malice from killing.—The holding in MANN v. STATE seems to be in accord with the prevailing rule on the subject of presumption of malice from killing. In United States v Armstrong, 2 Curt. C. C. 446, Fed. Cas. No. 14,467, it is squarely asserted that no presumption of malice arises from the bare fact of killing. As will be seen by reference to Bowlby's Wharton on Homicide, §§ 44, 99, however, the common-law rule, as asserted in Mackalley's Case, 9 Coke, 67b, and Reg. v. Mawgridge, J. Kelyng. 121, that the law implies malice from the mere fact of an intentional killing, has been asserted repeatedly and without qualification by many American cases, among which are Murphy v. People, 37 Ill. 447; State v. Gillick, 7 Iowa, 287; Hawthorne v. State, 58 Miss. 778; McDaniel v. State, 8 Smedes & M. 401, 47 Am. Dec. 93; State v. Alexander, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440; Farrer v. State, 42 Tex. 265; M'Whirt's Case, 3 Gratt. 594, 46 Am. Dec. 196; United States v. Outerbridge, 5 Sawy. 620, Fed. Cas. No. 15,978. But, by reference to the same source, it will be seen that by the weight of modern authority this rule is confined to

cide to be malicious until the contrary appears from circumstances of alleviation, of excuse, or justification; and it is incumbent on the prisoner to make out such circumstances to the satisfaction of the jury, unless they appear from the evidence produced against him.

Same—"malice" defined.

3. Legal malice is the intent unlawfully to take human life in cases where the law neither mitigates nor justifies the killing. Properly construed, this was the meaning of the charge on this subject given by the trial judge.

Same—"cooling time"—jury.

4. The charge on voluntary manslaughter submitted to the jury the question of what was "cooling" time.

Witness—discrediting.

5. A witness is not to be discredited because of a discrepancy as to a wholly immaterial matter. The charge on this subject, while not strictly accurate, was not harmful to the defendant.

Instructions—argument of counsel.

6. The charge complained of as being too restrictive of the use which the jury might make of the argument of counsel is not open to this criticism. The jury could hardly have understood, from the charge given, that the court intended them to reject any impression of fact made on their minds by a discussion of the evidence by counsel.

Affirmance.

7. The evidence sustained the verdict, the trial judge approved it, and no error of law was committed which authorizes a vacation of the verdict.

(February 15, 1906.)

ERROR to the Superior Court for Newton County to review a judgment convicting defendant of murder. Affirmed.

The facts are stated in the opinion.

Messrs. **J. F. Rogers, R. R. Arnold, and H. O. Farr** for plaintiff in error.

Messrs. **William Schley Howard and John C. Hart**, Attorney General, for the State.

Evans, J., delivered the opinion of the court:

The plaintiff in error was tried upon an indictment charging her with the murder of Lee Pitts, and a verdict of guilty, with a recommendation to mercy, was returned by the jury. Thereupon the accused made a motion for a new trial, which was overruled by the court, and she excepted. Aside from the complaint that the evidence did not warrant the verdict, the motion for a new trial, as amended before the hearing thereon, contained six assignments of error upon the charge of the court.

1. The court charged the jury: "When the killing is proved to be the act of the defendant, the presumption of innocence with which he enters upon the trial is removed from him, and the burden is then upon him to justify or mitigate the homicide; but, as before charged, the evidence to

cases in which the fact of killing appears unaccompanied by surrounding circumstances; where the facts and circumstances attending a homicide are disclosed so as to warrant a conclusion therefrom as one of fact, of the presence or absence of malice, no presumption arises from the killing. State v. Rochester, 72 S. C. 194, 51 S. E. 685; Raines v. State, 81 Miss. 489, 33 So. 19. If the attendant circumstances appear, the character of the killing is to be determined by considering them; and it is not a matter of presumption which operates in the absence of explanatory evidence, but one for determination from the circumstances shown in evidence; and it is not material from which side the explanatory evidence comes. Among the cases adopting this rule are Boulden v. State, 102 Ala. 78, 15 So. 341; Hill v. People, 1 Colo. 436; Futch v. State, 90 Ga. 472, 16 S. E. 102; Farris v. Com. 14 Bush, 362; State v. Wright, 46 La. Ann. 1403, 16 So. 366; Brown v. State, 9 Neb. 157, 2 N. W. 378; Territory v. Lucero, 8 N. M. 543. 46 Pac. 18; State v. Byrd, 121 N. C. 684, 28 S. E. 353; State v. Alexander, *supra;* Bryant v. State, 7 Baxt. 67. In such case all the facts of the case, taken together, are to be considered, and from these the question is to be decided whether the slayer acted maliciously. Hicks v. State, 25 Fla. 535, 6 So. 441; State v. McLaughlin, 149 Mo. 19, 50 S. W. 315; Territory v. Lucero, *supra;* Com. v. Green, 1 Ashm. (Pa.) 289. But, while the rule as thus modified permits an inference of malice from the bare fact of the killing, and while the inference may take the place of proof and be conclusive in the absence of evidence bearing on the subject, the inference is not one of law; it is to be drawn by the jury as a matter of fact. This was held in Lane v. State, 85 Ala. 11, 4 So. 730; Keady v. People, 32 Colo. 57, 66 L.R.A. 353, 74 Pac. 892; Hicks v. State, 25 Fla. 543, 6 So. 441; and Pointer v. United States, 151 U. S. 396, 38 L. ed. 208, 14 Sup. Ct. Rep. 410. As stated, in substance, in Krehnavy v. State, 43 Neb. 337, 61 N. W. 628, while the jury are at liberty to infer an intent to kill from the act of killing, if the circumstances warrant it, they are under no legal obligation to do so, the test being one of logic rather than one of law. The question is one of logic, not of formal law. Small v. Com. 91 Pa. 304.

It is to be observed that the inference and presumption here referred to apply to the special matter of malice only, and that they should not be confused with general questions of presumptions and burden of proof as to guilt or innocence.

do this may be found in the evidence offered by the state to prove the killing, as well as by the evidence offered by the defendant." Plaintiff in error contends that the defendant's statement and some of the circumstances appearing in evidence tended to show that the homicide was accidental, and it was error to charge that, if the killing was proved to be the act of the defendant, malice would be presumed from the *factum* of the homicide. Before examining the prior decisions of this court bearing on this assignment of error, it may not be unprofitable to briefly advert to the common-law rule on this subject. Lord Hale said: "When one voluntarily kills another without any provocation, it is murder; for the law presumes it to be malicious, and that he is *hostis humani generis*." 1 Hale, P. C. 455. In 1 Hawkins, P. C. chap. 31, § 32, it is declared that, "whenever it appears that a man killed another, it shall be intended, prima facie, that he did it maliciously, unless he can make out the contrary, by showing that he did it on a sudden provocation," etc. Sir Wm. Blackstone, in his Commentaries (4 Bl. Com. 201), said: "We may take it for a general rule that all homicide is malicious, and, of course, amounts to murder, unless where justified, excused, or alleviated into manslaughter; and all these circumstances of justification, excuse, or alleviation it is incumbent upon the prisoner to make out to the satisfaction of the court and jury,—the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former how far they extend to take away or mitigate guilt." And in 1 East, P. C. 224, it is laid down that, "the fact of killing being first proved, the law presumes it to have been founded in malice, unless the contrary appear. All the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him." Upon the truth of these facts, so alleged, the jury alone are to decide; but whether, taking them to be true, the homicide is justified, excused, or alleviated, is matter of law, upon which the jury ought to be guided by direction of the court. Citations of similar import from common-law authorities might be multiplied *ad libitum*. These various expressions may be regarded as the statement of a rule of evidence to the effect that, if the homicide is proved, and the evidence adduced to establish it shows neither mitigation nor justification, malice will be presumed from the proof of the homicide; but the presumption is a rebuttable one, and may be overcome by evidence of alleviation or justification. If the evidence adduced to establish the homicide presents two conflicting inferences, one of malice, and the other an absence of malice, then it becomes a question of fact, to be decided by the jury, as to which aspect of the evidence is the real truth of the occurrence. As was remarked by Mr. Wharton, the question of proving malice is one of logic, and not of formal law. 2 Wharton, Crim. Law, § 314. Text writers generally deal with the presumption of malice arising from proof of the homicide as a rule of evidence, rather than a principle of substantive law. See 1 Greenl. Ev. § 34.

The first discussion of the subject by this court appears in the report of the case of Hudgins v. State, 2 Ga. 188. In commenting on the sufficiency of the evidence to support a verdict of murder, Lumpkin, J., said: "The law presumes every homicide to be felonious until the contrary appears, from circumstances of alleviation, of excuse, or justification; and it is incumbent on the prisoner to make out such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him." No question was raised as to what would be an appropriate charge under the facts of that case, and the discussion was limited to the point before the court, *viz.*, the quantum of evidence necessary to support a conviction of murder. The point was up in like manner in the following cases: Roberts v. State, 3 Ga. 325; Choice v. State, 31 Ga. 424, 464; Bird v. State, 14 Ga. 54; Wortham v. State, 70 Ga. 336; Cohron v. State, 20 Ga. 752. In Clarke v. State, 35 Ga. 80, the court held that an instruction that "when a homicide is proved, the presumption is that the killing is murder, and that it was for the evidence to show justification or to reduce the offense to a lower grade," was unobjectionable. A similar instruction was upheld in the following cases: Dozier v. State, 26 Ga. 157; Hill v. State, 41 Ga. 504; Wilson v. State, 69 Ga. 241; Bell v. State, 69 Ga. 752; Marshall v. State, 74 Ga. 26; Vann v. State, 83 Ga. 44, 9 S. E. 945; Lewis v. State, 90 Ga. 95, 15 S. E. 697; Butler v. State, 92 Ga. 601, 19 S. E. 51; Dorsey v. State, 110 Ga. 333, 35 S. E. 651; Tuggle v. State, 119 Ga. 969, 47 S. E. 577; Williford v. State, 121 Ga. 173, 48 S. E. 962; Anderson v. State, 122 Ga. 175, 50 S. E. 51. An examination of the facts of these cases will show that either all or some of the evidence offered to establish the homicide demonstrated an unprovoked killing without extenuation. In the first instance, when the fact of a voluntary homicide is shown, unaccompanied by any circumstances of excuse or extenuation, malice is presumed, and the court may so charge. Also, where

the homicide is established by evidence, some of which excludes any inference of alleviation, while mitigation may be inferred from some of the circumstances, it is proper to instruct the jury that the law presumes malice from the proof of the killing, unless the evidence shows alleviation or justification, and leave it to the jury to decide the issue of fact as to whether the killing was with or without extenuating circumstances. As was said by Simmons, J., in Vann's Case, *supra:* "If the proof that shows the killing itself discloses that it was done without malice, of course, the presumption does not exist; but, if the accompanying proof does not, then the burden is thrown upon the defendant to show that it was done without malice." It is not incumbent on the accused to prove an absence of malice, where the evidence for the prosecution shows facts which will excuse the homicide or reduce its grade; and it has been held to be error to charge the jury that, if the defendant "struck the fatal blow that killed deceased, then the law imposed on him the obligation to show he was justified in so doing, and makes the killing murder, and it is on the prisoner to produce evidence of justification to reduce the crime to manslaughter or justifiable homicide if he could by proof." Crawford v. State, 12 Ga. 142; Reid v. State, 50 Ga. 556; Perry v. State, 102 Ga. 366, 30 S. E. 903.

In Futch v. State, 90 Ga. 472, 16 S. E. 102, there appears to be a clear recognition of the principle that the presumption arising from the proof or admission of a homicide is a rule of evidence. In that case the accused, in his statement to the jury, admitted that he had killed the deceased, but this admission was accompanied by an explanation which, if true, would negative malice. There was also evidence of an admission of the homicide, made by the accused before the trial, without any accompanying explanation which would justify the killing. The trial judge charged that "it is a law of this state that when a person admits a homicide, the law presumes that homicide to be murder, and the burden is cast upon the defendant to show the homicide to be justifiable." This charge, as applied to the statement of the defendant made on the trial, was held to be error; but this court expressly held that the instruction was correct as applied to the admission of the homicide, made by the defendant previous to the trial. This decision was followed in Perkins v. State, 124 Ga. 6, 52 S. E. 17. There the only admission of the homicide by the accused was in his statement to the jury, and it was accompanied by an explanation negativing malice. Accordingly, it was held error to charge that "if, in the progress of the trial, it shall have been shown at any time or admitted to you that the defendant did kill the deceased, as charged in the bill of indictment, that then the law presumes the killing to be murder, and that presumption remains and exists until, from the evidence in the case, it be shown that a lower grade of homicide than murder is to be found against him, or that the facts and circumstances show a justifiable homicide." The vice in this charge consisted in the instruction that murder would be presumed from the admission of the homicide, made by the defendant in his statement to the jury, when that admission was coupled with an explanation which negatived malice. The principle of the foregoing decisions was applied in Green v. State, 124 Ga. 343, 52 S. E. 431, wherein it was recognized that it was "a well-established rule in this state that where a killing of a human being is proved, and the evidence adduced to establish the killing does not show circumstances of justification or alleviation, malice will be inferred. But, if the evidence relied upon by the state to show the killing contains circumstances of alleviation or justification, the burden of proving that the crime was murder is not shifted." The charge given in that case was held to be inapplicable, because all the evidence introduced to establish the killing, as well as the defendant's statement, showed mitigating circumstances.

From this analysis of the prior adjudications of this court, we conclude that, in a case where the evidence adduced to establish the homicide presents two conflicting theories of fact, one based upon circumstances indicating malice, and the other upon warranted inferences which negative its existence, then it becomes a question of fact, to be decided by the jury, as to which one of these inconsistent theories is in accord with the real truth of the occurrence; and in such a case it is proper to charge the jury as was done in this case. The witnesses for the state testified to facts which excluded all idea of any palliation, the defendant's evidence showed mitigating circumstances, the charge of the court submitted this conflict in the evidence to the jury, and they were told, in substance, that, if they found from the evidence that the homicide was without excuse or extenuation, the killing would be murder. The charge was correct in its statement of the law, and was applicable to the facts of the case. We have discussed this question at length, because it was doubted by counsel for the state that the later cases of Perkins and Green were in

line with the older adjudications, and permission was granted to review them. Upon a careful examination of those cases, we are of the opinion that they do not conflict with any prior decision, but are in entire harmony with all previous adjudications on the subject.

Attack was made on another excerpt from the charge, substantially like the one under discussion, on the ground that an instruction that the grade of the homicide might be reduced below that of murder by evidence offered either by the state or the defendant was too restrictive, inasmuch as the jury would have the right to reduce the killing from murder, if there was a lack of evidence, or a conflict of evidence, or the witnesses were not credible. From what has already been said on this subject, it is apparent that this exception is without merit. In every case the *corpus delicti* must be established beyond a reasonable doubt. The jury was so instructed in this case. If the homicide was proved beyond a reasonable doubt, and if, from the evidence establishing the homicide, the jury found no facts of extenuation, they had a right to imply a felonious killing.

2. Complaint is made of the definition of malice which was given to the jury. In its charge the court said: "Legal malice is an intent unlawfully to take away the life of a fellow creature, in a case where the law would neither justify nor to any degree excuse the intention, if the killing should take place as intended." The criticism is that this charge made the existence of legal malice depend upon facts which would justify or excuse the intention, whereas there would be no legal malice if, under the circumstances of the case, there was mitigation which would reduce it to manslaughter. Every intentional or unjustifiable killing is not necessarily murder. It may be manslaughter. If the charge is to be construed as defining malice to be an intent unlawfully to take human life under circumstances the law would not justify, then it was erroneous. Dowdy v. State, 96 Ga. 653, 23 S. E. 827. But this is not a proper construction of this charge. It does not stop with declaring that malice implies an intent unlawfully to slay under circumstances affording no justification; but it goes further, "nor to any degree excuse the intention." Unless we say that this last phrase amounts to nothing more than tautology, the exact equivalent of justification, the construction contended for cannot be placed on the court's language. The language, "nor to any degree excuse the intention," fairly, by contrast, should be held to refer to mitigation, and the charge to convey the meaning that malice is the intent to take human life, in cases where the law neither mitigates nor justifies. The definition given by the trial judge was taken from the case of Taylor v. State, 105 Ga. 746, 31 S. E. 764, where it was admitted by counsel to state a correct principle of law, and the court concurred in this view. The criticism now urged was not made in that case. See also Jones v. State, 29 Ga. 607.

3. The court charged, literally, Penal Code 1895, § 65, defining voluntary manslaughter. This charge is attacked because the court omitted to tell the jury that they were the judges of what is "cooling time." This assignment is without merit, for the court, in a subsequent part of the charge on voluntary manslaughter, instructed the jury that "what is known in law as 'cooling time' is always a question for the jury."

4. Another ground of the motion for a new trial complains of the following charge: "When an apparent discrepancy exists between the testimony of the different witnesses, it is the duty of the jury to reconcile the whole together, if it can be done, so as not to impute perjury to anyone. When witnesses agree as to the important facts testified to, slight discrepancies in the collateral attendant facts afford no ground to discredit them." The error alleged is the invasion of the province of the jury by the court, in that it was for the jury to say what discrepancies in the testimony of a witness should discredit him. This instruction was in the language of a charge delivered in the case of Cobb v. State, 27 Ga. 685, of which the court said, at page 699: "We perceive no error in the charge of the court in laying down the rule for reconciling conflicting evidence." Unquestionably the court must have considered the phrase, "slight discrepancies in the collateral attendant facts," equivalent to "immaterial matters." So construed, the charge was not objectionable, because a witness is not to be discredited simply for the reason that his testimony concerning a wholly immaterial matter may not be in accord with the truth. Civil Code 1895, § 5295. We doubt the correctness of the ruling in Cobb's Case on this subject, but do not think the instruction, even if erroneous, ground for a new trial in the present case. The only variance between the state's witnesses was upon an immaterial matter, and we are of the opinion that a verdict so strongly supported by evidence as this one is should not be disturbed because of a verbal inaccuracy which, under the facts, was not harmful to the accused.

5. The last ground of the motion complains of the charge: "The jury cannot act upon their private or personal knowledge of

the question at issue. You try the case from what you hear from this stand, and from the law applicable thereto, using the argument of counsel to assist you in understanding the law as applicable to the evidence." It is counsel's contention that the court restricted the use of the argument by the jury. When the judge was giving them this instruction, the evidence had all been delivered, and the case fully argued by counsel. Presumably the case was discussed by counsel with reference to the application of the facts to the law of the case. The burden of this instruction was a caution to the jury to try the case on the evidence and the law, and not to act upon their personal knowledge of the facts. The jury could hardly have understood, from this charge, that the court intended them to reject any impressions of fact made on their minds by a fair and full discussion of the evidence by counsel. We see no error in this charge which requires a new trial.

6. A strong case of murder was made out by the state's evidence, the trial judge approved the verdict, and we do not think any error of law was committed which authorizes a vacation of the verdict.

Judgment affirmed.

All the Justices concur.

PENNSYLVANIA SUPREME COURT.

RE ESTATE OF G. BRUCE HARTON, Deceased.

APPEAL OF BERTHA HARTON ORR.

(213 Pa. 499, 62 Atl. 1058.)

Benefit certificate—legal representatives.

1. A contract by a mutual benefit society, having charter power to pay sums to the family and heirs of deceased members, to pay to his "legal representatives," will be construed to mean his "heirs."

Same—amendment of charter.

2. The retention of a mutual benefit certificate payable to the "legal representatives" of the member, which, because of lack of authority in the society to provide otherwise, must be construed as heirs, after the amendment of the charter so as to permit a payment to assigns, without any attempt to change the beneficiary according to the rules of the order and the execution of a will in favor of an assign, will not deprive the heirs of the right to the fund on the theory that the amendment restored to the words "legal representatives" their primary meaning.

(January 2, 1906.)

APPEAL by Bertha Harton Orr from a decree of the Orphans' Court for Allegheny County dismissing exceptions to a settlement of the account of the executor of G. Bruce Harton, deceased. Affirmed.

The facts are stated in the opinon.

Messrs. **Lazear & Orr**, for appellants:

The beneficiary has ordinarily no vested interest in the beneficial certificate.

Heasley v. Heasley, 191 Pa. 539, 43 Atl. 364.

No application was needed to change the beneficiaries, because the original certificates naming "legal representatives" answered the same purpose, and obviated the necessity for such application.

Marsh v. Supreme Council A. L. of H. 149 Mass. 512, 4 L.R.A. 382, 21 N. E. 1070; Richmond v. Johnson, 28 Minn. 447, 10 N. W. 596; Masonic Mut. Ben. Soc. v. Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Durian v. Central Verein, 7 Daly, 168.

Unless the words of the charter are clearly prohibitive or restrictive, the contract must be carried out as it was made.

Case Note.—Insurance; right to change beneficiary by will.—It seems to be a settled rule that the assured in an ordinary life-insurance policy cannot, by his will, change the beneficiary designated in the policy.

Thus, in Virgin v. Marwick, 97 Me. 578, 55 Atl. 520, it was held that the right to the proceeds of a life-insurance policy is a right so vested in the beneficiary that it cannot be altered or taken away by the will of the insured.

In Wilmaser v. Continental L. Ins. Co. 66 Iowa, 417, 55 Am. Rep. 277, 23 N. W. 903, it was held that the insurance company's promise to pay the amount of the policy to a named beneficiary was a material part of the contract, and therefore the will of the insured could not have the effect to alter the contract and make it payable to another than the beneficiary named, because neither of the parties to the agreement could change the undertakings of the other without his consent.

In Gould v. Emerson, 99 Mass. 154, 96 Am. Dec. 720, the policy was payable to the insured's wife and children in accordance with Mass. Gen. Stat. chap. 58, § 62, providing that a policy of insurance on the life of any person for the benefit of any married woman shall inure to her separate use and benefit and that of her children; and it was held that this statute restrained him from revoking the trust which he had thus created, and, therefore, his will could not affect the construction of the policy or the distribution of the proceeds thereof.

In Ruppert v. Union Mut. Ins. Co. 7 Robt. 155, it was held that where one had caused his life to be insured by an insurance company whose charter permitted it to issue

Donithen v. Independent Order of Foresters, 209 Pa. 170, 58 Atl. 142.

The words "legal representatives," descriptive of the beneficiaries in the certificate, mean, in this case, executors.

Northwestern Masonic Aid Asso. v. Jones, 154 Pa. St. 99, 35 Am. St. Rep. 810, 26 Atl. 253; Day v. New England L. Ins. Co. 111 Pa. 507, 56 Am. Rep. 297, 4 Atl. 748; Kennedy's Estate, 2 W. N. C. 492; Osborn v. First Nat. Bank, 175 Pa. 494, 34 Atl. 858.

Mr. George M. Harton, for appellee:

The will does not affect the case, because, under the law, the member had no vested interest in the fund; it was no part of his estate, and he could not dispose of it by will.

Arthur v. Odd Fellows' Beneficial Asso. 29 Ohio St. 557; Northwestern Masonic Aid Asso. v. Jones, 154 Pa. 99, 35 Am. St. Rep. 810, 26 Atl. 253; 1 Bacon, Ben. Soc. 3d ed. § 237; Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166; Supreme Council A. L. of H. v. Perry, 140 Mass. 580, 5 N. E. 634; Union Mut. Asso. v. Montgomery, 70 Mich. 587, 14 Am. St. Rep. 519, 38 N. W. 588; Beatty's Appeal, 122 Pa. 428, 15 Atl. 861.

As the association has prescribed the form for change of beneficiary, that form must be pursued; otherwise no change can take place.

Masonic Mut. Asso. v. Jones, 154 Pa. 108, 26 Atl. 255; Vollman's Appeal, 92 Pa. 50; Brown v. Ancient Order of U. W. 208 Pa. 101, 57 Atl. 176.

Only persons coming within the class "family" or "heirs" can participate in the fund.

State ex rel. Atty. Gen. v. Central Ohio Mut. Relief Asso. 29 Ohio St. 406; Fodell v. Miller, 193 Pa. 570, 44 Atl. 919.

There was no power in beneficial organiza-

policies of insurance upon the life of any person for the benefit of any designated woman, minor, or minors, which should inure to the benefit of such designated person or persons independently of the assured as well as his or her creditors; and the policy of insurance so issued declared the same to be "for the sole and separate use and benefit of his three children," naming them,—he could not afterwards, by will, give and devise the policy to his executors.

The decisions as to the right of members of benefit societies or benevolent associations thus to effect a change in beneficiaries are not harmonious. This can be attributed in part to the difference in the wording of the benefit certificates, and to the dissimilarity of the by-laws and constitutions of such organizations.

Speaking with reference to the essential differences between certificates of mutual benefit associations and ordinary contracts of life insurance, it was said in Holland v. Taylor, 111 Ind. 121, 12 N. E. 116: "For many, and, indeed, for most, purposes, mutual benefit associations are insurance companies, and the certificates issued by them are policies of life insurance governed by the rules of law applicable to such policies. There are, however, some essential differences usually existing between the contracts evidenced by such certificates and the ordinary contract of life insurance. . . . The most usual difference is the power on the part of the assured in mutual benefit associations to change the beneficiary. But, as in either case the rights of the beneficiary are dependent upon and fixed by the contract between the assured and the company or association, there seems to be no reason why the assured should have any greater power to change the beneficiary in one case than in the other, except as that power may be inherent in the nature of the association, or is reserved to him by the constitution, or by the laws of the association, or by the terms of the certificate."

In Woodruff v. Tilman, 112 Mich. 188, 70 N. W. 420, it was said that certificates of mutual benefit associations partake of the nature of testamentary dispositions of property, and, unless prohibited by the rules of the association, may be disposed of by will; and, therefore, it was held that the insured member could charge his beneficiary with the payment of a particular debt out of the insurance money, or, in other words, he could change his beneficiary as to a portion of the insurance.

But in McClure v. Johnson, 56 Iowa, 620, 10 N. W. 217, upon a similar state of facts, it was held that this could not be done.

Where no provision is made in the charter of a mutual benefit society as to the designation of a beneficiary, or change thereof, a beneficiary has no vested interest in a benefit certificate until the death of the insured member. The fact that the first beneficiary paid the assessments and has possession of the certificate does not deprive the member of his right to change the beneficiary by his will. Masonic Benev. Asso. v. Bunch, 109 Mo. 560, 19 S. W. 25. In this case the court said: "There is a marked distinction between an ordinary policy of life insurance and a certificate of membership in a benevolent society. In the former the beneficiary's interest is a vested right immediately upon the issuing of the policy, whereas in a benevolent society, like plaintiff, the beneficiary has no vested right in the certificate before the death of the member on whose account it was issued, and the member may change the beneficiary without the consent of the beneficiary."

In Supreme Council C. M. B. A. v. Priest, 46 Mich. 429, 9 N. W. 481, the rules of the association provided that the fund on the death of the member should be paid to the person or persons last named by him and entered by his order on the will book of the association. The assured did this, reserving full right to make a different disposition, which he afterwards attempted to do by an ordinary will. It did not appear that there was anything in the act under which the

tions to issue certificates payable to other than the family or heirs.

State ex rel. Atty. Gen. v. Central Ohio Mut. Relief Asso. 29 Ohio St. 405; State v. Standard Life Asso. 38 Ohio St. 281; State ex rel. Atty. Gen. v. People's Mut. Ben. Asso. 42 Ohio St. 579; National Mut. Aid Asso. v. Gonser, 43 Ohio St. 1, 1 N. E. 11; Supreme Council, C. B. L. v. McGinness, 59 Ohio St. 531, 53 N. E. 54; State v. Moore, 38 Ohio St. 7; Sargent v. Supreme Lodge, K. of H. 158 Mass. 557, 33 N. E. 650.

In order to preserve the contract, the words "legal representatives" have been held to be broad enough to include heirs or next of kin, which construction should hold here.

Bishop v. Grand Lodge, E. O. of M. A. 112 N. Y. 628, 20 N. E. 562; Mutual Life Ins. Co. v. Armstrong, 117 U. S. 597, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; Duncan v. Walker, 1 Yeates, 220; Casey v. Lockwood, 24 R. I. 72, 52 Atl. 804; Gutridge v. Vanatta, 27 Ohio St. 366; Northwestern Masonic Aid Asso. v. Jones, *supra;* Masonic Mut. Asso. v. Jones, 154 Pa. St. 107, 26 Atl. 255; Comly's Estate, 136 Pa. 153, 20 Atl. 397; Osborn v. First Nat. Bank, 175 Pa. 498, 34 Atl. 858; Rankin's Estate, 13 Pa. Co. Ct. 617; Ringwalt v. Ringwalt, 4 Pennyp. 276; Ralston v. Waln, 44 Pa. 279.

Stewart, J., delivered the opinion of the court:

G. Bruce Harton, a resident of Allegheny county, in this state, was the holder of a beneficial certificate issued by the Knights Templar & Masonic Mutual Aid Society in the sum of $5,000, payable to his legal representatives. He died February 20, 1904, unmarried, and without issue. By his will he

association was organized, or in its rules, which would deprive a member of his right and power of disposing of the fund by last will and testament in the ordinary manner. It was held that the will operated as a revocation of the previous disposition. The court said: "Very clear and binding provisions must be shown to deprive a person of the right given him by the laws of the land to dispose of such a fund by his last will."

In Supreme Council A. L. of H. v. Perry, 140 Mass. 380, 5 N. E. 634, the statute under which the corporation was organized gave it authority to provide for the widow, orphans, or other persons dependent upon deceased members; and further provided that the fund should not be liable to attachment. The court said: "The claim that the fund is subject to disposition by will appears to be contrary to the scheme projected by the statute. If the fund were subject to testamentary bequest, then, upon the decease of the member, it might go into the hands of his executor or the administrator of his estate, and become assets thereof, liable to be swallowed up by the creditors."

In Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166, it was held that where by-laws of the association provide that no change of beneficiary shall be made without the consent and approval of the directors, the last will of a member, not approved by the directors before his death, does not effect a valid change.

But in Raub v. Masonic Mut. Relief Asso. 3 Mackey, 68, where the object of the association as declared by its charter was "to provide and maintain a fund for the benefit of the widow, orphans, heir, assignee, or legatee, of a deceased member;" and in his application for membership the member directed that the fund be paid to his sister, "unless I should hereafter otherwise direct," —it was held that he could change his beneficiary by will without the knowledge of the association, although one of the by-laws provided "that no change of beneficiary can be made or recognized until submitted to and approved by the board of directors;" because the right to designate the beneficiary by will was fully and completely recognized by the charter, and the by-law which attempted to cut it off was inoperative.

In High Court C. O. of F. v. Malloy, 169 Ill. 58, 48 N. E. 392, it was held that upon the death of the beneficiary the assured was authorized to direct by will the disposition of the fund, where a by-law of the mutual benefit order provided: "In the event of the death of all the beneficiaries designated by the member in accordance with the laws of the order, before the decease of such member, if he shall have made no other or further disposition thereof, the benefit shall be paid" to certain designated persons.

But in Olmstead v. Masonic Mut. Ben. Soc. 37 Kan. 93, 14 Pac. 449, there was no such by-law as in the preceding case; and it was held that, where a benefit certificate was made payable to the assured's wife or her legal representative, and she died during his lifetime, a will made by the assured could not divert the fund from the heirs of his deceased wife. This decision, however, was upon the ground that § 76, chap. 93, Laws 1871, prescribing the manner in which an insured person may, upon the death of the designated beneficiary, compel an insurance company to take up and cancel the policy and issue a new one payable to another nominated beneficiary, is applicable to beneficiary societies, and furnishes the exclusive method of diverting the fund. The court conceded, for the purposes of the argument, that the general rule which regards the rights of beneficiaries as vested when the policy is taken out, is not applicable to certificates of co-operative insurance; but said that in any case a change could not be made, except with the consent of the society and in conformity with its rules and regulations.

This last statement appears to embody a

gave the residue of his estate, "together with moneys due from life insurance," share and share alike, to his sister, Mrs. William M. Orr, and his niece, Margaret Fertig. A controversy having arisen with respect to the fund between these residuary legatees and the heirs at law, it was agreed that the fund should be paid over to the executor of the will, and the rights of the parties with respect thereto should be determined on the audit of the executor's account. It resulted in an award of the fund to the heirs at law, and the residuary legatees have taken this appeal from the decree.

The relation between Harton and the association was contractual, and the contract is to be interpreted in the light of conditions existing when it was entered into. The association was a beneficial society organized under the laws of the state of Ohio. The act authorizing associations of this character expressly indicates the purpose and objects of the same, and to this extent places a limitation upon their powers and privileges. The purpose and objects, as expressed by the act, are "for the mutual protection and relief of the members, and for the payment of stipulated sums of money to the family or heirs of the deceased members of such association." The contract with Harton was to pay "his legal representatives" the sum of $5,000. If we are to accept this designation of beneficiaries as meaning what the words used in their primary sense imply,—executors or administrators,—it would result that the association had contracted to do something outside of its powers. Such construction is always to be avoided where there is a secondary sense which would make the contract conform to law. The law does not presume that parties to a contract intended by it the accomplishment of an illegal object, but, on the contrary, every presumption is allowed in favor of a legal purpose; and so it is that, when words are susceptible of two different senses, they are to be understood as to have a legal and actual operation, not by way of

general rule; and so it is held that, if the by-laws point out the mode in which the beneficiary may be changed, another beneficiary can be substituted only in the manner provided, and an attempt of the assured to dispose of the fund by will is wholly ineffectual. Renk v. Herrman Lodge, 2 Dem. 409. In this case the objection to the attempted disposition of the fund by will was raised by the society. However, in Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19; McCarthy v. Supreme Lodge N. E. O. of P. 153 Mass. 314, 11 L.R.A. 144, 25 Am. St. Rep. 637, 26 N. E. 866; and Fink v. Fink, 171 N. Y. 616, 64 N. E. 506,—the contest was between the claimants under the will and the beneficiaries named in the certificate. The objection to the manner of the attempted change was not made by the association, and, nevertheless, the foregoing rule was applied. But the following cases appear to be opposed to this rule:

Although the by-laws of a benevolent order point out the manner of change in the beneficiary, it was held in Splawn v. Chew, 60 Tex. 532, that this provision was for the benefit and protection of the company, which might be insisted upon or waived, at its election; and a change could be fully effected by the member's will where it made no objection to the manner of the change.

And in Kepler v. Supreme Lodge, K. of H. 45 Hun, 274, 10 N. Y. Supp. 383, the constitution of the lodge provided, *inter alia:* "In the event of the death of all the beneficiaries designated by the member before the decease of such member, if he shall make no other disposition thereof the benefit shall be paid to the heirs," etc. The designated beneficiary, the wife of the member, died. No change was made in the certificate, but, by will, which did not specifically mention the insurance fund, the insured left all his property to his stepdaughter. The will was immediately delivered to, and kept by, one of the principal officers of the lodge, and the insured told the reporter of the lodge about the will, and that the fund was to go to his stepdaughter. Neither of these officers made any report to the lodge with reference to the will. It was held that the delivery of the will to the proper officer of the lodge, and the contemporaneous statements made by the assured to the reporter of the lodge, and the retention of the will by the lodge without any objection to the form or manner of designation, constituted a waiver of any defect or irregularity in such designation or disposition, and the stepdaughter was entitled to the fund.

In Schardt v. Schardt, 100 Tenn. 276, 45 S. W. 340, however, the court, while holding that the beneficiary named in the second policy issued by a benefit association could not object that the surrender of that policy and the issuance of a third one payable to another beneficiary was not in conformity with the rules and by-laws of the order, the order having waived its requirements in that respect and standing indifferent between the parties, nevertheless said, in reply to the contention that the policy had been disposed of by will, that it did not and could not pass by the will, but only according to its terms and provisions.

In Grand Lodge, A. O. U. W. v. Noll, 90 Mich. 37, 15 L.R.A. 350, 30 Am. St. Rep. 419, 51 N. W. 268, it was held that, where the benefit certificate was lost or mislaid without fault of the assured, so that it was impossible for him to change the beneficiary in the manner prescribed by the by-laws, equity would recognize the insured's bequest of the insurance money to another.

concession or correction, but as the true interpretation of the governing purpose of the parties. The rule thus stated is one of many used to discover the intention of the parties, which is always allowed to govern when ascertained. The rule imposes no intention, but seeks to discover the true one. The words "legal representatives" have a secondary sense, well recognized, which harmonizes entirely with the purposes and objects of the association. The instances are not few in which they have been held to mean heirs at law. "The terms 'legal representatives,' 'personal representatives,' etc., are often used in statutes and instruments of writing in a broader sense, so as to include all persons who stand in place of or represent the interest of another, either by his act or operation of law." 18 Am. & Eng. Enc. Law, 2d ed. p. 814. "The word 'representatives' may mean next of kin or descendants or executors or administrators, according as the intention of the testator is manifested in the will." University of Pennsylvania's Appeal, 97 Pa. 187.

The application of this rule, then, gives us not a possible or probable understanding of the parties to the contract, but an understanding which, for all judicial purposes, is to be regarded as definitely ascertained. As thus interpreted, this contract, when made, provided for the payment of a stipulated sum to the heirs of G. Bruce Harton. Did it so continue until his death in 1904? In 1891 the objects and purposes of these beneficial associations were extended by a supplement to the original act, so that thereafter executors, administrators, or assigns of deceased members could be made beneficiaries. In certificates thereafter issued, in which the stipulated sum was payable to legal representatives, these words would necessarily be given in their primary sense, and be understood as meaning executors or administrators. Harton survived this change in the law some thirteen years. During all this time, he had the right, under the rules of the association, to appoint other beneficiaries, in the prescribed mode, by surrendering his original certificate and accepting a new one with the names of the substituted beneficiaries therein; but he did not exercise this right. His certificate remained at his death as it was when originally issued, payable in terms to his legal representatives.

It is argued on behalf of appellants that surrender and substitution in this case were not required, since by the change of the law it was competent for the association to contract for the payment of the stipulated sum to executors and administrators, and that the amended law was so impressed on this earlier contract as to impose on the words "legal representatives" their primary meaning, and that Harton is presumed to have known of the change, and his retention of the original certificate, under these circumstances, requires that the contract be interpreted as of the time of his death. We fail to see the force of this argument. The earlier contracts of this association stand clear of the amended law of 1891. The amendment was not curative in any sense. If this particular contract was invalid before, it was none the less so after, the amendment. But it was not invalid, as we have seen. It was a valid and subsisting contract that required payment of the stipulated sum to the heirs at law. Had Harton died prior to the adoption of the amendment, it is not open to question that his heirs could have successfully asserted their right to the money. The amendment did not interfere with their right. Nothing could defeat it but an unequivocal act on the part of Harton, in conformity with the rules of the association, appointing other beneficiaries. His attempt at a testamentary disposition of the fund was futile, for the reason that he had no property in it (Northwestern Masonic Aid Asso. v. Jones, 154 Pa. 99, 35 Am. St. Rep. 810, 26 Atl. 253), and for the further reason that the rules of the association provided that change of beneficiaries was to be made by surrender of certificate. Neither Harton's attempted disposition of the fund by will, nor the fact that for thirteen years prior to his death the certificate that he held was in conformity to the letter of the amended law governing the association, and that certificates issued during that period in the same terms gave the stipulated sum to the executor or administrator, can be considered as affecting the rights settled under the original contract. We are concerned with Harton's desires and purpose with respect to this fund only as they find expression in the original contract; no subsequent act of his that could change or qualify them agreeably to law or the rules of the association being shown. It is familiar law, but will bear repetition here, that a contract is to be construed in reference to the time when it was made, and to contemporaneous laws and usages. 2 Story, Contr. p. 43. There is nothing else in the case that calls for consideration here.

The conclusion reached by the court below was correct, the appeal is dismissed at the cost of appellants, and the decree is affirmed

VIRGINIA SUPREME COURT OF APPEALS.

C. W. GRANDY, Exr., etc., of William Selden, Deceased, Appt.,
v.
C. E. KENNEDY.

(104 Va. 826, 52 S. E. 635.)

Administration upon property of living person.

1. A statute providing for the taking of an absentee's property and administering it when he is alive, without his knowledge or consent, and in a proceeding to which he is not a party, and of which he has no notice, is void as depriving him of his property without due process of law.

Legacy—suit to recover—laches.

2. Mere failure for fifteen years to apply for a legacy will not bar a right to recover it, where claimant had no knowledge of his rights until shortly before action brought, the interested parties are all living, no evidence has been lost, there is no uncertainty as to the amount due, or presumption of payment, and the one who has received the money from the administrator has given a refunding bond.

(January 25, 1906.)

APPEAL by defendant from a decree of the Law and Chancery Court of Norfolk in plaintiff's favor in a suit to compel payment of a legacy. Affirmed.

The facts are stated in the opinion.

Messrs. **Loyall & Taylor**, for appellant:

All the necessary protection is afforded the absent party in restoring him to his rights should he return.

Marx v. Hanthorn, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508; Hagar v. Reclamation Dist. No. 108, 111 U. S. 710, 28 L. ed. 572, 4 Sup. Ct. Rep. 663.

Unless the appellee can reasonably account for his delay, equity will refuse him relief.

Eubank v. Barnes, 93 Va. 156, 24 S. E. 908; Orr v. Pennington, 93 Va. 271, 24 S. E. 928; Tate v. Jones, 98 Va. 547, 36 S. E. 984.

Messrs. **Burroughs & Brother**, for appellee:

Letters of administration upon the estate of a live person are void.

Jochumsen v. Suffolk Sav. Bank, 3 Allen, 87; D'Arusment v. Jones, 4 Lea, 251, 40 Am. Rep. 12; Devlin v. Com. 101 Pa. 273, 47 Am. Rep. 710; Springer v. Shavender, 118 N. C. 33, 33 L.R.A. 775, 54 Am. St. Rep. 708, 23 S. E. 976; Schleicher v. Gutbrod (Tex. Civ. App.) 34 S. W. 65; Clapp v. Houg, 12 N. D.

Case Note.—Constitutionality of statutes providing for administration of estate of absentee.—The general question of the validity of administration of the estates of absentees has two aspects, the jurisdictional and the constitutional. As to the first, which has been much discussed, it may suffice here to say that the weight of authority is against the jurisdiction of courts of probate to grant administration in such cases, upon the ground that, in order to confer jurisdiction upon a court to grant letters of administration upon a person's estate, that person must be in fact dead, and that, if he is not dead, there is no estate to administer upon, and hence no jurisdiction. The question of the constitutionality of such proceedings for administration arises, then, only where the jurisdiction of courts of probate is regarded as extending to such cases, or where statutes exist expressly authorizing the administration of estates of absentees.

In the case of Roderigas v. East River Sav. Inst. 63 N. Y. 460, 20 Am. Rep. 555, which holds that, since the state statutes conferring upon surrogates jurisdiction over the granting of letters of administration are to be construed as requiring a surrogate to determine the fact of death of the person upon whose estate administration is applied for, the decision of the surrogate's court as to its jurisdiction over the estate is conclusive until reversed, revoked, or vacated, so far as to protect innocent persons acting upon the faith of the letters of administration,—the constitutional question is not discussed, although it is said in the opinion of Miller, J., that it cannot well be claimed that the legislature has not the power to provide safeguards for the protection of innocent third parties who act under the decree of a competent court; and that enactments to guard against such consequences cannot be regarded as devesting a person of his property, or interfering with rights without due process of law.

But in Lavin v. Emigrant Industrial Sav. Bank, 8 Blatchf. 1, 1 Fed. 675, the Federal circuit court in the southern district of New York, while constrained to follow the decision in the Roderigas Case as to the efficacy of New York statutes to vest in the surrogate court jurisdiction to grant administration on the estates of absentees, held that those statutes in such application were unconstitutional as depriving the absentee of his property without due process of law; since he had no notice, actual or constructive, of the proceeding, and no opportunity to be heard. And the court also held that the proceeding was not a proceeding *in rem*, so that the seizure of the property itself by an officer of the court could be considered as constructive notice, since there was no seizure anterior to the decree or judgment declared to be binding on the absentee; and that such legislation cannot be justified as an exercise of police power.

In Clapp v. Houg, 12 N. D. 600, 65 L.R.A. 757, 102 Am. St. Rep. 589, 98 N. W. 710, it is held that a statute providing for the appointment of a special administrator in

600, 65 L.R.A. 757, 102 Am. St. Rep. 589, 98 N. W. 710; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Andrews v. Avory, 14 Gratt. 236, 73 Am. Dec. 355; Carr v. Brown, 20 R. I. 215, 38 L.R.A. 294, 78 Am. St. Rep. 855, 38 Atl. 9.

The relation between the parties in this case is that of trustee and *cestui que trust*. The trust is a continuing one, and in such cases the doctrine of laches has no application.

2 Story, Eq. § 1520a; 1 Pom. Eq. Jur. §§ 418, 419; Atty. Gen. v. Fishmongers' Co. 5 Myl. & C. 16; Leake v. Leake, 75 Va. 800; Nelson v. Carrington, 4 Munf. 332, 6 Am. Dec. 519; Coles v. Ballard, 78 Va. 139; Wissler v. Craig, 80 Va. 22; Tunstall v. Withers, 86 Va. 892, 11 S. E. 565; Bell v. Wood, 94 Va. 677, 27 S. E. 504; Jameson v. Rixey, 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 861; Aylett v. King, 11 Leigh, 486.

Buchanan, J., delivered the opinion of the court:

This suit was instituted by C. E. Kennedy against C. W. Grandy, surviving executor of Dr. William Selden, deceased, to recover a legacy.

It appears that Dr. Selden, by his last will and testament, which was probated in November, 1887, bequeathed to Charles H. Kennedy the sum of $1,000. Kennedy died before the testator, leaving three children, who, under § 2523 of the Code of 1887 [Va. Code 1904, p. 1290], were entitled to the legacy. The executors paid to two of the children their portion of the legacy. Upon the 7th day of January, 1896, the corporation court of the city of Norfolk, upon proof that C. E. Kennedy, the other child, had been a resident of this state, and had since gone from and had not returned to the state, more than seven years prior to that date, adjudged, ordered, and decreed that he was and should be presumed to be dead, as declared by § 3373 of the Code of 1887 [Va. Code 1904, p. 1786], and appointed T. D. Kennedy, his brother, administrator of his estate. A few days after his appointment he collected his brother's share of the legacy from the appellant as surviving executor of Dr. Selden.

In 1904 C. E. Kennedy, who had been absent from the state for many years, made a demand upon the surviving executor for his share of the legacy; and, upon his refusal to pay the same this suit was instituted, and, upon a hearing of the cause, a decree was rendered against him for the sum de-

cases where "the death of the person whose estate is in question is not satisfactorily proved; but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead, or has been secreted, confined, or otherwise unlawfully made away with,"—is invalid as depriving the person of his property and its possession without notice or due process of law, when applied to the property of a person living, although such special administrator has no power to administer such estate generally; that the taking of the possession of the property of such person under letters of administration issued without notice is not such notice to such owner as will validate the proceedings; and that the taking of possession of a person's property under such circumstances cannot be upheld as a proper exercise of the police power of the state.

In Scott v. McNeal, 5 Wash. 309, 34 Am. St. Rep. 863, 31 Pac. 873, it was held that proceedings to obtain letters of administration are substantially *in rem*, so that all parties must be held to have received notice of the institution and pendency of such proceedings; and that therefore the administration of the absentee's estate does not operate to deprive him of his property without due process of law,—a decision which was reversed by the United States Supreme Court in Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108, stated at length in the case in hand.

To some expressions in the case last cited, which would seem to indicate that a state is absolutely without power to provide by a special proceeding for the administration and care of the property of an absentee, and to confer jurisdiction on its courts to do so irrespective of the fact of death, which are explained in the case of Cunnius v. Reading School District, 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, as intended to be taken only with reference to the particular case before the court and the context of the opinion, is doubtless attributable the decision in Carr v. Brown, 20 R. I. 215, 38 L.R.A. 294, 78 Am. St. Rep. 855, 38 Atl. 9, that a statute authorizing administration upon the estate of a person who has left home and not been heard from for seven years is unconstitutional, although it provides for the publication for three months of a notice of intention to apply for letters of administration or prove the last will and testament of such person; which decision, so far as it intimates that, by the operation of the 14th Amendment, the states are deprived of power to legislate concerning the estates of absentees, was expressly disapproved by the United States Supreme Court in the Cunnius Case. In commenting on the case, however, Mr. Justice White says: "The opinion leads to the view that the conclusion of the court was primarily based upon the construction that the statute did not create a conclusive presumption conferring jurisdiction in the event the absentee was alive, and not dead." The decision in the Cunnius Case is sufficiently set forth in the opinion in GRANDY v. KENNEDY.

manded. From that decree this appeal was taken.

The first assignment of error is that the payment made by the appellant to T. D. Kennedy, as administrator of the estate of the appellee, was a valid payment, and that the trial court erred in not so deciding.

In order to sustain this contention, it will be necessary to hold that § 3373 of the Code, when considered in connection with §§ 2253 and 2639 [Va. Code 1904, pp. 1160, 1352], which provide for the granting of letters of administration when a person is dead, authorizes the appointment of an administrator of the estate of the appellee, under the facts disclosed by the record; and, if it does, that it is not in conflict with that portion of the 14th Amendment to the Constitution of the United States which ordains that no state shall "deprive any person of life, liberty, or property without due process of the law."

Section 3373 [p. 1786] is as follows: "If any person, who shall have resided in this state, go from and do not return to the state for seven years successively, he shall be presumed to be dead in any case wherein his death shall come in question, unless proof be made that he was alive within that time."

It may well be doubted whether the legislature intended by that section to authorize the courts to grant letters of administration upon the estate of a person who was once a resident of the state, and had been absent therefrom for more than seven years, irrespective of death. But, if it be conceded that such was its intention, is not the statute in plain violation of the due-process-of-law clause of the 14th Amendment?

It is conceded, and, if it were not, it is well settled, that the grant of letters of administration on the estate of a live man, as if he were dead, is absolutely void.

In the case of Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108, the question of the validity of such letters of administration was fully discussed, the authorities, English and American, cited, and the conclusion reached that a court of probate, in the exercise of its jurisdiction over the probate of wills and the administration of estates of deceased persons, had no jurisdiction to appoint an administrator of a living person, and that the appointment of an administrator, after public notice to the next of kin, creditors, and the like, of the estate of a living person who had been absent from the state more than seven years, was in violation of the due-process-of-law clause of the 14th Amendment to the Constitution of the United States. And there are general expressions in that opinion which would seem to indicate that a state was absolutely without power to provide by special proceeding for the administration and care of the property of an absentee, and to confer jurisdiction on its courts to do so, irrespective of the fact of death.

But in the recent case of Cunnius v. Reading School District, 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, that court, in considering the validity of certain statutes of the state of Pennsylvania "relating to the grant of letters of administration upon the estates of persons presumed to be dead by reason of long absence from their former domicil," held that the due-process-of-law clause of the 14th Amendment to the Constitution of the United States does not wholly deprive a state of the power to confer jurisdiction on its courts to administer the estates of absentees, irrespective of the fact of death, by special and appropriate proceedings distinct from the general law for the settlement of the estates of decedents. It further held, that fixing the period of a person's absence from his last domicil within the state at seven years, or more, before his estate could be administered under the special proceedings, was not so unreasonable as to render the statute repugnant to the due-process-of-law clause of the 14th Amendment; and that the notice required to be given by order of publication before an administrator could be appointed, and the safeguards provided for the protection of the property of the absentee in case of his return, satisfied the requirements of the 14th Amendment. But the court expressed the opinion in that case, that a state law which did not provide, among other things, for adequate notice as a prerequisite to the proceedings for the administration of the estate of an absentee would be repugnant to the 14th Amendment.

It is said that the expression of the court in that case, that the appointment of an administrator of the estate of an absentee while he is still living, without adequate notice as a prerequisite to such appointment, would be void, was unnecessary to a decision of that case, and therefore a mere *dictum*. Even if this were so, the principle there announced is in accord with the repeated declarations of that court, as to what is required by the due-process-of-law clause of the 14th Amendment. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Scott v. McNeal, *supra*.

Tested by that rule, a statute which provides for the taking of an absentee's property and administering it when he is alive, without his knowledge or consent and in a proceeding to which he is not a party, and of which he has no notice, is clearly in violation of his rights under the 14th Amendment.

The other assignment of error is that the trial court ought to have denied the relief sought, because of the long delay of the appellee in asserting his claim.

It has always been a principle of equity to discourage stale demands, and laches is often a defense wholly independent of the statute of limitations. But the rule is adopted because after great lapse of time, from death of parties, loss of papers, or death of witnesses, there is danger of doing injustice, and there can be no longer a safe determination of the controversy. Tazewell v. Saunders, 13 Gratt. 354; Bargamin v. Clarke, 20 Gratt. 544, 553; Rowe v. Bentley, 29 Gratt. 756, 763; Jameson v. Rixey, 94 Va. 342, 346, 64 Am. St. Rep. 726, 26 S. E. 861.

Mere delay is not always laches, and laches in the assertion of a right is not always sufficient to defeat it. The laches must be such as to afford a reasonable presumption of satisfaction or abandonment of the claim, or such as to prevent a proper defense by reason of the death of parties, loss of evidence, or otherwise. Tazewell v. Saunders, 13 Gratt. 362; Jameson v. Rixey, 94 Va. 346, 64 Am. St. Rep. 726, 26 S. E. 861, and cases cited. Whether the lapse of time is sufficient to bar a recovery must of necessity depend upon the particular circumstances of each case. Aylett v. King, 11 Leigh, 486; Rowe v. Bentley, 29 Gratt. 763; Bell v. Wood, 94 Va. 677, 683, 27 S. E. 504. Tested by these general principles, the facts of this case do not make out such a case of laches as ought to bar the appellee of his right to recover. The time between the accruing of his right to collect the legacy and the institution of his suit is about fifteen years,—a long time to delay the assertion of his right if he had knowledge of it. It is not shown when he first learned of it, but it does appear that he had been absent from the state for more than seven years before letters of administration on his estate were granted, that during that period he had not been heard from by his nearest relatives, and that he was still a nonresident at the time of the institution of his suit. We think it may be fairly inferred from the record that he had no knowledge of his rights until after his legacy had been paid to his administrator, and probably not until shortly before he made his demand upon the appellant and instituted his suit. But if it be conceded that he knew that the legacy had been left him, the only thing other than mere lapse of time that could stand in the way of his right to recover is that the appellant voluntarily paid it to another, who had apparent, but no real, authority to receive it, and who gave a refunding bond for appellant's protection. The appellant whose duty it was to pay, and the appellee, who was entitled to receive the legacy, are both living; no evidence has been lost by death, no records have been destroyed or papers lost, there is no uncertainty as to the amount that is due, and no presumption of payment. In the absence of all of these, the equitable circumstances which generally constitute the grounds for the application of the doctrine of laches, we do not think that the appellee can be said to be guilty of such laches as will bar his right to recover.

We are of opinion that there is no error in the decree appealed from, and that it should be affirmed.

WASHINGTON SUPREME COURT.

F. H. WESTCOTT AND WIFE, Respts.,
v.
SEATTLE, RENTON, & SOUTHERN RAILWAY COMPANY, Appt.

(— Wash. —, 84 Pac. 588.)

Carrier—injury to passenger by dog.

A street car company is liable for injuries inflicted upon a passenger by a dog permitted to be in a coach set apart for passengers.

(February 16, 1906.)

Case Note.—Liability of carrier for injury to passenger by dog or other animal.—Aside from the above case, but two others have been found which come within the scope of this note.

In Barrett v. Malden & M. R. Co. 3 Allen, 101, a horse railroad company was held liable to a person bitten by a dog as he was entering one of its cars as a passenger. There was evidence that the dog which inflicted the injury was kept on the premises of the defendant for several weeks by a person in its employment who had charge of its stables, and also evidence which tended to show that this was done with the knowledge and implied assent of its general agent or superintendent.

In Trinity & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389, a dog which was to be shipped on the train was tied by the porter to a truck upon the platform in front of the waiting room of the station, so that the dog could reach the door of that room. There was evidence, which was contradicted, that the porter was informed that the dog was vicious. Plaintiff went to the station for the purpose of taking passage upon the train, and, just as she had placed one foot in the door of the waiting room, she was seized and bitten by the dog. She

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiffs' favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts sufficiently appear in the opinion.

Messrs. **Peters & Powell** for appellant.

Mr. **Robert A. Devers** for respondents.

Per Curiam:

This action was brought by the respondents, to recover for damages to the clothing and to the sensibilities of respondent, Margaret Westcott, while a passenger upon one of appellant's cars. These damages were inflicted by a four-months-old puppy, brought into the car by another lady passenger, and permitted by the conductor to remain there. Verdict was rendered in favor of the respondents, judgment was entered thereon, and from such judgment this appeal is taken.

A street car company has no right to carry dogs upon a coach that is set apart for passengers, and if it does so, and damage is caused by said dog, it must respond to the same. There being no errors in instructions, or in the admission of testimony, the judgment is affirmed.

had not purchased a ticket, nor in any way made known to the company's agents her purpose to become a passenger over its road. Verdict and judgment were rendered for plaintiff in the trial court, but the members of the appellate court differed upon the question whether or not plaintiff, when hurt, was a passenger, as well as upon the further one as to the degree of care which the carrier owed to her, if a passenger, while at the station and before actually entering upon the cars. A majority of the court held that the jury should have been instructed that it was the duty of the company to exercise that degree of care which persons of ordinary prudence would employ under the same circumstances, and a charge requiring more than this was erroneous.

In The Lord Derby, 4 Woods, 247, 17 Fed. 265, a pilot taken on board at the mouth of the Mississippi river while on the voyage to New Orleans was seriously bitten by a dog which had been brought, as part of the cargo, from Europe for sale in this country. The dog was suspected of a disposition to bite strangers generally, and was kept chained under the cabin table where he was concealed from view. The cabin was the place where the pilot had been assigned to sleep, and where he had a right to go. The ship was held liable.

ILLINOIS SUPREME COURT.

KATIE STRAWBRIDGE et al., Appts.,
v.
JOHN STRAWBRIDGE et al.

(220 Ill. 61, 77 N. E. 78.)

Will—vested estate.

A devise after the death of a life tenant, of testator's property to his children, naming them, "and their children, forever," will vest the fee in the first takers, the word "children" being given the effect of "heirs." where another construction would result in partial intestacy, and postpone the vesting of the estate contrary to the policy of the law.

(Cartwright, Ch. J., and Ricks, J., dissent.)

(February 21, 1906.)

Case Note.—Conveyance of fee by devise to one and his or her child or children.—The construction of a devise of the kind in question depends, primarily, upon the general rules that the intention of the testator is to be regarded as the polestar of interpretation, and that the court, in ascertaining such intention, will not be limited to the particular clause in question, but may look to the four corners of the will, and even to the concomitant circumstances. The ascertainment of such intention is further aided by the presumption that the testator did not mean to die intestate as to any portion of his estate.

However, "the term 'children' is primarily and technically used as a word of purchase, and not of limitation, and the immediate descendants of the person named as the ancestor" (Lytle v. Beveridge, 58 N. Y. 605); but if it appears to have been the intention of the testator to use it in a different sense, as a word of limitation, it will be so construed in order to effectuate that intention. Stokes v. Tilly, 9 N. J. Eq. 130; Turner v. Patterson, 5 Dana, 292; Foster v. McKenna, 8 Sadler (Pa.) 538, 11 Atl. 674; Williams v. Sneed, 3 Coldw. 533; Forest Oil Co. v. Crawford, 23 C. C. A. 55, 39 U. S. App. 408, 77 Fed. 106.

And there are certain specific presumptions of intention which obtain in this class of cases, one of which is that, where a devise is made by one spouse to the other and their children, the testator will be deemed to have intended to give the other spouse a life estate only with remainder to the children, as otherwise the property might pass at the named devisee's decease to strangers in blood. Frank v. Unz, 91 Ky. 621, 16 S. W. 712; Hood v. Dawson, 98 Ky. 285, 33 S. W. 75; Moushand v. Rodetzky, 5 Ohio N. P. 256.

Another specific presumption, which is based on the testator's presumed intention, above referred to, to dispose of the whole estate, is known as the rule in Wild's Case. In this case, which is reported in 6 Coke, 17,

APPEAL by grandchildren of Benjamin Strawbridge, deceased, from a decree of the Circuit Court for Tazewell County giving such a construction to his will as disallowed rights claimed by them under it. Affirmed.

The facts are stated in the opinion.

Mr. John T. Elliff, for appellants:

The terms "child" and "children" are words of purchase, in contradistinction to the term "heirs," which is held to be a word of limitation.

Baker v. Scott, 62 Ill. 86; Beacroft v. Strawn, 67 Ill. 28; Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 589; Peoria v. Darst, 101 Ill. 609; Chapin v. Crow, 147 Ill. 219, 37 Am. St. Rep. 213, 35 N. E. 536; Ebey v. Adams, 135 Ill. 80, 10 L.R.A. 162, 25 N. E. 1013; Smith v. Kimbell, 153 Ill. 368, 38 N. E. 1029; Chapin v. Nott, 203 Ill. 341, 67 N. E. 833; Schaefer v. Schaefer, 141 Ill. 337, 31 N. E. 136.

Mr. Jesse Black, Jr., for appellees.

Boggs, J., delivered the opinion of the court:

This was a bill in chancery filed by the children and legal heirs of Benjamin Strawbridge, deceased, for the purpose of having a construction placed upon the fourth clause of his last will and testament. The testator, in his last will, in the first clause thereof, bequeathed all his personal property to his wife. In the second clause he devised his real estate to his wife during her natural life. By the third clause he bequeathed to

it is said that it "was resolved for good law, that, if A devises his lands to B and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issues should take, and as immediate devisees they cannot take because they are not *in rerum natura*, and, by way of remainder, they cannot take, for that was not his intent, for the gift is immediate; therefore such words shall be taken as words of limitation. . . . But if a man . . . devises land to husband and wife, and after their decease to their children, or the remainder to their children, . . . although they have not any child at the time, yet every child which they shall have after may take by way of remainder, according to the rule of the law; for his intent appears that their children should not take immediately."

This rule forms the basis of decision of a large number of the American cases.

In Lofton v. Murchison, 80 Ga. 391, 7 S. E. 322, it is held that a devise to testator's daughter of certain land, "to her and her children, free from the disposition of any future husband," the daughter having no children at the time the will took effect, created an estate tail under the resolution in Wild's Case, which a state statute enlarged into an estate in fee simple.

In Davis v. Ripley, 194 Ill. 399, 62 N. E 852, the decision that a devise of real and personal estate to the two daughters of testatrix "and their children," the daughters having no children, passed the title in fee simple, was based on a state statute which provides that words of inheritance are not necessary to carry a fee, rather than on the rule in Wild's Case; such rule being said to be no longer necessary, as the statute which gives the fee simple where the common law gave only a life estate gives a larger estate than the rule would do.

And in Boehm v. Baldwin, 221 Ill. 59, 77 N. E. 454, the statute above alluded to and the presumption as to testator's intention to dispose of all his property were relied on as the basis for the decision that a devise of property to a son, followed by the words "said land as above described is given to Elias V. Baldwin and his children provided he shall have children by his wife," operates to convey the fee, notwithstanding the son never had any children.

In Lachland v. Downing, 11 B. Mon. 32, a devise of the residue of testator's estate, to be equally divided among named devisees, "to them and their children forever," was held sufficiently to indicate an intention that the named devisees should take the fee; since the words used evidently occupy the place of the habendum clause, and do not coalesce with the direction to divide, so as to embrace the children in the direction for a division.

In Moran v. Dillehay, 8 Bush, 434, a devise of a tract of land to testator's daughter "and her children forever," followed by a limitation over in case of her death without heirs of her body, was held to give the daughter an estate in fee, subject to be defeated by the contingency of her death without heirs of her body; such construction being fortified by prior and subsequent clauses and language in the instrument evidently showing that the words "children forever" were used by testator as synonymous with the word "heirs" or "heirs of the body."

Where it is manifest from the repeated and persistent use of the words throughout the will that the testator intended to use them as words of limitation, a devise to testator's "grandsons and their children" vests a fee-simple title in the grandsons. Williams v. Duncan, 92 Ky. 125, 17 S. W. 330.

In Hood v. Dawson, 98 Ky. 285, 33 S. W. 75, a devise of property to a named person, "to him and his children forever," with a limitation over if the said person should die leaving no child or children, was held to give such person a fee, subject to be defeated by his death without children, it appearing from the different wording of another clause of the will devising an estate for life that testator did not mean by the clause under consideration to give to devisee only a life estate.

In Childers v. Logan, 23 Ky. L. Rep. 1239,

his son Benjamin F. Strawbridge the sum of $200. The fourth clause is as follows: "I give and devise all the rest, residue, and remainder of my real estate, of every name and nature whatsoever, upon the decease of my wife, Sarah Strawbridge, to be divided equally between my children, to wit, John B. Strawbridge, William R. Strawbridge, Benjamin F. Strawbridge, Harry Strawbridge, George B. McC. Strawbridge, Emma Mehan, Jesse Strawbridge, and Parson Strawbridge, and to their children forever." It appeared from the bill that John B. Strawbridge and Benjamin Franklin Strawbridge have not now, and have not had, any children. William Strawbridge has eight children; Emma Mehan has ten children; Jesse Strawbridge has two children; Harry S. Strawbridge has seven children, three of whom were born after the death of the testator; George Strawbridge has seven children, two of whom were born after the death of the testator; and Parson Strawbridge has one child. Sarah Strawbridge, the life tenant, died on or about March 1, 1902. It does not appear from the allegations of the bill whether the children, or either of them, that were born to Harry S. Strawbridge and George Strawbridge after the death of the testator were born before the death of the life tenant. The bill alleges that the testator had no real estate at the time of making his will, or at the time of his death, other than the real estate involved in the fourth clause.

The whole contention is as to the effect

65 S. W. 124, where the devise was in the following words: "I will that at the death of my wife that my daughter Addie and her children, and Charlie, my son, and his children, have the homestead and cottage together with the 20 acres of land,"—the word "children" was held to give the son and daughter the fee, such intention being deducible from the whole instrument, and the word "children" being evidently used in the sense of heirs in another clause; although the court said that, if the testator had simply used the word "children" in the manner in which it was used in the clause quoted, it would be much inclined to hold that he used it as a word of purchase.

In Jones v. Jones, 13 N. J. Eq. 236, it is held that the rule that, where lands are devised to a named person and children, such person having children living at the time of the devise, the word "children" may be taken as a word of purchase according to its natural import, will yield to the testator's intention; and that an intention to use the word "children" as a word of limitation is inferable where the named devisee, upon whom a personal charge is made as a condition of the devise, would be, should the children be admitted to a share of the devise, in worse condition than the children, and where the testator, in a specific provision for one of such children, who was an infant of tender years, in another part of the will provided that he should not come into possession of his legacy till his majority. Compare Forest Oil Co. v. Crawford, 23 C. C. A. 55, 39 U. S. App. 408, 77 Fed. 106.

In Best v. McClelland, 19 Pa. Co. Ct. 553, a devise of a tract of land to testator's son "and his children" was held to convey an estate in fee, by operation of the rule in Shelley's Case, although the son had a child living at the time of the devise; a subsequent clause ordering that, after the son should have paid a certain sum charged upon him, then the executor should give him a clear title to said land, being regarded as evincing testator's intention that the word "children" should be construed as a word of limitation, and not of purchase.

And in Mosby v. Paul, 88 Va. 533, 14 S. E. 336, a devise of a share of testator's residuary estate to his daughter "and her children" was held to give the daughter an absolute fee-simple estate, the reference to the children being taken merely to indicate the motive of the gift.

In Biggs v. McCarty, 86 Ind. 352, 44 Am. Rep. 320, it was held that a devise to the testator's daughter "and her children," the daughter having at the time the will was made a child which afterward died, operated to convey the property in fee to the daughter and her child *en ventre sa mère* at the time of the devise, as tenants in common, to the exclusion of after-born children.

And where a devise was to a woman "and her children," she having children living at the time of the devise, the mother and children take as tenants in common of the fee. Allen v. Hoyt, 5 Met. 324.

A similar decision was made in Moore v. Leach, 50 N. C. (5 Jones, L.) 88, where a devise was made to testator's daughter of certain real estate, "to her . . . and her children forever."

A devise, "after the death of my beloved wife, I will that one half of the home plantation and all improvements be the property of my beloved daughter, Nancy Reich, and the other half of my home plantation and all improvements to be the property of Alfred Hampton and his wife, Jureda Reich, and their children,"—was held to give the devisees and their children living at the time the will took effect the fee-simple estate as tenants in common, in Hampton v. Wheeler, 99 N. C. 222, 6 S. E. 236.

In Turner v. Patterson, 5 Dana, 292, it is held that, under a devise, "to my daughter, . . . I give to her and her children the 50 acres, . . . to each an equal part," the daughter and her children then living would take, in the absence of anything to show a different intention, as tenants in common of the fee; but that, where another clause shows an intention to give the daughter a life estate, she would take such estate, and the children would take a remainder.

An intention to give, by devise of a share

of the last words of said fourth clause, "and to their children forever." The appellees' contention is that the eight children of the testator named in the said fourth clause of the will take title in fee simple, appellants' contention being that the eight children above named take only a life estate. The true construction of the will was presented to the trial court on demurrer, and a decree was rendered construing the will to devise estates in fee to the sons and daughters of the testator named in the fourth clause of the will. Appellants abided their demurrer and prayed an appeal to this court. The term "children" is primarily a word of purchase, and is not to be construed as equivalent to "heirs" in the absence of other words or circumstances showing it to have been used in that sense; but, where there are other words in the will showing that the word "children" was used in the sense of "heirs," the term will be construed as a word of limitation equivalent to "heirs." 5 Am. & Eng. Enc. Law, 2d ed. title, "Children," pp. 1092, 1093, and note 1 on the latter page. The words "heirs," "issue," and "children," when found in wills, may be construed interchangeably when necessary to effectuate the intention of the testator. Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 589. In Leiter v. Sheppard, 85 Ill. 242, we found that the testator had employed the words "children" and "heirs" synonymously, and we interpreted the will accordingly. The testator, in the clause of the will under consideration, expressly devised "all the rest,

of testator's property to a son "and his children," an estate to the son for life, with remainder to the children, was held to be deducible from a restriction of the right to sell such interest, and an expression of desire that such lands be kept for homes for testator's sons and their children after them, in Fielden v. Ballenger (Tenn. Ch. App.) 35 S. W. 758.

A departure from the rule in Wild's Case was announced by the court of appeals of Kentucky, in Carr v. Estill, 16 B. Mon. 309, 63 Am. Dec. 548, in which a devise to a woman "and her children," she having at the time no children, was construed as giving her a life estate, with remainder to such children as she might have. Under the rule in Wild's Case, such a devise would be regarded as giving a fee tail; and the court held that, since, by statute, fees tail were converted into fees simple, to give effect to the rule (which was originally adopted to promote the intention of the testator) would be to frustrate and defeat the acknowledged intention of the testator, as the children would then take nothing under the devise.

In Adams v. Adams, 20 Ky. L. Rep. 655, 47 S. W. 335, a devise of testator's residuary estate to his daughter "and her children in their exclusive right" was regarded as giving the daughter a life estate with remainder to the children; the court saying that, if such a devise should be construed as giving a joint estate, the quantity of interest each would take would remain uncertain and shift on the birth of each after-born child,—a condition of affairs which the testator would hardly be supposed to have intended to create.

The same doctrine was adhered to in Sims v. Skinner, 26 Ky. L. Rep. 443, 81 S. W. 703, the court saying that, while ordinarily gifts and conveyances to a mother and her children, or a father and his children, would create a joint tenancy, a different rule of construction should prevail for gifts from a father to his daughter and her children, or to a son and his children, or from a husband to a wife and children, for the reason stated in Adams v. Adams, *supra*.

In Kuhn v. Kuhn, 24 Ky. L. Rep. 112, 68 S. W. 16, a devise to a testator's daughter of a farm, followed by the words, "I give this farm to her and her children to be theirs with all its appurtenances," was construed, in view of all the provisions of the will, as giving the daughter a life estate with remainder to her children.

In Smith v. Smith, 27 Ky. L. Rep. 362, 85 S. W. 169, a devise: "I also give to my wife during her life 140 acres of land; . . . at her death to my son and his children,"—was held to give the son a life estate, with remainder to his children, in view of the rule that the word "children" must be considered as a word of purchase, and not of limitation, in the absence of something to show a contrary intention on the part of the testator.

A devise to testator's daughter "and her children, the children taking their mother's share," was held plainly to indicate an intention on the part of the testator to give his daughter an estate for life, with remainder to children, in Smith's Estate, 9 Phila. 348.

In this connection may also be considered devises in a slightly different form, as to a named person "and to his children."

In Parkman v. Bowdoin, 1 Sumn. 359, Fed. Cas. No. 10,763, a devise to a named person for life, and at her death to her son "and to his lawfully begotten children in fee simple forever," with a limitation over in case he should die without children lawfully begotten, was held, in conformity to the rule in Wild's Case, the son having no children at the time of the devise, to give him a fee tail with remainder over on indefinite failure of issue.

In Leiter v. Sheppard, 85 Ill. 242, a devise to a named person, "and to her children, heirs, and assigns after her," was construed as giving the first taker a fee, the court holding the words "children" and "heirs" to be used synonymously, in view of the fact that it was apparently the testator's intention that the devisee should stand on an equal footing with others, to whom an absolute estate was given, and of the fact that personal estate was comprehended in the share of the devisee.

In Moushand v. Rodetzky, 5 Ohio N. P.

residue, and remainder of my real estate, . . . upon the decease of my wife, Sarah Strawbridge, to be divided equally between my children, to wit (naming eight of his children), and to their children forever." From this clause the meaning he intended to be given to the word "children," as used by the testator, must be determined.

By § 13 of chapter 30 of the Revised Statutes of Illinois of 1903, words of inheritance are not necessary in this state to pass a fee; and it is therein provided that "every estate in lands which shall be granted, conveyed, or devised . . . shall be deemed a fee-simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law." The spirit of this statute and the disposition of the courts, as a matter of public policy, is to adopt such a construction as will give an estate of inheritance to the first donee. Leiter v. Sheppard, *supra*. And when a fee simple is devised by a clause of a will, and other parts of the will are relied on as limiting and qualifying the estate given, they must show a clear intention on the part of the testator to so qualify or limit the estate, and, unless such intention clearly and unequivocally appears, the estate will not be limited. Giles v. Anslow, 128 Ill. 187, 21 N. E. 225. If the true intention of the testator, as disclosed by this devise, be held to create a life estate in his widow and a second life estate in each of his eight children named, with remainder over to their children, the construction so adopted would not be in entire harmony with the spirit of the statute, or with the disposition of this court to favor the adoption of such construction as would vest the fee in the first donee.

The provision that the "rest, residue, and remainder" of the real estate is "to be equally divided between my children, to wit, (naming them), must necessarily refer to the eight children named, and the words "their children" must refer, respectively, to the children of each of the eight children of

256, a devise of property to testator's wife for life, then to his daughter and to her children and grandchildren or their legal representatives, was held to give the daughter an estate in fee, such daughter having no children or grandchildren; the joint use of the terms "children" and "grandchildren" being regarded as indicating that the term "children" was intended to signify heirs.

In Re Utz, 43 Cal. 200, a devise to testator's daughter, "and to her children," was held to vest an estate in common in the devisees; it not appearing that the testator used the word "children" in the sense of heirs or issue.

In Forest Oil Co. v. Crawford, 23 C. C. A. 55, 39 U. S. App. 408, 77 Fed. 106, a devise to testator's son, and to his children, was construed, with reference to the entire will, as giving the son a life estate, with remainder to his children living at testator's death, which opened to let in after-born children, even though the payment of legacies was imposed on the son. Compare Jones v. Jones, 13 N. J. Eq. 236.

Another form of devise, of a similar character, was the subject of consideration in Small v. Field, 102 Mo. 104, 14 S. W. 815, where a bequest of testatrix's residuary estate to her daughter "for the sole use of herself and children" was construed, in view of the obligations of the testatrix to her daughter, and of the use of terms found in other parts of the will, and of the fact that the gift to the daughter was subject to a legacy, as giving the daughter a fee in the lands devised; the reference to the children being taken as indicative of motive.

In Smith v. Fox, 82 Va. 763, 1 S. E. 200, it was held that a devise to a daughter of testator, without limitation, a subsequent clause of the will stating: "It is my will and desire that all property, whether real or personal, willed by me to my daughters, . . . shall be held in trust . . . for the separate use of them and their children, free from the control of their husbands,"—gives the daughter a fee simple, the testator being deemed to have used the word "children" as synonymous with "heirs," in view of the fact that the daughter had been married for thirty years and had no children.

A devise "in trust . . . for the benefit of my daughter . . . and her children," the daughter then having children living, was held, in view of the rule in Wild's Case and of a statute establishing the form by which estates in common might be created, to give an estate in common to the daughter and her children, in Hunt v. Satterwhite, 85 N. C. 73.

In Frank v. Unz, 91 Ky. 621, 16 S. W. 712, a devise to testator's wife "for her own use and the benefit of her children forever" was regarded, in view of the rule hereinbefore stated in relation to devises by one spouse to the other and their children, and of the fact that the words used only gave the wife the use, as giving the wife a life estate, with remainder to the children in fee.

In Bowers v. Bowers, 4 Heisk. 293, a devise to testator's daughter of property, "to have and to hold the same to her and her children to her special use and benefit forever," was construed as giving the daughter and her children a joint equitable estate; since there was nothing to indicate that the testator meant to use the word "children" as a word of limitation.

The question whether a testator is to be deemed to have used the word "children" as a word of limitation also arises in cases of bequests of personalty, and in cases where the devise is to a person for life, and at his death to descend to, or be equally divided among, his children.

the testator named. Benjamin F. Strawbridge, one of the eight children of the testator named, was a bachelor without children and living with the testator at the time the will was made and at the time of the testator's death, and John Strawbridge, another of the eight children named, never had any children. If the construction that the eight children each take an undivided one-eighth interest for life, with remainder in fee to their children, respectively, therein, be adopted, as neither Benjamin F. nor John B. had child or children when the will was made or when the testator died, it would seem that the probability that the shares devised to them would become intestate property, would have occurred to the testator and have been provided against by him, as clearly he desired to control, by his will, the devolution of his property. He made a will, and it is to be presumed he intended to provide for the disposition of his entire estate, and it is our duty to adopt such a construction of the will as disposes of the entire estate if that meaning can reasonably be given to it. Craw v. Craw, 210 Ill. 246, 71 N. E. 450. If the meaning "their heirs" be given to the words "their children," the presumption that an entire disposal of the property of the estate was intended, and the policy of the law that the fee should vest in to first taker will be given effect. If the words "their children" be given a literal and technical meaning, the well-settled presumption that the testator intended to make an entire disposal of his estate would not be given full operation, for he knew when he made the will that neither of these two sons had children, and with that knowledge it is highly improbable he would have employed the word "children" in the sense of natural offspring. We think that the intention of the testator, as gathered from a fair reading of the whole will, viewed in the light of the circumstances surrounding the testator at the time of making the will, was to use the word, "children," not in the sense of offspring, but in that other sense or meaning, not infrequently given the word, of heirs generally.

The decree of the Circuit Court declaring title in fee to the remainder passed to the eight children of the testator named in the fourth clause of the will was correct, and must therefore be affirmed.

Cartwright, Ch. J., and Ricks, J., dissent.

IOWA SUPREME COURT.

GILBERT S. GILBERTSON, State Treasurer, Appt.,
v.
GEORGE A. OLIVER, Exr., etc., of Julia P. Whiting et al.

(— Iowa, — 105 N. W. 1002.)

Succession tax—evidence of indebtedness—nonresident creditor.

Certificates of deposit, notes, mortgages, and other evidences of indebtedness of residents of a state, held at the time of his death by the creditor at his domicil in another state, are not subject to the jurisdiction of the former state, within the meaning of its statute imposing a tax on collateral inheritances.

(February 8, 1906.)

Case Note.—Liability of debt due from resident to nonresident to succession tax.—As pointed out in a note in 2 L.R.A. (N. S.) 637, it is a well-established principle of constitutional law, subject however to an exception in case of special circumstances giving a debt a "business situs" at the domicil of the debtor, that the exclusive situs of a debt for the purposes of property taxation is at the domicil of the creditor, and that, in the absence of such circumstances, the debt cannot be assigned a local situs for such purpose at the debtor's domicil if the creditor is domiciled elsewhere. This constitutional principle, however, is not applicable to succession taxes, which are laid upon the succession to, or transfer of, property, and not upon the property itself. And even when, as by the statute involved in the foregoing case, the tax is, in form, made payable in respect of property "within the jurisdiction," the principles which govern in case of a property tax are not necessarily controlling. Thus, the phrase, "within the jurisdiction of this state," in the Vermont statute imposing a collateral inheritance tax, was construed in Re Joyslin, 76 Vt. 88, 56 Atl. 281, to mean property within the probate jurisdiction; and it was accordingly held in that case that no tax was payable, under the statute, with respect to indebtedness due to a decedent resident in Vermont from residents of other states. Applying the doctrine of this case conversely, a debt due from a resident of Vermont to the estate of a nonresident would be liable to the tax under the Vermont statute. In most jurisdictions, however, succession taxes are regarded as laid according to the principle of domicil, or the principle of actual situs of the property, or according to both principles. If domicil is adopted as the exclusive principle in laying the tax, it is obvious that debts due to residents by nonresidents of the

APPEAL by plaintiff from a judgment of the District Court for Monona County in defendants' favor in a proceeding to enforce payment of a collateral inheritance tax. Affirmed.

The facts are stated in the opinion.

Messrs. **Charles W. Mullan,** Attorney General, and **Lawrence DeGraff** for appellant.

Messrs. **J. M. Holt** and **J. L. Carney,** for appellees:

The situs of personal property fixes the jurisdiction of the court for the purpose of enforcing the collateral inheritance tax.

Re McGhee, 105 Iowa, 9, 74 N. W. 695; Re Weaver, 110 Iowa, 330, 81 N. W. 603; Orcutt's Appeal, 97 Pa. 179; People ex rel. Bank of the Commonwealth v. Tax & A. Comrs. 23 N. Y. 192; Lines's Estate, 155 Pa. 378, 26 Atl. 728; Small's Estate, 151 Pa. 1, 25 Atl. 23; Alvany v. Powell, 55 N. C. (2 Jones, Eq.) 51.

The debts, although a species of intangible property for the purpose of taxation, if not for all purposes, are to be regarded as situated at the domicil of the creditor, and not that of the debtor.

Hunter v. Board of Supers. 33 Iowa, 378, 11 Am. Rep. 132; Kirtland v. Hotchkiss, 100 U. S. 498, 25 L. ed. 562; New Orleans v. Stempel, 175 U. S. 314, 44 L. ed. 178, 20 N. Y. Supp. 110; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 289, 65 Am. St. Rep. 653, 45 S. W. 245; Boyd v. Selma, 96 Ala. 144, 16 L.R.A. 729, 11 So. 393; People v. Park, 23 Cal. 138; Cooley, Taxn. 2d ed. 22; 1 Desty, Taxn. § 67, p. 322.

The tax in this case could not have attached to the securities held by and in the possession of Julia P. Whiting at the time of her death.

Re Weaver, 110 Iowa, 331, 81 N. W. 603; Re Wiltsey, 122 Iowa, 428, 98 N. W. 294; Williamson's Estate, 153 Pa. 508, 26 Atl. 246; Re Handley, 181 Pa. 339, 37 Atl. 587; Mellon's Appeal, 114 Pa. 564, 8 Atl. 183.

As to the enforcement of a tax upon personal property, the domicil of the testator governs, and not that of the debtor.

jurisdiction imposing the tax will be subject to the tax, and that debts due from residents to nonresidents will not be subject. This is the judicial view taken of the English legacy and succession duty acts, though they are broad enough in terms to cover all legacies and successions without reference to domicil or situs. The domicil is also recognized in Connecticut as the true principle according to which the tax ought to be laid: but, as stated in Gallup's Appeal, 76 Conn. 617, 57 Atl. 699, the local statute adds to the force of example the influence of reciprocity by permitting the exaction of the tax with respect to personal property within the state, belonging to the estate of a nonresident, but directing the treasurer not to collect the same if the decedent resided in a state which does not collect a transfer or succession tax from personal property therein, belonging to the estate of Connecticut decedents.

In New York and some other states the tax is laid according to the principles both of domicil and of actual situs. It is apparent that, under such a statute, the tax is payable, not only in respect to debts due from nonresidents to residents, but also in respect to debts due from residents to nonresidents if the conditions essential to give them a local "business situs" exists. The inquiry as to the nature of these conditions belongs rather to the subject of property taxes than succession taxes. It may be remarked, in this connection, however, that it is competent for a state to assign a local situs, for the purpose of property taxation even, to credits belonging to a nonresident which have been reduced to a concrete form, and the evidences of which are held within the state, in the hands of an agent for the purposes of collection or renewal with a view to new loans and the carrying on of such transactions as a permanent business. New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; State Assessors v. Comptoir Nat. D'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109, and other cases cited in 1 Parmele's Wharton, Confl. L. § 80c, p. 175.

In New York, however, the courts have gone further, and held that assets belonging to the estate of a nonresident were "property within the state," and thus liable to the payment of a succession tax by reason of circumstances not generally regarded as sufficient to give property a situs apart from the owner's domicil for the purposes of a property tax. Thus, deposits made in New York banks by nonresidents, and which remained long enough to justify a finding that the property was not *in transitu* merely, were held in Re Houdayer, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718, to be "property within the state," and thus subject to the payment of the transfer tax, although the conditions essential to give them a local business situs within the state, which would be necessary to subject them to a property tax, do not appear to have existed. This decision was followed in Re Blackstone, 69 App. Div. 127, 74 N. Y. Supp. 508 (Affirmed in 171 N. Y. 682, 64 N. E. 1118), and that case was affirmed by the United States Supreme Court in 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277. The decision of the Supreme Court, however, merely goes to the constitutional power of the legislature to subject the deposit to the payment of the tax, and the correctness of the construction placed upon the statute by the New York decisions was not passed upon.

So, bonds of a foreign corporation, as well as bonds and certificates of stock of domestic corporations, when deposited in a safe-

Caruth v. Caruth, (Iowa) 103 N. W. 103; Story, Confl. L. § 481; Dicey, Confl. L. 677; Minor, Confl. L. §§ 139, 141; Re Gable (Gara v. Austin) 79 Iowa, 178, 9 L.R.A. 218, 44 N. W. 352; Kirtland v. Hotchkiss, 100 U. S. 499, 25 L. ed. 562.

Sherwin, J., delivered the opinion of the court:

At the time of her death Julia P. Whiting was a resident of the state of New Hampshire. Some time prior thereto she had deposited money in banks in this state, receiving therefor certificates of deposit in the usual form, which certificates she owned and had in her possession in New Hampshire at the time of her decease. She also owned, and had in her possession at said time and place, other evidences of indebtedness and securities therefor in the form of notes and mortgages, debts represented thereby being owed by residents of this state, and an interest in shares of stock of an Iowa corporation. She died testate, devising this property to collateral heirs, and the plaintiff claims that it is subject to the payment of a collateral inheritance tax under the provisions of § 1467 of the Code, which is as follows, so far as it is material here. "All property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the statutes of inheritance of this or any other state, or by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor or donor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of an adopted child of a decedent, or to or for charitable, educational, or religious societies or institutions within this state, . . . " is subject to pay a collateral inheritance tax to the state of Iowa.

The domicil of the testator was in New

deposit vault within the state for safe-keeping, although owned by a nonresident, have been held subject to the payment of a transfer tax. Re Whiting, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715. This decision, so far as it applies to the stock, is conformable to the rule established by the weight of authority with respect to the situs of corporate stock for the purposes of property taxation: but, in assigning a local situs to the bonds of either foreign or domestic corporations owned by a nonresident, merely because of their physical presence within the state, it not appearing that they were there under such circumstances as to give them a business situs, it is opposed to the rule established with respect to the situs of such property for the purposes of property taxation. See Detroit v. Lewis, 109 Mich. 155, 32 L.R.A. 439, 66 N. W. 958; Herron v. Keeran, 59 Ind. 472, 26 Am. Rep. 87.

But, even under the doctrine that prevails in New York, the mere fact that the debtor is domiciled in that state is not sufficient to give the debt a local situs for the purposes of the transfer tax. Thus, an indebtedness, whether reduced to a concrete form or not, due from a resident to a nonresident, is not subject to the payment of the tax if the evidences thereof are not within the state. Re Phipps, 77 Hun. 325, 28 N. Y. Supp. 330, Affirmed in 143 N. Y. 641, 37 N. E. 823. So, bonds of a domestic corporation, which are in another state in possession of a nonresident, are not subject to the New York transfer tax. Re Bronson, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707. And bonds executed by a natural person, secured by mortgages on real property in New York, which were kept at the residence of the decedent in another state, are not subject to the New York transfer tax. Re Preston, 75 App. Div. 250, 78 N. Y. Supp. 91.

In Pennsylvania, as well as in New York, the succession tax is laid according to the principles both of domicil and of actual situs. The courts of that state, however, unlike the courts of New York, seem to regard the existence of the conditions which would be essential to give a debt due from a resident to a nonresident a local situs for the purposes of a property tax necessary to give it such a situs for the purposes of the succession tax. Thus, in Orcutt's Appeal, 97 Pa. 179, United States bonds belonging to the estate of a person domiciled in another state, though deposited for safe-keeping in a Pennsylvania trust company, were held not subject to the transfer tax. It may be pointed out, in this connection, that such bonds, though exempt from property tax, are not exempt from a succession tax. Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829.

So, in Lewis's Estate, 203 Pa. 211, 52 Atl. 205, the court, while adhering to the rule that the situs of intangible personal property, such as bonds, notes, stocks, mortgages, and other evidences of debt, follows the domicil of the owner, makes an exception in case of such securities owned by nonresidents, which have been held by an agent for investment and reinvestment,—the same conditions, it will be observed, which will give such property a local situs for the purposes of a property tax.

It will be observed that, under any of the theories with respect to succession tax, except that which obtains in Vermont, the indebtedness involved in GILBERTSON v. OLIVER would not be liable to the tax inasmuch as there were no circumstances connecting the debt with the state of Iowa, except the residence of the debtor in that state. According to the Vermont doctrine, however, that fact would itself be sufficient to subject the debt to the payment of the tax.

Hampshire, and the certificates of deposit and other evidences of indebtedness involved herein were in her possession there at the time of her death. But the appellant contends that the indebtedness owing to her by residents of this state at the time of her death was intangible property within this state, subject to its jurisdiction and liable to pay an inheritance tax. The controversy presents for determination but one legal question, namely, Was the property of the deceased within the jurisdiction of this state at the time of her death? There is a conflict in the adjudicated cases as to whether such evidences of indebtedness are taxable at the domicil of the owner, or whether the actual situs of such property, and not the domicil of the owner, determines the liability to taxation. The great weight of authority, however, supports the holding of our own cases that this species of personal property, which is in a sense intangible and incorporeal, is taxable at the domicil of the owner, and not elsewhere, unless the owner has himself given it a different situs. In the early case of Davenport v. Mississippi & M. R. Co. 12 Iowa, 539, the city of Davenport and the county of Scott undertook to tax mortgages which had been placed on property of the defendant in this state, but which were owned and held by nonresidents of the state. At that time the statute provided that all real and personal property "within this state" was subject to taxation, etc. In discussing the question whether the mortgages were property within this state, this court, speaking through Baldwin, J., said: "It is true that the situs of the property mortgaged is within the jurisdiction of the state; but the mortgage itself, being personal property, a chose in action, attaches to the person of the owner. . . . It is agreed . . . that the owners and holders of the mortgages are nonresidents of the state. If so, and the property in the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the state, and, if not, they are not the subject of taxation." In Hunter v. Board of Supers. 33 Iowa, 376, 11 Am. Rep. 132, a resident of this state had deposited in a bank in Illinois for safe-keeping notes which had never been in this state. In holding that the debt evidenced by the notes was taxable in this state it was said: "The property in the evidence of the debt is not taxable, and hence whether the 'credit' or 'debt due' was or was not subject to taxation at the time cannot be determined alone by the situs of the evidence. The debt due of which the notes are the evidence, is property vested in the owner wherever he may reside. This property in the right—the chose in action—is as absolute a property therein, and he is as well entitled to it, as he is to tangible property in possession; and this species of property—debts due—must, in the nature of things, follow and be with the owner,—except, perhaps, where he has conferred authority upon someone else as his agent to loan, manage, receive, and collect the same for him. . . . The right to the 'money due' being in the appellant, the property in the right must of necessity be at the place where he resides, irrespective of the situs of the evidence."

The principle announced in these two cases is clearly controlling in this, and it is supported by the weight of authority, as we have said. Judge Cooley, in his work on Taxation, says: "The state has no jurisdiction to assess a tax as a personal charge against nonresidents. Neither can the personalty of a nonresident be taxed, unless it has an actual situs within the state, so as to be under the protection of its laws. The mere right of a foreign creditor to receive from his debtor within the state the payment of his demand cannot be subjected to taxation within the state. It is a right that is personal to the creditor where he resides, and the residence or place of business of his debtor is immaterial." 1 Cooley, Taxn. 3d ed. 24. The general rule is stated thus in 1 Desty on Taxation, 326: "The situs of invisible and intangible property, not growing out of real estate, is with the owner. . . . Intangible property has no actual situs. If for purposes of taxation it be assigned a situs, it should be the place where it is owned, not the place where it is owed. To make it follow the debtor, instead of the creditor, is to tax poverty, instead of wealth. A debt has its situs at the residence of the creditor, and may be there taxed." This general rule has been announced by the Supreme Court of the United States. In Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558, Judge Harlan says: "The debt in question, although a species of intangible property, may for purposes of taxation, if not for all purposes, be regarded as situated at the domicil of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is, at best, only evidence of the debt, not the debt itself. The bond may be destroyed, but the debt . . . the right to demand the repayment of the money loaned, with the stipulated interest—remains. Nor is the locality of the debt for the purposes of taxation affected by the fact that it is secured by mortgage upon real estate situated in Illinois." The rule is followed in New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110, and in the following, among other cases: Boyd v. Selma, 98 Ala. 144, 11 So. 393, 16 L.

R.A. 729 (and see extended note therein on the subject and cases cited); People v. Park, 23 Cal. 138.

The general rule as to succession and distribution is based on the same principle; the law of the domicil ordinarily deciding whether a person may take as heir or distributee. "It is founded in a great measure upon the doctrine that movables have no situs and accompany the person of the owner." Story, Confl. L. 8th ed. 481; Dicey, Confl. L. 678; Caruth v. Caruth (Iowa) 103 N. W. 103. Some of the courts have held that the actual situs of the notes or other evidence of the debt determine the right to tax; but even under such rule the plaintiff can claim nothing, because the certificates and notes involved were actually in a foreign state at the domicil of the testator. Bridges v. Griffin, 33 Ga. 113, is the only case cited by the appellant, and the only one that we have been able to find, that holds that the residence of the debtor fixes the situs of the property. In Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189, relied upon by appellant, it was held that national bank stock was taxable at the place where the bank was located, irrespective of the domicil of the owner of the shares; but the decision was based on the national banking act, which expressly so provided. In Mager v. Grima, 8 How. 490, 12 L. ed. 1168, the question involved here was not discussed, the case deciding a constitutional question only. The other cases relied on by appellant follow the rule referred to, that the actual situs of the notes or other evidences of debt ordinarily determines the place of taxation.

Whether a nonresident creditor, by placing his intangible property in the hands of an agent within this state for management and control for business purposes, may fix its situs for taxation, we do not determine.

The judgment of the District Court is right, and it is affirmed.

KANSAS SUPREME COURT.

ALBERT BALDWIN, Plff. in Err.,
v.
JOHN BALDWIN.

(— Kan. —, 84 Pac. 568.)

Specific performance—parol agreement—possession.

1. In an action to enforce a parol agreement to convey lands, where possession is relied upon as part performance to take the case out of the statute of frauds, the character of the possession is of the greatest importance. It must be notorious, exclusive, continuous, and in pursuance of the contract.

Instruction.

2. An instruction that plaintiff is entitled to recover if he has proved that he was placed in possession of the land under the contract, held insufficient under the conceded facts in the case.

(February 10, 1906.)

ERROR to the District Court for Clay County to review a judgment in favor of plaintiff in an action brought to recover damages for breach of contract to convey real estate. Reversed.

Statement by **Porter, J.:**

This is an appeal from a judgment rendered against plaintiff in error in an action for damages for the breach of a parol agreement to convey certain lands consisting of a farm in Clay county. Albert Baldwin, now past ninety-six years of age, is the father of John Baldwin, defendant in error, and in 1893 owned an 80-acre farm upon which he was living with an unmarried daughter. John Baldwin was then visiting at his father's, with his family, on the way to take up land in Oklahoma. He claims that his father offered that if he would move upon the place, stay there, and keep and support his father, the latter would deed to him the land. He says that he told his father he would agree to this, provided he could purchase the adjoining 120 acres, which he did a few days thereafter, and informed his father that he had decided to accept the offer, but his father said: "All right, I will make you out a deed the first time I go to Clay Center." That he moved with his family at once upon the place and farmed it, in connection with the 120 acres he had purchased, until 1896, when he built a house on his own land. He also claims from the time he moved upon the 80 acres in 1893, until 1901, his father continued to live with him, and that he furnished the support and maintenance agreed upon during this time. In 1901 Albert Baldwin went upon a visit to a married daughter in Idaho, where he has ever since remained, and some time after going there conveyed the 80 acres to this daughter. The conveyance was recorded in February, 1902. The son then brought this action, claiming that he has fully performed the contract on his part so far as it was possible for him to do and except as prevented by his father; that the value of the land is $800; and that the reasonable value of the services performed under the agreement is $800. There was no

Headnotes by PORTER, J.

Note.—The character of the possession essential to constitute part performance to satisfy the statute of frauds is discussed in a subject note, 3 L.R.A.(N.S.) 790, 807 *et seq.*

valuable and lasting improvements placed upon the land by plaintiff, and, except for some slight alterations in some wire fencing, no improvements of any kind were made upon it. There were 10 acres broken out in 1893 and the same when the action was brought. The son used the remainder of the land in connection with his own farm as a pasture. Defendant below filed a general denial, and also a counterclaim upon an open account for money loaned to the son at various times, and supplies and property which he claims the son received from him. Among other items was one for $300 which he testifies was pension money loaned the son and for which he says the son agreed to execute a note, but never did so. Some of the items he says he never intended to charge against the son unless the son charged him for board. In his testimony he denies making any agreement to convey the land, and declares that the son rented a part of the 80 acres from him and gave him a share of the crops, and that he always held possession of the land himself; that portions of it were rented by him to other persons during the time plaintiff claims to have had possession. He denies that the son kept or maintained him. He testifies that he lived with his son during the first three years in his own house on this land and furnished provisions and money for his share of the living expenses; that after the son moved to the other place he remained in his own house, but took part of his meals at the son's, and stayed at the son's house about one fourth of the time. He also testifies that his reason for leaving and going to the daughter's in Idaho was that his son's wife told him she could not keep him any longer, and that he would have to leave. The jury found generally for plaintiff for $800.

Messrs. **Coleman & Williams**, for plaintiff in error:

The facts did not justify specific performance.

Goddard v. Donaha, 42 Kan. 757, 22 Pac. 708; Baldwin v. Squier, 31 Kan. 283, 1 Pac. 591; 29 Am. & Eng. Enc. Law, p. 834; Galbraith v. Galbraith, 5 Kan. 409; Schwindt v. Schwindt, 61 Kan. 377, 59 Pac. 647; Hubbard v. Hubbard, 140 Mo. 301, 41 S. W. 749.

Messrs. **F. P. Harkness, George L. Davis**, and **R. C. Miller**, for defendant in error:

If a special agreement has been performed in part by the plaintiff, and its further performance has been prevented by the act of the defendant, the plaintiff may, at his option, either sue for the breach and recover damages, or abandon the contract altogether and recover upon a general *indebitatus assumpsit*.

9 Cyc. Law & Proc. p. 688; Clendennen v. Paulsel, 3 Mo. 230, 25 Am. Dec. 435.

Specific performance of a parol contract will be decreed when there has been such a part performance that a refusal by one party to perform will operate as a fraud upon the other, and also when the parties, in case of a breach of such a contract, cannot be placed in their original position.

Seaman v. Aschermann, 51 Wis. 678, 37 Am. Rep. 849, 8 N. W. 818; Riggles v. Erney, 154 U. S. 244, 38 L. ed. 976, 14 Sup. Ct. Rep. 1083; Denlar v. Hile, 123 Ind. 68, 24 N. E. 170; Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297; Twiss v. George, 33 Mich. 253; Lamb v. Hinman, 46 Mich. 112, 6 N. W. 675, 8 N. W. 709; Brinton v. Van Cott, 8 Utah. 480, 33 Pac. 218; Williams v. Carpenter, 14 Colo. 477, 24 Pac. 558.

If the vendor is in fault, the purchaser should recover damages, including compensation for actual loss, and for the increase in the value of the land.

Foley v. McKeegan, 4 Iowa, 1, 66 Am. Dec. 107; Abell v. Munson, 18 Mich. 306, 100 Am. Dec. 165; Pumpelly v. Phelps, 40 N. Y. 59, 100 Am. Dec. 468; Margraf v. Muir, 57 N. Y. 155; Baldwin v. Munn, 2 Wend. 399, 20 Am. Dec. 627; Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218; Burk v. Serrill, 80 Pa. 413, 21 Am. Rep. 105; Dustin v. Newcomer, 8 Ohio, 49; Hall v. Delaplaine, 5 Wis. 206, 68 Am. Dec. 57.

Porter, J., delivered the opinion of the court:

Defendant in error contends that, by filing a general denial, and failing to plead the statute of frauds, plaintiff in error waived any defense under the statute. The petition alleges a contract to convey lands, but is silent as to whether the contract was in writing or in parol. Plaintiff offered evidence of a parol contract, and the case appears to have been tried upon the theory that the statute of frauds was a defense except as certain facts relied upon by plaintiff served to avoid the statute. It was said in Wiswell v. Tefft, 5 Kan. 263, that the statute of frauds can be relied upon as defense under a general denial. Without reviewing the authorities upon that question, or considering the claim of defendant in error that the statement in Wiswell v. Tefft is *dictum*, it is sufficient to say that the objection in this case to the statute of frauds as a defense is raised for the first time in this court, and, for that reason, cannot be regarded with favor.

The principles governing the case are the same as though this were an action for specific performance of an oral agreement to convey the land. Part performance is relied upon to take the contract out of the statute. It is elementary that the acts of part performance must be such that it would be a

fraud upon the party seeking the decree for the other to refuse to perform. When he has so altered his situation upon the faith of the oral promise that a refusal to convey would result not merely in damages, not simply in the denial of what he was to receive, but also in inflicting upon him an injustice which the courts consider a constructive fraud, equity then lifts the oral contract out of the statute and compels a performance. Browne, Stat. Fr. §§ 447, 448, 457. It is likewise elementary that the acts of part performance relied upon must have been done in pursuance of the contract, and must be clearly, definitely, and satisfactorily shown. Lewis v. North, 62 Neb. 552, 87 N. W. 312, 314; Brown v. Hoag, 35 Minn. 373, 376, 29 N. W. 135; Browne, Stat. Fr. § 457. It is also said that the acts of part performance are not confined to the doing what the contract stipulates, although they must be related to and connected with the contract. The acts which plaintiff below claims amounted to part performance are (1) the payment of the purchase price or the performance of the service contracted for, and (2) the entry into possession of the land. It is well settled that payment of the purchase price alone is not sufficient part performance. Goddard v. Donaha, 42 Kan. 754, 22 Pac. 708; Barnes v. Boston & M. R. Co. 130 Mass. 388, 390; Edwards v. Fry, 9 Kan. 417.

The only question we need consider is whether the court erred in instructing the jury that plaintiff was entitled to recover if he proved that the contract was entered into and the services performed by him, so far as he was permitted to perform them, and that "under said contract he was placed in possession of the real estate." A distinction has been made by many of the authorities between the acts which are considered sufficient part performance in case of parol gift of land and a parol agreement to convey, which distinction is without any substantial foundation. In the one case, possession without valuable and lasting improvements, or some other special facts, is held not sufficient; in the other, it is said possession alone is all that is required. "A parol gift of land, even from father to son, will not be enforced unless followed by possession and by valuable improvements made by the donee, or unless there are some other special facts which render the failure to complete the donation peculiarly inequitable and unjust." Pomeroy, Contr. § 130. The same author says (§ 133): "Possession of the land is a sufficient act in case of an agreement; possession and improvements in case of a mere parol promise or gift." This distinction has been repudiated by a number of courts and for the very sound reason that in both classes of cases courts afford relief and compel specific performance upon exactly the same equitable considerations. Aside from the contract in the one case and the gift in the other, the acts of the parties have resulted in such change in the situation or condition of the party seeking to compel that it would be unjust and inequitable to deny him relief. The enforcement is not based upon the contract in the one or the gift in the other. In Galbraith v. Galbraith, 5 Kan. 402, it is said (page 410): "So far, we have considered the case as one arising out of pure contract as between strangers, because the petition alleges a direct and positive contract, but if it be considered as a gift, without consideration, the conclusions will not be changed. The fundamental principle upon which courts obtain jurisdiction remains the same. It would as much be a hardship and fraud on the donee to be put in possession, to be induced to make large improvements for the melioration of the estate, and then for the donor to refuse to execute the gift, as it would be in the case of a purchaser." Page 411: "It is admitted, however, that on this point the decisions have not been as uniform and harmonious as in the case of a purchase for a valuable consideration, though the general current of authorities, as well as the reasons given, apply equally as well to a gift as to a purchase. The same rule holds in the one as in the other. The possession and improvements must be under the gift, and induced by it, or made in consequence of it." In the same case the court, referring to the diversity of opinion upon the sufficiency of possession alone, uses the following language (page 409): "It seems to be almost universally held that the delivery of possession, and the making of valuable improvements, will be such part performance as will entitle the vendor to specific execution of the contract. While there is some diversity of views as to whether the mere letting into possession alone, or possession and payment of the consideration money, in whole or in part, or some other acts, will constitute such part performance, there seems to be none where the possession is taken under the contract, in pursuance thereof, and continued, accompanied by lasting and valuable improvements of the premises." In stating the general rule in reference to the effect of part performance upon a parol gift of land, the language frequently adopted by this court and others seems to ignore any distinction between parol gifts and parol agreements to convey. In Flanigan v. Waters, 57 Kan. 18, 45 Pac. 56, it is said: "Equity protects and enforces a parol gift equally with a parol contract of the sale of land, where possession is taken in pursuance of the gift, improvements made, and the donee changes

his situation or condition upon the faith of the gift." The language used by the Supreme Court of the United States in Neale v. Neale, 9 Wall. 1, 19 L. ed. 590, is the same in substance; but it is said in Edwards v. Fry, 9 Kan. 417, 423, that delivery of possession will take a case out of the statute, and the weight of authorities supports this contention. If the question were a new one, we should incline to hold that bare possession is not sufficient; and there is certainly no substantial reason for requiring valuable improvements in a case of parol gift which does not apply with equal force to the case of a parol agreement to convey.

All the authorities agree, however, that when possession is relied upon as part performance, it must be notorious, exclusive, and obviously in pursuance of the contract. Browne, Stat. Fr. §§ 472–476; Baldwin v. Squier, 31 Kan. 283, 284, 1 Pac. 591. It appears, without contradiction, that at the time the agreement is alleged to have been made the old man was living on this land. The son brought his family there and moved into the house with his father, and this arrangement continued for three years. The son then built a house for himself on his adjoining land, and removed there with his family. For some time afterwards the old man continued to occupy his own house. The son claimed that he farmed the 80 acres in connection with his own land, but the character of his possession under the conceded facts could hardly be said to have been exclusive. At least, under all the circumstances in evidence and the claim of defendant that he never surrendered the possession to his son, but kept it himself, and rented the land to others, the instructions, with reference to the character of the possession which it was necessary for plaintiff to establish in order to recover, were very meager. The jury was instructed that it was sufficient if plaintiff proved that, "under said contract, he was placed in possession of the real estate." It is said in Browne on the Statute of Frauds, § 474: "Secondly, it must be exclusive. Where the purchaser moves in upon the premises and remains there in company with the previous occupant, not as the ostensible and exclusive proprietor; or where the metes and bounds of the land alleged to be purchased are not fixed and recognized, and the purchaser occupies it in common with adjacent land of his own,—it has been held that possession, as an act of part performance, was not sufficiently made out." The authorities also hold that the possession must be continuous. The instruction entirely ignores this element of possession, and, literally construed, would authorize a verdict for plaintiff if possession under the contract was delivered and afterward abandoned. We think that where possession is relied upon in a case of this kind, the character of the possession is of the greatest importance, and it must be open, notorious, exclusive, and continuous, and, as said in Baldwin v. Squier, *supra*, obviously in pursuance of the contract.

It is also held that before specific performance of a parol agreement to convey lands will be enforced, the facts relied upon must be established by clear and satisfactory proof. This rule rests upon solid grounds. The evidence in this case is conflicting. The jury found upon the issues in favor of the plaintiff, and, while we cannot consider the weight of the evidence with a view of reversing or affirming their verdict, it is proper to say that the evidence relied upon to establish the contract and the performance of it is not, in our opinion, clear or satisfactory.

For the errors in the instructions, therefore, the judgment will be reversed, and the cause remanded for a new trial.

All the Justices concur.

MAINE SUPREME JUDICIAL COURT.

W. R. LYNN SHOE COMPANY v. AUBURN-LYNN SHOE COMPANY.

(100 Me. 461, 62 Atl. 499.)

Trademark—geographical and proper name.

1. A valid trademark may be secured in a combination of the name of the place where the goods are manufactured with that of the manufacturer.

Same—infringement.

2. The adoption by a corporation of the name "Auburn-Lynn Shoe Company" is an infringement of the property rights of another corporation doing business in the same

Case Note.—Necessity of fraudulent intent to justify injunction against unfair competition.—That a fraudulent intent on the part of one who has appropriated or imitated a technical trademark is not necessary to entitle the owner of the mark to relief in equity is well settled, though the rule is otherwise in an action at law. Browne, Trademarks, 2d ed. § 386; Paul, Trademarks, § 196; Sebastian, Trademarks, 4th ed. pp. 11, 117. In case of technical trademarks, the courts have said that the right to an injunction to restrain the appropriation or imitation thereof depends upon the tendency of the imitation to mislead and deceive and create confusion between the goods of the two parties; that, where the similarity is sufficient to convey a false impression to the public mind, and is of a character to deceive the ordinary purchaser in the exercise of ordinary care and caution, it is sufficient to

place, which has adopted the name "Auburn-Lynn" as a trademark for shoes manufactured by it, without proof of fraudulent intent on the part of the former.

Unfair competition—fraud.

3. Fraudulent intent is necessary to constitute unfair competition by the use of names in such a manner as to convey to the trade the impression that the goods of one manufacturer are those of another.

Same—alteration of name.

4. Unfair competition in trade by the use of names in such a manner as to induce the trade to believe that the goods of one manufacturer are those of another is not avoided by merely substituting one name for another on the old trade literature so as not to obliterate the old name, but convey the impression of succession to the rights connected with it.

Damages—profits from unfair trade.

5. One guilty of simulating another's trademark, and also of unfair trade in leading customers to believe that his product is that of the other, is liable not only for the profits realized from goods containing the fraudulent trademark, but also for the profits resulting from the wrongful acts committed in the unfair competition.

(November 16, 1905.)

APPEAL by defendant from a decree of the Supreme Judicial Court for Androscoggin County in plaintiff's favor in a suit brought to enjoin alleged unlawful use of plaintiff's trademark and trade name; and exceptions by plaintiff to rulings upon the matter of accounting. Appeal dismissed. Exceptions sustained.

The facts are stated in the opinion.

give the injured party the right to redress, and the intention of the party infringing is immaterial, since the effect of the imitation is the same, whether the simulation is accidental or the result of a fraudulent intent. It is difficult to perceive why this reasoning is not equally pertinent in cases of unfair competition which do not involve the infringement of a technical trademark, since the resulting injury and the relief sought are the same in both cases. Yet it has been frequently declared that in case of unfair competition merely, where the infringement of a trademark proper is not involved, a fraudulent intent is an essential element, without which the injured party is entitled to no relief. McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166, Reversing 21 Fed. 276; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co. 43 C. C. A. 511, 104 Fed. 243, Affirming 92 Fed. 774; Hostetter Co. v. Conron (C. C. S. D. N. Y.) 111 Fed. 737; N. K. Fairbank Co. v. Windsor, 61 C. C. A. 233, 124 Fed. 200; Lamont v. Hershey (C. C. M. D. Pa.) 140 Fed. 763; Wm. Rogers Mfg. Co. v. Simpson, H. M. & Co. 54 Conn. 527, 9 Atl. 395; Hallett v. Cumston, 110 Mass. 29; Plant Seed Co. v. Michel Plant & Seed Co. 23 Mo. App. 579; American Brewing Co. v. St. Louis Brewing Co. 47 Mo. App. 14; Mrs. G. B. Miller & Co. Tobacco Manufactory v. Commerce, 45 N. J. L. 23, 46 Am. Rep. 750; Day v. Webster, 23 App. Div. 601, 49 N. Y. Supp. 314; T. B. Dunn Co. v. Trix Mfg. Co. 50 App. Div. 75, 63 N. Y. Supp. 333; Gaines v. Leslie, 25 Misc. 20, 54 N. Y. Supp. 421; Hoeb v. Bishop, 22 Ohio L. J. 151; C. F. Simmons Medicine Co. v. Mansfield Drug Co. 93 Tenn. 84, 23 S. W. 165; Knott v. Morgan, 2 Keen, 213; Boston Rubber Shoe Co. v. Boston Rubber Co. 7 Can. Exch. 187.

In the English cases the word "trademark" is often given a broad application, often covering what are more frequently called "trade names" in this country. There is a line of English cases holding that a fraudulent intent to deceive is not necessary to make a cause of action, where a name used by the plaintiff in designating his goods is used by the defendant as a rival in the trade to characterize similar goods; but in a good proportion of these cases, at least, the courts speak of such a name as a trademark. Among these cases holding that a fraudulent intent in using the name is not essential are Singer Mfg Co. v. Wilson, L. R. 2 Ch. Div. 434; Cellular Clothing Co. v. Maxton [1899] A. C. 326; Powell v. Birmingham Vinegar Brewery Co. [1896] 2 Ch. 79; Reddaway v. Banham [1896] A. C. 199, Reversing [1892] 2 Q. B. 639; Millington v. Fox, 3 Myl. & C. 338; Hendriks v. Montagu, L. R. 17 Ch. Div. 638; North Cheshire & M. Brewery Co. v. Manchester Brewery Co. [1899] A. C. 83; Guardian Fire & Life Assur. Co. v. Guardian & General Ins. Co. 50 L. J. Ch. N. S. 253.

In the Singer Case, which the court spoke of as the case of a trademark, though it was not the case of a registered trademark, it was held that fraud need not be averred or proved in order to obtain protection for a trademark, and that, if the defendant used it innocently in the first place, he could be enjoined from persisting in the use of it after the complainant's rights were known to him. Considering the fact that names used in trade description are spoken of so frequently in the English cases as trademarks, it may be that the above cases might be distinguished from other classes of cases in which unfair competition is alleged by false representations or imitations of the plaintiff's packages or goods in any way so as to deceive the public.

Among the cases which declare that an intention to deceive is necessary to constitute unfair competition, it is quite often declared, nevertheless, that this intention may be inferred from the circumstances. That the party who has made such representations or imita-

Messrs. George C. Wing, George C. Wing, Jr., and White & Carter, for defendant:

The words "Auburn-Lynn shoes" are not capable of being a valid trademark.

Browne, Trademarks, §§ 80. 178; Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; Candee v. Deere, 54 Ill. 439, 5 Am. Rep. 125; Meneely v. Meneely, 1 Hun, 367; Webster v. Webster, 180 Mass. 310, 62 N. E. 383; Gilman v. Hunnewell, 122 Mass. 139; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Chadwick v. Covell, 151 Mass. 190, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068.

Defendant has a right to advertise its shoes as Auburn-Lynn shoes purely as advertising.

Leather Cloth Co. v. American Leather Cloth Co. 11 H. L. Cas. 523.

The measure of the plaintiff's damage is what he has lost, not what the defendant has gained.

Browne, Trademarks, § 61; Morgan v. Fuller, L. R. 2 Eq. 299.

Messrs. Oakes, Pulsifer, & Ludden and Enoch Foster, for plaintiff:

The protection of the law is the same whether the plaintiff's name is treated as a trademark or a trade name.

Hainque v. Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014; Stachelberg v. Ponce, 128 U. S. 686, 32 L. ed. 569, 9 Sup. Ct. Rep. 200; Burt v. Tucker, 178 Mass. 493. 52 L.R.A. 112, 86 Am. St. Rep. 499, 59 N. E. 1111; Dadirrian v. Yacubian, 39 C. C. A. 321, 98 Fed. 872; Charles E. Hires Co. v. Consumers' Co. 41 C. C. A. 71, 100 Fed. 809; Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co. 43 C. C. A. 511, 104 Fed. 243; American Washboard Co. v. Saginaw Mfg. Co. 50 L.R.A. 609, 43 C. C. A. 233, 103 Fed. 281.

The name, having been stamped on the shoes, became technically a trademark as well as a trade name.

Browne, Trademarks, § 91; 26 Am. & Eng. Enc. Law, p. 358; Hazelton Boiler Co. v. Hazelton Tripod Boiler Co. 142 Ill. 494, 30 N. E. 339.

No other person or corporation can lawfully use the name, or a portion of it, to designate articles of manufacture similar

tions as are calculated to deceive the purchasers of the goods must have intended the natural and probable consequences of the act is declared in a considerable number of cases. McCann v. Anthony, 21 Mo. App. 83; R. Heinisch's Sons Co. v. Boker, 86 Fed. 765; N. K. Fairbank Co. v. Luckel, K. & C. Soap Co. 42 C. C. A. 376, 102 Fed. 327.

To substantially the same effect, other cases hold that the intent may be and often is made out, not from direct testimony, but as an inference from the circumstances. N. K. Fairbank Co. v. R. W. Bell Mfg. Co. 23 C. C. A. 554, 45 U. S. App. 190, 77 Fed. 869; Centaur Co. v. Neathery, 34 C. C. A. 118, 62 U. S. App. 557, 91 Fed. 891; Enoch Morgan's Sons Co. v. Whittier-Coburn Co. 118 Fed. 657; Lamont v. Hershey; Elgin Nat. Watch Co. v. Illinois Watch Case Co.; Day v. Webster; Gaines v. Leslie,—*supra*; Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722; Hoeb v. Bishop, *supra*; Hoyt v. Hoyt, 2 Pa. Co. Ct. 152.

A clear rejection of the doctrine that a fraudulent intent or motive is necessary to make out a case of unfair competition is also found in a considerable number of cases, which hold that if, by imitation of another's goods, packages, labels, or other distinguishing marks, a dealer has put his goods on the market in a way to deceive the public, he may be restrained from this kind of unfair competition. Some of these cases are cases involving the use of a name used by the complainant. Among this class of cases are Carlsbad v. Tibbetts, 51 Fed. 852; Bissell Chilled Plow Works v. T. M. Bissell Plow Co. 121 Fed. 357; Holmes, Booth, & Haydens v. Holmes, B. & A. Mfg. Co. 37 Conn. 278, 9 Am. Rep. 324; Eckhart v. Consolidated Mill. 4 L.R.A.(N.S.)

Co. 72 Ill. App. 70; Viano v. Baccigalupo, 183 Mass. 160, 67 N. E. 641; Wirtz v. Eagle Bottling Co. 50 N. J. Eq. 164, 24 Atl. 658; Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L.R.A. 42, 43 Am. St. Rep. 769, 39 N. E. 490, Reversing 71 Hun, 101, 24 N. Y. Supp. 801; Amoskeag Mfg. Co. v. Garner, 54 How. Pr. 297; Colton v. Thomas, 2 Brewst. (Pa.) 308; Armington v. Palmer, 21 R. I. 109, 43 L.R.A. 95, 79 Am. St. Rep. 786, 42 Atl. 308.

Other cases to similar effect have been decided with respect to the use of labels by the defendant in a way to deceive the public by imitating the plaintiff's labels, although the latter had no exclusive right to the label which he had adopted. Coffeen v. Brunton, 4 McLean, 516, Fed. Cas. No. 2,940; Geo. T. Stagg Co. v. Taylor, 95 Ky. 651, 27 S. W. 247; Heinz v. Lutz Bros. 146 Pa. 592, 23 Atl. 314.

Other decisions identical in principle have sustained injunctions against imitating various marks, stamps, packages, or other distinguishing characteristics of complainant's goods. Scriven v. North, 67 C. C. A. 348, 134 Fed. 366, Modifying 124 Fed. 894; New England Awl & Needle Co. v. Marlborough Awl & Needle Co. 168 Mass. 154, 60 Am. St. Rep. 377, 46 N. E. 386.

That an intent to deceive will not of itself create a cause of action where the simulation of another's goods is not calculated to mislead the public has been decided in several cases. N. K. Fairbank Co. v. R. W. Bell Mfg. Co. 23 C. C. A. 554, 45 U. S. App. 190, 77 Fed. 869; Kann v. Diamond Steel Co. 32 C. C. A. 324, 61 U. S. App. 22, 89 Fed. 706; Centaur Co. v. Marshall, 38 C. C. A. 413, 97 Fed. 785; G. W. Cole Co. v. American

to plaintiff's, but of different origin or ownership.

Symonds v. Jones, 82 Me. 302, 8 L.R.A. 570, 17 Am. St. Rep. 485, 19 Atl. 820; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Browne, Trademarks, § 52.

The adoption of a proper name as a part of a corporate name may carry with it patent evidence of fraud.

Royal Baking Powder Co. v. Royal, 58 C. C. A. 499, 122 Fed. 337; Wyckoff, Seamans, & Benedict v. Howe Scale Co. 58 C. C. A. 510, 122 Fed. 348; Garrett v. T. H. Garrett & Co. 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472; R. W. Rogers Co. v. Rogers Mfg. Co. 17 C. C. A. 576, 35 U. S. App. 843, 70 Fed. 1017; Stuart v. F. G. Stewart Co. 33 C. C. A. 480, 63 U. S. App. 561, 91 Fed. 243; Charles S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L.R.A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; Williams v. Farrand, 88 Mich. 473, 14 L. R.A. 161, 50 N. W. 446; Lamb Knit Goods Co. v. Lamb Glove & Mitten Co. 120 Mich. 159, 44 L.R.A. 841, 78 N. W. 1072; American Novelty & Mfg. Co. v. Manufacturing Electrical Novelty Co. 36 Misc. 450, 73 N. Y. Supp. 755.

Plaintiff is entitled to full accounting.

Browne, Trademarks, §§ 506, 507, 516–518; 26 Am. & Eng. Enc. Law, p. 505; Avery v. Meikle, 85 Ky. 435, 7 Am. St. Rep. 604, 3 S. W. 609; El Modello Cigar Mfg. Co. v. Gato, 25 Fla. 886, 6 L.R.A. 823, 23 Am. St. Rep. 537, 7 So. 23; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; N. K. Fairbank Co. v. Windsor, 118 Fed. 96; Sawyer v. Kellogg, 9 Fed. 601; Graham v. Plate, 40 Cal. 593, 6 Am. Rep. 639.

Whitehouse, J., delivered the opinion of the court:

This cause in equity comes to the law court upon the appeal of the defendant corporation from a final decree enjoining it from an unlawful use of plaintiff's trademark and trade name, and upon the plaintiff's exceptions to that portion of the decree respecting the extent of the liability of the defendant corporation to account for the profits of its business.

The material facts established by the finding of the court are as follows:

Cement & Oil Co. (C. C. A. 7th C.) 65 C. C. A. 105, 130 Fed. 703.

On this question of the necessity of an actual, fraudulent intent to make a case of unfair competition, the above case of W. R. LYNN SHOE CO. v. AUBURN-LYNN SHOE CO. is not very explicit. It is stated in the third headnote that fraudulent intent is necessary. The court, however, does not explicitly declare this, though by implication it does. After speaking of the diversity of opinion, "or of expression," on the question, and quoting from the United States Supreme Court to the effect that wrongful intent is necessary, it holds that a general finding in the case that there was unfair competition "involved a finding that there was in fact a fraudulent intent on its part." However, as it clearly finds from the facts themselves that there was, on the part of the defendant, "a manifest intention and persistent effort" to deceive purchasers and appropriate the value of the reputation of the complainant, it was not necessary for the court to determine whether, if there had not been a fraudulent intent in fact, there would have been a case of unfair competition.

There is an obvious conflict in the cases as to the necessity of a fraudulent intent to create a case of unfair competition. Many cases hold it is necessary, and others hold that it is not. But, inasmuch as the cases which hold the existence of a fraudulent intent to be essential hold that it may be inferred where the obvious result of the imitation is to mislead the public, it will not often be greatly important to decide whether the actual intent is essential or not, as its existence, if necessary, will usually be presumed wherever the result of the misrepresentation is calculated to deceive the public and injure the complainant.

As a matter of principle, however, the decisions which hold that the motive or intent of the defendant is not an essential element of the case are much more satisfactory than those to the contrary. To recover damages it seems to be generally conceded that an intent to defraud is necessary; but, so far as concerns the question of an injunction to restrain a defendant from misrepresentation or imitation unfair to a rival, it is not easy to see why there should be any distinction between what is called a case of unfair competition and an ordinary case of infringing a trademark. If a defendant has innocently imitated another's goods, he may not be liable for it in damages on that account; but that seems to be no reason why, when the question of the imitation is brought to his attention, and he refuses to cease the injurious imitation, he should not then be restrained from continuing it. He can no longer be deemed innocent with respect to his subsequent conduct. If the imitation of the name, label, package, or other distinguishing mark of the goods of a rival is such as tends to deceive the public and injure the rival, there seems to be no sound reason why that imitation should not be restrained for the future, though it may have been begun innocently.

The whole subject of unfair competition seems to be limited to copying, imitating, or, by some other method, falsely representing one's goods to be those of a rival. Where this is done, the resulting wrong, not only to the rival, but to the public, seems not only to justify, but to require, the interference of a court of equity.

The plaintiff corporation has been engaged in business in Auburn, Maine, since 1898, manufacturing ladies' boots and shoes under several styles, among which are "comfort" and "common sense." The corporation was named for W. R. Lynn, who was an experienced manufacturer of shoes, a stockholder in the company until about the first of 1903, and the superintendent of manufacture for several years. He continued his services with the corporation until June 5, 1903. In November, 1899, the corporation adopted the name "Auburn-Lynn Shoes" as the name of a part of its products, and that name was used as a general name for the entire product for two or three years prior to the bringing of this bill, and became the trademark of the plaintiff's manufactured product. In June, 1903, the plaintiff adopted a trademark in the form of the following device:



A cut was made and the trademark printed in a booklet in the early part of 1903, and 5,000 copies of it were sent out for the use of the trade. The trademark stamp was applied to the plaintiff's shoes for the first time in June, 1903. The plaintiff also extensively used the term "Auburn-Lynn Shoes" upon its labels, postal cards, envelopes, bill heads, letter heads, orders, blanks, circulars, and slips, upon which the words "Auburn-Lynn Shoes, made by the W. R. Lynn Shoe Co., Auburn, Maine," were made very prominent. In the trademark and trade name "Auburn-Lynn Shoes," the word "Auburn" signified the city of Auburn, the place of manufacture, and the word "Lynn" signified W. R. Lynn, the superintendent of manufacture in the plaintiff corporation. The defendants Lunn and Reed were salesmen for the plaintiff, each having assigned to him certain territory in the western states.

July 9, 1903, the defendants, Lunn, Lynn, and one Sweet, organized the defendant corporation under the name of "The Auburn-Lynn Shoe Company." Lynn was president, Lunn treasurer, and Lynn, Lunn, and Sweet directors. The Auburn-Lynn Shoe Company entered into business in Auburn near the place of business of the W. R. Lynn Shoe Company. The names "Auburn" and "Lynn" in the name of the corporation were intended to represent the name of the city of Auburn, Maine, and the name "Lynn," the defendant W. R. Lynn, who was known as a manufacturer. The defendant company, soon after its organization, adopted the following trademark:



and used it upon the first goods sent out under date of September 4, 1903. The Auburn-Lynn Shoe Company made styles of goods similar to those manufactured by the W. R. Lynn Shoe Company, under the names of "common sense" and "old ladies" shoes, etc., but they were not identical, though many styles were not readily distinguishable. The Auburn-Lynn Shoe Company, in July and August, sent letters to the old customers of the plaintiff, calling attention to the fact that W. R. Lynn had ceased to be connected with the plaintiff company, and that a new corporation had been formed. Reference was made, however, to the "improved styles" to be manufactured by the Auburn-Lynn Shoe Company. Circulars, made after this bill was filed and served, were put in the first cartons shipped by the defendant company, and were also sent by mail to the former customers of the W. R. Lynn Shoe Company. They were headed with the trademark of the Auburn-Lynn Shoe Company, and contained no reference to the fact that Mr. Lynn had ceased to be connected with the W. R. Lynn Shoe Company, or that the Auburn-Lynn Shoe Company was not the same manufacturer as the plaintiff. But they contained the following sentence: "Our common sense shoes are noted for softness and excellent wearing qualities, and have brought comfort to thousands of women troubled with aching and tender feet." At the time this circular was first issued, the Auburn-Lynn Shoe Company had sold no goods.

As a result of these circumstances, the plaintiff in the fall of 1903 found unusual difficulty in selling in its old territory. Many of its old customers gave orders to the new company, and also much confusion arose in regard to the mail intended to be addressed to the plaintiff. Before the organization of the defendant company, letters intended for the plaintiff had been addressed to the W. R. Lynn Shoe Company and the Auburn-Lynn Shoe Company; but after the new company was organized, it

claimed to receive and did receive and open all letters addressed to the Auburn-Lynn Shoe Company. When the Auburn-Lynn Shoe Company commenced business, it provided the old customers of the W. R. Lynn Shoe Company with envelopes addressed to the Auburn-Lynn Shoe Company, and apparently some of those envelopes were used by the customers of the plaintiff in sending orders and remittances. At least 32 letters, between August 4, 1903, and the time of hearing this bill in March, 1904, intended for the plaintiff, but addressed to the Auburn-Lynn Shoe Company, came into the hands of the defendant corporation. They contained orders, checks, and general correspondence, some of the defendant's printed, addressed envelopes, and some in writing. They were mostly from old customers, and from the letters the defendant company obtained information concerning the business of the plaintiff.

On the 15th day of September, 1903, after this bill was brought, the defendant corporation changed its name to the "Lunn & Lynn Shoe Company," but it continued to use the old stationery and copies of the printed trademark, substituting "Lunn &" for "Auburn" in red ink; the word "Auburn" being crossed, but not obliterated.

The defendant Reed was employed by the defendant company as salesman, and has covered practically the same territory as he did with the old company. It was the understanding that he should visit the old customers of the plaintiff, and he did so. The defendant Lunn acted as salesman for the defendant company from September until November, covering his old territory. After September 22, 1903, no goods were billed by the defendant company under the name of the Auburn-Lynn Shoe Company, but under the name of the Lunn & Lynn Shoe Company. After the change of name, one order only appears to have been taken by the defendant's salesman on the order blanks of the Auburn-Lynn Shoe Company.

The inference and legal conclusions deducible from the findings of fact are thus stated by the presiding judge before whom the testimony was taken:

"I rule that the term 'Auburn-Lynn Shoes,' adopted by the plaintiff and affixed by it to its goods, as a combination, was a valid trademark and trade name, though it was in part geographical. I hold that the plaintiff had acquired by use an exclusive right to the name 'Auburn-Lynn Shoes' as a trademark and trade name.

"I hold that the conduct of the defendant company, in adopting the phrase 'Auburn-Lynn Shoe Company' as its trademark, and in conducting a shoe business under that corporate name, manufacturing goods similar in style and character to those manufactured by the plaintiff, and so nearly so as not to be distinguishable by ordinary observers, advertising and selling those goods in the territory covered by Lunn and Reed when they were acting for the plaintiff company in the sale of Auburn-Lynn shoes, constituted unfair competition. I think it was well calculated to mislead customers, notwithstanding the correspondence of the defendant company and its officers to the old customers, in which they stated that a new corporation had been formed, and that Mr. Lynn had ceased to be connected with the plaintiff company. And although the trade customers of the plaintiff might even generally be informed of the situation, the purchasing public, so far as it appears, was not informed, and could not well be informed, and were liable to be deceived, and the plaintiff, at the same time, injured thereby. Those who had been in the habit of dealing in and purchasing the Auburn-Lynn shoes might well understand that the product of the Auburn-Lynn Shoe Company represented the plaintiff's manufacture. And, even after the change of name to Lunn & Lynn Shoe Company, the use of the old literature, so changed as only to indicate that the Lunn & Lynn Shoe Company was the successor of the Auburn-Lynn Shoe Company, did not help the matter. If customers could be led to believe that the Auburn-Lynn Shoe Company was the manufacturer of shoes which they had formerly bought as 'Auburn-Lynn shoes,' they would not be undeceived by seeing literature in which 'Auburn' was changed to 'Lunn &' in such a way as to give the impression that the Lunn & Lynn Shoe Company was a successor of the 'Auburn-Lynn Shoe Company.'

"I do not, however, find that the use of the words 'Lunn & Lynn Shoe Company' is an infringement upon the plaintiff's rights, except so far as it may, by the manner of use, directly or indirectly give any impression that it is the successor of the Auburn-Lynn Shoe Company, or had, or has ever had, anything to do with the manufacture of the 'Auburn-Lynn shoes.' I think the defendant company may lawfully make use of the composite name 'Lunn-Lynn,' although Lunn was formerly the salesman, and Lynn the manufacturer, of the Auburn-Lynn shoes, and although Lynn is the person for whom the Auburn-Lynn shoes were named in part. The defendant company must not use its corporate name or conduct its business so as to convey to the trade the impression that its manufactured product is the Auburn-Lynn shoe product of the plaintiff, or that it is the successor of the plaintiff or of the Auburn-Lynn Shoe Company, and it must so conduct its business

in this respect that persons of ordinary intelligence may not be deceived. I think the duty is upon it to take such measures as may be necessary to clearly avoid confusion.

"I think the defendant company, its officers, agents, and servants, should be enjoined from the use in any way of the trademark and trade name 'Auburn-Lynn Shoes,' as applied to its product, and from the use of the name 'Auburn-Lynn Shoe Company' in the manufacture and sale of 'Comfort,' 'Common Sense,' 'Old Ladies,' and other similar shoes, or in business or correspondence connected therewith, and from the use of the name 'Lunn & Lynn Shoe Company' as the successor of the Auburn-Lynn Shoe Company, unless in each instance it states clearly that it is not the manufacturer of the Auburn-Lynn shoes."

Thereupon the presiding judge sustained the bill against the defendant corporation and entered the following decree:

"(1) That the plaintiff is entitled to the exclusive use of the name 'Auburn-Lynn Shoes' as a trademark and a trade name.

"(2) That the defendant corporation, its officers, agents, and servants, be and are hereby perpetually enjoined from the use in any way of the trademark or trade name 'Auburn-Lynn Shoes' as applied to its product.

"(3) That the defendant company, its officers, agents, and servants, be and are hereby perpetually enjoined from the use of the name 'Auburn-Lynn Shoe Company' in the manufacture and sale of 'Comfort,' 'Common Sense,' 'Old Ladies,' and other similar shoes, and from the use of said name 'Auburn-Lynn Shoe Company' in its business and its correspondence connected therewith.

"(4) That the said defendant company, its officers, agents, and servants, be and are hereby perpetually enjoined from the use of the name 'Lunn & Lynn Shoe Company' as the successor of the 'Auburn-Lynn Shoe Company,' unless in each instance it states clearly that it is not the manufacturer of the 'Auburn-Lynn Shoes.'

"(5) That the defendant company, its officers, agents, and servants, be and are hereby perpetually enjoined from the use of its corporate name, or the conduct of its business, so as to convey to the trade the impression that its manufactured product is the Auburn-Lynn shoe product of the plaintiff, or that it is the successor of the plaintiff, or of the Auburn-Lynn Shoe Company, and from so conducting its business in this respect that persons of ordinary intelligence would be deceived thereby.

"(6) That it be referred to John A. Morrill, Esq., of Auburn, a master in chancery, to take an account of all the profits of the business of the defendant corporation growing out of sales of shoes upon which was impressed the trademark of the Auburn-Lynn Shoe Company, or any simulated trademark using the name 'Auburn-Lynn,' from the 9th day of July, A. D. 1903, to the date of this decree, and ascertain and report the amount of such profits, together with all damages sustained by the plaintiff during said period by the wrongful use of the plaintiff's trademark and trade name, and by the unfair competition of the defendant corporation during said period."

The bill was dismissed without costs as to the defendants Lunn and Reed.

It is the opinion of the court that these deductions and conclusions were clearly warranted by the findings of fact, and that the defendant's appeal must be dismissed.

It is contended in behalf of the defendant company that, as the word "Auburn" in the plaintiff's trade name indicated the place of manufacture, and the word "Lynn" signified the name of the manufacturer, the phrase "Auburn-Lynn shoes" could not become the subject of an exclusive property right of the plaintiff, and was therefore incapable of being a valid trademark. But this contention cannot be sustained.

It may be difficult to reconcile the conclusions reached by different courts upon the facts reported in the multitude of decisions relating to this subject, and impracticable to give an exact statement of what a trademark may consist under all circumstances; but an analysis of the leading cases shows that they are all in substantial accord upon the equitable principles and fundamental propositions respecting the nature and protection of trademarks. "It is equitable," says Judge Putnam, in Le Page Co. v. Russia Cement Co. 17 L.R.A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941, "that a manufacturer . . . who has given reputation to any article should have the privilege of realizing the fruits of his labors, by transmitting his business and establishment, with the reputation which has attached to them, on his decease to his legatees or executors, or during his lifetime to purchasers: and it is also in accordance with the principles of law and with justice to the community that any trademark, including a surname, may be sold with the business or the establishment to which it is incident; because, while it may be that individual efforts give them their value at the outset, yet afterwards this is ordinarily made permanent as a part of the entire organization, or as appurtenant to the locality in which the business is established, and thenceforward depends less on the individual efforts of the originator than on the com-

bined result of all which he created." The general common-law proposition, upon which all the courts unite, is that any words, letters, figures, marks, or devices, or combination of any of these, affixed to a commercial article and used primarily to indicate the origin or ownership of it, either by its own meaning or by association with the article, and not employed merely as descriptive of such article to designate its quality or ingredient only, or solely as a geographical name without any secondary signification, must be recognized as a valid trademark. All the courts agree that one man shall not be permitted, by imitating such distinctive name or mark already employed by another to designate a commercial article, to impose upon the public an article of his own manufacture as the genuine article of another, for the obvious reason that it would in the first place be a fraud upon the manufacturer first appropriating such mark, and, secondly, a fraud upon the consumers, who have a right to be protected against such imposition. In Symonds v. Jones, 82 Me. 302, 8 L.R.A. 570, 17 Am. St. Rep. 485, 19 Atl. 820, the court says: "The public come to associate these names, labels, and marks with the products of some particular origin or ownership, or of some particular factory, farm, etc. It is clear that such names, etc., thus become convenient for the consumer and valuable to the producer, and that both the consumer and the producer should be protected against their use by other parties upon other similar products. They become valuable according to the familiarity of the public with them, and the excellence of the product designated by them. The law justly recognizes such names, labels, and marks as important attributes or appurtenances of a business, and as proper to be transferred with any sale or transfer of the business and its plant." See also Delaware & H. Canal Co. v. Clark, 13 Wall, 311, 20 L. ed. 581; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Columbia Mill Co. v. Alcorn, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270. In the last-named case, Chief Justice Fuller says in the opinion: The term has been in use from a very early date, and, generally speaking, means a distinctive mark of authenticity, through which the . . . commodities of particular merchants may be distinguished from those of others. It may consist in any symbol, or in any form of words, but, as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trademark, which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose.

"And the general rule is thoroughly established that words that do not in and of themselves indicate anything in the nature of origin, manufacture, or ownership, but are merely descriptive of the place where an article is manufactured or produced, cannot be monopolized as a trademark."

But while it is undoubtedly the general rule that a geographical name, when used alone and affixed to a manufactured article for the purpose of designating the place of its manufacture, or the address of the manufacturer, cannot be appropriated as a trademark, it has been held in numerous well-considered cases that a geographical name which has long been used to indicate a particular manufactured article may acquire a secondary meaning as the designation of a particular class of such articles, or the product of a particular manufacturer, and thus either become entitled to protection against infringement as a valid trademark, or serve as a basis of a proceeding to prevent unfair competition. In American Waltham Watch Co. v. United States Watch Co. 173 Mass. 85, 43 L.R.A. 826, 73 Am. St. Rep. 263, 53 N. E. 141, it was held that, while the name "Waltham" on watches was originally used in a geographical sense, by long use in connection with the plaintiff's watches, it had acquired a secondary meaning as a designation of the watches which the public had become accustomed to associate with the name. In Montgomery v. Thompson [1891] A. C. 217, it was decided by the House of Lords that the term "Stone Ale," which had been applied to a particular quality of beer manufactured by the defendants at the town of Stone, was entitled to the protection of the court, and the plaintiff was enjoined from selling any ale not manufactured by the defendants under the name of "Stone Ale." In Wotherspoon v. Currie, L. R. 5 H. L. 508, it was held that the word "Glenfield," as applied to starch, had acquired a secondary meaning, and indicated to the public the starch made by the appellants. It was therefore decided that the word "Glenfield," as a denomination of starch, had become the property of the appellants. See also Reddaway v. Banham [1896] A. C. 199; Carlsbad v. Kutnow, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 167; Viano v. Baccigalupo, 183 Mass. 160, 67 N. E. 641; Metcalfe v. Brand, 86 Ky. 331, 9 Am. St. Rep. 282, 5 S. W. 773; Paul, Trademarks, § 59, and cases cited.

It is also conceded to be a general rule

that a personal name alone cannot be appropriated as a technical trademark, although it may receive protection from the courts when it is so used by another as to render him answerable to the charge of unfair competition. Every person has a right to the honest use of his own name in his business; but he will not be permitted by imitative and unfair devices to mislead the public in regard to the identity of the firm or corporation, or the goods manufactured by it. But a trademark that is originally personal, indicating that the article to which it is affixed is manufactured by a particular person, often comes by usage to indicate merely that the article was manufactured in the establishment with which he was formerly connected.

But it has been seen that there is a leading characteristic which distinguishes the trademark under consideration in the case at bar from the ordinary appropriation of a personal name or geographical term alone as a trademark. In the plaintiff's trademark, the geographical and personal names were both combined in an original devise bearing the words "Auburn-Lynn Shoes, Auburn, Maine."

This arbitrary composite name of the plaintiff's product, with the location of the manufactory expressly added, undoubtedly constituted an impersonal trademark. It will be found to respond to all of the recognized tests of a valid trademark. It did not describe the stock and different materials which entered into the manufacture of the shoes to which it was affixed. It did not necessarily signify that the shoes were the product of Lynn's personal skill, but, by a long use of the trademark in connection with the shoes, it had come to indicate that they were the product of the manufactory with which he was connected, and thus, through the reputation which they had acquired in the market, to operate as an assurance that they possessed certain general qualities and merits. It did not describe the shoes, but it indicated their origin and ownership. It was a trademark which others could not use with equal right and equal truth for the same purpose. The plaintiff had acquired the exclusive right to the use of it, and the adoption by the defendant of the phrase "Auburn-Lynn Shoe Company," as a trademark and corporate name, was an unauthorized simulation of the plaintiff's trademark, and constituted an infringement of the plaintiff's property right, without other proof of a fraudulent intent on the part of the defendant. Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 674, 45 L. ed. 379, 21 Sup. Ct. Rep. 270; Paul, Trademarks, §§ 183–185. The prompt abandonment of the defendant's trademark with the change of its corporate name to "Lunn & Lynn Shoe Company," after the commencement of this bill, was a practical admission of this infringement. It is not indispensable that the words and devices of the two trademarks should be in fact identical in order to constitute an infringement. In contemplation of law, two trademarks are substantially the same, if the resemblance between them is so close that it deceives a customer exercising ordinary caution in his dealing, and induces him to purchase the goods of one manufacturer for those of another. McLean v. Fleming, 96 U. S. 256, 24 L. ed. 832; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 63, 25 L. ed. 997. A critical comparison of two trademarks placed side by side might disclose differences in both words and devices, but, if the similarity is of such a character as to convey a false impression to the minds of ordinarily careful purchasers respecting the identity of the manufactory or of the goods, it is sufficient to afford ground for redress.

Again, it has been seen that the defendant corporation unnecessarily and without authority adopted the words of the plaintiff's trademark comprising the name of Lynn, for its corporate name. In William Rogers Mfg. Co. v. R. W. Rogers Co. 66 Fed. 56, the court says: "Although the use of a personal name as a trademark will not be protected against its use in good faith by a defendant who has the same name, the reason of the rule ceases, and the rule no longer applies, when the defendant, as in the case of a corporation, selects its own name, especially where it appears that such name is selected with an intention to mislead." In Holmes, Booth & Haydens v. Holmes, B. & A. Mfg. Co. 37 Conn. 278. 9 Am. Rep. 324, it was held that, where a corporation has, with their consent, embodied the names of its principal stockholders in the corporate name, the right to use the name so adopted will continue during the existence of the corporation; and that the use of these names by a rival company subsequently formed and embracing such stockholders, in such a manner as to mislead customers into the belief that the two companies were the same, was in violation of the plaintiff's right, and should be enjoined. See also Royal Baking Powder Co. v. Royal, 58 C. C. A. 499, 122 Fed. 337; Bissell Chilled Plow Works v. T. M. Bissell Plow Co. 121 Fed. 357.

In the light of both principle and authority, it thus appears that the defendant's aggressions upon the rights of the plaintiff, prior to the change of its name to "Lunn & Lynn Shoe Company," constituted not only a violation of the general law covering unfair competition, but a specific and positive

infringement of the plaintiff's exclusive right to the use of a technical trademark and trade name. The law of trademarks, it is true, is but a special feature of the general law of unfair competition in trade, which rests upon the elementary principle that no person has the right to sell his goods for those of another. But, as already indicated, there are important distinctions to be observed between them. In the first place, unfair competition, unlike the infringement of technical trademarks, does not necessarily involve the violation of any exclusive right in the plaintiff to the use of the names or symbols employed by the defendant. There may be unfair competition resulting from an unauthorized and improper use of such names and symbols, although the plaintiff has no property right in them as a trademark. Any conduct designed and having a natural tendency to deceive the public and enable one man to dispose of his goods for those of another may be unfair competition and be enjoined, although it is not expressly shown that any particular person was thereby actually deceived. McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Samuels v. Spitzer, 177 Mass. 226, 58 N. E. 693.

Again, it is frequently stated that in cases of technical trademark the fraudulent intent to deceive is presumed, while, in cases of unfair competition, the plaintiff must prove this intent, or show facts and circumstances from which it may be reasonably inferred. But upon this question of intent there is a great diversity of opinion, or of expression, in different courts, and it has been held in some cases that there is no practical distinction in this respect between cases of trademark infringement and unfair competition, since the reasons often given for not requiring proof of fraudulent intent in cases of technical trademark are equally applicable to cases of unfair competition. 28 Am. & Eng. Enc. Law, p. 419, and cases cited. The rule adopted in the United States Supreme Court is thus stated by Chief Justice Fuller in Elgin Nat. Watch Co. v. Illinois Watch Case Co. *supra:* "If a plaintiff has the absolute right to the use of a particular word or words as a trademark, then, if an infringement is shown, the wrongful or fraudulent intent is presumed, and, although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained. But where an alleged trademark is not in itself a good trademark, yet the use of the word has come to denote the particular manufacturer or vender, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 549, 34 L. ed. 997, 1004, 11 Sup. Ct. Rep. 396; Coats v. Merrick Thread Co. 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002.

It has accordingly been held that a court of equity will enjoin the infringement of a technical trademark, which has been occasioned by accident or mistake, without proof of actual fraud on the part of the defendant; but it will not enjoin the imitations of labels, bill heads, and commercial names of a rival trader, unless it satisfactorily appears that such imitations are fraudulently designed and have a tendency to occasion damage. McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828.

In the case at bar, after the plaintiff's bill was commenced, the defendant corporation changed its name to "Lunn & Lynn Shoe Company," but continued to use the old stationery and copies of the printed trademark, substituting "Lunn" for "Auburn" in red ink; the word "Auburn" being erased, but not obliterated. It has been seen that the presiding judge found and held that the "conduct of the defendant company, in adopting the phrase 'Auburn-Lynn Shoe Company' as its trademark, and in conducting a shoe business under that corporate name, manufacturing goods similar in style and character to those manufactured by the plaintiff, and so nearly so as not to be distinguishable by ordinary observers, advertising and selling those goods in the territory covered by Lunn and Reed, when they were acting for the plaintiff company in the sale of Auburn-Lynn shoes, constituted unfair competition. . . . Those who had been in the habit of dealing in and purchasing the Auburn-Lynn shoes might well understand that the product of the Auburn-Lynn Shoe Company represented the plaintiff's manufacture. And even after the change of name to the Lunn & Lynn Shoe Company the use of the old literature, so changed as only to indicate that the Lunn & Lynn Shoe Company was the successor of the Auburn-Lynn Shoe Company, did not help the matter. If customers could be led to believe that the Auburn-Lynn Shoe Company was the manufacturer of shoes which they had formerly bought as Auburn-Lynn shoes they would

not be undeceived by seeing literature in which 'Auburn' was changed to 'Lunn &' in such a way as to give the impression that the Lunn & Lynn Shoe Company was the successor of the 'Auburn-Lynn Shoe Company.'"

It has been seen that, in the light of the decisions, the unauthorized simulation of the plaintiff's trademark and trade name by the defendant corporation constituted an infringement of the plaintiff's exclusive right to the use of a technical trademark, with out other proof of a fraudulent intent on the part of the defendant; but the decision of the presiding judge that such conduct on the part of the defendant corporation, prior to the change of its name to Lunn & Lynn Shoe Company, constituted unfair competition, involved a finding that there was in fact a fraudulent intent on its part to convey to the trade an impression that its shoes were the Auburn-Lynn shoes, product of the plaintiff. This finding was not required to authorize the injunction against the use of the plaintiff's trademark by the defendant corporation, but it was nevertheless relevant and material upon the question of damages; since the presumption of wrongful intent in cases of technical trademark may be rebutted upon the question of liability for profits and damages. Elgin Nat. Watch Co. v. Illinois Watch Case Co. *supra*.

But the presiding judge further found that, even after the change of the name to Lunn & Lynn Shoe Company, the use of the old advertising literature, with changes only indicating that the Lunn & Lynn Shoe Company was the successor of the Auburn-Lynn Shoe Company, "did not help the matter," for the reason that customers would continue to receive the false impression that the shoes placed on the market by the Lunn & Lynn Shoe Company were the Auburn-Lynn shoes of the plaintiff. This was in effect a finding that the conduct of the Lunn & Lynn company in using the old literature, unaccompanied by any explicit statement that this company was not the manufacturer of Auburn-Lynn shoes, still constituted unfair competition.

These findings and conclusions of the presiding judge were justified by the facts reported. The entire history of the conduct of the shoe business by the defendant corporation, after the retirement of W. R. Lynn from the plaintiff company, discloses a manifest intention and persistent effort on the part of the management to beguile the old customers of the plaintiff company into purchasing the defendant's shoes, under the impression that they were the Auburn-Lynn product manufactured by the plaintiff, and thereby to appropriate the value of the reputation which the latter had acquired. It shows a determination to continue such efforts until compelled by the courts to forbear. Its change of name to Lunn & Lynn Shoe Company, considered in the light of its subsequent conduct in the use of the old trade literature, indicated an ingenious attempt to disguise the true nature of its methods and conduct, rather than a genuine purpose to desist from the pursuit of its course of unfair competition. All of the provisions of the decree signed by the presiding judge are therefore affirmed without modification, except the sixth paragraph, in regard to the extent of the accounting to which the plaintiff is entitled. This question is raised by the plaintiff's exceptions.

It has been seen by the sixth paragraph of the decree the cause was referred to a master to take an account of all the profits of the business of the defendant corporation, "growing out of sales of shoes, upon which was impressed the trademark of the Auburn-Lynn Shoe Company, or any simulated trademark using the name 'Auburn-Lynn,' from" the time of the organization of the defendant corporation to the date of the decree, with all damages sustained by the plaintiff during that period by the wrongful use of the plaintiff's trademark and trade name, and by the unfair competition of the defendant corporation during that period.

The words in quotation marks were introduced by the presiding judge in the decree filed by the plaintiff's attorney, and to this limitation upon his right to an accounting for the profits of the defendant's business the plaintiff took exceptions.

The rule which now prevails in the equity courts, respecting the wrongdoer's accountability for the "profits and damages" resulting from his unlawful acts, requires the master, not only to take an account of all the profits made by the defendant, but also to make an inquiry in regard to all damages sustained by the plaintiff on account of the defendant's wrongful acts; and, since it cannot be ascertained with any reasonable certainty how much of the profit is due to the trademark and how much to the intrinsic value of the commodity, the whole will be awarded to the plaintiff. It is equally well settled that the profits recoverable in equity for unfair competition are governed by the same rule as in cases of the infringement of trademarks, and are not limited to such as accrue from sales in which it is shown that the customer is actually deceived, but include all made on the goods sold in the simulated dress or package, and in violation of the rights of the original proprietor. N. K.

Fairbank Co. v. Windsor, 118 Fed. 96; Benkert v. Feder, 34 Fed. 534; Williams v. Mitchell, 45 C. C. A. 265, 106 Fed. 168; Sawyer v. Kellogg, 9 Fed. 601; Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; Graham v. Plate, 40 Cal. 593, 6 Am. Rep. 639; Avery v. Meikle, 85 Ky. 435, 7 Am. St. Rep. 604, 3 S. W. 609; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828.

In Singer Mfg. Co. v. June Mfg. Co. *supra*, it was held that, on the expiration of the plaintiff's patent, the right to make the patented article and to use the generic name "Singer" passed to the public, but that the defendant was guilty of unfair competition in failing to indicate that the machines made by him were not the product of the Singer Manufacturing Company: and the defendant corporation was accordingly directed to "account" for any profits which may have been realized by it because of the wrongful acts committed by it while engaged in such unfair competition, although there had been no infringement of a technical trademark.

In the case at bar it appears that between August 4, 1903, and the time of the hearing of the bill in March, 1904, 32 letters, intended for the plaintiff, but addressed to the Auburn-Lynn Shoe Company, came into the hands of the defendant corporation. They contained orders, checks, and general correspondence, some in the defendant's printed addressed envelopes, and some in writing. They were mostly from old customers, and from these letters the defendant company obtained information concerning the plaintiff's business. It expressly appears that, after the defendant's change of name, one order was taken by the defendant's salesman on the order blanks of the Auburn-Lynn Shoe Company.

It is accordingly the opinion of the court that the plaintiff is entitled to an accounting, not only for the profits realized by the defendant company from sales of shoes upon which was impressed the trademark of the Auburn-Lynn Shoe Company, or any simulated trademark using the name "Auburn-Lynn," but also for the profits resulting from the wrongful acts committed by the defendant company in its unfair competition with the plaintiff, between the time of its change of name to Lunn & Lynn Shoe Company and the date of the decree.

Defendant's appeal dismissed. Plaintiff's exceptions sustained. Cause remanded for a modification of the decree in accordance with this opinion.

4 L.R.A.(N.S.)

MASSACHUSETTS SUPREME JUDICIAL COURT.

MARY BURKE, by Next Friend,
v.
HENRY M. DAVIS.

(— Mass. —, 76 N. E. 1039.)

Servant—assumption of risk.

An employee in a laundry assumes the risk of injury from the operation of a mangle by having her hand drawn into the machine, although she works reluctantly under pain of dismissal for refusal, and under the assurance by the foreman that it is safe, and a guard placed on the machine proves inadequate, where she is fully aware of the risk involved in the undertaking.

(March 2, 1906.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County, made during the trial of an action brought to recover damages for personal injuries,

Case Note.—Effect of master's assurance as to obvious dangers of employment.—If a servant enters upon, or continues to, work upon an assurance that the service will not unduly imperil his safety, the mere fact that he had previously had some apprehensions as to the possibility of danger will not, as matter of law, render him chargeable either with an assumption of the risk or with contributory negligence. In most cases the question has arisen with respect to his contributory negligence. 1 Labatt, Mast. & S. § 450.

But, if the servant knows and fully comprehends the risk, he is charged with an assumption of the risk notwithstanding any assurance that he can do the work safely. Id. § 452.

The many cases on this question are clearly analyzed and reviewed in a note to McKee v. Tourtelotte, 48 L.R.A. 542. This shows that the cases are not in full accord with respect to the effect of such assurance. In some of them, where the servant's knowledge is imperfect and excusably so, he is not charged with assumption of the risks, as in the case of Nelson v. St. Paul Plow Works, 57 Minn. 43, 58 N. W. 868.

The assurance given by the master or his representative, with superior knowledge, or means of knowledge, of the situation and of its safety, may be relied upon by the servant, unless the danger is "so imminent or manifest as to prevent a reasonably prudent man from risking it." District of Columbia v. McElligott, 117 U. S. 633, 29 L. ed. 949, 6 Sup. Ct. Rep. 884.

But where the servant clearly knows the risks the cases substantially agree in holding that no assurance given him by any other person will justify him in ignoring the known danger. They fully sustain the decision in the above case of BURKE v. DAVIS.

which resulted in a verdict in defendant's favor. Overruled.

The facts are stated in the opinion.

Messrs. **Maurice M. Lynch** and **John B. Moran** for plaintiff.

Messrs. **Romney Spring** and **Harry H. Atwood**, for defendant:

Such a condition of the guard as disclosed by the evidence in this case did not constitute a defect.

Quigley v. Thomas G. Plant Co. 165 Mass. 368, 43 N. E. 205; Gleason v. Smith, 172 Mass. 50, 51 N. E. 460.

The risk of the injury which the plaintiff sustained was assumed by her.

Connolly v. Eldredge, 160 Mass. 566, 36 N. E. 469; Shine v. Cocheco Mfg. Co. 173 Mass. 558, 54 N. E. 245; Gaudet v. Stansfield, 182 Mass. 451, 65 N. E. 850; Crowley v. Pacific Mills, 148 Mass. 228, 19 N. E. 344; Pratt v. Prouty, 153 Mass. 333, 26 N. E. 1002; Patnode v. Warren Cotton Mills, 157 Mass. 283, 34 Am. St. Rep. 275, 32 N. E. 161; Richstain v. Washington Mills Co. 157 Mass. 538, 32 N. E. 908; Lowcock v. Franklin Paper Co. 169 Mass. 313, 47 N. E. 1000; O'Connor v. Whittall, 169 Mass. 563, 48 N. E. 844; Robinska v. Lyman Mills, 174 Mass. 432, 75 Am. St. Rep. 364, 54 N. E. 873; Sullivan v. Simplex Electrical Co. 178 Mass. 35, 59 N. E. 645.

The assurance of Mr. Spargo that there was no danger was not sufficient to relieve the plaintiff from the assumption of risk.

Kenney v. Hingham Cordage Co. 168 Mass. 278, 47 N. E. 117; Lowcock v. Franklin Paper Co. *supra*.

Sheldon, J., delivered the opinion of the court:

This is an action of tort, brought under Rev. Laws, chap. 106, § 71, to recover damages for injuries received by the plaintiff while in the employ of the defendant, and engaged in feeding sheets through a mangle for the purpose of drying and smoothing them. The action is based on the alleged negligence of the defendant in placing the guard blade in front of the rollers of the mangle too high, so that the plaintiff's hand passed under them, and was caught between the rollers and seriously injured.

The plaintiff was seventeen years old at the time of the accident. She had been at work for the defendant about two years and a half, working in the laundry, usually in the ironing room, but not often on mangles, and then only at the request of Spargo, the defendant's superintendent. She had worked 12 or 13 times on the mangle on which she was injured, and a few time on other mangles. This mangle is an ironing machine, consisting of a large, heated cylinder and several smaller rollers. The cylinder and the rollers revolve in opposite directions, so that the articles to be ironed are drawn between the rollers and the cylinder. On the morning of the accident, she began some other work, and Spargo ordered her to go to work upon this mangle. When she showed reluctance to do so, he said to her, "If you don't, you can put on your coat and hat and go home." She then went to work on it with one Jennie Laughton, put two roller towels and two sheets through the rolls, and started a third sheet, which was torn. Spargo then increased the speed of the mangle so that it ran at its highest speed, being the usual speed used in ironing sheets. The plaintiff saw him do this, and understood it. There was a guard on the mangle about 1 inch above the feed board, and in front of the rolls. This guard had been in the same position every time that the plaintiff had worked upon the machine. The distance between the feed board and the guard was plainly visible. This guard consisted of two pieces, a circular rod an inch or a little less in diameter, and a guard blade about an inch wide and an eighth of an inch thick. The lower surface of the guard blade was parallel to the feed board, and about an inch above it. The plaintiff testified that she tried to do the best she could with the torn sheet, but it went so fast that the first thing she knew her hand was in the mangle. She also testified that Spargo told her the machine was perfectly safe; that every time he told her to go up there, she told him she did not want to go because she knew nothing about it, and he said it was perfectly safe, that other girls had been up there and never been hurt; that she was afraid to work on this mangle, because she was afraid that she would be hurt, that her hand would be caught between the rolls; that she knew that the cylinder and the rolls were revolving; that she was afraid of the mangle because she thought from her prior experience that her fingers might get so far in that they might get caught, that if her hand went in she could not get it out; that in spite of what Spargo said she thought that he was not right, that there was more danger than he thought. Jennie Laughton testified that the purpose of the guard was "to warn by touch of the danger of the machine if you went beyond it." Another girl employed in the laundry testified for the plaintiff that Spargo told all the girls that the guard would prevent their fingers from going in any further, but that he also said that they should look out for their hands. Another of the girls employed in the laundry said that the guard was never changed; that her fingers usually passed under the

edge of the guard in pushing the work under; that the folder could push her fingers under so that they would touch the cylinder, and this fact could be seen by anyone standing on the floor who looked at it; that it would not absolutely prevent the fingers from going under. The whole arrangement of the cylinder and rolls was visible from the floor. At the end of the plaintiff's case the court ordered a verdict for the defendant, and the plaintiff excepted to this ruling.

The plaintiff concedes in argument that if this mangle had not been provided with a guard as above stated, she could have no remedy, for the reason that the danger of the operator's hands being dragged between the rollers was an obvious danger; and it was apparent that the only way for her to avoid danger was to keep her fingers and hands away from the rollers. She would have assumed the risk of such an accident. Gaudet v. Stansfield, 182 Mass. 451, 65 N. E. 850; O'Connor v. Whittall, 169 Mass. 563, 48 N. E. 844; Lowcock v. Franklin Paper Co. 169 Mass. 313, 47 N. E. 1000; Wilson v. Massachusetts Cotton Mills, 169 Mass. 67, 47 N. E. 506. But she argues that the effect of putting the guard upon this machine, taken in connection with the assurances made by Spargo, was to justify her in believing that it was adequate for her protection. Stager v. Troy Laundry Co. 38 Or. 480, 53 L.R.A. 459, 63 Pac. 645, 41 Or. 141, 143, 68 Pac. 405. But in that case there was evidence that the guard plate was improperly adjusted at a greater height above the table than it was intended to be put, while in the case at bar there is nothing to show that it was improperly placed. Moreover, the plaintiff, upon her own statement, was fully aware of the risk she ran in working upon this machine. and for that reason was reluctant to work upon it. It is true of her, as it was of the plaintiff in Connolly v. Eldredge, 160 Mass. 566, 36 N. E. 469, that the presence of the guard, though inadequate for complete protection, did not convert the mangle into a trap. She was not misled by any assurances of Spargo. Lowcock v. Franklin Paper Co. *supra;* Kenney v. Hingham Cordage Co. 168 Mass. 278, 47 N. E. 117. She was not ignorant of the proper method of doing her work, as in Manning v. Excelsior Laundry Co. 189 Mass. 231, 75 N. E. 254. And the fact that she consented to undertake the work only reluctantly, and under a threat of dismissal if she should refuse to do it, will not save her from being held to have assumed all the obvious risks of her undertaking. Wescott v. New York & N. E. R. Co. 153 Mass. 460, 27 N. E. 10; Lamson v. American Axe & Tool Co. 177 Mass. 144, 83 Am. St. Rep. 267, 58 N. E. 585.

On the whole case, we are of opinion that the plaintiff had assumed the risk of the accident which happened to her, and that the verdict against her was rightly ordered.

Exceptions overruled.

MICHIGAN SUPREME COURT.

JOHN DALLAVO, Plff. in Err.,
v.
JACOB SNIDER.

(— Mich. —, 107 N. W. 271.)

Slander—charging insolvency.

To render actionable *per se* a verbal charge that a merchant is not worth a dollar, that his property is in his wife's name, it must be shown that the words were actually spoken of and concerning him in relation to his business.

(April 3, 1906.)

Case Note.—Slander; oral charge of insolvency against a merchant.—It may fairly be doubted whether the weight of authority sustains the proposition laid down in DALLAVO v. SNIDER, that, to make an oral charge of insolvency actionable *per se*, it must be shown "that the words were actually spoken of and concerning the plaintiff in relation to his business;" and an examination of the cases cited in the opinion tends to confirm that doubt.

The case of Weiss v. Whittemore, 28 Mich. 366, was an action for libel. The publication complained of contained nothing reflecting upon plaintiff's solvency. The language was such that, had it been spoken, it would probably not have been held actionable *per se*, and this was what Judge Christiancy had in mind when he made what the court above calls his criticism of the exception to the distinction between written and spoken words. What he did say was that this distinction should be recognized when the question is of written language, approving the proposition that words not actionable *per se* when spoken might become so when written. He approached the question from the side of libel, and not of slander, and there is nothing in his language that can be construed to throw any doubt upon the proposition that a charge of insolvency is actionable *per se* no matter how or where made.

Foster v. Scripps, 39 Mich. 376, 33 Am. Rep. 403, was an action for libel where the sole question was whether or not the publication was privileged. There is nothing in the opinion that could in any way be made to apply to an action for slander, unless it is Judge Campbell's statement that "the authorities on the nonactionable character of spoken words have no necessary bearing on the character of written or printed libel."

Smedley v. Soule, 125 Mich. 192, 84 N. W. 63, was also an action for libel, this time by an attorney; in which the trial court

ERROR to the Circuit Court for Mecosta County to review a judgment in defendant's favor in an action brought to recover damages for slander. Affirmed.

The facts are stated in the opinion.

Messrs. Cogger & Broomfield, for plaintiff in error:

The words used contained a direct charge of dishonesty, insolvency, and bankruptcy; and such statements, made concerning a merchant or tradesman, are slanderous *per se*.

3 Sutherland, Damages, 2d ed. ¶ 1213; Cooley, Torts, 2d ed. p. 236; 13 Am. & Eng. Enc. Law, pp. 314–355; Haney Mfg. Co. v. Perkins, 78 Mich. 9, 43 N. W. 1073; Oliver v. Perkins, 92 Mich. 319, 52 N. W. 609; Cadwell v. Corey, 91 Mich. 340, 51 N. W. 888; Beneway v. Thorp, 77 Mich. 182, 43 N. W. 863; Newman v. Stein, 75 Mich. 402, 13 Am. St. Rep. 447, 42 N. W. 956; Henkel v. Schaub, 94 Mich. 544, 54 N. W. 293; Derham v. Derham, 123 Mich. 452, 82 N. W. 218; McGee v. Baumgartner, 121 Mich. 291, 80 N. W. 21; Smedley v. Soule, 125 Mich. 198, 84 N. W. 63; Savlan v. Ayer, 129 Mich. 545, 89 N. W. 359; Morasse v. Brochu, 151 Mass. 567, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N. E. 74; Lewis v. Hawley, 2 Day, 497, 2 Am. Dec. 121; Noeninger v. Vogt, 88 Mo. 589; Jones v. Littler, 7 Mees & W. 423; Phillips v. Hoefer, 1 Pa. St. 62, 44 Am. Dec. 111; Drake v. Hill, T. Raym. 184.

Messrs. **McKnight & McAllister** and **Joseph Barton**, for defendant in error:

The words used by defendant, and relied

charged the jury that the declaration averred an injury to plaintiff's fame and character as an attorney, and that "the publication complained of tends upon the face of it to the injury of plaintiff in respect to his profession and business." The result was a judgment for the plaintiff, which the supreme court reversed because of the charge, since it took a different view of the declaration, holding that it failed to allege any loss to the plaintiff in his profession; and it was further stated that "the record is barren of any evidence tending to show any such loss."

Tryon v. Evening News Asso. 39 Mich. 636, was also a libel case; but the publication contained no imputation as to plaintiff's solvency, and is not at all in point.

In Van Epps v. Jones, 50 Ga. 238, which arose from the defendant's false and malicious protest of a draft on the plaintiff, a lawyer, the court held that it was necessary to allege in the declaration that the charge was made with reference to the plaintiff's profession, on the theory that a mere accusation that a lawyer does not pay his debts would not necessarily injure him as such.

In Oakley v. Farrington, 1 Johns. Cas. 130, 1 Am. Dec. 107, the alleged slander was the calling of a justice of the peace "a damned rogue," and the court held the words not actionable *per se* because they were not spoken with reference to his official character or conduct.

Van Tassel v. Capron, 1 Denio, 250, 43 Am. Dec. 667, was also an action by a justice of the peace for slander in calling him "a damned blackleg," and adding that he was in a combination to cheat strangers; and the court held that the words were not actionable *per se* because they contained no charge against him as a magistrate, and that to make them actionable they must be spoken of, and touch, him in his official character, and that it was not enough that they tended to injure him in that respect.

In Cassavoy v. Pattison, 93 App. Div. 370, 87 N. Y. Supp. 658, the words alleged to be slanderous were: "Be careful how you deal with that man Cassavoy; he is dishonest; he will do you if he can." They were held not actionable *per se;* but it must be remembered that in this case the complaint contained no allegation that the plaintiff had any occupation, or was engaged in any business.

An extensive search has revealed but two cases in which the question was squarely raised whether or not words imputing insolvency to a merchant or business man are actionable without proof of special damages, if not made in reference to his business; and where it can be said the courts were really in accord with DALLAVO v. SNIDER.

In Dicken v. Shepherd, 22 Md. 399, it was held that an oral statement by the defendant that the plaintiff would never be able to pay for a mill which had been purchased from defendant to be used by the plaintiff, a miller, in his milling business; that defendant had extended the plaintiff's time in order to give other creditors a chance to get their money; and that they had better get their money out of the plaintiff as soon as possible, as he, the defendant, was going to shut down on the plaintiff at the expiration of the time; and that the plaintiff's other creditors would never get their money, —was not a charge of insolvency against the plaintiff in his business.

And in Redway v. Gray, 31 Vt. 292, it was held that an action cannot be maintained for words imputing insolvency to the plaintiff, unless the words were spoken of him concerning his business, and were untrue.

In an early New York case, Titus v. Follett, 2 Hill, 318, it was held that a declaration in slander was bad on special demurrer, where it alleged that, in a discourse of and concerning the plaintiffs, and their circumstances in business, the defendant said that the plaintiffs were down, but did not contain a direct allegation that the words were spoken of and concerning the plaintiffs in their business. This decision, however, turned on a mere question of the old technical system of pleading, which may now be fairly regarded as obsolete.

The confusion of the law on this point arises from a failure to make a clear distinction between charges of insolvency

upon by plaintiff for recovery, are not actionable *per se*.

Abbott, Pr. 181; Pollard v. Lyon, 91 U. S. 225, 23 L. ed. 308; Bishop, Non-Contract Law, 261; Cooley, Torts, 196–203; 2 Thompson, Trials, 2029; Crone v. Angell, 14 Mich. 340; Brace v. Brink, 33 Mich. 91; Bell v. Fernald, 71 Mich. 267, 38 N. W. 910; Burt v. McBain, 29 Mich. 260; Fowler v. Gilbert, 38 Mich. 292; Mains v. Whiting, 87 Mich. 172, 49 N. W. 559; Haney Mfg. Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073; Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609; Henkel v. Schaub, 94 Mich. 542, 54 N. W. 293; Beneway v. Thorp, 77 Mich. 181, 43 N. W. 863; Ritchie v. Stenius, 73 Mich. 563, 41 N. W. 687; Thibault v. Sessions, 101 Mich. 279, 59 N. W. 624; Randall v. Evening News Asso. 101 Mich. 561, 60 N. W. 301; Schultz v. Huebner, 108 Mich. 274, 66 N. W. 57; Youngs v. Adams, 113 Mich. 199, 71 N. W. 585; Loranger v. Loranger, 115 Mich. 681, 74 N. W. 228.

Blair, J., delivered the opinion of the court:

This is an action of slander. The slanderous publication relied upon is charged in the declaration as follows, *viz.*: "Did on, to wit, the 1st day of December, A. D. 1902, at the said village of Remus in the county and state aforesaid, in a certain discourse which the said defendant then and there had with one Frank Simon, in the presence and hearing of divers good and worthy persons, designedly, falsely, and maliciously speak

against merchants, manufacturers, and business men in general, and such charges as are found in the cases in which the words were spoken of an officer, lawyer, physician, etc., and where it is universally held that, to make language not slanderous *per se* actionable as applied to the official or professional character, it must be shown that the words were spoken with such reference to the office or profession of the person attacked that they directly tend to injure him in respect to it. It would seem, however, that nothing would tend so surely to occasion direct pecuniary loss to a merchant or business man as a general charge of insolvency. The solvency of such a person is so closely interwoven with his business and his mercantile character that judges and text-book writers have almost unanimously considered it impossible to separate from the calling itself a general charge of insolvency made concerning a business man with no particular reference to his vocation. Such general charge must necessarily include the particular one that he is insolvent with respect to his business. All the cases that can be found, except those above noted, hold this to be the law; while the text-books are unanimous thereon. Newell, Defamation, 192; Townshend, Slander & Libel, § 191; Odgers, Libel & Slander, 79, 80; Folkard's Starkie, Slander & Libel, § 117.

In Davis v. Ruff, Cheves, L. 17, 34 Am. Dec. 584, it was held that words imputing insolvency to a merchant need not be averred or proved to have been used in reference to the particular business that the merchant was engaged in, for "such words went not to the particular business, but to the general mercantile character of the individual."

In Lewis v. Hawley, 2 Day, 495, 2 Am. Dec. 121, it was held actionable to say of a cattle drover that he "is a bankrupt and unable to pay his debts." In this case as reported there is nothing to show how or where the language was used, except that it was spoken, and not written.

In a conversation concerning the plaintiff as a merchant, and in regard to his business and a debt due one of his creditors, to say of the latter, "it is hard for him to lose his debt," meaning that the plaintiff is insolvent and unable to pay the debt, and the creditor will lose it because of insolvency, is actionable *per se*. Mott v. Comstock, 7 Cow. 654.

Where defendant, upon being asked the question, "Were there any failures yesterday?" replied, "Not that I know of, but I understand there is trouble with" the plaintiffs,—the words were held to be spoken of the plaintiffs as merchants, and actionable *per se*. Sewall v. Catlin, 3 Wend. 291.

Where defendant refused to perform a contract that he had made with the plaintiff, a distiller, for the sale of grain, and in repeated conversations with others stated that he would not part with his grain as he was afraid he would not be paid for it, and said of the plaintiff, "there is a time when men will fail who must fail, and," the plaintiff's "time has come," such words were held to be actionable *per se*. Ostrom v. Calkins, 5 Wend. 263.

Falsely to say of a farmer that the sheriff will come and sell him out one of these days, and that, if his creditors do not sue him, the claims against him will be lost, is actionable *per se*. Phillips v. Hoefer, 1 Pa. St. 62, 44 Am. Dec. 111.

It has been the well-settled law in England from the earliest times that in actions for slander words imputing insolvency to a merchant or trader need not be shown to have been spoken with express reference to the plaintiff's business. Odgers, Libel & Slander, 79, 80, and cases there cited; Folkard's Starkie, Slander & Libel, § 117.

Of course, to impute bankruptcy to one not engaged in mercantile or manufacturing pursuits would not be actionable *per se*; and so it has been held that to use words imputing to a solicitor insolvency cannot be construed as conveying an imputation concerning his business as a solicitor. Dauncey v. Holloway [1901] 2 K. B. 441.

As to whether language charging one with refusal to pay debt is actionable, see note 3 L.R.A.(N.S.) 339.

publish, and declare of and concerning the said plaintiff, in connection with his said trade, business, and employment, these scandalous, malicious, and defamatory words, to wit: 'Them indemnity bonds (meaning thereby the indemnity bonds given by one James R. Kaley upon which this plaintiff had become indemnity bondsman) are no good. He (meaning the said plaintiff) is not worth a dollar (meaning that plaintiff was not collectible and was insolvent). His property (meaning said plaintiff's property) is all in his wife's name.'"

The plaintiff gave testimony as to his business relations, which was undisputed, tending to show that at the time of the publication of the alleged slanderous words he was the owner of and operating a mill at Wyman, some 14 miles from Remus, and was buying and selling logs, lumber, and ties, and manufacturing and selling lumber and shingles and ties in the country around Remus. "In my mercantile business and in buying and selling timber and logs, I did some business on credit. I made some purchases without paying the cash immediately, and, practically, I could deal more advantageously in that way. In 1902, about in August, I bought a certain amount of interest in the Mansfield Mercantile Company at Remus. . . . The Mansfield Mercantile Company was a general store handling dry goods, clothing, shoes, groceries, crockery, etc. That was a stock company, and I put $7,000 of money in there. I continued to have that interest in that business until some time in February or March, 1903. I was vice president of the company." The circumstances surrounding the speaking of the alleged slanderous words were substantially as follows: The plaintiff's son-in-law, Kaley, was engaged in the saloon business, and had given to the sureties upon his liquor bond an indemnifying bond signed by plaintiff to induce them to become such sureties. One of the sureties testified that after he signed the liquor bond he had a talk with defendant at the saloon of one Theisen. "Jacob Snider says to me, 'You went Kaley's bond?' I says, 'Yes, sir.' Well, Jake says, 'I think you made a great mistake.' He says, 'He is not worth anything.' I says, 'I got Mr. Dallavo's— He gave me his indemnifying bond.' Well, he says 'He is not worth anything; he is not worth a dollar; everything is in his wife's name.'" The other surety testified to substantially the same conversation. There was no proof or claim of special damages. The defendant introduced no evidence, but rested at the close of plaintiff's case.

Plaintiff's counsel requested the court to charge the jury, among other things, as follows: "In this class of cases, slander *per se*, it is not necessary for the plaintiff to show malice. Malice is a presumption of law from the publication of words actionable *per se*, and I charge you that these words are actionable *per se*, and that malice is presumed. Malice is a presumption of law from the false and injurious nature of the charge. In this case the words are actionable *per se*, and it is not necessary in this case for the plaintiff to allege or prove any actual damages. It is legally presumed that damages result from the utterance of such words, and that they cause injury as a natural and immediate consequence." The trial judge refused to give either of these requests, but instructed the jury that the words were not actionable *per se*, and that malice must be proved, upon the ground that it did not appear that the words were spoken of the plaintiff, as charged in the declaration, with reference to his business. "So we must go further than the words themselves, and ascertain as far as we can from the evidence what were the surrounding circumstances that led up to the talk, in order to determine what was the spirit in which these words were used," etc.

The important question in this case is whether the words counted upon were slanderous *per se*. If the words were slanderous *per se*, the charge of the court was given upon an erroneous theory, which affected the entire charge. If the words were not slanderous *per se*, the charge was too favorable to plaintiff, since no special damages were proved. In determining whether words are slanderous *per se*, a distinction has generally been recognized between words written or printed and words spoken. An exception to this rule has, however, been made in the case of words affecting a person in his profession or business, and it has been held that in such cases the distinction does not exist. The principle upon which this exception rests was questioned by Mr. Justice Christiancy in Weiss v. Whittemore, 28 Mich. 366, and we are satisfied that it is unsound. See Foster v. Scripps, 39 Mich. 376, 33 Am. Rep. 403; Tryon v. Evening News Asso. 39 Mich. 636. The law is well settled that it is libelous *per se* to publish of and concerning a merchant false statements touching him in his business, and naturally tending to injure him therein. And it might well be held that a statement of a merchant's insolvency, printed in the public press, even though connected with some matter entirely distinct from his business, was libelous *per se*, since the inevitable tendency must be, and is intended to be, injurious to him in his business. But, whatever the rule may be in such a case, we are satisfied that in a case where the charge is the uttering of slanderous words, the allegations

of the declaration must be sustained by proof that the words were actually spoken of and concerning the plaintiff in relation to his business, in order to make them slanderous *per se;* and this rule, we think, is sustained by the weight of authority. Van Epps v. Jones, 50 Ga. 238; Van Tassel v. Capron, 1 Denio, 250, 43 Am. Dec. 667; Oakley v. Farrington, 1 Johns. Cas. 130, 1 Am. Dec. 107; Cassavoy v. Pattison, 93 App. Div. 370, 87 N. Y. Supp. 658; Smedley v. Soule, 125 Mich. 192, 84 N. W. 63.

In view of our conclusion that the trial judge did not err in holding that the words proved were not slanderous *per se*, the other assignments of errors become immaterial.

The judgment is affirmed.

GEORGIA SUPREME COURT.

W. S. WITHAM, Plff. in Err.,
v.
ATLANTA JOURNAL.

(124 Ga. 688, 53 S. E. 105.)

Libel—using one's name in describing corporation.

1. Although in the headline over a newspaper article, wherein a named bank is stated to have made an assignment, owing to its failure to meet its obligations, the surname of an individual having no connection with such bank may be used as an adjective descriptive of the bank named in the body of the article, yet, if the publication, in plain and unambiguous terms, refers to the bank, and does not refer to such individual, or his trade, profession, or business, except by thus using his surname, the meaning of the published words cannot be enlarged or extended by innuendo so as to give him a cause of action for alleged libel, in the absence of an allegation of special damage.

Same—charge of criminal prosecutions pending.

2. To falsely publish of another that there are criminal cases pending against him is libelous *per se*.

Headnotes by FISH, Ch. J.

(January 13, 1906.)

ERROR to the City Court of Atlanta to review a judgment in favor of defendant in an action brought to recover damages for the alleged publication of a libel. Reversed.

Statement by Fish, Ch. J.:

This was an action for libel brought by W. S. Witham against the Atlanta Journal. After a jury had been impaneled, and before any evidence was introduced, the defendant made an oral motion to dismiss the petition, which was sustained, and the plaintiff excepted. The alleged libelous language declared on constituted an article in a newspaper published by the defendant in Atlanta, and, including headlines, was as follows:

Witham Bank at Barnesville Assigns.

People's Bank has Made an Assignment Following Failure to Pay Deposit Certificates.

(Special Dispatch to The Journal.)

Barnesville, Ga., Jan. 6.—The People's Bank has made an assignment to Mr. E. Rumble and A. A. Murphy, following its failure to meet the certificates which fell due January 1, given on its plan of reorganization in January, 1902. The records show that the assignment was filed with the clerk of Pike superior court at Zebulon, Saturday, January 3, 1903, at 11:30 o'clock P. M. After all efforts had failed Saturday

Case Note.—Libel and slander; written charge with reference to plaintiff's business.—WITHAM v. ATLANTA JOURNAL goes even farther than Dallavo v. Snider, *ante*, 973 in that it holds a written charge of insolvency published in a newspaper not libelous *per se*, because not made in reference to the plaintiff's business. It seems plain that there are in the publication set out above some, at least, of the elements necessary to make it libelous *per se*. There is no question as to the identification of the plaintiff; nor can there be any reasonable doubt that the natural tendency of the language used would be to destroy the public confidence in the plaintiff's banks, and to cause intending patrons to refrain from doing business with him, thereby occasioning him great pecuniary loss. But the court is emphatic in saying that the language used contained no charge against the plaintiff in reference to his business, and for that reason holds that he cannot recover without alleging and proving special damages. For a discussion of this principle as applied to oral charges of insolvency, see Dallavo v. Snider, *ante*, 973, and the case note appended thereto. If its application to cases of slander is against the weight of authority, *a fortiori* it must be further removed from being a well-established rule of law when it is sought to apply it to cases of libel. Not one opinion can be found in the books, that holds a written charge of insolvency not libelous *per se*, even though not made with reference to the plaintiff's business. See McKenzie v. Denver Times Pub. Co. 3 Colo. App. 554, 34 Pac. 577; Newell v. How, 31 Minn. 235, 17 N. W. 383; Mitchell v. Bradstreet Co. 116 Mo. 226, 20 L.R.A. 138, 38 Am. St. Rep. 592, 22 S. W. 358, 724; Hermann v. Bradstreet Co. 19 Mo. App. 227; Bee Pub. Co. v. World Pub. Co. 59 Neb. 713, 82 N. W. 28; McIntyre v. Weinert, 195 Pa. 52, 45 Atl. 666; Shepheard v. Whitaker, L. R. 10 C. P. 502, 32 L. T. N. S. 402.

to secure money with which to pay the bank's obligations, as per promise of its reorganizers, the assignment was decided upon by the bank officials after a consultation with some of the creditors. It is understood that the assignment is satisfactory to the holders of the certificates. While everybody here regrets the new turn affairs have taken, there is little excitement over it. Efforts will be made to yet reach a settlement without having any extensive litigation, as all the parties at interest seem to be satisfied to have as little litigation as possible. Judge Howard Van Epps, of Atlanta, and Col. R. L. Berner, of Forsythe, were in the city to-day representing W. S. Witham, and it is understood that a proposition has been made looking to a settlement of the civil [and] criminal cases pending against Witham, growing out of his connection with the old Barnesville Savings Bank.

It was alleged that all of this publication was false, malicious, and libelous, and that it was "of and concerning petitioner." It was further alleged that at the time of the publication in question the plaintiff, Witham, was president of 19 banks located throughout the state of Georgia, and financial agent of 11 other such banks; that all of these banks were commonly known as "Witham banks," and that no other Witham in Georgia is connected in the public mind with the term "Witham bank." The publication complained of meant, and intended the public to understand, that the People's Bank therein referred to was a "Witham bank," and that this one of the Witham banks had made an assignment on account of its failure to meet the demands of holders of certificates of deposit, when as a matter of fact plaintiff had no connection whatever with the People's Bank, owned no stock in it, held no office in it, and had no interest in its success or failure; and the charge in the newspaper article that it was a "Witham bank" was recklessly false, malicious, and libelous, and, owing to the large circulation of the newspaper, has worked irreparable damage to the plaintiff, "subtle and intangible in its nature, and not capable of accurate itemization, or of special proof." Plaintiff is connected, either as president or financial agent, or both, with 30 banks doing business in Georgia, all of which are known by the public and commonly designated as "Witham banks," and, by reason of his financial connection with banks in New York and other money centers, he is enabled freely to command the necessary funds for the use and protection of his banks, all of which are upon a solid foundation and being successfully operated, "save that their confidence in petitioner will necessarily be impaired and the public favor withdrawn from him by reason of said publication." Such a publication, in a newspaper of such extensive circulation as the one published by the defendant, "naturally and inevitably tends to shake public and general confidence in the system of banks operated and controlled by petitioner in the state of Georgia, or with which his name is connected, and to deter depositors from depositing in any one of the Witham banks, or to cause them to withdraw their deposits already made, and to create suspicion and distrust in the minds of creditors, such as to incline them to precipitate and press their claims," and, by reason of petitioner's financial connection and business employment, "the publication by the defendant of the false and malicious article aforesaid tends naturally and inevitably to impair his credit, impair or destroy the public confidence in him, and in part, at least, to injuriously affect and destroy his ability to retain his present employment, or to receive remunerative compensation for his labor in the future, to petitioner's general damage in the sum of $50,000."

Mr. **Howard Van Epps**, for plaintiff in error:

The article alleged to be libelous was actionable as being falsely and maliciously uttered and published, and as naturally tending to shake public confidence in Witham, injure his existing business, and impair his capacity to conduct successfully similar business enterprises in the future.

Beazley v. Reid, 68 Ga. 380; Holmes v. Clisby, 118 Ga. 820, 45 S. E. 684; Colvard v. Black, 110 Ga. 647, 36 S. E. 80; Shepheard v. Whitaker, L. R. 10 C. P. 502, 32 L. T. N. S. 402.

A libel on the plaintiff in the way of his trade, office, or business, is actionable, whether any special damages are shown to have flowed therefrom or not.

Harman v. Delany, 2 Strange, 898, 1 Barnard. K. B. 289, 438, Fitzg. 121.

Messrs. **Rosser & Brandon** for defendant in error.

Fish, Ch. J., delivered the opinion of the court:

We think it clear from the language of the publication that, with the exception of the concluding sentence thereof, no statement of fact therein was made of and concerning the plaintiff as an individual, and that it contained no charge on the plaintiff in reference to his business or trade. The use of the plaintiff's surname as an adjective descriptive of the particular bank which was alleged to have assigned was merely incidental to the charge made in the article against the bank. It was not charged that the plaintiff had assigned, which might have

amounted to a libel, if he had been engaged in business as a private banker or otherwise, where his success was dependent upon his financial credit. Nor was it alleged that the plaintiff's bank had assigned, which, if he had owned and operated a bank, might be construed to be a charge on him in reference to his trade or business. But the charge was that "Witham bank at Barnesville assigns" and there is nothing in the petition which shows that Witham owned any bank at Barnesville, or even elsewhere. The effect of the allegations in the plaintiff's petition is that, as he was connected, either as president or financial agent, with 30 banks in this state, the use in a newspaper publication of his surname to describe the Barnesville bank alleged therein to have assigned was a charge on him in reference to his business, which naturally tended to impair his credit and destroy public confidence in him as a business man. Granting, as the innuendo alleges, that the publication meant that a bank at Barnesville, of which the plaintiff was either president or financial agent, had failed, still it seems to us clear that the charge in the publication was against the bank, and not against the plaintiff, either personally or in reference to his business. We apprehend that, if the plaintiff had been president of this very bank, and the allegation as to its having made an assignment had been untrue, the right of action for the libel would have been in the corporation, and not in the plaintiff. The libel would be on the corporation, and not on its president. There would be no charge on the person who happened to be president of the bank, in reference to his trade, office, profession, or business. How, then, can the mere written intimation that the plaintiff was president, financial agent, or otherwise closely connected with a bank alleged to have failed, amount to a charge on him in reference to his trade or business? Suppose that the charge had been that "the People's Bank at Barnesville, of which W. S. Witham is president," or "the People's Bank at Barnesville, of which W. S. Witham is financial agent, has assigned," would Witham have had a cause of action based upon the falsity of the statement that he was president, or financial agent, of this bank, unless he had suffered special damage by reason of the publication? We think not. Words, to be actionable, *per se*, as tending to injure the plaintiff in his trade, profession, or business, must contain a charge made on him in reference to such trade, profession, or business. Civil Code 1895, § 3837; Van Epps v. Jones, 50 Ga. 240. The language which we are now discussing contains no charge made on Witham of any character whatever. For these reasons, we do not think that the plaintiff had any cause of action upon that portion of the newspaper article in reference to the alleged assignment of the People's Bank at Barnesville. While it is alleged in the petition that the defendant "falsely and maliciously did publish of and concerning petitioner" the language in question, yet, as the demurrer only admitted what was well pleaded, and this allegation is not well pleaded in reference to this portion of the publication, which is not legitimately susceptible to this construction, such allegation is not aided by the demurrer.

2. But while the petition fails to show that the portion of the newspaper article in reference to the assignment of the People's Bank at Barnesville contains a libelous charge on the plaintiff in reference to his trade, profession, or business, it does show that the statement in reference to the plaintiff, with which the publication concludes, if false, as the petition alleges, is libelous *per se*, as it in effect charges that there are "criminal cases pending against Witham, growing out of his connection with the old Barnesville Savings Bank." This is equivalent to imputing to the plaintiff crimes punishable by law, and under our Code such an imputation, if false, is actionable *per se*. Civil Code 1895, § 3837. It matters not that the article failed to mention what particular crimes were charged against the plaintiff in the criminal cases alleged to be pending against him. The charge that there were "criminal cases pending against Witham, growing out of his connection with the old Barnesville Savings Bank," necessarily implied that there were crimes charged against him which were punishable by law. "To render words actionable *per se*, it is not necessary that they should in express terms charge another with a crime punishable by law. It is sufficient, if they impute a crime. . . . that the hearers understand [that this is] what is meant." Lewis v. Hudson, 44 Ga. 568. Besides, this is an action for libel, which, according to the definition given by our Code, "is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule." Civil Code 1895, § 3832. "A publication coming within this definition is actionable without an averment of special damage." Holmes v. Clisby, 118 Ga. 820, 822, 45 S. E. 684. It is clearly apparent from the language now under consideration that the statement therein contained tended to injure the reputation of the plaintiff, and to expose him to public hatred or contempt; and it was therefore

actionable without any allegation of special damage arising therefrom.

Counsel for the defendant in error state, in their brief, that this last paragraph of the publication "is not claimed by petitioner to be libelous," and that he "bases his entire cause of action on the fact that the People's Bank of Barnesville was also designated as the 'Witham bank.'" While it is true that the argument of counsel for the plaintiff in error in this court has been directed to establishing the proposition that the plaintiff had a cause of action for the publication of the portion of the article in reference to the assignment of the People's Bank, and nothing has been directly said by him as to a cause of action arising merely from the last paragraph of the publication, yet, as the whole of the article is alleged to be libelous, and this portion thereof is referred to by counsel for plaintiff in his brief, we cannot say that the plaintiff has admitted that he does not rely for a recovery upon the language of this paragraph. We have, therefore, felt bound to deal with it in deciding the question raised by the demurrer. It follows that the petition was not, as a whole, subject to a general demurrer, and that the court erred in sustaining the motion to dismiss it.

Judgment reversed.

All the Justices concur except **Beck, J.**, not presiding.

OHIO SUPREME COURT.

GEORGE NONAMAKER et al.,
Plffs. in Err.,
v.
JACOB J. AMOS et al.

(73 Ohio St. 163, 76 N. E. 949.)

Parol modification of oil lease—statute of frauds.

Where an oil lease provides that, in consideration of the grant therein made, the lessees will yield and pay to the lessor as royalty a certain share of "the oil produced and saved from the premises," the parties to the lease may subsequently, for a consideration, increase or decrease the royalty by parol agreement, and such agreement is not within the statute of frauds.

(December 22, 1905.)

ERROR to the Circuit Court for Wood County to review a judgment affirming a judgment of the Court of Common Pleas in plaintiffs' favor in an action brought to enforce a contract for royalties under an oil lease. Reversed.

Statement by **Price, J.**:

On the 19th day of December, 1903, the defendant in error, Jacob J. Amos, commenced an action in the court of common pleas against the plaintiffs in error and the Buckeye Pipe Line Company to enforce specific performance of the conditions of an oil lease, and for an accounting for his share of all the oil produced under said lease. He avers in his petition that the plaintiffs in error, George Nonamaker, Peter Finkler, and Henry C. Bacon, are jointly interested in the work of operating for and producing oil from his lands in Wood county, under a written lease between them, dated October 11, 1902, which contained the provision that "for the consideration of one dollar and other valuable considerations the lessor demised and granted to the said lessees the said sixty acres of land for the purpose and with the exclusive right of operating thereon for gas and oil, upon the express conditions that the said named defendants [lessees] should yield and pay to the lessor, plaintiff herein, the one-sixth part of all the oil produced and saved from the premises, delivered free of expense into the tanks or pipe line to the credit of plaintiff. . . . " It is further alleged that, in pursuance of the terms of the lease, the lessees proceeded to operate and have completed six wells, and since on or about December, 1902, have been continuously operating under said lease; that the Buckeye Pipe Line Company connected its lines with the oil tanks on the leasehold under an arrangement with the lessees, and that it has taken into its lines all the oil

Headnote by the COURT.

Case Note.—Parol modification of an original contract required to be in writing.—It may be stated as a general rule that contracts required by the statute of frauds to be in writing cannot be modified by parol. This general rule is illustrated by many cases involving that clause of the statute of frauds which requires a contract concerning an interest in lands to be in writing; as where there was a modification of the consideration,—Helsley v. Swanstrom, 40 Minn. 196, 41 N. W. 1029; Wilson v. Beam, 12 Ky. L. Rep. 367, 14 S. W. 362; or an extension of time within which the contract was to be performed, as in Heth v. Wooldridge, 6 Rand. (Va.) 605, 18 Am. Dec. 751, where there was a contract by which the vendee of land was to pay an additional sum for the land if coal was found upon it within a certain time, and by parol that time was extended; or where there was an option for the purchase of land, and the time had been extended by parol,—McConathy v. Lanham, 116 Ky. 735, 76 S. W. 535; Atlee v. Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110; or where time had been extended within which lumber was to be cut upon land,—Platt v. Butcher, 112

produced from his lands without any authority from him to so do; that plaintiff had signed and tendered to the pipe line company a division order, giving him the one sixth of said oil and the lessees five sixths, and requested it to sign the same, and that it refused; that he signed and presented a similar division order to the lessees and requested them to sign the same, and that they refused, and that by their conduct and the conduct of the pipe line company, he has been and is being deprived of his one sixth of the oil. The prayer of the petition is for a decree of specific performance, and that the pipe line company account for the oil taken from said premises, and that plaintiff have judgment for the amount found due him and for general relief.

The answer of the lessees, plaintiffs in error, admits the terms of the lease as stated by the lessor, but further avers "that, upon the completing and testing the first well on said premises, they became convinced that the amount of oil which could be produced from said well, or from any well or wells on said lands, would be so small that said premises could not be profitably operated for oil at a royalty of one sixth; that thereupon they so informed the plaintiff, and stated that they would at once surrender their rights under said instrument and abandon the premises, unless he would reduce the royalty prescribed in said instrument from one sixth to one eighth, and that they would have immediately abandoned; but that the plaintiff made and entered into the following

Cal. 634, 44 Pac. 1060; or where the time was extended within which certain building improvements were to be made,—Clark v. Guest, 54 Ohio St. 298, 43 N. E. 862. And the same rule nas been applied where there was an attempt to modify a contract with respect to the quantity or quality of the land embraced therein, as in Wigginton v. Ewell, 10 Ky. L. Rep. 383, 9 S. W. 285, where a different tract of land than that mentioned in the contract was substituted by parol; or in Rucker v. Harrington, 52 Mo. App. 481, where the vendor attempted to substitute a less perfect title; or where there was a change in boundaries,—Abell v. Munson, 18 Mich. 307, 100 Am. Dec. 165; or where, in the written contract, a survey was to be made by certain surveyors, who declined to perform the work, and other surveyors were substituted,—Dana v. Hancock, 30 Vt. 616. And the same rule has been applied where there was an attempted modification reducing the amount of bark to be taken from growing trees,—Thomson v. Poor, 57 Hun, 285, 10 N. Y. Supp. 597. And in Hasbrouck v. Tappen, 15 Johns. 200, it was held that, regardless of a parol agreement extending the time within which to convey land, no rights under the original contract had been waived.

And the same general rule has been applied where there was an attempted modification of a contract not to be performed within a year, such contract being required to be in writing. Thus, in Hanson v. Gunderson, 95 Wis. 613, 70 N. W. 827, it was held that a contract by a firm to pay an employee a fixed sum per year for five years could not be changed by parol so that each of the two partners would pay one half the amount.

And the general rule is also illustrated by numerous decisions involving the clause of the statute of frauds requiring contracts for the sale of personalty in excess of a certain amount to be in writing; as where the amount of goods has been increased or diminished by parol,—Schultz v. Bradley, 57 N. Y. 646; or the quality of the goods has been changed,—Carpenter v. Galloway, 73 Ind. 418; Brown v. Sanborn, 21 Minn. 402; or the time for the completion of the contract has been extended,—Whittier v. Dana, 10 Allen, 326; Clark v. Fey, 121 N. Y. 470, 24 N. E. 703; or where there was a parol change of the consignee to whom goods were to be shipped,—Kribs v. Jones, 44 Md. 396.

However, there are some cases which hold a different rule, and their decisions seem to be directly at variance with the general rule as laid down by the majority of decisions.

Thus, in Stearns v. Hall, 9 Cush. 31, it was held that certain evidence tending to show that there had been a parol change extending the time of performance of a written contract concerning the sale of land was admissible upon the ground that the evidence in question did not undertake to regulate performance of the contract. The court, in this decision, enters into a discussion of the statute of frauds in general, and says there is nothing in the statute holding that a written contract may not be varied by parol, but that such modification is left to be decided by the rules and principles of the law in relation to the admission of parol evidence to vary the terms of a written contract. The decision is based upon Cummings v. Arnold, 3 Met. 486, 37 Am. Dec. 155, where there was a written contract for the manufacture of certain cloth at a stipulated price, and thereafter by parol agreement the time of shipment was modified, and the court held that the parol agreement was binding, although the first agreement was required by the statute of frauds to be in writing.

In Marsh v. Bellew, 45 Wis. 38, it was held that the waiver of payment at the time fixed in the contract for the sale of real estate, or the extension of the time fixed for such payment, is not such a variation of the terms of the contract as to prevent evidence of such change from being received in a court of equity; and that such verbal modification does not fall within the statute.

And in Scheerschmidt v. Smith, 74 Minn. 224, 77 N. W. 34, it was held that, while a written contract within the statute of

verbal agreement with them, *viz.*: That, in consideration of their continuing to operate said premises for oil, the royalty should and would thereafter be one eighth, instead of one sixth, as prescribed in said instrument, and that if, at the end of thirty days after the completion of any well, the production of the land should amount to an average of 5 barrels per day for each well in operation, the royalty should be one sixth, as specified in said instrument, and, furthermore, that if, at the end of thirty days from the completion of any well on said lands, the production of said lands should amount to an average of 10 barrels per day for each well, the royalty, in that event, should be one fourth of the production; that, in consideration of said agreement, these defendants continued in possession of said lands, and at a large expense to themselves drilled, completed, and equipped thereon five additional wells, which with the first well, they have continuously operated, which they would not have done but for said agreement; that at no time at or after thirty days from the completion of any of said wells has the total production of said lands averaged more than 2 barrels per well per day." The defendants then say that they have always been willing to account for the one-eighth royalty, and willing to sign a division order to that effect.

To this answer plaintiff replied, denying all its averments. He further alleges that the claim made in the answer is within the statute of frauds, and therefore void.

Trial was had in the court of common pleas on the issues, and the finding and judgment were for the plaintiff. The defendants appealed to the circuit court, where the case was again tried. That court made findings of facts which support the allegations of the answer as to the agreement to change the royalty from one sixth to one eighth, but held that the agreement, not being in writing, is within the statute of frauds, and therefore void. The defendant in error has filed a cross-petition in error, alleging, in part, that the findings of fact are not justified by the evidence. These findings of fact are further noticed in the opinion. The court made a decree for the plaintiff against the plaintiffs in error, and error is prosecuted here to reverse it.

Mr. **James O. Troup**, for plaintiffs in error:

The contract to reduce the royalty was not within the statute of frauds.

Great Western Turnp. Co. v. Shafer (N. Y.) 65 N. E. 1121; Croke v. American Nat. Bank, 18 Colo. App. 3, 70 Pac. 229; Bobo v. Richmond, 25 Ohio St. 115; Negley v. Jeffers, 28 Ohio St. 91.

Messrs. **James & Kelly**, for defendants in error:

This is an agreement or contract concerning lands or an interest in lands.

Hirth v. Graham, 50 Ohio St. 57, 19 L.R.A. 721, 40 Am. St. Rep. 641, 33 N. E. 90; Clark v. Guest, 54 Ohio St. 298, 43 N. E. 862; Pease v. Gibson, 6 Me. 81; Wait v. Baldwin, 60 Mich. 622, 1 Am. St. Rep. 551, 27 N. W. 697; Crawford v. Wick, 18 Ohio St. 190, 98 Am. Dec. 103; Armstrong v. Kattenhorn, 11 Ohio, 265.

A parol contract relating to real and personal property, indivisible, is barred by the statute.

Shahan v. Swan, 48 Ohio St. 25, 29 Am. St. Rep. 517, 26 N. E. 222.

A contract which is not to be performed within one year is within the statute.

Heaton v. Eldridge, 56 Ohio St. 87, 36 L.R.A. 817, 60 Am. St. Rep. 737, 46 N. E. 638.

From the very nature of the verbal agreement or contract, it was impossible to perform the terms thereof within one year.

frauds cannot, so long as it remains executory, be altered verbally so as to bind the parties as a part of the contract, yet, evidence is admissible to prove an oral waiver of performance according to the terms of the contract as a ground of forfeiture, as, for example, by orally agreeing to extend the time of payment.

In Bryan v. Hunt, 4 Sneed, 543, 70 Am. Dec. 262, in a suit on a written contract for the sale and delivery of merchandise, it was held that it is competent for the parties to an executory written contract not under seal, at any time before breach thereof, by a subsequent verbal agreement founded on sufficient consideration, either to waive altogether, or dissolve, or annul, the previous written agreement, or in any manner to add to, subtract from, or vary or qualify, the stipulations of such agreement, and thus to make a new or different contract.

In Blumenthal v. Bloomingdale, 100 N. Y. 558, 3 N. E. 292, a parol agreement to substitute another stairway and other privileges in place of the stairway the erection of which was covenanted in a written lease was held good as a new contract, inuring as a tenancy from year to year.

In Stark v. Wilson, 3 Bibb, 476, the substitution by parol of certain persons as appraisers in place of those named in a written contract for the sale of land at a price to be fixed by the appraisers was held not to be within the statute of frauds; and the court decreed specific performance. It will be noted that the facts in the case are very similar to Dana v. Hancock, 30 Vt. 616, but the ruling of the court was different.

The right to modify by parol an original contract that was in fact reduced to writing, though not required to be so by the statute of frauds, presents a different question.

Welever v. I. H. Detwiler Co. 15 Ohio C. C. 684; Reinheimer v. Carter, 31 Ohio St. 579; Crabil v. Marsh, 38 Ohio St. 331; Armstrong v. Kattenhorn, *supra;* Flinn v. Manning, 1 Cin. Sup. Ct. Rep. 110; Lefferson v. Dallas, 20 Ohio St. 68; Henry v. Henry, 27 Ohio St. 121; Lithgow v. Shook, 39 Ohio L. J. 39.

Price, J., delivered the opinion of the court:

There is no merit in the cross-petition in error filed in this proceeding by Amos, the defendant in error. It seems that he was not satisfied with the findings of fact made by the lower court; but he did not file a motion for new trial as a foundation for a review of such findings. Nor was the defendant in error entitled to any relief in damages against the Buckeye Pipe Line Company on account of any facts appearing in the record, and it was not liable to account to him for any oil which was the subject of controversy between the lessor and lessee. The pipe line company took the oil as a common carrier, or bailee, for both parties; and, when they could not agree on a division of it, and therefore not upon a division order upon the company, it was unable to decide between them on the only question of difference, and the lessor resorted to the proper court for its solution. This view will become quite clear from our further consideration of the case.

The lease of October 11, 1902, granted to the plaintiffs in error and their heirs and assigns, "all the oil and gas in and under said tract of land, and also said tract of land for the purpose and with the exclusive right of operating thereon for said gas or oil, with the right of way, the right to lay pipes over and to use water from said premises; and also the right to remove, at any time, all property placed thereon by the lessee." The grant is for a term of twenty years from date and as much longer as oil or gas is found in paying quantities thereon, yielding and paying to the lessor "the one sixth of the oil produced and saved from the premises, delivered free of expense into the tanks or pipe line to the lessor's credit." There is another important clause in the lease: "It is agreed further, that the second party (lessees) shall have the right at any time to surrender the lease to the first party for cancelation, after which all payments and liabilities to accrue under and by virtue of its terms shall cease and determine, and the lease shall become absolutely null and void." The lessees proceeded to operate under this lease, and drilled and equipped one oil well, which the circuit court found "did not produce oil sufficient to pay for operating the same at one-sixth royalty as prescribed in the lease." That court further found that the defendants, now plaintiffs in error, informed the plaintiff, Amos, that they would abandon said premises and surrender said lease, unless he would agree to reduce the royalty stipulated therein from one sixth to one eighth; and they proposed that, if he would make that reduction, they would proceed to further drill and operate the lease for oil. Thereupon the lessor and lessees entered into a parol contract to the effect that, if the lessees would continue to further drill and operate said lands for oil, the royalty should be one eighth, instead of one sixth, as provided in the lease; and, further, that if, at the end of thirty days from the completion of any well, the average production of said lands should amount to 5 barrels per day for each well, the royalty to the lessor should be one sixth; and, if the production at the end of thirty days from the completion of any well should amount to an average of 10 barrels per day from each well, the royalty to the lessor should be one fourth of the oil produced. In consideration of this parol contract, the lessees drilled, equipped, and operated five additional wells on said lands, at an expense to themselves of not less than $6,000. But at no time since the completion of either or any of said wells has the production exceeded an average of 2 barrels per day for each well. When it came to signing a division order according to the terms of the parol contract, Amos, the lessor, refused, and demanded one-sixth royalty as stipulated in the written lease, and brought action to enforce specific performance of its terms.

While the circuit court found all the above facts to be established, it held that the verbal agreement so made is within the statute of frauds and therefore void. Is its conclusion of law sound? That statute is found in § 4199, Rev. Stat. 1906, and its provisions relative to the present controversy may be quoted as follows: "No action shall be brought whereby to charge the defendant . . . upon any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning of them; nor upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

It is claimed for the lessor, who commenced the action under review, that (1) the parol contract relied on relates to an interest in or concerning land; and (2) that the contract was not to be performed within the space of one year from the making thereof.

We cannot assent to either proposition. The title to the land is not involved, nor is any interest or estate therein. The question arises on a lease supplemented by a parol contract with reference to the consideration. There is no controversy over the extent of the grant, and the parol contract does not undertake to lessen or enlarge the estate granted. Touching the division of the oil when brought to the surface, the written lease stipulates that the lessees shall yield and pay "to the lessor the one-sixth part of the oil produced and saved from the premises, delivered free of expense into the tanks or pipe line to the lessor's credit. . . . " This share is the lessor's compensation for the lease and the rights granted therein. The five sixths go to the lessees by virtue of the same instrument, because the grant to them was the oil contained in the premises. Therefore the parol contract related to personal property, and not real estate, or an interest in or concerning the same. In Kelley v. Ohio Oil Co. 57 Ohio St. 317, 39 L.R.A. 765, 63 Am. St. Rep. 721, 49 N. E. 399, this court held that petroleum oil is a mineral, and while it is in the earth it forms part of the realty; and, when it reaches a well and is produced on the surface, it becomes personal property, and belongs to the owner of the well. In the opinion by Burket, J. (on page 328 of 57 Ohio St., page 768 of 39 L.R.A., page 722 of 63 Am. St. Rep., and page 401 of 49 N. E.), it is said: "Petroleum oil is a mineral, and while in the earth it is part of the realty, and should it move from place to place by percolation, or otherwise, it forms part of that tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract, it becomes part and parcel of that tract; and it forms part of some tract, until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property, the property of the person into whose well it came. . . . It is property of, and belongs to, the person who reaches it by means of a well and severs it from the realty and converts it into personalty." The same doctrine is again laid down in Northwestern Ohio Natural Gas Co. v. Ullery, 68 Ohio St. 259, 67 N. E. 494.

The lessees, by the written instrument, agreed to drill and operate for oil, and of what they would thus produce from the wells, and thereby sever from the realty, they were to yield and pay to the lessor one sixth. Hence, when the parties entered into the parol contract as found by the lower court, they were not contracting for an interest in or concerning real estate, but for a division of personal property in proportions different from those named in the written lease. The royalty is an incident to the written instrument as a means of compensation to the lessor for the grant and privileges therein conveyed. Akin to the foregoing is the case of Long v. White, 42 Ohio St. 59. It is there held that the statute of frauds cannot defeat the recovery of the purchase money on a verbal contract for the sale of a dwelling house then annexed to real estate, but to be severed from the freehold and delivered on rollers, after the same has been so severed, and which was delivered in accordance with the contract. In that case the defense was that the dwelling house, when the verbal contract for its purchase was made, was standing upon the premises, erected upon permanent walls, a solid and strong foundation permanently affixed to the premises, and constituted a part of the same. The defense was held bad and the seller recovered. In Negley v. Jeffers, 28 Ohio St. 90, 91, it is held that when a deed to real estate has been executed, or title in any other way passed, subsequent agreements between vendor and vendee, as to the pecuniary liabilities growing out of the transaction, which do not take away or confer any interest in the land, but only determine the time when the purchase money becomes due, are not affected by the statute of frauds. It is further held that a subsequent contract between the parties, by the terms of which the vendee, for a valuable consideration received, agreed to waive his right to insist on the performance of conditions precedent which were in writing, and take the property subject to encumbrances, and pay the balance due, is not a contract within the statute of frauds, and may be proved by parol. See also Blakeney v. Goode, 30 Ohio St. 350. In Shaw v. Walbridge, 33 Ohio St. 1, this court decided that where a grantor in a deed, absolute on its face, claimed that it was a mortgage, in a proceeding to establish that claim, it was competent for the grantee to show that, although originally a mortgage, the equity of redemption had been released by a parol agreement. Beyond doubt, the party released an interest in real estate. We think these authorities ample on the first proposition. The second contention is that the parol contract was not to be performed within one year, and for that reason it is within the statute of frauds. We think this position is also untenable. The only time fixed for performance is when oil is "produced and saved," and on its face is susceptible of being performed within a year, within the legal signification of that term. One well had been drilled and was in operation when the verbal agreement was made. The premises consisted of 60 acres, and the remaining wells, five in number, could be,

and perhaps were, drilled and put in operation within the year, and they may all become worthless and nonproductive within the year after each had been operated. The rule is well stated by Browne in his work on the Statute of Frauds, §§ 274–276. In § 274 it is said: "Suppose that the parties make no stipulation as to time; but the performance of the agreement depends either expressly or by reasonable implication upon the happening of a certain contingency which may occur within the year. In such case it is settled upon authority, and is reasonable in principle, that the statute should not apply. The agreement may be performed entirely within the year, consistently with the understanding and the rights of the parties." The author in the following section cites illustrations of his meaning. And in § 276 he adds: "Cases where the promise is to continue to do something until an implied contingency occur—as, for instance, to pay during the promisee's life, to pay during the life of another, to work for another during his life, to board the promisee during his life, to educate a child, to support a child, to pay during coverture—are not within the statute, because the contracting parties contemplate that the one whose life is involved may die within the year. . . . Agreements to continue to do something for an indefinite period, which may be terminated at any time by either party, or which may be terminated by such a change in the circumstances of the parties as will make it unreasonable or unnecessary that they should be farther bound, the contingency of such change of circumstances being implied in the nature of the contract, are not within the statute." It is well to remember here that one of the stipulations in the lease is that the lessees might abandon and surrender the lease at any time and remove their property, terminating all further liabilities. But we will not further pursue the discussion in the text-books.

This court has spoken sufficiently plain on the subject in several cases. In Randall v. Turner, 17 Ohio St. 262, it is held that a verbal agreement for the sale of lands which has been fully performed on the part of the vendor is not rendered void by the statute of frauds. In the opinion by Day, Ch. J. (on page 269), it is said: "The most that can be claimed is that it [the contract] was not likely to be performed in a year; but it was clearly susceptible of performance within that time. The road [railroad] might have been abandoned within a year, and thus a reasonable time to wait for its completion would have expired. There was surely nothing in the contract that fixed the time of performance beyond a year. It is well settled by the authorities upon this point that the contract was not within the statute of frauds. . . . Moreover, the suit being for the purchase money of the land, and the contract having been fully performed on the part of the vendor, the statute did not apply." Jones v. Pouch, 41 Ohio St. 146, is a case where there was a verbal contract to construct a section of a road within a year and twenty days from the date of the contract. The work could have been completed within the year, and it was held that this was not an "agreement not to be performed within the space of one year from the making thereof;" and an action thereon was not prohibited by the statute of frauds. A very decisive case is found in Towsley v. Moore, 30 Ohio St. 184, 27 Am. Rep. 434. Miss Towsley was a minor about eleven years old, and, with the advice and consent of her mother, agreed to work for Moore in his household and kitchen until she arrived at the age of eighteen, for which service Moore was to board, clothe, and furnish her with schooling, and at the expiration of her term of service pay her what such service was reasonably worth. She rendered the service agreed upon. In her action to recover, among other defensive matter, Moore set up the statute of frauds that the contract could not be and was not performed within a year from its date. This was admitted by the reply, but it averred that she did fully complete and perform the same, and that her services were worth the amount sued for. It was held on the above facts that, "although an action cannot be maintained upon a verbal contract not to be performed within one year, yet, when such contract has been fully performed by one party, the other having obtained its benefits, he cannot refuse to pay the reasonable value thereof." That is a very instructive case on the one-year clause of the statute of frauds, and the principles of various decided cases are well summed up in the opinion on page 194 of 30 Ohio St., 27 Am. Rep. 434.

In the light of the authorities, only a few of which we have noted, how stands the case at bar? Relying on the integrity of the verbal agreement with their lessor, the plaintiffs in error drilled, equipped, and put in operation five additional wells, at an expense of not less than $6,000, and tendered him the eighth royalty agreed upon as the inducement to make the large expenditure. They have fully performed the contract on their part, of which performance lessor has received the benefits; and can he now repudiate the contract as invalid and defeat the rights of the lessees? He has brought his action in a court of equity for specific performance of the terms of the original written lease, and the lessees plead the change in the royalty merely. Courts of equity do

not always grant specific performance of contracts, and they will not do so where it would work manifest injustice to adverse parties. On the facts found in this case there is not a semblance of equity in the lessor's claim, and the circuit court should have denied his prayer for relief.

The judgment of the Circuit Court is reversed, and rendering the proper judgment on the facts found we find for the plaintiffs in error, and dismiss the petition filed in the Court of Common Pleas by defendant in error.

Davis, Ch. J., and Shauck, Crew, and Spear, JJ., concur.

WISCONSIN SUPREME COURT.

DAVID DICKSON et al., Respts.,
v.
OSCAR LOEHR, Appt.,
and
CHARLES W. PARKER, Interpleader.

(126 Wis. 641, 106 N. W. 793.)

Land contract—failure of title.

1. The foreclosure of a land contract cannot be prevented by one who has never been ready and willing to perform, on the ground that the vendor had no title to a small part of the property which he had contracted to convey, where there was nothing to show that the vendor was not at all times ready and willing to furnish such title.

Mortgage—foreign—strict foreclosure.

2. One who has conveyed land in a foreign state as collateral security for the payment of money under a contract may, upon failure to make payment, be required to convey title to the property.

Same—redemption.

3. The time allowed by local law for redemption from mortgage foreclosure will be applied by analogy upon directing a conveyance of land located in another state, which is held as collateral security for the payment of money under a contract.

Land contract—foreclosure—redemption period.

4. Ten days is too short a time to allow for redemption from a judgment foreclosing a land contract, where the amount involved is large, and a substantial payment was made when the contract was entered into: and the vendor has remained in possession of the property.

(Winslow, J., dissents.)

(January 9, 1906.)

APPEAL by defendant from a judgment of the Circuit Court for Waukesha County in plaintiffs' favor in an action brought to foreclose a land contract. Reversed.

Statement by Kerwin, J.:

This action was commenced in the county

Case Note.—Foreclosure of mortgage upon land in another state.—Although, as shown in the foregoing opinion, a court of one state cannot proceed *in rem* against lands in another, the jurisdiction of equity with respect to the foreclosure of mortgages upon lands in another state is not necessarily limited to suits for strict foreclosure, but extends, also, to suits where a judicial sale is necessary though the jurisdiction in that case must be made effective by a decree operating *in personam*, directing the owner of the equity of redemption to convey or release his title to the purchaser at the sale. In Muller v. Dows, 94 U. S. 444, 24 L. ed. 207, where such jurisdiction was upheld, a decree was granted by a Federal court sitting in Iowa, directing the sale of the entire property covered by a mortgage upon a railroad lying in part in Iowa and in part in Missouri, and directed the master to execute a good and sufficient deed to the purchaser. So, in International Bridge & Tramway Co. v. Holland Trust Co. 26 C. C. A. 469, 52 U. S. App. 240, 81 Fed. 422, it was held that a United States circuit court had jurisdiction of a suit to foreclose a mortgage upon a bridge located partly in Texas and partly in Mexico, as to that portion of the bridge lying in Mexico. The suit was brought by the trustee named in the mortgage, and the decree directed a sale by a master; and the bridge company, its officers and directors, were required to execute conveyances good and sufficient under the laws of Texas to the purchaser for such of the property as was situated in that state, and good and sufficient conveyances according to the law of Mexico for such of the property as was in Mexico.

So, the following cases upheld the jurisdiction of a court of equity of one state to foreclose in this manner a mortgage upon land in another. Mead v. New York, H. & N. R. Co. 45 Conn. 199; Georgia Southern & F. R. Co. v. Mercantile Trust & D. Co. (McTighe v. Macon Constr. Co.) 94 Ga. 306, 32 L.R.A. 208, 47 Am. St. Rep. 153, 21 S. E. 701; Brown v. Chesapeake & O. Canal Co. 73 Md. 567, Appx.; Union Trust Co. v. Olmsted, 102 N. Y. 729, 7 N. E. 822; Mead v. Brockner, 82 App. Div. 480, 81 N. Y. Supp. 594; McElrath v. Pittsburg & S. R. Co. 55 Pa. 189.

In Eaton & H. R. Co. v. Hunt, 20 Ind. 457, and Farmers' Loan & T. Co. v. Bankers' & M. Teleg. Co. 44 Hun, 400, however, the court seems to have been of the opinion that it was impossible to make a decree of foreclosure effective with respect to property beyond the jurisdiction, though neither case expressly denies the power to make the decree thus effective by the requisition

court of Waukesha county against the defendant Loehr for the foreclosure of a land contract, executed on the 14th day of June, 1902, upon real estate and personal property situated in the county of Waukesha. The venue of said action was changed to the circuit court of Waukesha county, where the action was tried. The purchase price of the property described in the contract was $38,000, in addition to certain real estate, which, by the terms of the contract, was to be conveyed by the defendant to plaintiff David Dickson as part of the purchase price. The $38,000 was, by the terms of said contract, to be paid, $2,000 at the time of the enseal-ing and delivery of the contract, $2,000 on or before January 1, 1903, $9,000 on or before June 1, 1904, and $25,000 on or before June 1, 1905, and interest on said deferred payments at 5 per cent; the defendant Loehr agreeing to pay a mortgage of $15,000 then existing upon the premises, and all taxes which had been assessed, and such as might thereafter be assessed on said premises, and also keep the buildings thereon insured, and deliver abstracts of the property conveyed by him to the plaintiff David Dickson. The defendant also deeded to the plaintiff David Dickson 147 acres of land in Nebraska as collateral security for the payment of the $2,000 falling due January 1, 1903. By the terms of said contract possession of the property was to be retained by plaintiffs until the sum of $13,000 in cash had been paid. Said contract further provided that in case defendant Loehr should fail to make any of the payments specified in the contract, or keep any other agreement therein provided, said contract should be absolutely void thirty days after such failure, and all payments made by him thereon forfeited. Defendant defaulted and plaintiffs brought action of strict foreclosure. Defendant, after his demurrer to the complaint was overruled, answered admitting the contract set up in the complaint, and alleging that, on or about the 1st day of November, 1903, for a valuable consideration the plaintiffs agreed that the time for defendant to perform should be postponed until May 15, 1904. The defendant Charles Parker was, on application to the court, interpleaded; he claiming to be the owner of the two safes, a bookcase, and an oil painting included in the land contract. The case was tried in the circuit court of Waukesha county in February, 1905, and judgment rendered in favor of plaintiffs, from which this appeal was taken.

Messrs. **Curtis & Mock**, for appellant:

The vendee may show a partial or total failure of consideration.

Akerly v. Vilas, 15 Wis. 402.

The court should fix a reasonable time in which to redeem.

Baker v. Beach, 15 Wis. 99; Buswell v. Peterson, 41 Wis. 82.

Mr. **J. E. Wildish** for respondents.

of a conveyance or release from the mortgagor or owner of the equity of redemption.

In Grey v. Manitoba & N. W. R. Co. [1897] A. C. 254, 66 L. J. P. C. N. S. 66, it was held that a court of a province of Canada has no power to order a sale as an entirety of a division of a railway part of which is within and part without its territorial jurisdiction. The court said that the thing asked for was a judicial sale of land partly within and partly without the jurisdiction as an entire thing. The question was not presented as to the power of the court to grant a decree directing a sale of land beyond the jurisdiction in connection with a decree requiring a conveyance by the mortgagor or owner of the equity of redemption. In Strange v. Radford, 15 Ont. Rep. 145, an action in Ontario for sale, for delivery of possession, and for relief under a covenant in a mortgage upon land in Manitoba, the court said that the plaintiff might have a judgment of foreclosure, as such judgment would operate *in personam* to extinguish the mortgagor's personal right of redemption; but that the court would not go further and decree a sale of the property.

In Guarantee Trust & S. D. Co. v. Delta & P. Land Co. 43 C. C. A. 396, 104 Fed. 5, it was held that a sale of lands owned by a railroad company in Mississippi, by a master or commissioner appointed by a decree rendered in a United States circuit court for the western district of Tennessee in a suit to foreclose a mortgage upon the property, did not affect the title, since the court had no jurisdiction to decree the sale. The case was distinguished from Muller v. Dows, *supra*, upon the ground that in the latter case the sale was made at the instance of the trustees in the mortgage, who could be directed by the purchaser to join in a conveyance; and that the mortgagor was required to execute a deed of assurance to the purchaser at the sale; whereas in the case at bar the action was brought by a bondholder, and there was no deed of assurance, either by the trustees, or by the mortgagor.

In many of the cases above cited in which the jurisdiction was upheld the property beyond the territorial jurisdiction was part of a parcel used as an entirety; another part of which was within the territorial jurisdiction. This is a matter, however, that appears to go to the discretion of the court in exercising jurisdiction, rather than the existence of jurisdiction. Thus, Eaton v. McCall, 86 Me. 346, 41 Am. St. Rep. 561, 29 Atl. 1103, asserted the jurisdiction of a court in a proper case to foreclose a mortgage upon land in another state, and to make the decree effective by a deed requiring the mortgagor to convey; but held that the court will not exercise such jurisdiction

Kerwin, J., delivered the opinion of the court:

The court adjudged that the defendant Loehr defaulted and failed to make payments specified in the contract, and also forfeited the 147 acres of land in the state of Nebraska, which had been deeded to plaintiff David Dickson to secure the $2,000 payment falling due January 1, 1903; and also forfeited all payments made on the contract; and further adjudged that the said defendant Loehr be devested of all right, title, and interest in the property agreed to be conveyed by plaintiffs to him; and that, if defendant Loehr should pay to plaintiffs within ten days after notice of entry of judgment $2,000, plaintiffs should deed to him the Nebraska land; and that, if defendant Loehr should pay the sum of $28,547.31 in addition to the $2,000 above mentioned, besides $137.25, costs, within ten days after notice of entry of judgment, then the action should be dismissed and all the terms and conditions of the land contract be deemed fulfilled and redeemed, and the contract be in full force and effect; and that, in default of such payment, the judgment be absolute, and the defendant Loehr be adjudged to pay the plaintiffs' costs. And it was further adjudged that defendant Parker was the owner of two safes, one oil painting, and a bookcase.

The errors complained of may be considered under the following heads: (1) That it was error to decree foreclosure, for the reason that it appeared plaintiffs were not the owners of a portion of the property which was the subject of conveyance in the land contract; (2) that it was error to adjudge the 147 acres of land in Nebraska forfeited on account of noncompliance with the terms of the contract; (3) that it was error to give defendant Loehr only ten days in which to redeem.

1. The first error assigned is respecting the ownership by defendant Parker of two safes, a bookcase, and an oil painting; and it is claimed that, because plaintiffs failed to prove title to these articles, they were not entitled to a decree of foreclosure. It appears from the record that the judgment in favor of Parker as to this property has been satisfied, and the articles assigned to plaintiffs. But even if such had not been done, we are of opinion that the failure of title under the facts of this case would not be sufficient to defeat plaintiff's right of recovery. It does not appear that plaintiffs could not have furnished title to all property if defendant had tendered performance on his part, nor that defendant ever offered to perform, or was ready and willing to do so. Moreover, the judgment expressly provides that if defendant perform on his part, then the contract shall be in full force. The failure to perform or tender performance on the part of defendant was not because of Parker's title to these articles of personal prop-

where the entire property is situated without the state, and no reason is shown why the mortgage cannot be foreclosed according to the laws of the place where the land is situated without loss or inconvenience.

It is apparent from what has already been said that it is the personal jurisdiction over the owners of the equity of redemption, and the consequent ability to require them to execute conveyances or releases to the purchaser at the sale, that makes the jurisdiction of the court effective. And, in this connection, it is proper to call attention to the general principle, operative in all cases in which a court of one jurisdiction seeks to affect the title to land in another, that it is the conveyance pursuant to the decree, and not the decree itself, that passes the title; and that the decree without the conveyance does not affect the legal title. Watkins v. Holman, 16 Pet. 25, 10 L. ed. 873; Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; Bullock v. Bullock, 52 N. J. Eq. 561, 27 L.R.A. 213, 46 Am. St. Rep. 528, 30 Atl. 676, and other cases cited in the note to Proctor v. Proctor, 69 L.R.A. 695.

And not only is a decree without a conveyance ineffectual to pass the title, but the conveyance must be executed by the very person whose title or interest is to be affected. A conveyance by a master, or commissioner, or other officer appointed by the court for that purpose, is ineffectual. Corbett v. Nutt, 10 Wall. 464, 19 L. ed. 976; Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621, and other cases cited at page 696 of the note subsequently referred to.

When, however, pursuant to such decree, the conveyance or release has been executed in the manner required by the *lex rei sitæ*, it is as effective not only in the state or country where the decree is rendered, but in that where the land is located, as if it had been voluntarily executed. Bullock v. Bullock, *supra*.

The court of the state in which the land is situated, however, will not enforce obedience to the decree requiring the conveyance. Ibid.

In Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067, however, a court of Michigan gave effect to a decree rendered in Ohio in a suit for the dissolution of a partnership and an accounting, which directed a sale of land of the partnership in Michigan, the land having been purchased by one of the parties to the suit and the other party having been ordered by the decree to quitclaim, but never having done so.

The general subject of the jurisdiction of equity over suits affecting real property in another state or country is discussed in an exhaustive note to Proctor v. Proctor, 69 L.R.A. 673.

erty, and, so far as the record shows, the plaintiffs were at all times able, ready, and willing to furnish title, and, under the judgment, were obliged to do so immediately upon performance by defendant.

2. The second assignment of error is to the effect that the court erred in declaring the interest of defendant in the 147 acres of land in Nebraska forfeited on failure to pay, within ten days, $2,000, which it was conveyed to secure. It is clear that the conveyance of this land to plaintiff David Dickson amounted to a mortgage, and, had the property been situate in this state, plaintiff's remedy would have been by foreclosure and sale. But the case before us presents a different situation. The plaintiff could not foreclose in the courts of this state by proceedings *in rem* against the lands in Nebraska. Gates v. Paul, 117 Wis. 170, 94 N. W. 55; Farmers' Loan & T. Co. v. Postal Teleg. Co. 55 Conn. 334, 3 Am. St. Rep. 53, 11 Atl. 184; Page v. McKee, 3 Bush, 135, 96 Am. Dec. 201; Guarantee Trust & S. D. Co. v. Delta & P. Land Co. 43 C. C. A. 396, 104 Fed. 5; Poindexter v. Burwell, 82 Va. 507; White v. White, 7 Gill & J. 208; Davis v. Headley, 22 N. J. Eq. 115; Watkins v. Holman, 16 Pet. 25, 10 L. ed. 873. Since the plaintiff cannot proceed in this state *in rem* for the foreclosure of his mortgage interest, the question arises as to his remedy. The mortgagor or grantor in the deed of the Nebraska land is a resident of the state of Wisconsin, and has been personally served; and, while our courts have no jurisdiction to transfer or pass title to such lands, still a court of equity may act upon the person who holds the title and compel a conveyance or release of lands in another state. In the case before us the *res* being in a foreign jurisdiction, and plaintiff, therefore, being without an adequate remedy except in a proceeding against the mortgagor, equity will grant relief by operating upon the person of the mortgagor compelling him to convey or release his interest in case of failure to pay the amount for which the land is held as collateral security. This doctrine is well established. Wood v. Warner, 15 N. J. Eq. 81; Vaughan v. Barclay, 6 Whart. 392; Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181; Sutphen v. Fowler, 9 Paige, 280; McElrath v. Pittsburg & S. R. Co. 55 Pa. 189; Robinson v. Johnson (Tenn. Ch. App.) 52 S. W. 704; Penn v. Hayward, 14 Ohio St. 302; Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Rourke v. McLaughlin, 38 Cal. 196. It follows that the judgment below should have been that the defendant Loehr pay the amount of the debt within a time fixed by the court, or convey to plaintiff the property transferred as security. It is unnecessary to consider the question of plaintiff's remedy by foreclosure in the state of Nebraska, since he was entitled to a remedy in the courts of this state where both he and defendant reside. He was not obliged to go to a foreign tribunal to seek a remedy against a resident of this state. He was entitled to the remedy which the courts of this state afford him.

The question arises as to the time which, by the judgment of the court, defendant should be allowed to pay the debt for which the Nebraska land was held as security. Had the land been situate in Wisconsin, defendant would have been entitled to one year after rendition of judgment under foreclosure proceedings to redeem, and we are inclined to think that, in harmony with this statute, equity would require that he have such time. Since one year has well-nigh elapsed since entry of judgment, the defendant should have reasonable time within which to pay the debt, or convey the Nebraska land to plaintiff David Dickson.

3. The defendant assigns as error that ten days was not sufficient time within which to redeem by paying the amount found due under the land contract and performing the conditions thereof. Under the English rule, the general doctrine was to give six months, and the time was sometimes extended for an additional six months. Farrell v. Parlier, 50 Ill. 274. This court has allowed ninety days. Buswell v. Peterson, 41 Wis. 82. But no definite rule as to time can be laid down in any case; the time should be reasonable in view of the circumstances of the case. Here the amount to be paid was large and a substantial payment had been made at the time of entering into the contract. Besides the plaintiffs remained in possession. There is nothing appearing in the record which would warrant the court in making the time to redeem unusually short, and we think the court abused its discretion in making it only ten days. Defendant Loehr should have a reasonable time to redeem under the contract. It follows from what has been said that judgment should be entered for the plaintiffs to the effect that defendants be devested of all right, title, and interest in the property described in the land contract, provided that, if the defendant Loehr shall pay within six months from notice of entry of judgment $2,000, the plaintiffs shall deed to him the Nebraska lands, and that, in case defendant Loehr fail to make such payment, he be ordered and required to convey his interest in said land to the plaintiff David Dickson within ten days after expiration of said six months. The judgment should further provide that if defendant Loehr pay the amount due on the contract and costs within six months

after notice of entry of judgment, the action be dismissed, and all provisions of the contract deemed complied with; but, in default of such payment, the judgment be absolute, and all payments forfeited, and the plaintiffs have their costs.

Judgment is reversed, and the cause remanded, with instructions to the court below to enter judgment in accordance with law and this opinion.

Winslow, J., dissenting:

In this case it is decided, in effect, that a mortgage upon lands in Nebraska may be foreclosed by strict foreclosure in the courts of this state. This holding seems to me to be erroneous. It is the law of this state that a real-estate mortgage, whether legal or equitable, cannot be enforced by a strict foreclosure, but only by judgment of foreclosure and sale under the statute. Rogers v. Burrus, 53 Wis. 530, 9 N. W. 786; Green v. Pierce, 60 Wis. 372, 19 N. W. 427. There was no proof of the law of Nebraska on the subject, hence it must, for the purposes of the case, be deemed the same as the law of Wisconsin. Yet in this case a strict foreclosure has been decreed, in violation of the law of both states, because the parties are in one state and the land in another. The numerous cases holding that land contracts or trusts relating to property in a foreign state may be enforced in a personal action against the contractor or trustee by judgment requiring him to specifically perform his contract or fulfil the duties of his trust have no application. This is a case where the law of the forum and the law of the state where the land is situated prohibit the remedy by compulsion of the person, and require a remedy substantially *in rem*. Nor do the cases where action is brought to foreclose upon a single complete property, like a railroad extending into another state or jurisdiction, apply. In such cases jurisdiction of one portion of an indivisible *res* is obtained, and foreclosure and sale of the whole property by the court so obtaining jurisdiction is deemed a necessity. But this is no such case.

In my judgment the court could only determine how much was due the plaintiff upon the instalment for the payment of which the Nebraska land was deeded as security, and when it had done this it had exhausted its power, and the plaintiff would be obliged to bring his action in Nebraska to foreclose the equitable mortgage created by the deed. It is proper to note that it will appear by examination of the decisions in Nebraska that the supreme court of that state seems to have held that an equitable mortgage like the present, resulting from an absolute deed of real estate as collateral security only, may be foreclosed by strict foreclosure. Gallagher v. Giddings, 33 Neb. 222, 49 N. W. 1126; South Omaha Sav. Bank v. Levy, 1 Neb. (Unof.) 255, 95 N. W. 603. What effect this holding might have on the correctness of the present judgment may not be clear; but it cannot be considered because no proof was made in the case that such was the law of Nebraska, and, in the absence of such proof, the law of that state is conclusively presumed to be the same as the law of this state.

UTAH SUPREME COURT.

MATILDA TUCKETT, Appt.,
v.
AMERICAN STEAM & HAND LAUNDRY, Respt.

(— Utah, —, 84 Pac. 500.)

Master—injury to employee—particular defect.

1. A servant injured by the unsafe condition of a machine is not, in order to hold the master liable for the injury, bound to point out the particular defect which rendered the machine unsafe.

Same—unsafe machine.

2. The failure of a portion of a machine to return automatically to position after performing its service as designed to do may be considered in determining whether or not the master performed his duty in furnishing safe machinery for the use of an employee, although the latter is injured because of its jerky forward motion.

Evidence—appeal—proximate cause.

3. In determining a question of proximate cause, the appellate court cannot reject testimony of a witness that, at the time of the accident, a machine which caused the injury ran faster than ever before, as unworthy of belief.

Master—assumption of risk.

4. The mere fact that one operating an ironing machine in a laundry knows that it is running in an unsteady and jerky manner, and that the mechanism for automatic return of the board is out of order, is not sufficient to show assumption of risk of injury from such condition, if she has but an

Case Note.—Servant's assumption of risk of danger imperfectly appreciated. The fact that a servant knows of conditions of machinery or other things, out of which danger in his employment arises, is not necessarily equivalent to a knowledge of the dangers. The latter must depend upon the obvious connection or relation between the conditions and the dangers that may arise from them. In order to establish that the servant assumes the risk in such case, it must be shown that he possesses a sufficiently exact appreciation of the nature and extent of the danger to enable him to esti-

imperfect knowledge of the construction of the machine, and the defects known do not indicate the probability of the accident, which actually happens.

Same—contributory negligence.

5. A servant operating an ironing machine in a laundry is not guilty of contributory negligence in obeying the order of the superintendent, in response to her complaint that the machine is not operating properly, to place her hand on top of the board to prevent its going clear through under the roller, where she has no knowledge, actual or constructive, of the danger of obeying the order.

(February 13, 1906.)

APPEAL by plaintiff from a judgment of the District Court for Salt Lake County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by **Howell**, District Judge:

The plaintiff brought this action to recover damages from the defendant for personal injuries alleged to have been sustained by her while working at a shirt-bosom ironer in a laundry operated by defendant, and as a result of its negligence. The complaint, after alleging that the defendant was, at the time of the accident and the bringing of the action, a corporation organized and existing under the laws of the state of Utah, and engaged in the business of operating a laundry, in which was used a certain machine called a shirt-bosom ironer, proceeds to set forth the grounds of negligence on the part of the defendant in respect to the said machine and the plaintiff while operating it, as follows: (1) That the defendant so negligently and carelessly adjusted the ironing machine, and so negligently and carelessly suffered and permitted the same to be out of repair, and so negligently and carelessly suffered and permitted the brake and levers of said machine to be and remain rusty and difficult of operation, so that the said machine, and especially the pressure of the heated roller on the ironing board or table, could not be regulated and controlled, whereby and because of which the ironing board or table would not freely pass underneath the roller of the said machine at the proper distance and place intended for it, and would not release itself and return automatically, as was intended. (2) That the defendant so negligently and carelessly adjusted the said machine and suffered and permitted it to be out of working order, so that it would run in a jerking and irregular manner, and so that the heated roller did not work properly, but at times slipped and revolved with greater rapidity than at other times. (3) That the defendant negligently and carelessly failed to guard or protect the roller of said machine, so as to prevent the hand or arm of the person operating it from being drawn in between the said roller and the ironing board or table. (4) That the defendant carelessly and negligently failed to properly instruct the plaintiff in respect to the mechanism of the said machine, or as to the use thereof, or as to the manner of prosecuting or performing her work thereat, and failed and neglected to warn her of the dangers and risks incident thereto, and especially of the danger and risk of her arm or hand being drawn in between the roller and the ironing table or board of the said machine, although plaintiff was ignorant of the said dangers and risks. (5) That, on the contrary, the defendant negligently and carelessly instructed and directed the said plaintiff in the prosecution of her work to take hold of said ironing board or table with her hands, and to hold thereto so as to prevent it being propelled too far underneath and past the said roller of the said machine, and by hand to pull or draw the same back and return it to its former position; all of which was an improper and unskilful way and manner of prosecuting said work, as plaintiff is now informed, but of which fact she knew not at the time of her injury; such

mate the possibilities of his environment in so far as they affect his bodily safety. 1 Labatt, Mast. & S. § 279a. A large number of cases clearly recognize the principle that the servant's knowledge of a defect is a bar to his action only when it also appears that he understands the risk created by that defect. Among the cases to this effect are Union P. R. Co. v. Jarvi, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65; Davis v. St. Louis, I. M. & S. R. Co. 53 Ark. 117, 7 L.R. A. 283, 13 S. W. 801; Myhan v. Louisiana Electric Light & P. Co. 41 La. Ann. 964, 7 L.R.A. 172, 17 Am. St. Rep. 436, 6 So. 799; Stiller v. Bohn Mfg. Co. 80 Minn. 1, 82 N. W. 981; Schall v. Cole, 107 Pa. 1; Huddleston v. Lowell Machine Shop, 106 Mass. 282. Indeed, it may be regarded as a settled rule of law that the servant must not only know of defective conditions, but also of the danger arising therefrom, in order to charge him with an assumption of the risk. The difficulty arises from the application of the principle to the particular conditions. In many instances comprehension of the risk is inferred from knowledge of the conditions. This is a reasonable inference where the danger is unmistakably obvious; but this question is one to be decided in each case upon the separate facts in that case.

As to the effect of an imperfect appreciation of the danger when the servant obeys a specific order, see case note to Choctaw, O. & G. R. Co. v. Jones, *ante*, 837.

method being made necessary, however, by reason of the machine being improperly adjusted and out of working order. The complaint concludes by alleging that, while the plaintiff was operating the ironing machine as directed, while she was exercising ordinary care on her part, and while she was ignorant of the dangers involved therein, her hand was, in consequence of the aforesaid acts of negligence of the defendant, drawn in between the roller and the ironing board and table, as a result of which it was injured and a portion of it had to be amputated.

The answer of the defendant admits, first, that at the time of the accident and of the bringing of the action it was a corporation existing under the laws of Utah; second, that it was at said times engaged in the business of operating the laundry, and was using therein the ironing machine described in the complaint; third, that the plaintiff, when injured, was in the employ of the defendant, was operating the machine in question, and was injured as set forth in the complaint; but denies each and every other allegation (that is, the answer denies that the defendant was guilty of any of the acts of negligence set forth in plaintiff's complaint). Further answering, the defendant affirmatively alleges that the plaintiff had been employed to run the machine, was familiar with its operation, understood the dangers incident to running it, and therefore assumed all risk of injury therefrom. Also that plaintiff's act in placing her hand on the ironing board as it was about to pass under the heated roller was unnecessary, and constituted negligence, which proximately contributed to her injury.

The facts, as developed at the trial from the testimony introduced on behalf of the plaintiff, are as follows: The defendant was, at the time the plaintiff received her injuries, engaged in the business of conducting a laundry in Salt Lake City. The plaintiff, at the time of the accident was about twenty-two years of age, was employed by the defendant as a laundress, and had been so employed for about two years and a half. Prior thereto she had been engaged in the same occupation at another laundry for about a year and a half, and, during her entire experience, had worked at several different ironing machines, more or less similar to that at which she was injured, though she had no technical knowledge of the mechanism of any of them. She had operated two different sorts of mangles, which, according to her testimony, consist of a pair or more of large rollers, between which the articles to be smoothed are passed over a stationary table in front of them, apparently much as they would be passed between an ordinary clothes wringer, and they are used for ironing large pieces, like sheets and blankets. Some mangles are provided with guards in front of the rollers to prevent the hands from being drawn in between them while feeding the cloth in; others are not. The plaintiff had had experience with both. She had also worked on a body ironer, a machine for smoothing the unstarched portions of a shirt, and which is similar to a mangle, only that it is smaller, and is operated in practically the same manner. She had run a wristband machine, which consists of two rollers which are brought together by means of pressing on a foot treadle, the wristband being fed between the rollers much in the same manner as pieces are fed into a mangle; the differences being that the wrist band ironer is smaller than the mangle, there is no table in front of it, and the upper roller is heated, which is not the case with the mangle. The shirt-bosom ironer by which plaintiff was injured differs in construction and operation from any of the ironing machines that have been described, and which may be regarded as of the mangle type. It consists of a table or board fastened to a pivotal stand; the top of the table or board being about 4 feet from the floor. The shirt bosom is fastened to the table or board, and then the latter is pushed forward by means of a foot treadle on the left side of the machine, until it comes under a heated roller. The treadle is connected with three pulleys, one a stationary pulley, and the other two slip pulleys. Two belts run from the pulleys to a countershaft, which is kept revolving by the motive power of the plant; steam being the power used in this laundry. By pressing the toe upon the treadle, one of the belts is thrown on to the stationary pulley from the outside slip pulley, and the movable table or board is sent forward under the before-mentioned roller, and when the toe is lifted from the treadle, and the heel pressed thereon, the other belt is thrown from the other slip pulley onto the stationary pulley in a reverse motion, and the movable table or board is then apparently supposed to return automatically to its former position. Before the ironing table or board is set in motion the shirt bosom is fastened thereto, under side uppermost, with the neckband toward the roller and the tail of the shirt toward the operator; the ironing table or board being about the size of an ordinary shirt bosom. On the right of the machine is a lever, which works in a ratchet wheel; the purpose thereof being to bring the ironing table or board up to the roller and thus regulate the pressure.

The plaintiff was set at work at this shirt-bosom ironer as soon as it arrived from the factory and was installed in defendant's laundry, which was about three months be-

fore the accident occurred. She had never, prior to that time, used a laundry machine precisely like it, though she had for about a year prior thereto operated a shirt-bosom ironer which was similar to it, except that it had no lever on it to regulate the pressure. When the machine was set up, the superintendent of the laundry, Mr. Thomas Mathews, explained to the plaintiff how it should be operated. He showed her how to fasten on the shirt, which was done in a somewhat different manner than on the other ironer, explained to her that the purpose of the lever was to bring the ironing table or board up to the roller, and instructed her to run it through to the end of the table or board and back again. The plaintiff testified that, when she did so, the table or board would return automatically. Ten days or two weeks later the same superintendent instructed her to let the table or board run not only through to its end, but clear through to the bumper, which consisted of an arm on the back bar of the frame of the machine, and opposite the operator. Plaintiff testified that she did so, and was then obliged to take hold of the forward end of the table or board with her hands and pull it back. All this time the machine ran in an unsteady and jerky manner, and the plaintiff testified the superintendent, as well as the foreman, had frequently passed by her while it was running in that manner and had had an opportunity to observe it. Indeed, the plaintiff called his attention to the fact. Then he went on a trip, and about a week after his return, on the morning of the accident, the plaintiff made complaint to him about the manner in which the machine acted. She told him that the lever was rusty; that it was difficult to lift it; that the machine ran very hard; that it sometimes went slow and sometimes went fast; and that she could never depend upon it. The superintendent, who was standing by her at the time and in a position to observe the machine, assured her that it would regulate itself in time, that it would run easier in time in using it, and he thereupon instructed her to run it so that the table or board would not touch the bumper. He also told her to keep her hand on top of the board, on the shirt, in order to prevent it from going clear through to the bumper. The plaintiff commenced to operate the machine in conformance with these last instructions given her; this being the first time she had ever put her hand on top of the board or table, although she had previously taken hold of the edge of it to pull it back when it was being run through to the bumper. When operating the machine in this manner, according to her latest instructions, she was compelled to pull the table or board back with her hands because it did not return automatically. She had worked in this manner about an hour. Her left hand was on top of the table or board to steady it and prevent it going clear through to the bumper, when it gave a sudden start forward and the table or board went more swiftly than ever before, and thus drew her hand right in between it and the roller, and she was unable to get it out until the superintendent came to her assistance. She was then taken to the hospital and a portion of her hand amputated.

At the close of the plaintiff's case the defendant moved for a nonsuit, the principal grounds of which may be reduced to the following propositions: First, it is contended that there was no evidence of negligence on the part of the defendant in respect to the machine in any particular, or toward the plaintiff who was operating it; second, that, even assuming there was, the condition of the machine was entirely open and obvious, the plaintiff was bound to know it, and the danger arising from its operation was one of the assumed risks of plaintiff's employment; and, third, that in operating the machine in the manner she did the plaintiff was guilty of contributory negligence. The court sustained the motion for a nonsuit and dismissed the case, and from the judgment entered thereon, the plaintiff has appealed to this court.

Messrs. **Powers & Marioneaux**, for appellant:

It was not necessary for the plaintiff to point out the particular defect.

Mangum v. Bullion, B. & C. Min. Co. 15 Utah, 534, 50 Pac. 834.

A nonsuit could not properly be granted upon the ground that the plaintiff assumed the risk.

Ibid.; Ball v. Gussenhoven, 29 Mont. 321, 74 Pac. 872; Thomas v. Exeter, H. & A. Street R. Co. 73 N. H. 1, 58 Atl. 838.

Messrs. **Sutherland, Van Cott, & Allison** and **William D. Riter**, for respondent:

The condition of this machine was entirely open and obvious, and plaintiff was bound to know it, and the danger arising from its operation was one of the assumed risks of her employment.

Gilbert v. Guild, 144 Mass. 601, 12 N. E. 368; Upthegrove v. Jones & A. Coal Co. 118 Wis. 673, 96 N. W. 385; Kupkofski v. John S. Spiegel Co. 135 Mich. 7, 97 N. W. 48; Keenan v. Waters, 181 Pa. 247, 37 Atl. 342; Helmke v. Thilmany, 107 Wis. 216, 83 N. W. 360; Coyle v. Griffing Iron Co. 63 N. J. L. 609, 47 L.R.A. 147, 47 Atl. 665; Egnor v. N. C. Foster Lumber Co. 115 Wis. 530, 92 N. W. 242; Blom v. Yellowstone Park Asso. 86 Minn. 237, 90 N. W. 397; Arizona Lum-

ber & Timber Co. v. Mooney, 4 Ariz. 366, 42 Pac. 952; Buehner Chair Co. v. Feulner, 28 Ind. App. 479, 63 N. E. 239; Cudahy Packing Co. v. Marcan, 54 L.R.A. 258, 45 C. C. A. 515, 106 Fed. 645; French v. First Ave. R. Co. 24 Wash. 83, 63 Pac. 1108; E. S. Higgins Carpet Co. v. O'Keefe, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; Cook v. Bullion-Beck & C. Min. Co. 12 Utah, 51, 41 Pac. 557; Christienson v. Rio Grande Western R. Co. 27 Utah, 132, 101 Am. St. Rep. 945, 74 Pac. 876; McGlynn v. Brodie, 31 Cal. 376; Fritz v. Salt Lake & O. Gas & E. L. Co. 18 Utah, 493, 50 Pac. 90; Sweet v. Ohio Coal Co. 78 Wis. 127, 9 L.R.A. 861, 47 N. W. 182; Terry v. Schmidt, 54 C. C. A. 83, 116 Fed. 627; Beach, Contrib. Neg. § 360.

The rule of assumption of risks applies not only to those existing at the time of the employment, but to those subsequently arising, of which the servant has knowledge, or is bound to have knowledge.

Sowden v. Idaho Quartz Min. Co. 55 Cal. 443; Missouri Furnace Co. v. Abend, 107 Ill. 51, 47 Am. Rep. 425; 2 Thomp. Neg. 1008; Mad River & L. E. R. Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312.

The order of the master to perform the service is not material where it appears that the servant has knowledge, actual or constructive, of the risk, and encounters it without coercion.

1 Thomp. Neg. § 56; 1 Labatt, Mast. & S. § 438; Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 395; Graves v. Brewer, 4 App. Div. 327, 38 N. Y. Supp. 566; Anderson v. Winston, 31 Fed. 528; Hogan v. Northern P. R. Co. 53 Fed. 519; Anderson v. H. C. Akeley Lumber Co. 47 Minn. 128, 49 N. W. 664.

Plaintiff was guilty of contributory negligence, notwithstanding any direction which she may have received.

1 Labatt, Mast. & S. § 442; Hogan v. Northern P. R. Co. *supra;* Gorman v. Des Moines Brick Mfg. Co. 99 Iowa, 257, 68 N. W. 674; Chicago, B. & Q. R. Co. v. McGraw, 22 Colo. 363, 45 Pac. 385; Roul v. East Tennessee, V. & G. R. Co. 85 Ga. 197, 11 S. E. 558; Davis v. Western R. Co. 107 Ala. 626, 18 So. 173; Jones v. Galveston, H. & S. A. R. Co. 11 Tex. Civ. App. 39, 31 S. W. 706; Bradshaw v. Louisville & N. R. Co. 14 Ky. L. Rep. 688, 21 S. W. 346; Robinson v. Dininny, 96 Va. 41, 30 S. E. 442; Texas & P. R. Co. v. Bradford, 66 Tex. 732, 59 Am. Rep. 639, 2 S. W. 595; Lee v. Chicago, St. P. M. & O. R. Co. 101 Wis. 352, 77 N. W. 714; Badger v. Janesville Cotton Mills, 95 Wis. 599, 70 N. W. 687; Groth v. Thomann, 110 Wis. 488, 86 N. W. 178; Stafford v. Chippewa Valley Electric R. Co. 110 Wis. 331, 85 N. W. 1036; Marland v. Pittsburgh & L. R. Co. 123 Pa. 487, 10 Am. St. Rep. 541, 16 Atl. 624; Cleveland, C. C. & St. L. R. Co. v. Coffman, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179.

Howell, District Judge, delivered the opinion of the court:

Though made as one of the grounds for a motion for a nonsuit, counsel for respondent did not, in their oral argument, nor do they in their brief, very strenuously contend that the plaintiff failed to establish that respondent was negligent in permitting the machine to be in the condition disclosed by the testimony in this case. The evidence shows that, "when the machine is in good working order, the table comes back automatically." It is true that while appellant testified positively that to the knowledge of the respondent, through its superintendent, the machine ran in a jerky and unsteady manner while she was operating it, and that the ironing board or table would not return automatically to its place after being sent forward under the roller, she was not able to point out the particular defect in the machine which was the cause of it running in the manner it did and being in the condition in which it was. This difficulty was, however, fully considered in the case of Mangum v. Bullion, B. & C. Min. Co. 15 Utah, 534, 50 Pac. 834, and it was therein held that it was not necessary for the plaintiff to point out the precise defects. It appeared in that case that the plaintiff was injured by reason of the unsafe and defective condition of the machinery connected with and used in the hoisting of a cage in defendant's mine. Justice Bartch, delivering the opinion of a unanimous court, used the following language with reference to the objection made that the particular defect that caused the injury was not pointed out by the plaintiff; "It is also urged that the respondent cannot recover, because he failed to show specifically what particular defect caused the accident. If this position were sound, then, in many cases of this character, the injured servant could not recover, regardless of the negligence of the employer; for, while such servant may know the general or immediate cause of the injury, it frequently happens that he is unable to point out the particular defects which actually did cause it, and yet it may be clear enough that the employer's negligence was the proximate cause. In this case the immediate cause of the injury was clearly shown; and if, as the jury must have found, the occurrence took place through the negligence of the employer, and if the evidence warrants such a finding,—and we think it does,—then the plaintiff is entitled to recover, notwithstanding that no witness was able to name with absolute certainty the exact mechanical defect which

caused the cage to stop. In Nelson v. St. Paul Plow Works, 57 Minn. 43, 58 N. W. 868, Mr. Justice Mitchell said: 'If the evidence justified the jury—as we think it did—in finding that the "drop" fell because of the defective condition of the machine, and that such defective condition was chargeable to the negligence of the defendant, it was not essential to plaintiff's recovery that he should be able to show what the exact nature of the defect was.' Atchison, T. & S. F. R. Co. v. Lannigan, 56 Kan. 109, 42 Pac. 343." So, here, if the testimony of the plaintiff be true,—and we must assume that it is, for upon a motion for a nonsuit we are not only not permitted to weigh testimony as a jury would, but, on the contrary, must consider it in the most favorable light for the plaintiff,—then there can be no doubt that the machine in question was in a very defective condition and defendant knew it, or ought to have known it, for the matter was brought to its attention through the complaints of the plaintiff and by the observation of the superintendent. The plaintiff could not say whether the defect resulted from a failure to adjust the machine properly, or whether it was due to it being out of repair,—all she could say was that it was not running smoothly. The plaintiff was not only ignorant of the mechanism of machinery in general, but she had no knowledge of the mechanism of this particular machine, though she had operated it for some time. A person may operate a machine for a long time and yet have no technical knowledge of its construction or operation; so it is not surprising that, while the plaintiff realized that the machine was not running evenly as it should, she could assign no particular reason for it. The plaintiff also testified that, when she commenced to use the machine and allowed the table or board to run just to its end, it would return automatically to its former position; that, when she allowed it to run to the bumper, it would not so return; and that, when she again only allowed it to run to the end, it would not then return as it did at first.

It is insisted by counsel for the defendant and respondent that the failure of the table or board to return automatically could have no bearing on the accident, because the plaintiff was injured while the table or board was in the forward motion; and, while that may be true, the behavior of the table or board under these various circumstances and at these different times conclusively demonstrates that there was something wrong with the machine, for the reasonable inference from the testimony is that the table or board should have returned automatically under any and all circumstances, and would have done so had the machine been in good working order. What caused the irregularity in the action of the board or table is not so clear; but this defect, as well as the jerky running, was known to the defendant, and the causes therefor were also known, and ought to have been known by it because of its duty to inspect its machinery and keep it in repair. Under such circumstances, the jury might reasonably say that the defendant had not performed its full duty to the plaintiff in exercising ordinary and reasonable care to obtain a reasonably safe machine for the plaintiff to operate. As was said in the Mangum Case, *supra:* "While the employer is not required to furnish machinery and appliances for the use of its servant which are absolutely safe, or to furnish the best which can possibly be obtained, still it is his duty to exercise ordinary and reasonable care and diligence to obtain and furnish such as are reasonably safe, and reasonably well adapted to perform the work for which they are intended, and such as the servant may, with the exercise of ordinary prudence and care, use in the performance of his work with reasonable safety to himself; and it is likewise the employer's duty to exercise reasonable care in operating the same, and to keep them in suitable condition and repair. Whether in the case at bar the defendant, as employer, performed its duty in these regards, or whether it was negligent in furnishing the machinery and appliances used by the injured servant, or in keeping them in suitable condition and repair, were questions of fact, to be determined by the jury from all the circumstances surrounding the occurrence which caused the injury, and which were in evidence; and the record fails to present a case which authorizes the court to say, as matter of law, that the defendant was not negligent, and that the plaintiff cannot recover. Such a judgment is warranted only where the record presents such a state of facts that all reasonable men must arrive at the same conclusion from a consideration of them. Hall v. Ogden City Street R. Co. 13 Utah, 259, 57 Am. St. Rep. 726, 44 Pac. 1046; Saunders v. Southern P. Co. 13 Utah, 275, 44 Pac. 932." If there was sufficient evidence introduced by the plaintiff to justify the court in submitting to the jury the question of whether or not the defendant was negligent in permitting the machine in question to be in a defective condition, as alleged in the complaint, then to bring the case at bar squarely within the Mangum Case it is only necessary to consider whether or not such negligence, if found by the jury, could be said by it to be the proximate cause of the injury. It is strenuously insisted by counsel for the defendant that, if the plaintiff had

not put her hand on top of the ironing table or board and permitted it to remain there until the table or board passed beneath the roller, she would not have been injured, and therefore that circumstance was the proximate cause of the injury. This statement of counsel is based upon the assumption that the testimony of the plaintiff that the table or board at the time of the accident ran swifter than ever before cannot be credited. As has already been pointed out, however, this court is not warranted in weighing the testimony of the plaintiff and concluding therefrom that it is not to be believed. We think there was sufficient proof of the negligence of the defendant to go to the jury, and the court was not justified in withdrawing the case from their consideration, unless it can be said, as matter of law, either that plaintiff, by her conduct, assumed the risk of injury, or that she was guilty of contributory negligence in doing what she testified she did; and, indeed, the principal justification for the granting of the nonsuit herein by the trial court that is put forth by counsel for respondent is that she not only assumed the risk, but that she was guilty of contributory negligence.

These two well-recognized doctrines of the law of master and servant, that of assumed risk arising from the contract of employment and that of contributory negligence growing out of the law of torts, as applied to the contractual relation of master and servant, are not difficult to state in general terms. They are, however, so closely related, although appertaining to different departments of the law, that they are generally united when speaking of the defenses which a master may have to an act of negligence on his part toward his servant, and not infrequently they are somewhat confused, one with the other, by the courts. Whatever difficulties present themselves in regard to these two principles relating to the law of master and servant consist not so much in any uncertainty in the doctrines themselves, but in applying them to the varying facts of the different cases; and these difficulties we must necessarily encounter in this case. A general statement of these two doctrines, which has been frequently quoted with approval in this court, is found in the Mangum Case, *supra;* and, inasmuch as there is a similarity between the facts in that case and in the case at bar, we deem it proper to quote somewhat extensively from the opinion in that case, in order that we may consider how the principles therein enunciated affect the case before us. Justice Bartch, speaking upon this subject, used the following language: "It is also insisted for the appellant that the injury which the plaintiff sustained was incident to his employment, and that he assumed the risk. The mere fact that the respondent was aware that the cage was shaking, and not running smoothly, is not sufficient to justify us in holding that he had assumed the risk, and there is no evidence to show that the defects were of such an obviously dangerous character that he ought to have appreciated the risk, and ceased his employment, or that a man of reasonable precaution, placed under similar circumstances, would have done so. It is shown that the plaintiff was not skilled in mechanic arts, had never worked in a machine shop, and never had anything to do with machinery, except in this mine. Therefore he had the right to rely, at least to a reasonable extent, on the judgment of his employer, who is presumed to have a knowledge of the machinery used in his business, and to assume that he would discharge his duty by furnishing reasonably safe machinery, and keeping it in proper condition and repair. Where an employee has knowledge of defects in machinery used in his employment, and the defects are not so dangerous as to threaten immediate injury, or the danger is not such as to be reasonably apprehended by him, his continuance in the service will not defeat a recovery for injuries resulting from such defects. If, however, the defects are so obviously and immediately dangerous that a person of ordinary prudence and precaution would refuse to use the machinery, then, if the servant continues its use, he assumes the risk. We think it was a question for the jury to determine whether, under all the circumstances in evidence in this case, the employee, by continuing in his employment with knowledge of the defects, assumed the risk of the injury which he sustained. 'Mere knowledge of the defect is not sufficient, unless it does or should carry to a servant's mind the danger from which he suffered. A servant may assume that the master will do his duty; and therefore, when directed by proper authority to perform certain services, or to perform them in a certain place, he ordinarily will be justified in obeying orders, subject to the qualification that he must not rashly or deliberately expose himself to unnecessary and unreasonable risks which he knows and appreciates. It is one thing to be aware of defects, and another to know and appreciate the risks resulting therefrom.' Thomas, Neg. p. 851. In Patterson v. Pittsburg & C. R. Co. 76 Pa. 389, 18 Am. Rep. 412, Mr. Justice Gordon, delivering the opinion of the court, said: 'In this discussion, however, we are not to forget that the servant is required to exercise ordinary prudence. If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a

man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such case the law adjudges the servant guilty of concurrent negligence, and will refuse that aid to which he would otherwise be entitled. But where the servant, in obedience to the requirements of the master, incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident.' In Lee v. Southern P. R. Co. 101 Cal. 118, 35 Pac. 572, the supreme court of California, respecting the risk of an employee, said: 'It is not only necessary that an employee should know of the defect in the machinery in order to hold that he assumed the risk, but the danger arising from the defect must also be known or reasonably apprehended by him.' So, in Northern P. R. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590, Mr. Justice Field said: 'The servant does not undertake to incur the risks arising from the want of sufficient and skilful co-laborers, or from defective machinery or other instruments with which he is to work. His contract implies that, in regard to these matters, his employer will make adequate provision that no danger will ensue to him. This doctrine has been so frequently asserted by courts of the highest character that it can hardly be considered as any longer open to serious question,' "—citing cases.

Comparing the facts of that case with those developed in the case at bar, we find that, just as the plaintiff therein knew that the cage was shaking and rattling, so the plaintiff herein knew that the ironing machine was running in a jerky, unsteady manner; but from mere knowledge of such a fact it could not be said in either case that the plaintiff had assumed the risk. In the Mangum Case it was shown that the plaintiff was not skilled in the mechanic arts, nor experienced in the construction of machinery, though he had worked in the mine in which he was injured some time prior thereto. So in this case, though plaintiff had been operating the machine at which she was injured for three months, she had no technical knowledge of machinery, and had but an imperfect knowledge of the construction of the particular machine in question. In the case cited the plaintiff knew that, if the cage stopped suddenly, he would be injured, and the plaintiff in this case knew that, if the machine suddenly started forward, her hand would probably be drawn in between the roller and the ironing board or table. But in the former case the plaintiff could not foresee that the rattling and shaking of the cage would cause it to stop as it did, and in the latter case the plaintiff could not foretell that the table or board would start suddenly forward as it did, simply because it was not running smoothly; and therefore in neither case could the plaintiff have reasonably apprehended that the defects in the machinery, of which they were cognizant, threatened immediate injury to himself or herself in such a way as to enable the court to say, as matter of law, that he or she assumed the risk, or was guilty of contributory negligence.

So far we have considered the two questions, that of assumed risk and that of contributory negligence, together, because the facts of both the case cited and the case at bar are applicable to each of them, but inasmuch as there are other facts in both cases which affect the question of contributory negligence, but there are no more that bear on the question of assumed risk, we shall henceforth consider them separately. The doctrine of assumed risk, considered by itself, is well stated in Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, which has also been quoted with approval by this court, as follows: "The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus, in the face of knowledge, and without objection, without assuming the hazards incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master notwithstanding the defect, and in such case cannot recover." So, in the case at bar, the plaintiff had a right to assume that the defendant would use reasonable diligence in furnishing her with a machine suitable to operate, and if the defendant failed to perform that duty, as it undoubtedly did, according to her testimony, then plaintiff was entitled to recover unless the defect in the machine which caused the injury was known to her, or so patent that she could readily

have observed it; but, as has been shown, she did not at the time of the accident know precisely what was the difficulty with the machine, nor did she know when she testified; and, inasmuch as she was not a mechanic, we cannot say, as matter of law, that she should have observed it, although she may have believed there was something the matter with the machine.

Counsel for respondent state the general doctrine of assumed risk, from another point of view, but no less accurately, as follows: "The master is not liable because an appliance which he furnishes for the use of his servants is dangerous, but because he permits him to work with such an appliance in ignorance of the danger." Applying this general statement of the law to the case at bar, we may say that, even though the machine upon which the plaintiff was employed to work was in a dangerous condition, the defendant would not be responsible unless the plaintiff was ignorant of such danger. Of course, counsel contends that she was not ignorant, while we think that the evidence tends to show she was; so that the difference is not as to what the law of assumed risk is, but as to how it should be applied. Counsel argues that, because the plaintiff knew that the machine was defective, she knew, or ought to have known, of the danger as a matter of law; but, as has already been explained, it by no means follows that, simply because she may have believed that the machine was defective, as a matter of law, she knew, or ought to have known, that it was defective to the extent that it was dangerous; and therefore, inasmuch as the burden of proving that the plaintiff was not ignorant of the danger is upon the defendant, the question should have been left to the jury.

Counsel cite a large number of cases in which it was held, applying the principle of assumed risk stated substantially in the language above quoted to the facts of the case under consideration, that the plaintiff was not ignorant of the danger arising from the defective machinery, and was therefore not entitled to recover. As has already been said, however, the applicability of the principle depends on the precise circumstances of each case. An attempt, even if possible, therefore, to distinguish all those cases from that at bar, would be unprofitable. But, inasmuch as counsel rely particularly upon the case of Kupkofski v. John S. Spiegel Co. 135 Mich. 7, 97 N. W. 48, and inasmuch as the facts in that case are more similar to those in the case at bar than most of the cases cited by counsel, we deem it right to consider that case somewhat in detail and by way of comparison. In that case plaintiff sued to recover damages for personal injuries received by her while operating a shirt-bosom ironer in defendant's laundry. The ground of negligence relied on was that the defendant allowed the machine, which was apparently the same as that in question here, to become out of repair. The testimony introduced on behalf of the plaintiff showed that she was seventeen years old, and had worked at the machine about two weeks, when the belt which furnished the power to the machine became loose and caused it to run with a jerky motion. With the machine running in this fashion, and while the plaintiff was holding the shirt on the ironing table or board, about 6 inches away from the roller, the table or board stopped and then started with a jerk, drawing plaintiff's hand under the roller. The trial court directed a verdict for the defendant, and on appeal the judgment was affirmed on the ground that the plaintiff assumed the risk, and was also guilty of contributory negligence. It will be noticed at once that, so far as the question of assumed risk is concerned, there is an all-important difference between the facts in the Michigan case and in the case at bar. In the former case the plaintiff observed the precise defect that caused the injury. She knew that the belt was loose, and that, when the friction became unusual, the machine would slow down, and, as the belt moved again to perform its office, the machine would start up again, so that she knew exactly what to expect when the machine stopped. On the contrary, in the case at bar the plaintiff only knew that the machine ran in a jerky, unsteady fashion. There was no defect apparent to her, like a loose belt, which indicated in any manner that the machine would, at any time, run faster than ever before. In the former case the court could well say that the plaintiff should have realized the danger, that she was not ignorant of it, whereas in the present case it is impossible for the court to so say.

There only remains, then, one question to consider, namely, whether or not the court shall say that the plaintiff was guilty of contributory negligence; whether or not, under similar circumstances, an ordinarily careful person would have put his hand on the ironing board or table when it was going forward, as the plaintiff did; and whether or not such action on plaintiff's part proximately contributed to her injury, for such is the test in determining this question. In dealing with this matter, it is necessary, as already indicated, to consider certain facts developed at the trial, which were not adverted to in determining whether or not the plaintiff assumed the risk. The plaintiff in the present case complained to the defendant's superintendent about the machine not running steadily, and received the answer that it would be all right in time,—after it

had been used a while. So in the Mangum case, heretofore cited, the plaintiff called the superintendent's attention to the defective condition of the apparatus, and was informed that the cables were going to be changed pretty soon, and that another cage would then be used. But the facts in the present case are somewhat stronger for the plaintiff than in the Mangum Case, because the superintendent not only used language to the plaintiff which was tantamount to an assurance of safety, as in that case, but went further, and gave her a direct and positive order to put her hand on top of the ironing table or board to prevent it going clear through to the bumper, the obedience to which placed her in a position to be injured. The effect of such a direct and positive order from a master to a servant to perform an act in the course of his employment, which is dangerous, or to perform such an act in a dangerous manner, is twofold. It may constitute an additional act of negligence on the part of the master. If the order of the master constitutes an act of negligence, and if the servant obeys it, and by reason of such obedience is injured, he can count upon such an act of negligence when he brings an action to recover for his injury. In order, however, to recover, he must show that the obeying of the order was the proximate cause of the injury. So, in this case, the plaintiff did right in alleging in her complaint, as a ground of recovery, that the superintendent gave the order he did, though a recovery on that ground might be defeated, because we are inclined to think that the obedience to the order was not the proximate cause of the injury,—the plaintiff might have placed her hand on the table or board with safety had it not jumped forward; but this question should be left to the jury. To the act of negligence in giving such an order, there may, of course, be pleaded the same defenses as to any other act of negligence, including that of assumed risk and contributory negligence; for it logically follows that a servant is not excused in obeying an order from the master when the risk arising therefrom is open and obvious, or when no person of ordinary prudence would do so. Viewed in another light, such an order of the master may have an important bearing upon the question of whether or not the plaintiff was guilty of contributory negligence. It has also been held in certain cases that, when a servant is directed by his master to perform a certain piece of work in a particular manner, he will ordinarily be justified in obeying the order so given, without being chargeable with the assumption of risk incident to the work. Cook v. St. Paul, M. & M. R. Co. 34 Minn. 45, 24 N. W. 311; Strong v. Iowa C. R. Co. 94 Iowa, 380, 62 N. W. 799.

But it is well said by Mr. Labatt in his work on Master and Servant, § 438: "For practical purposes, however, this principle is not of much importance, as the ultimate question to be determined in this, as in all other classes of cases when the defense of an assumption of the risk is put forward, is simply whether the servant had knowledge, actual or constructive, of that risk, and encountered it without being subjected to what the law regards as coercion. . . . No differentiating significance, therefore, can be ascribed to the fact that the injury was received as the result of obeying an order, where it appears that the servant was merely directed to do something which was a part of the regular work of the establishment in which he was employed, and that the risk to be encountered was fully comprehended by him." So, if it be, as in our opinion it was, the case that plaintiff had no knowledge, actual or constructive, of the danger to which she exposed herself by obeying the superintendent's order, then, of course, no negligence on her part can be predicated upon her obedience to the order. But if it be said, and it well might be, that, if the plaintiff had placed her hand on the table or board without an order from the master so to do, she would have been guilty of contributory negligence, then such a conclusion might not be warranted when the order was given, because, though the plaintiff might well have doubted the safety of so doing if left to herself, the direction of the master might be said to have set her doubting mind at rest, and induced her to do what she would otherwise not have done. She testified, in fact, that until ordered to do so she had never placed her hand on top of the ironing table or board, though she had taken hold of the edge of it to draw it back when it had gone clear through to the bumper, and she might well have thought, when the board or table was not running as it should, that the order of the master to put her hand on top of it was for the purpose of preventing it from going too far. The order of a master, or his representative, under such circumstances as these, tends to negative the contention that the servant voluntarily encountered a danger which was, or ought to have been, comprehended by him; or, putting it in another way, it goes to show that the servant's ignorance of the hazard he was running in doing what he did is excusable. Mr. Labatt, § 439, adverts to this subject in the following manner: "But there is also a large class of cases in which that fact is treated as a differentiating element, and in which the courts apply a doctrine which, in so far as it

is susceptible of formal enunciation, may be stated as follows: Although the circumstances, when abstracted from the fact of the giving of the order, may be such as to justify a court in holding that the servant appreciated the danger to which his injury was due, and was negligent in subjecting himself to that danger, such a conclusion is, in a large number of instances, not warrantable, if the testimony goes to show that the immediate occasion of his being subjected to that danger was his compliance with the order. The effect of this doctrine is that where the servant, in obedience to an order, performs a duty which, though dangerous, is not so dangerous as to threaten immediate injury, or where it is reasonably probable that the work may be safely done by using more than ordinary caution or skill, he may recover if injured. It will be seen that this rule, when analyzed, amounts to nothing more than a statement that, in determining what is ordinary care on the part of a given individual, all the circumstances of his position should be regarded, including, in cases like the present, the servant's orders, the demands of his duty, the apparent risk to be met, and the purpose of his action, no less than his physical surroundings. Having weighed all these considerations, unless the case then discloses that the risk was such as would not be taken by a man of common prudence so situated, the court cannot justly declare that the taking of that risk by the servant, in obedience to orders, was negligence. The practical result of such a doctrine, when stated in terms of the servant's knowledge, is that the servant may maintain an action, unless he not only knows what is the risk to be encountered, but also that it will probably be attended with injury which he cannot avoid by the exercise of care and caution." The same author then gives the reasons upon which this doctrine is based, and, so far as they are applicable here, they are as follows (§ 440): First. That "the servant does not stand on the same footing with the master. . . . In other words, when a servant did not assert his judgment in opposition to the supposed better judgment or stronger will of his master, the law usually allows a jury to determine whether he was negligent, or acted in reliance upon the judgment of his master, or out of a constrained acquiescence in the rule of obedience which his relation as servant imposed." Second. That the "servant [is] entitled to rely on the master's performance of his duties." The juridical theory is that the order, having a natural tendency to throw the servant off his guard, may properly be considered to excuse him from the exercise of the same degree of care as would have been incumbent on him if the case had not involved this factor. Third. "That when a servant is suddenly called upon to execute a piece of work in a particular manner, under the eye of his employer, or his employer's representative, a careful observation of the conditions is generally quite impracticable, if the direction is to be carried out with that promptitude which is expected from subordinates." It follows from what has been said that, even if we might have said that the plaintiff did not act with that carefulness which everyone is legally bound to exercise, if no order had been given by the master to act just as she did, the giving of such an order prevents us from saying so.

So far as the question of contributory negligence is concerned, the case at bar is also easily distinguished from the case of Kupkofski v. John S. Spiegel Co. 135 Mich. 7, 97 N. W. 48, because the plaintiff herein was ordered by the master to change her method of feeding the machine from that to which she was accustomed to one of increased and extraordinary danger, and within a short time after such order was given, while operating the machine in accordance therewith, was injured, whereas the injury to the plaintiff in the Michigan case was in no sense the result of the change made by her in obedience to the master's orders in the manner of operating the machine from a comparatively safe process to one conceded to be extremely dangerous. Practically all that has been said concerning the effect of an order from the master is applicable to an assurance of safety given by him, and especially as it affects the question of whether the servant can be charged with contributory negligence; for, inasmuch as the knowledge possessed by the servant is ordinarily inferior to that of the master, the former is justified in relying upon the statement made by the latter as to the extent of the danger, or, as it is very aptly expressed by Mr. Labatt, § 451: "In view of this disparity of information, an assurance of safety, like a specific order, may be regarded as having had the effect of lulling the servant into a feeling of security and given him good reason to believe that there was no need for the vigilance which he would otherwise have exercised."

We are of the opinion that the case should have been submitted to the jury, and that the trial court erred in sustaining the motion for a nonsuit.

The cause is reversed, and a new trial granted. Costs of this appeal are to be taxed against respondent.

Bartch, Ch. J., and McCarty, J., concur.

ILLINOIS SUPREME COURT.

FRANKLIN UNION NO. 4, Appt.,
v.
PEOPLE OF THE STATE OF ILLINOIS.

CHARLES SMITH, Appt.,
v.
SAME.

FRED KITCHEL, Appt.,
v.
SAME.

JOHN MUCHER, Appt.,
v.
SAME.
(Two Cases.)

(220 Ill. 355, 77 N. E. 176.)

Appeal—defect of parties.

1. The want of capacity of a voluntary association to maintain an action in its own name cannot be raised for the first time on appeal.

Injunction—defect of parties—jurisdiction.

2. Defect of parties plaintiff will not deprive a court of jurisdiction to hear an application for injunction, or justify defendant in ignoring an injunction which is granted.

Same—broader than bill.

3. One against whom an injunction is issued cannot ignore it on the ground that it is broader in its terms than the bill justifies.

Same—violation by corporation—punishment.

4. A corporation may be fined for the wilful violation of an injunction.

Labor union—interference with employees.

5. Equity may enjoin a labor union, the members of which are on a strike, from preventing the employment of other persons in their places by force, threats, intimidation, and picketing.

Same—liability for acts of members.

6. A labor union cannot escape liability for the acts of its members which are the direct result of a strike which it has inaugurated, on the ground that its officers advised the members to be orderly and obey the law.

Employee—interference with.

7. To follow one because he has taken employment at a particular place, to spy after him, to stop him and warn him, to put

Case Note.—Punishment of corporation for contempt.—As far back as the reign of Charles II., it was held, in a case in King's bench, that a corporation cannot be attached for a contempt of court. Mill's Case, T. Raym. 152, 2 Keble, 1. To the same effect are Smith v. Butler, Comb. 326; Re Hooley, 79 L. T. N. S. 706; and London v. Lynn, 1 H. Bl. 206. And the latter case is cited in Demorest v. Midland R. Co. 10 Ont. Pr. 82, to the proposition that attachment for contempt will not lie against a corporation. So, in King v. Freeman's Journal [1902] Ir. Rep. 2 K. B. 82, it is held that an application for contempt against an incorporated company should be, not by motion for attachment, but to attend and answer in respect of such contempt.

On its face, the case of Kirk v. Philadelphia & W. C. T. R. Co. 7 Del. Co. Rep. 71, seems to be a case of attachment against a corporation for contempt in disobeying an injunction. But nothing is said in the case about the right to punish a corporation for contempt; and it is impossible to ascertain from the facts stated whether the attachment was directed to the corporation as such or to its officers and members.

The correctness of the proposition that a corporation cannot be attached for contempt is obvious, since the corporation is intangible, and has no body that can be arrested or taken by attachment or execution. But, because of the inability to attach a corporation, it is argued in some cases that a corporation cannot be punished for contempt at all. Thus, in Davis v. New York, 1 Duer, 451, which was a motion for attachment against an alderman of New York for alleged contempt in violating an injunction directed to the mayor, aldermen, and commonalty of the city, the court held that an injunction directed exclusively to a corporate body by its corporate name is operative and binding upon every person whose personal action as a member or officer of the corporation it seeks to restrain or control; since, "upon any other construction, . . . an injunction addressed exclusively to a corporation must be in all cases a nugatory and senseless proceeding. A corporation cannot be attached; nor have we been able to discover that there are any means by which, when such is the form of the injunction, its obedience as a corporation may be compelled or its disobedience punished. . . . Unless the injunction, therefore, in such case, operates upon those members and officers of the corporation by whom its corporate will is manifested and corporate acts performed, and unless it creates a duty for which they, as parties to the suit, are personally responsible, it is emphatically *brutum fulmen*,—the words may be those of command or menace, but they are addressed to no one, and signify nothing."

Dicta to similar effect are found in First Cong. Church v. Muscatine, 2 Iowa, 69, and Sercomb v. Catlin, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606.

But, as said in 5 Thompson on Corporations, § 6449, the administration of justice would be exceedingly lame if a corporation, through its officers, could wilfully set at naught the judgment, decree, or order of a court of justice, and escape all punishment therefor. And all the modern cases in which the question has been directly decided seem to be in harmony in holding that a corporation may be punished for contempt in disobeying the judgments, decrees, or orders of a court of justice, made in a case within its

him in fear, to intimidate him or coerce him, are alike unlawful.

Appeal—interlocutory order.

8. A reservation by the trial court of the question whether a fine imposed on defendant for violation of an injunction can be paid to complainants in satisfaction of their damages and expenses is merely interlocutory, and not subject to review on appeal.

Injunction—collateral attack—averments of bill.

9. The truthfulness of the averments of injury in a bill for injunction cannot be questioned in a proceeding for contempt for violation of the injunction.

Same—violation—fine.

10. One thousand dollars is not an excessive fine to impose on a labor union for violation of an injunction restraining interference with the business of former employers of members on a strike, where the violation is flagrant and often repeated.

Same—violation—mode of punishment.

11. A petition is not necessary for the punishment of one for violation of an injunction, and one filed cannot be objected to if it fully advised defendant of the charge against him.

Same—sufficiency of order.

12. An order adjudging one guilty of contempt for violation of an injunction is not insufficient for failure to set out the particulars of the violation, if it refers to the petition and affidavits where such matters appear.

Appeal—contempt—insufficiency of record.

13. One convicted of contempt cannot,

jurisdiction. The leading case on this question is People v. Albany & V. R. Co. 12 Abb. Pr. 171, 20 How. Pr. 358, where the power of the court to punish a corporation for disobedience of an injunction was sustained. The court said that the power which makes an order can enforce it; that a party who disobeys the order may be punished for it, and no exception to the rule could be acknowledged; that every person within the jurisdiction of the court, high or low, natural or artificial, is, in a proper sense, subject to its power, and, in case of disobedience, amenable to punishment. The court continued: "It is no answer to say that the act of the corporation is manifested and carried into effect by individuals, and that those persons are always liable to the process of the law, and may be punished, and therefore an injured party has always the means of redress. It is a poor compliment to the law to say that, while the principal is the real offender, though you cannot reach him, you can reach his agent,—his instrument. Besides, the agent may be entirely irresponsible or comparatively innocent. And why cannot a corporation be punished for contempt? It is said because it cannot be attached,—that is, personally seized or taken. This shows no sufficient reason. In the former equity practice it sometimes became necessary to order a corporation to answer a bill in chancery. If it refused, it was not strictly attached as a natural person would be, but a distringas, or writ, authorizing a distress upon its property, was issued; this failing, a second, and sometimes a third, was issued; and, if these were insufficient, then process of sequestration was issued against it, and its property sequestered for the benefit of the aggrieved party. 1 Barb. Ch. 76. Why may not process of sequestration be issued against it to punish it for contempt in violating an injunction, as well as contempt in refusing to answer? Why may it not be fined for the contempt, and the fine collected in the ordinary way? Corporations are often indicted for neglect of duty or for positive misfeasance, and the punishment upon conviction is by the imposition of a fine. The punishment by fine for a contempt is one of the usual modes of punishment, and directly recognized by statute. So, also, the sequestration of property is recognized among the elementary writers." The court declared it could not coincide with the opinion expressed by Mr. Justice Duer in Davis v. New York, *supra*, as to the inefficiency of this process upon the corporation itself; and adds: "It is true that a corporation cannot be personally attached or apprehended; but I do not agree that there are no means by which its obedience to an injunction can be compelled or its disobedience punished, or that, as to the corporation itself, the injunction is a mere *brutum fulmen*. On the contrary, I think the means of punishment are within the reach of the court, and, though not probably quite so effective as in the case of a natural person (for imprisonment cannot be resorted to), they are sufficiently so in most cases to effect the desired object. Much of the supposed impunity of corporations as such from punishment for contempt, when spoken of in the elementary treatises on this subject, is founded, I think, upon the idea that they cannot be attached, from which it by no means follows that other modes of punishment may not be administered."

On the authority of this case, it was also held, in New York v. New York & S. I. Ferry Co. 64 N. Y. 622, that a corporation may be fined for violating an injunction.

So, in Hillis v. Peekskill Sav. Bank, 18 N. Y. Week. Dig. 287, it is held that, when a decree or judgment is pronounced against a corporation, which it refuses to obey, the party who avers that the corporation is in contempt may have the writ of distringas to bring it before the court, and after that, if no satisfactory answer is given to the alleged contempt, the court may order a sequestration to enforce the performance of the decree or order of the court.

And the right to punish a corporation for contempt for violating an injunction order is also sustained in Golden Gate Consol. Hydraulic Min. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628.

So, in State, West Jersey Traction Co.,

on appeal, question the sufficiency of the recitals on which the orders are based because not supported by the record. in the absence of a certificate by the clerk showing that the complete record is before the court.

(Boggs and Scott, JJ., dissent.)

(February 21, 1906.)

APPEALS by defendants from judgments of the Appellate Court, First District, affirming judgments of the Superior Court for Cook County punishing defendants for contempt in violating an injunction. Affirmed.

The facts are stated in the opinion.

Mr. John A. Bloomingston, for appellants:

The court had no jurisdiction to enter the order.

Tolman v. Jones, 114 Ill. 155, 28 N. E. 464; Kerfoot v. People, 51 Ill. App. 415; Spoors v. Coen, 44 Ohio St. 502, 9 N. E. 132; Munday v. Vail, 34 N. J. L. 420; Reynolds v. Stockton, 43 N. J. Eq. 213, 3 Am. St. Rep. 305, 10 Atl. 385, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.

A corporation can only be punished through its officers or those acting in aid of it, in the absence of legislative enactment to the contrary.

Sercombs v. Catlin, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606; McKim v. Odom, 3 Bland. Ch. 415; Rex v. Windham, 1 Cowp. 377; Re Western M. & F. Ins. Co. 38 Ill. 289.

The court erred in granting indemnity to

Prosecutor, v. Board of Public Works, 58 N. J. L. 536, 37 Atl. 578, it is held that proceedings by way of contempt will lie against corporations as well as against individuals. The court says that, in case of individuals, the process is by attachment, followed by a fine, or imprisonment, or both. But, in case of a corporation, the process in equity courts is by writ of sequestration; and that in courts of law distringas is the appropriate writ.

Again in United States ex rel. Southern Exp. Co. v. Memphis & L. R. R. Co. (C. C. W. D. Tenn.) 6 Fed. 237, it is held that a corporation may be punished by fine for violation of an injunction, and that the court is not confined to the remedy against the directors individually, or such other persons as were responsible for the violation. The court said that in England it was not usual to punish a contempt by a fine, even in the case of natural persons; that they were to stand committed to prison; and that obedience to an injunction against privileged persons and corporations was sometimes enforced by sequestration, which placed the property of the contemnor in custody until obedience was given; but added that our Revised Statutes have prescribed the mode of punishment, and directed that it shall be by fine or imprisonment, and that this operates as a negation of all other modes of punishment.

And in McKim v. Odom, 3 Bland, Ch. 407, the right to a distringas against a corporation which had refused to obey a summons to answer in proceedings in which it was made a defendant was sustained. The court said the only mode of proceeding either to enforce an answer or obedience to a decree is by a distringas and sequestration of the property of the corporation. He therefore granted the distringas, and said that upon the first distringas to compel an appearance or answer the sheriff should take issues or personal property of the corporation to a certain amount; upon the alias distringas he should levy a certain other amount; and on the pluries distringas he should distrain the whole of the personal estate, together with the rents and profits of the land. And, if it should be ascertained by the return of all these successive writs that the corporation had no property upon which a distringas could be levied, or which could be taken under a sequestration, then the bill might be taken *pro confesso*, and if, having no property, or after all its property had been sequestered, it still stood out and refused to appear and answer, then the court thought that, according to the better and more reasonable opinion, the plaintiff might have an attachment against the members, or at least those who had been duly summoned and served with the subpœna.

So, in Cowie v. Trudeau (superior court for Lower Canada), cited in note in 31 Am. Rep. 665, a bank was fined for contempt in refusing to comply with a *subpœna duces tecum* ordering it to have certain books in court on a certain day.

And the right to punish a corporation for contempt in refusing to comply with an order or decree of court seems to be assumed in Indianapolis Water Co. v. American Strawboard Co. (C. C. D. Ind.) 75 Fed. 972; Seventy-Six Land & Water Co. v. Superior Court, 93 Cal. 139, 28 Pac. 813; Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co. 48 Hun, 190, 15 N. Y. S. R. 686; Manhattan Electric Light Co. v. Harlem Lighting Co. 44 N. Y. S. R. 169, 18 N. Y. Supp. 371; Taber v. New York Elev. R. Co. 12 Misc. 460, 34 N. Y. Supp. 29; Baltimore & O. R. Co. v. Wheeling, 13 Gratt. 40; Lee v. Aylesbury Urban District Council, 19 Times L. R. 106.

In Jones v. Boston Mill Corp. 4 Pick. 507, 16 Am. Dec. 358, which was a bill in equity praying a decree to enforce the specific performance of an award against a corporation, which declined to execute it, it was argued that the court was incompetent to enforce its decrees against a corporation on account of its inability to use such compulsory process as courts of chancery employed in like cases in England. But the court said that, if a distringas, sequestration, or other form of process should become necessary to the due and complete execution of a decree against a corporation, the court was authorized to devise and issue such process.

the complainants. There was no evidence of pecuniary loss.

Noble Twp. v. Aasen, 10 N. D. 274, 86 N. W. 742; People ex rel. Davis v. Compton, 1 Duer, 532; Moffat v. Herman, 116 N. Y. 134, 22 N. E. 287; East River Bank v. De Lacy, 37 Misc. 765, 76 N. Y. Supp. 927.

Contempts are purely punitive in the absence of statute.

Re Pierce, 44 Wis. 411; Lester v. People, 150 Ill. 423, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004; People ex rel. Munsell v. Court of Oyer & Terminer, 101 N. Y. 247, 54 Am. Rep. 691, 4 N. E. 259; Oster v. People, 192 Ill. 476, 56 L.R.A. 462, 61 N. E. 469.

The right to give indemnity is purely statutory.

State ex rel. Lanning v. Lonsdale, 48 Wis. 366, 4 N. W. 390; Swift v. State, 63 Ind. 81; Re Rhodes, 65 N. C. 518; O'Rourke v. Cleveland, 49 N. J. Eq. 579, 31 Am. St. Rep. 719, 25 Atl. 367.

Strike benefits are lawful.

Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Asso. 59 N. J. Eq. 49, 46 Atl. 208; Levy v. Rosenstein, 56 App. Div. 618, 67 N. Y. Supp. 630.

Guilt in contempt proceedings should be proved beyond a reasonable doubt.

State v. Davis, 50 W. Va. 100, 40 S. E. 331; Accumulator Co. v. Consolidated Electric Storage Co. 53 Fed. 793; Probasco v. Probasco, 30 N. J. Eq. 108; Sutton v. Davis, 64 N. Y. 633; Bates's Case, 55 N. H. 325; Benbow v. Kellom, 52 Minn. 433, 54 N. W.

In Re Western M. & F. Ins. Co. 38 Ill. 289, the court says that when a court makes an order appointing a particular person a depositary of the court funds, and such person, knowing of such order, accepts the deposit, he becomes an officer of the court, and the court may order him to refund the money, and, if he fails to do so without showing some valid reason, may proceed against him as for a contempt; and that the same rule would apply to a corporation; and, if its officers having control of its funds, and having the means of payment belonging to a corporation in their hands, should refuse to pay, they too might be proceeded against as for a contempt. But the question in issue was whether, after such a depositary became insolvent with court money in his hands, and made an assignment for creditors, his assignee could be considered as a quasi officer of the court, and punished for contempt in refusing to obey a summary order.

In Rex v. Windham, 1 Cowp. 377, where a mandamus directed to the warden of a college to compel him to affix the common seal of the college to an answer to a bill in the court of chancery against the warden, fellows, and scholars, was granted, the court said that in the court of chancery, where a bill is brought against a corporation, if the corporation is in contempt, there is no remedy by way of proceeding for a contempt personally against the real parties who offend, but that the mode of compulsion is by sequestration. But that this mode of proceeding would affect the whole body and punish the corporation at large; and that the corporation at large in this case was not in fault, since the majority of the body had obeyed the process of the court as far as in their power lay, and were ready to put in their answer, but the individual warden, whose act was necessary to render that answer complete, refused to put the seal of the college to it, and therefore the court of chancery had stayed its process for the contempt, in mercy to the acquiescing parties, that the present application for mandamus might be made.

Though nothing is said about the right to punish a corporation for contempt, an indictment against a corporation for disobedience to an order of court was sustained in Queen v. Birmingham & G. R. Co. 3 Q. B. 708. The defendants not coming in to plead under the usual venire, some of the goods of the company were seized under a distringas. It was moved to quash the indictment on the ground that a corporation is not indictable, but the court refused to quash, and directed the defendants to demur, giving them leave, if judgment should be against them, to plead over. The defendants appeared in the court of common pleas, and demurred, and the case was argued, and it was held that on this demurrer there must be a judgment for the Crown. On the proposition that indictment will not lie against a corporation, the court said only one direct authority was referred to, a *dictum* of Judge Holt in an anonymous case reported in 12 Mod. 559; and that the nature of the offense to which the observation of the judge applied did not appear. The court also said that, as a general proposition, it was opposed to a number of cases which show that a corporation may be indicted for breach of duty imposed upon it by law, though not for a felony or crimes involving personal violence.

That a corporation may be held liable for criminal contempt for publishing in a newspaper printed and circulated in a place where a trial is had, an article concerning the cause on trial, which is calculated to prejudice the jury and prevent a fair trial, is held in Telegram Newspaper Co. v. Com. 172 Mass. 294, 44 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445. It was contended that a corporation could not be guilty of a criminal contempt of court, although it might be fined for what is called a civil contempt; but this contention was denied. The court said a corporation cannot be arrested and imprisoned in either civil or criminal proceedings; but its property may be taken, either as compensation for a private wrong, or as punishment for a public wrong.

And the right to punish a municipal corporation for contempt is sustained in Marson v. Rochester, 97 N. Y. Supp. 881, where

482; Re Buckley, 69 Cal. 1, 10 Pac. 69; United States v. Jose, 63 Fed. 951.

There is a distinction between violating an injunction and aiding and abetting.

Parsons v. People, 51 Ill. App. 467.

Picketing is lawful.

Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Asso. *supra;* Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3, 90 Fed. 608.

Messrs. Horace Kent Tenney and James H. Wilkerson, with Messrs. Tenney, Coffeen, Harding, & Wilkerson, for appellees:

Unless the injunction was void *ab initio*, appellants could not violate it with impunity. The court had jurisdiction, and the injunction was therefore not void.

Sumner v. Milford, 214 Ill. 388, 73 N. E. 742; O'Brien v. People, 216 Ill. 354, 75 N. E. 108; Keyes v. Ellensohn, 82 Hun, 13, 30 N. Y. Supp. 1035, Affirmed in 144 N. Y. 700, 39 N. E. 857; Re Ruppaner, 25 N. Y. Civ. Proc. Rep. 158, 37 N. Y. Supp. 429; Iowa County v. Mineral Point R. Co. 24 Wis. 93; Ada Street M. E. Church v. Garnsey, 66 Ill. 132.

The power of the court is not limited to a personal proceeding against the officer or agent who does or directs the act.

the court said it thought a municipal corporation might be punished for contempt, the same as any other corporation, where it assumed to act in its corporate capacity in a matter involving the rights of an individual. The court distinguished the case of Davis v. New York, 1 Duer, 510, containing a *dictum* adverse to this proposition, on the ground that there it appeared that the whole body politic were considered as plaintiffs, and that it was said by the judge, in effect, that it would be unintelligible to levy a tax upon the whole public to pay a fine which should, when paid, be returned to the treasury; and the court added that it could be readily seen that, if a municipality were fined as for a criminal contempt, the fine so paid would go into the treasury and so back to the taxpayer, and therefore no good or ill would result, but that the case at bar was entirely different; that here the plaintiff sought to prevent a wrong threatened to be done to his property by the municipality; that, if such wrong were done, the municipality would be liable for the damages; that, anticipating this, he sought to prevent the injury by injunction, and yet, in violation of such injunction order, the damage notwithstanding was done; and that, although he might bring an action against the city for the damages, he might, nevertheless, recover the actual damage suffered as by way of fine in the present proceeding. The court also said, its attention had been called to the statement of several text writers, and to the *dictum* of the courts in some cases, to the effect that a municipal corporation cannot be punished for contempt; that, of course, it is elementary that a corporation other than a municipal one may be so punished, and that it thought it reasonable to hold that a municipal corporation engaged in a municipal work which is restrained by order of the court, and which continues such work in violation of the injunction, which violation results in an injury to the property of the private individual, may be punished for the violation of such injunction at the instance of such private individual, to the extent of the damages sustained by him by reason of such violation. But in New York it is expressly provided, by the Code of Civil Procedure, § 2284, that a corporation may be fined for contempt; and it was said this was evidently intended to settle the question that had theretofore arisen, as to whether the corporation could be punished for contempt.

To the contrary of this case, it is held in Bass v. Shakopee, 27 Minn. 250, 4 N. W. 619, 6 N. W. 776, that a municipal corporation cannot be guilty of a contempt in disobeying an injunction; that such contempt, if any, in disobeying a writ directed to the city, must be the contempt of individual persons, as, for instance, the officers of the city. But the court here relied on Davis v. New York, distinguished in the preceding case, and London v. Lynn, 1 H. Bl. 206. The statement by Mr. Justice Duer in Davis v. New York, that a corporation cannot be punished for contempt, is hardly more than a *dictum*, since the question was not whether the corporation might be punished, but whether the individual members might be punished for violation of an order directed to the corporation. And the statement is not confined to municipal corporations, but is broad enough to apply to any corporate body. Moreover, Mr. Justice Duer said later in his opinion (page 495) that the supposition that there exists an important distinction, or any distinction whatever, between a municipal corporation and any other corporation aggregate, in respect to the powers of courts of justice over its proceedings, is entirely gratuitous, and, as it seemed to him, as destitute of reason as it certainly is of authority. The decision in London v. Lynn was simply that attachment would not lie against a corporation for contempt; and this decision also seems not to be confined to municipal corporations only. Indeed, it is not clear that it is intended in the case of Bass v. Shakopee itself to make a distinction between municipal corporations and other corporations, though the form of statement would lead one to think so.

7 Am. & Eng. Enc. Law, p. 847; Rapalje, Contempts, §§ 1, 48; Cook, Corp. § 15b; 2 High, Inj. 4th ed. § 1460; Com. v. New Bedford Bridge, 2 Gray, 339; Com. v. Pulaski County Agri. & M. Asso. 92 Ky. 201, 17 S. W. 442; United States ex rel Southern Exp. Co. v. Memphis & L. R. R. Co. 6 Fed. 237; Cary Mfg. Co. v. Acme Flexible Clasp Co. 48 C. C. A. 118, 108 Fed. 873; Re Tift, 11 Fed. 463; Indianapolis Water Co. v. American Strawboard Co. 75 Fed. 972; Re North Bloomfield Gravel Min. Co. 11 Sawy. 590, 27 Fed. 795; Re Western M. & F. Ins. Co. 38 Ill. 289; Golden Gate Consol. Hydraulic Min. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628; Wells, F. & Co. v. Oregon R. & Nav. Co. 9 Sawy. 601, 19 Fed. 20.

The union, having joined with its members in a conspiracy to do acts forbidden by the injunction, is to be held liable under the rules relating to conspiracy.

O'Brien v. People, 216 Ill. 354, 75 N. E. 108; Chicago, W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770; Brennan v. People, 15 Ill. 511; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898; Graff v. People, 208 Ill. 312, 70 N. E. 299; Van Eyck v. People, 178 Ill. 199, 52 N. E. 952; Miller v. John, 208 Ill. 177, 70 N. E. 27; Lasher v. Littell, 202 Ill. 551, 67 N. E. 372; State v. McCahill, 72 Iowa, 111, 30 N. W. 555, 33 N. W. 599; Patnode v. Westenhaver, 114 Wis. 460, 90 N. W. 467; United States v. Kane, 23 Fed. 748; United States v. Cassidy, 67 Fed. 698; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 803; United States v. Weber, 114 Fed. 950; 6 Am. & Eng. Enc. Law, pp. 864–866; Casey v. Cincinnati Typographical Union, No. 3, 12 L.R.A. 193, 45 Fed. 135; Ex parte Richards, 117 Fed. 658; Union P. R. Co. v. Ruef, 120 Fed. 127; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524.

It is illegal to boycott a man.

Loewe v. California State Federation of Labor, 139 Fed. 71; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Delz v. Winfree, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; Casey v. Cincinnati Typographical Union, No. 3, 12 L.R.A. 199, 45 Fed. 135; Hopkins v. Oxley Stave Co. 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 917; Doremus v. Hennessy, *supra;* Jensen v. Cooks' & Waiters' Union, 39 Wash. 531, 81 Pac. 1069; Seattle Brewing & Malting Co. v. Hansen, 144 Fed. 1011.

Intent to injure renders the acts of the combination created for that purpose illegal.

O'Brien v. People, 216 Ill. 354, 75 N. E. 108; Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046; London Guarantee & Acci. Co. v. Horn, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Berry v. Donovan, 188 Mass. 353, 74 N. E. 603; Graham v. St. Charles St. R. Co. 47 La. Ann. 214, 27 L.R.A. 416, 49 Am. St. Rep. 366, 16 So. 806; Moran v. Dunphy, 177 Mass. 485, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; Curran v. Galen, 152 N. Y. 33, 37 L.R.A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; Doremus v. Hennessy, *supra;* Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Casey v. Cincinnati Typographical Union, No. 3, *supra;* Walker v. Cronin, 107 Mass. 555; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; 1 Eddy, Combinations, § 525; United States ex rel. Guaranty Trust Co. v. Haggerty, 116 Fed. 510; State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890.

The maintenance of the picket system was a violation of the injunction.

Knudsen v. Benn, 123 Fed. 636.

Hand, J., delivered the opinion of the court:

This was a bill in chancery filed in the superior court of Cook county on October 9, 1903, by the Chicago Typothetæ, a voluntary association established for the purpose of advancing and improving the binding and printing business engaged in by its members in the city of Chicago, and for the purpose of employing skilled mechanics whose services might be required by its various members, for and on behalf of R. R. Donnelly & Sons Company, W. F. Hall Printing Company, Marsh & Grant Company, Faithorn Printing Company, Rogers & Company, S. D. Childs & Company, Jefferson Theater Program Company, Shea, Smith, & Company, and A. R. Barnes & Company, members of said association, against Franklin Union No. 4, its officers and members, praying that an injunction issue restraining said Franklin Union No. 4, its officers and members, from interfering with the business of the members of said association and their employees and persons seeking employment from them. The bill averred that Franklin Union No. 4, its officers and members, had entered into a conspiracy between themselves and with other unknown persons to prevent the members of said association from carrying on their business, and to effect the object of said conspiracy said Franklin Union No. 4, its officers and members, had inaugurated a strike, and by a systematic course of force

and violence, threats, intimidation, and picketing, sought to prevent, and were preventing, persons in the employ of the members of said association from longer continuing in their employment and other persons from entering their employment, the effect of which was to injure and destroy the business of the members of said association. The bill, in scope and character and the relief asked, is substantially the same as the bill filed in O'Brien v. People, 216 Ill. 354, 75 N. E. 108, where many of the questions raised on these appeals are considered and determined adversely to the contention of these appellants.

The defendants were notified of the filing of the bill and the application for an injunction, and on the 10th day of October, 1903, the court issued an injunction restraining Franklin Union No. 4, its officers, and the other defendants, among other things, from in any manner interfering with, hindering, obstructing, or stopping any of the business of complainants, or their agents or employees, in the operation of their business, or from entering upon the grounds or places where the employees of complainants were at work, for the purpose of interfering with, hindering, or obstructing complainants' business in any manner, and also from compelling, or attempting to compel, by threats or intimidation, force or violence, or by unlawful persuasion, any of the employees of complainants to refuse or fail to do their work or discharge their duties as such employees, or by like methods inducing employees to leave the service of complainants, or by like means preventing persons from freely entering into the service and employment of complainants and continuing therein, and also by like unlawful means compelling and inducing, or attempting to compel or induce, the doing of any act in furtherance of the alleged conspiracy, or to interfere with the complainants or their officers or employees in the free, uninterrupted, and unhindered control and direction of their business, or from aiding or assisting any others in so doing, and from congregating upon or about the sidewalks, streets, alleys, or approaches adjoining or adjacent to the premises occupied by complainants, for the purpose of intimidating the employees of complainants, or preventing them, or any of them, from rendering their services and discharging their duties to complainants, and also from, either singly or in combination with others, collecting in and about the approaches to the factories and places of business of complainants for the purpose of picketing or patrolling or guarding the streets, avenues, gates, and approaches and places of business of the complainants, for the purpose of intimidating, threatening, and coercing, or unlawfully persuading, any of the complainants' employees, or of preventing persons seeking employment with them from going to and from the places of business of complainants.

In the bill, as originally framed, the members of the Chicago Typothetæ were named, but not as complainants; the averment of the bill being that it was filed by the Chicago Typothetæ for and on behalf of its members, naming them. The members each, however, signed the following statement in writing, immediately following the verification of the bill: "We, the undersigned, members of complainant association, hereto affix our seals and consent and request that action be brought in court by the filing of the foregoing bill of complaint." On the 18th of October, by leave of court and without prejudice to the injunction, which was expressly extended to cover the amended and supplemental bill, an amended and supplemental bill was filed, in which all of the members of said association named in the original bill, and the C. H. Morgan Company, a member of the association, were formally named as complainants.

The immediate cause of the strike inaugurated by Franklin Union No. 4, and its officers and members, was that a contract had been entered into between the Chicago Typothetæ, on behalf of its members, and the members of Franklin Union No. 4, regulating the hours, wages, and terms of employment between the different members of the Chicago Typothetæ and the members of said union. That contract Franklin Union No. 4, by resolution, on September 27, 1903, annulled. The Chicago Typothetæ and its members thereupon refused to further recognize Franklin Union No. 4 or deal with its members as members of said union. Thereafter, and upon the 5th day of October, 1903, a strike was inaugurated by Franklin Union No. 4 against the members of the Chicago Typothetæ. On October 16th a petition was filed in said cause, which was amended on October 21st, representing to the court that John Mucher, Fred Kitchel, and Charles Smith had been guilty of a violation of the injunction issued on October 10th. A rule was entered to show cause, the respondents were notified and appeared and filed answers, and upon a hearing they were adjudged guilty of contempt of court, and each was sentenced to imprisonment in the county jail of Cook county for a period of thirty days and to pay a fine of $100. On November 2d a second petition was filed against John Mucher, representing to the court that he had, subsequent to his first conviction, again violated the injunction of October 10th, and a rule was entered to show cause. He was notified and filed an answer,

and a hearing was had, and he was adjudged to be in contempt of court and was sentenced to imprisonment in the county jail of Cook county for 30 days. On November 20, 1903, a petition was filed against Franklin Union No. 4 and Charles F. Woerner and John M. Shea, respectively president and secretary of Franklin Union No. 4, representing that Franklin Union No. 4 and its said officers had repeatedly violated said injunction of October 10th. The petition was subsequently dismissed as to Woerner and Shea. Franklin Union No. 4 filed an answer, and a hearing was had, and the union was adjudged to be in contempt of court and a fine of $1,000 was imposed upon Franklin Union No. 4. Several appeals or writs of error were prosecuted or sued out by said respondents to review said judgments of conviction, to the appellate court for the first district, where the cases were heard together, and the several judgments of the superior court were affirmed, and several appeals have been prosecuted to this court by said respondents from the judgments of affirmance of the appellate court, and upon motion the cases have been submitted in this court upon the same briefs, and will be considered together and disposed of in one opinion.

A complete record has been filed in the case of Franklin Union No. 4. A short record, containing a copy of the order adjudging the respondent guilty of contempt of court and imposing sentence upon him, and a copy of the appeal bond, are the only matters contained in the record filed in each of the other cases. Numerous questions have been raised in the brief filed by appellants, some of which are material to a final disposition of the questions raised upon the records filed in the several cases, and several of which, in the manner in which the records have been framed in the cases other than that of Franklin Union No. 4, are not open to review in this court. As the case of Franklin Union No. 4 involves the main points relied upon as grounds of reversal, and there is a complete record filed in that case, as a matter of convenience we will first consider that case, and then dispose of such questions as are not involved in the decision of that case, but which are urged as grounds of reversal in the appeals of the individual appellants. In those cases, as the records contain no certificate of evidence, no questions of fact are involved.

The first contention made is that the court was without jurisdiction, by reason of the want of proper parties, to enter the order of October 10th directing the issuance of said injunction, and, for that reason, it is urged, the respondents could not be lawfully adjudged guilty of contempt of court for a violation of the injunction. The bill shows upon its face that the Chicago Typothetæ was not an actual or an artifical person, and, had the question of its capacity to sue been raised by a demurrer to the bill or by a motion to dissolve the injunction upon the face of the bill, there would have been some force in the position that the bill was defective for want of proper parties. We think, however, the defect in the bill of want of proper parties apparent only and not real, as it appears upon the face of the bill it was filed in the name of the Chicago Typothetæ for and on behalf of the members of that association, naming them; and the individual members of the association ratified and confirmed the action of the association in filing the bill in its name for and on their behalf, by indorsing upon the bill their individual requests and consents that the bill be filed and action be taken thereon by the court,—that is, an injunction for and on their behalf be issued upon the filing of the bill. The want of capacity to file a bill in chancery by an unincorporated body—a voluntary association—must be taken advantage of by demurrer, if the lack of capacity to sue appears upon the fact of the bill, and if it does not appear upon the face of the bill the question must be raised by plea; otherwise the want of capacity of such association to sue will be waived, and the question of its capacity to sue cannot be raised in this court upon appeal for the first time. "With regard to the proper method of objecting to the incapacity of plaintiffs to sue in actions by unincorporated associations, the usual rules apply, and such objections may be waived or cured in the usual manner. Thus, where the bill, declaration, or complaint shows, upon its face, want of interest or capacity to sue, the proper method of taking advantage of the defect is by demurrer; but, where the defect does not thus appear, the objection must be raised by plea or answer." 22 Enc. Pl. & Pr. p. 238.

In Ada Street M. E. Church v. Garnsey, 66 Ill. 132, suit was begun against that church by the name of the "Ada Street Methodist Episcopal Church," instead of against the trustees of said church, and judgment was rendered in favor of the plaintiff. On appeal to this court it was held a suit would not lie against a church organized under the act of 1845, as such, but that the suit should be brought against the trustees of the church; but it was said, as the question was not raised in the lower court, it could not be raised in this court on appeal for the first time. On page 134 the court said: "The defendants are not sued as a corporation, but as a church. As a church they cannot sue or be sued. Actions by or against them must be brought by or against the trustees. The defendants, however, failing to take ad-

vantage of this objection in the court below, cannot now avail of it here."

If, however, it were conceded that there was a defect of parties, that fact would not have deprived the court of jurisdiction to have heard and decided the questions before it, and its order granting the injunction would not have been void, and the respondents could not have justified their acts in violation of the injunction on the ground that there was a defect of parties to the bill. The appellants do not contend, however, that there was a total incapacity upon the part of the complainant named in the bill to sue; but their real contention is that the injunction granted was broader than the averments of the bill would warrant. They state their own contention in the following manner: "We do not claim a defect in the parties, nor do we urge the incapacity of the parties before the court. We concede that, as far as the Chicago Typothetæ was concerned, the court had plenary powers to act; but, having gone outside of the pleadings to bring in complainants, of its own motion, giving them relief which they did not ask, we believe the court acted without jurisdiction, and its order in this behalf was void."

The question thus raised was considered by this court in O'Brien v. People, *supra*. On page 363 of 216 Ill., page 111 of 75 N. E., the court said: "The chief argument against the jurisdiction of the court is that the allegations of the bill of complaint are not sufficient to sustain the prayer of the bill, and do not set out specific facts which would give the court jurisdiction; in other words, that the bill would have been obnoxious to a demurrer. It is well settled that jurisdiction does not depend upon the sufficiency of the bill. If the court has jurisdiction of the subject-matter and of the parties, nothing further is required. The cause of action may be defectively stated; but that does not destroy jurisdiction. A bill may state conclusions; but if not demurred to, and the evidence supports a decree conforming to the general allegations of the bill, and the decree is within the power of the court to render, the court has jurisdiction. Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit. If the law confers the power to render a judgment or decree, then the court has jurisdiction. Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; United States v. Arredondo, 6 Pet. 709, 8 L. ed. 554; Grignon v. Astor, 2 How. 338, 11 L. ed. 290; Applegate v. Lexington & C. County Min. Co. 117 U. S. 267, 29 L. ed. 895, 6 Sup. Ct. Rep. 742. Jurisdiction of the particular matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs. State ex rel. Egan v. Wolever, 127 Ind. 306, 26 N. E. 762; Jackson v. Smith, 120 Ind. 520, 22 N. E. 431; Fields v. Maloney, 78 Mo. 172; Dowdy v. Wamble, 110 Mo. 280, 19 S. W. 489. Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance; for, if it states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches, and the court has power to decide whether the pleading is good or bad. 1 Elliott, Gen. Pr. § 230; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Winningham v. Trueblood, 149 Mo. 572, 51 S. W. 399. Jurisdiction does not depend upon the rightfulness of the decision. It is not lost because of an erroneous decision, however erroneous that decision may be. Sherer v. Superior Court, 96 Cal. 653, 31 Pac. 565; Young v. Lorain, 11 Ill. 624, 52 Am. Dec. 463; Lane v. Bommelmann, 17 Ill. 95; Cody v. Hough, 20 Ill. 43; Iverson v. Loberg, 26 Ill. 179, 79 Am. Dec. 364; Feaster v. Fleming, 56 Ill. 457; Hobson v. Ewan, 62 Ill. 146; Spring v. Kane, 86 Ill. 580; Allman v. Taylor, 101 Ill. 185; St. Louis & S. Coal & Min. Co. v. Sandoval Coal & Min. Co. 111 Ill. 32; Reid v. Morton, 119 Ill. 118, 6 N. E. 414; Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420; State ex rel. Moriarity v. McMahon, 69 Minn. 265, 38 L.R.A. 675, 72 N. W. 79; People ex rel. Tweed v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211."

When a court has before it, as it is conceded the court had in this case, a party complainant asking that an injunction issue, and a party against whom it is asked to issue, upon a bill stating a case falling within its general equitable jurisdiction, the court has jurisdiction to decide whether an injunction should issue or not and the character of the injunction which should issue; and, should the court err in ordering an injunction to issue when one ought not to issue, or should it order an injunction broader in its terms than the averments of the bill would justify, its action, on appeal or writ of error, would be set aside; but upon an attachment for contempt, which is in its nature collateral, for a violation of the injunction, a party who has violated the injunction will not be heard to say the injunction ought not to have issued, or was broader in its terms than the bill justified, as an excuse for his action, as the error of the court in granting an injunction, or in granting one broader than the averments of the bill will justify, does not deprive it of jurisdiction to act, and its order directing

the injunction to issue is a valid and binding order until modified or vacated or set aside upon appeal or writ of error.

In Iowa County v. Mineral Point R. Co. 24 Wis. 93, on page 131, the court said: "The force or efficacy of a decree, as between the parties before the court, does not depend upon the fact that there may be other persons, proper or necessary parties, who are not before it. The absence of such persons is not a defect involving the jurisdiction or power of the court over the parties who are present or over the subject-matter of the suit, so far as those parties may be concerned. The court may, nevertheless, proceed to a decree, and such decree, though rendered in violation of the rules and practice of equity in such cases, is not void as between the parties to it. It is irregular, but not void. It binds the parties to it until set aside or reversed in some direct proceeding for that purpose. And the reason of this is obvious. Jurisdiction exists whenever there is a suit the subject-matter of which is cognizable in a court of chancery, and parties are before the court whose rights in relation to such subject-matter the court may adjudicate. And the effect of such adjudication between the parties, until reversed or set aside, does not depend upon the fact that the power of the court may have been erroneously exercised in making it. If there be necessary parties wanting, whose absence may render the adjudication fruitless or ineffectual because the rights of such parties cannot be determined, that may be good cause for arresting the proceedings or dismissing the suit; but it does not deprive the court of power to proceed." The jurisdiction of the court does not depend upon the question of the correctness of its order. Jurisdiction is not lost because the court enters an erroneous decree, however erroneous it may be. O'Brien v. People, *supra*.

In Tolman v. Jones, 114 Ill. 147, 28 N. E. 464, the court appointed a receiver of the assets of an insolvent corporation and ordered one of the defendants to the bill to assign and turn over to the receiver certain property. The defendant declined to obey the order on the ground it was broader than the court was authorized to make under the averments of the bill, and required him to surrender to the receiver property which was not shown to be the property of the insolvent corporation. The defendant was charged to be in, and was punished for, a contempt of court. He prosecuted an appeal, and on page 154 of 114 Ill., page 465 of 28 N. E., this court said: "If it be the true construction of the order that it required the assignment of other property than property of the corporation or property alleged as belonging to it, then the order in that respect would be too broad, and wrong. But it does not follow that appellant would be justified in disobeying the order for that reason. That would depend upon whether or not the court had jurisdiction. The principle is of universal force that the order or judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous. People ex rel. Davis v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Sullivan v. Judah, 4 Paige, 444; Fennings v. Humphrey, 4 Beav. 1; Chuck v. Cremer, 2 Phill. Ch. 112; Richards v. West, 3 N. J. Eq. 456; Meriam v. Harsen, 2 Barb. Ch. 274. This has often been held in reference to disobedience to injunctions, as in the cases above; and the principles which govern cases of contempt for a violation of an injunction order are applicable here."

On the 18th of October an amended and supplemental bill was filed which cured all the defects claimed to exist in the original bill. If the original bill was of such character that there could have been some relief of some kind granted under it, then clearly it could have been amended, and if it could be amended it was not a void bill, and the court did not fail, by reason of the want of parties or otherwise, to obtain, by the filing of the bill, jurisdiction of the parties and the subject-matter of the suit for the purpose of making the order of October 10th. A bill which can be amended is not void. Kruse v. Wilson, 79 Ill. 233; Bassett v. Bratton, 86 Ill. 152. The defendants should have applied to the court to modify the injunction, instead of ignoring it, if they were of the opinion it was broader than the averments of the bill authorized. In Tolman v. Jones, *supra*, on page 155 of 114 Ill., page 465 of 28 N. E., the court points out the proper practice where the order of the court is broader than the averments of the bill will justify. On that page it is said: "The order, . . . at the most, was not wholly void, but only in the particular wherein it is complained of as being too broad. Appellant's proper remedy would have been an application to the court to modify the order in that respect. There was no such application."

We think it is clear, from any view that can be taken of this case, the court had jurisdiction of the parties and of the subject-matter of the suit, and that its order of October 10th, granting the injunction, was not void, but was a valid and binding order until modified, set aside, or reversed, and that the respondents cannot escape punishment for a violation of the injunction issued in pursuance of that order on the ground that the court was without jurisdic-

tion to enter it or exceeded its jurisdiction in entering it.

It is next contended that Franklin Union No. 4 cannot be punished for a violation of said injunction, as it is said a corporation can only be punished through its officers, or those acting in aid of it, for a contempt of court. In former times the rule was held to be substantially in accordance with the contention above made, but that doctrine now seems to have been exploded, as all the modern text writers and adjudicated cases, so far as we have been able to discover, where the question has been fairly presented for consideration or decision, hold that a corporation may be punished for a contempt of court. While, by reason of its impersonal nature, it cannot be arrested and imprisoned, it may be fined, and the fine collected by sequestration of its property. It is uniformly held that a corporation may be guilty of a crime and punished by a fine; and we have been unable to discover any valid legal reason why it cannot be adjudged guilty of a contempt of court for the wilful violation of an injunction, and punished by a fine.

High, in his work on Injunctions (vol. 2, § 1460), says: "A court of equity has jurisdiction to punish a corporation as well as a private person for contempt in violating an injunction." He cites, in support of the text, New York v. New York & S. I. Ferry Co. 64 N. Y. 622. In that case the action of the trial court in imposing a fine upon the defendant railroad company for the violation of an injunction was sustained, and it was, in express terms, held a defendant corporation would be fined for violating an injunction.

In American & English Encyclopedia of Law, vol. 7, 2d ed. p. 847, it is said: "Formerly it was thought that a corporation could not be held liable for contempt, as, by reason of its impersonal nature, it could not be attached. And there are *dicta* to this effect in some of the late cases. The weight of modern authority, however, is against this doctrine. While a corporation cannot be attached or imprisoned, it may nevertheless be guilty of a contempt in disobeying or violating an order or decree of court, as it may be guilty of a tort or crime; and it may be fined therefor and its property sequestered."

In volume 10 of the Cyclopedia of Law and Procedure (page 1235) the author of the article on "Corporations" announces the law upon the subject in the following language: "There are early decisions to the effect that a corporation cannot be attached for a contempt of court committed in refusing to obey its order or judgment. This is obvious when it is considered that a corporation is intangible and has no body that can be arrested or taken by attachment or execution, and that the only means of compelling the attendance of a corporation in a court of justice at common law was by a distraint of its lands or goods. But we may easily conclude, both upon principle and modern authority, that a corporation may be punished for those contempts which consist in the disobedience of the judgments, decrees, or orders of a court of justice, made in a case within its jurisdiction." Rapalje, in his work on Contempts (§§ 1, 48), thus states the general rule: "It is conclusively settled by a long line of decisions that at common law all courts of record have an inherent power to punish contempts committed *in facie curiæ;* such power being essential to the very existence of a court as such, and granted as a necessary incident in establishing a tribunal as a court. And this power extends to the punishment of wilful contempts committed by corporate bodies as well as by individuals."

In Re Western M. & F. Ins. Co. 38 Ill. 289, Mr. Justice Lawrence, in discussing the powers of a court of chancery to control a depositary of the court funds, on page 290, said: "When a court makes an order appointing a particular person a depositary of the court funds, and such person, knowing of such order, accepts the deposit, he unquestionably becomes *pro hac vice*, an officer of the court. The court may order him to refund the money, and, if he fails to do so, without showing some valid reason, may proceed against him as for a contempt. The same rule would apply to a corporation; and, if its officers having control of its funds, and having the means of payment belonging to the corporation in their hands, should refuse to pay, they, too, might be proceeded against as for a contempt."

From a consideration of the authorities and the principles which control courts of chancery in the enforcement of their decrees, we are clear that the courts of this state have power to adjudge a corporation, other than a municipal corporation, guilty of contempt for the wilful violation of an injunction; and that such corporation may be punished by fine upon being adjudged guilty of a contempt of court. The case of Sercomb v. Catlin, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606, relied upon as sustaining a conclusion different from that at which we have arrived, is not in point. In that case the proceedings were against an officer of the corporation, and what was said in the case with reference to punishing a corporation for contempt of court was not necessary to be said in deciding the questions then before the court. And the case of Hughson v. People, 91 Ill. App. 396, also cited by appel-

lants, was a proceeding against an officer of the corporation, and not against the corporation. These cases, when properly understood, are not in conflict with the general current of modern authority upon the question now under consideration.

It is further contended that the evidence does not show Franklin Union No. 4 to have been guilty of a violation of said injunction, and that the court erred in adjudging it to be guilty of contempt. It appears: That on the 27th day of September, 1903, a meeting of the members of Franklin Union No. 4 was held at Bricklayers' Hall, in the city of Chicago. That the meeting was called to order by the president of the union. That Grof, McCabe, Goadeck, Boettger, Mansfield, and Kavanagh were appointed as assistant sergeants at arms. That 478 members out of 480 members present voted to adopt the following resolution:

Chicago, September 27, 1903.

At a special meeting of the Franklin Union, held at Bricklayers' Hall, Sunday, September 27, 1903, the following resolutions were unanimously adopted:

Whereas, on or about January, 1902, a preliminary agreement was presented to Franklin Union by the Chicago Typothetæ, which provided, among other things, that said agreement should become operative when duly signed by the various firms composing the said Chicago Typothetæ; and whereas, this agreement was concurred in by Franklin Union merely as a tentative agreement, with the express understanding that it become operative only with such firms as desired to become parties to the same by making individual agreements with Franklin Union; and whereas, we have waited about two years and have failed to obtain even one of the individual agreements above referred to; and whereas, the Chicago Typothetæ, and the firms composing the same, have evinced unusual carelessness and indifference in this matter, and have shown no disposition to perfect the tentative agreement, as aforesaid:

Be it therefore resolved, that Chicago Franklin Union does hereby declare the aforesaid tentative agreement as null and void.

Be it further resolved, that the Chicago Typothetæ be immediately notified of this action.

Fifth. That in the event the present demand for higher wages terminates in a strike, that no strike benefits be paid for the first week of the strike.

Sixth. That the strike benefit be limited to $5 per week for single men and $7 per week for married men.

Seventh. The levy of a special assessment of $2 a week, the same to continue during the entire strike, until suspended by act of the union, and to be levied on the entire membership who are employed. Those on a strike to be excused during the term they are on strike, but the assessment to be enforced as soon as they secure work.

Eighth. That suitable headquarters be engaged on the south and west sides for the purpose of transacting the business of the union in regard to the strike.

Ninth. That two committees, of three members each, be appointed to act in the capacity of a visiting committee for the purpose of visiting the various employers; and further, the members of the visiting committee receive the sum of $2.50 per day for each day's time lost.

Tenth. That the scale take effect on and after Monday, October 5, 1903.

That after the adoption of the resolution, on motion, the president appointed a strike committee, a conference committee, and a visiting committee. That Franklin Union No. 4 at that time had a membership of about 1,800. That about 200 of its members went out on the strike inaugurated October 5th. That Franklin Union No. 4 established headquarters, pursuant to the resolution of September 27th, at No. 14 Custom House Place, which was situated in the vicinity of the business places of the members of the Chicago Typothetæ. That girls and unmarried men, members of the union, received $5 per week, and married men, members of the union, received $7.00 per week each, while on the strike, as strike benefits. That each member of the union not on the strike paid an assessment of $2 per week to Franklin Union No. 4, which was to continue during the strike. That the members out on the strike were excused from paying said assessment while on the strike, but the assessment was to be collected so soon as they were at work. That the strike benefits were paid to the strikers by the secretary of Franklin Union No. 4 at its headquarters at 14 Custom House Place. That when the appellants John Mucher, Fred Kitchel, and Charles Smith, and others, all members of Franklin Union No. 4, with the exception of John Mucher, were on trial for having violated said injunction, the president and secretary of Franklin Union No. 4 were present, and they were each defended by the regular attorney of the union. That Kavanagh, an assistant sergeant at arms of Franklin Union No. 4, was on the picket line and assaulted employees of the members of the association several times. That members of the visiting committee of Franklin Union No. 4 called at the homes of the employees of members of the association and sought to persuade

or hire said employees to leave the employment of members of the association. That other employees of the members of the association were taken to the headquarters at 14 Custom House Place by members of said Franklin Union No. 4, where they were offered or paid money on condition they would quit the employment of the members of the association. That members of Franklin Union No. 4 followed young women in the employ of members of the association from the buildings where they were employed, to the street or elevated cars, went into the cars, continually watched them, and when the young women left the cars followed them to their homes. That when men or women employees of the members of the association were on the street on their way to and from their homes or places of employment, they were stopped near the union headquarters by members of the union, who by threats and by calling them opprobrious and insulting names sought to force them to leave the employment of members of the association. That more than 25 specific assaults were made by members of Franklin Union No. 4 upon employees of the members of the association within a few hundred feet of the door of the headquarters of the Union at 14 Custom House place within two weeks of the time the strike was inaugurated. That in several instances men and women in the employ of members of the association, while in the vicinity of the place of their employment upon the public streets of the city, were knocked down and beaten by members of the union. That persons in the employ of the association were assaulted and beaten by members of Franklin Union No. 4 upon the public streets, while in the vicinity of the headquarters of the union, when on their way to and from their homes, and even while under the escort of a policeman. That members of Franklin Union No. 4, singly, in pairs, and in large numbers, congregated on the public streets and in the public alleys near the approaches to the places of business of the members of the association for the purpose of picketing, and when the employees of the members of the association, or persons seeking employment of them, approached the business places of the members of the association, by threats, and often by violence, the members of Franklin Union No. 4, while thus picketing, sought to induce and prevent such persons from remaining in the employ of the members of the association, or from accepting employment of the members of the association. The charge in the bill against Franklin Union No. 4, its officers and members, was that said Franklin Union No. 4, its officers and members, had conspired together to do an unlawful act, by agreeing together to prevent the members of said Chicago Typothetæ from carrying on their business; and that, in furtherance of said conspiracy, they had inaugurated a strike, and, by a systematic course of force and violence, threats, intimidation, and picketing, they sought to prevent, and were preventing, persons in the employ of the members of said association from longer continuing in their employment and other persons from entering their employment.

A conspiracy at common law may be defined, in short, as an agreement or combination formed between two or more persons to do an unlawful act or to do a lawful act by unlawful means. Smith v. People, 25 Ill. 9, 76 Am. Dec. 780. The gravamen of the offense is the combination (People v. Sheldon, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785), and a combination may amount to a conspiracy although its object be to do an act which, if done by an individual, would not be an unlawful act. Chicago, W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770. And the agreement or combination need not be evidenced by a writing. It may be a verbal agreement or undertaking or a scheme evidenced by the action of the parties. Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577. The law is well settled that, when a conspiracy is once entered into, each conspirator then becomes liable for all the acts of his co-conspirators done in furtherance of the objects of the conspiracy. In Lasher v. Littell, 202 Ill. 551 on page 555, 67 N. E. 372 on page 373, the court said: "The conspiracy being established, everything said, written, or done by either of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by every one of them, and may be proved against each." And in Chicago, W. & V. Coal Co. v. People, *supra*, on page 452 of 214 Ill., page 779 of 73 N. E., that "after an unlawful combination is formed, the acts of the different parties to the combination, which tend to further its purposes, bind all parties to the combination."

It will be readily conceded by all that labor has the right to organize as well as capital, and that the members of Franklin Union No. 4 had the same legal right to organize said union as the members of the Chicago Typothetæ had to form that association, and that the members of Franklin Union No. 4 had the legal right to quit the employment, either singly or in a body, of the members of said association, with or without cause, if they saw fit, without rendering themselves amenable to the charge of conspiracy; and that the courts would not have been authorized to enjoin them from so doing, even though their leaving the employ-

ment of the members of the association involved a breach of a contract. While such is the law, it is equally true that, upon the members of Franklin Union No. 4, either singly or in a body, leaving the employment of the Chicago Typothetæ, the members of the association had the right to employ other persons in their places, and when Franklin Union No. 4, its officers and members, agreed together that by calling a strike, and by force, threats, intimidation, and picketing, they would prevent the members of said association from employing other persons in their places, then they entered upon an unlawful undertaking, the carrying into effect of which might be enjoined by a court of chancery. In the O'Brien Case, upon page 373 of 216 Ill., page 115 of 75 N. E., it was said: "There can be no doubt that any attempt to coerce the Kellogg Switchboard & Supply Company into signing said agreement by threats to order a strike was unlawful. It was violative of the clear legal right of the company, and was unjust and oppressive as to those who did not belong to the labor organizations. Nevertheless, the strike was ordered, and thereafter the plaintiffs in error sought, by threats, intimidation, and violence, to prevent men and women from taking the places of the strikers." And in Mathews v. People, 202 Ill. 389, on page 401, 63 L.R.A. 73, on page 78, 95 Am. St. Rep. 241, on page 249, 67 N. E. 28, on page 32, it was said: "An employer whose workmen have left him and gone upon a strike, particularly when they have done so without any justifiable cause, is entitled to contract with other laborers or workmen to fill the places of those who have left him. Any workman seeking work has a right to make a contract with such an employer to work for him in the place of any one of the men who have left him to go out upon a strike. . . . Liberty includes the right to make and enforce contracts, because the right to make and enforce contracts is included in the right to acquire property. Labor is property. To deprive the laborer and the employer of this right to contract with one another is to violate § 2 of article 2 of the Constitution of Illinois, which provides that 'no person shall be deprived of life, liberty, or property without due process of law.' It is equally a violation of the 5th and 14th Amendments of the Constitution of the United States, which provide that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deprive any person of life, liberty, or property without due process of law, 'nor deny to any person within its jurisdiction the equal protection of the laws.'"

It appears that the strike was inaugurated by Franklin Union No. 4; that it provided a place in which the strikers might congregate near the business places of the members of the Chicago Typothetæ; that it raised a fund by assessing the members of the union that did not go out upon the strike; that said fund was used by it to maintain its members who did go out, while they were engaged in the strike; that its regular committees actively sought to induce persons in the employ of members of the Chicago Typothetæ, or who sought employment from them, not to remain in their employ or not to accept employment from them, and that many of its members were actively engaged in picketing and in the use of force and intimidation against the employees of the members of the association or persons seeking employment from them. It is clear that the violence, force, threats, intimidation, and coercion which immediately followed the inauguration of the strike on October 5th, in the vicinity of the headquarters of Franklin Union No. 4 and the business places of the members of the Chicago Typothetæ, were the direct result of the action of Franklin Union No. 4 at the meeting of September 27th, and of the action of the union and its officers thereafter, and the results which followed were those which Franklin Union No. 4, and its officers, were bound, in law, to know would likely follow their action in inaugurating and carrying on what counsel characterize as an industrial war; and Franklin Union No. 4, having set in motion the force which produced the results pointed out, cannot excuse itself for the part it took in the conspiracy by the statement of its officers that they advised the members of the union to be orderly and to obey the law. The citizen, wnen engaged in lawful pursuits, must be accorded the right to walk the public streets of our cities and our country highways in absolute security, and to go to and return from his home and place of business or employment without being interfered with. To follow him, to spy after him, to stop him and threaten him, to put him in fear, to intimidate him, or to coerce him, are alike unlawful. Intimidation and coercion are relative terms. What would put in fear a timid girl or weak woman or man might not terrorize the strong and resolute. All are alike entitled to the protection of the law. Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 802, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077.

In Doremus v. Hennessy, *supra*, on page 614 of 176 Ill., on page 801 of 43 L.R.A.,

page 206 of 68 Am. St. Rep., and page 925 of 52 N. E., it was said: "No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require." And: "It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for him, or causing them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion, with an attempt to inflict an injury which causes loss." In Beck v. Railway Teamsters' Protective Union, *supra*, on page 520 of 118 Mich., on page 416 of 42 L.R.A., page 427 of 74 Am. St. Rep., and page 22 of 77 N. W., it was said: "To picket complainants' premises in order to intercept their teamsters or persons going there to trade is unlawful. It, itself, is an act of intimidation and an unwarrantable interference with the right of free trade. The highways and public streets must be free to all for the purposes of trade, commerce, and labor. The law protects the buyer, the seller, the merchant, the manufacturer, and the laborer in the right to walk the streets unmolested. It is no respecter of persons, and it makes no difference, in effect, whether the picketing is done 10 or 1,000 feet away." And in Vegelahn v. Guntner, *supra*, on page 97 of 167 Mass., on page 723 of 35 L.R.A., page 444 of 57 Am. St. Rep., and page 1077 of 44 N. E., it was said: "The patrol was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. It was thus one means of intimidation indirectly to the plaintiff, and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed. An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon; and persons employed, or seeking employment, have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them."

The strong arm of the law would be short, indeed, if a member of Franklin Union No. 4, who was guilty of using violence, force, threats, and intimidation, can alone be punished, and the corporation—the organized entity—which organized the strike, furnished the money to maintain it, and molded, shaped, and conducted it, through its officers, from regular headquarters maintained by it, cannot be reached and punished for the force, violence, threats, and intimidation which naturally would, and did, flow from the unlawful acts which it has instigated its members to commit. We think the evidence clear and unequivocal that Franklin Union No. 4 was a party to the conspiracy alleged in the bill to exist, and that it was properly found guilty of a violation of the injunction.

It is further urged that the court erred in reserving for future consideration the question whether the whole or any part of the fine assessed against Franklin Union No. 4, when collected, should be paid to the complainants for their damages and expenses. If the court hereafter should adjudge that said fine, or any part thereof, should be so applied, it will then be time enough for Franklin Union No. 4 to object to its application in that manner. That portion of the order is interlocutory, and not now subject to review in this court; and for that reason we express no opinion upon the question as to the power of the court, after the fine is collected, to direct the payment of the whole or any portion thereof to the complainants in satisfaction of their damages or expenses.

It is next urged that it does not appear that the members of the Chicago Typothetæ have been damaged by the action of Franklin Union No. 4. The bill sets up a state of facts which, if true, conclusively show that, if the business of the members of the Chicago Typothetæ was broken up by said Franklin Union No. 4, its officers and members, inducing the employees of the members of said association to abandon their employment and by preventing other persons from entering their employment, the members of said association would suffer irreparable injury. The truthfulness of this averment of the bill cannot be questioned in this proceeding. Nor do we think the fine imposed upon Franklin Union No. 4 of $1,000, excessive. The violation of the injunction was flagrant and often repeated, and the imposition of a nominal fine would not have been an adequate punishment of Franklin Union No. 4, or a vindication of the law.

It is also said that the petition upon which Franklin Union No. 4 was adjudged to be guilty of contempt was insufficient. It was not necessary that a petition be filed; an affidavit would have been sufficient. In the O'Brien Case, on page 368 of 216 Ill., page 113 of 75 N. E., the court said, in

speaking of the contention that the petition filed against the respondents, and upon which they were adjudged guilty of contempt, was insufficient: "They were not entitled to a specific bill of particulars, nor was it necessary to set out the charge with the same particularity that would be required of an indictment. 1 Bishop, Crim. Proc. § 643. It has often been held that, in an attachment proceeding for contempt, alleged to have been committed out of the presence of the court, it should be brought to the attention of the court by an affidavit setting out the particular respects in which the injunction is alleged to have been violated; but that was sufficiently done in this case. 4 Enc. Pl. & Pr. pp. 776, 780; People v. Diedrich, 141 Ill. 665, 30 N. E. 1038; Oster v. People, 192 Ill. 473, 56 L.R.A. 462, 61 N. E. 469." The petition filed against Franklin Union No. 4 fully advised it of the charge made against it, and was sufficient.

It is further said the order adjudging Franklin Union No. 4 guilty of contempt was insufficient. The order referred to the petition and the affidavits filed in its support, and in apt terms adjudged Franklin Union No. 4 guilty of a violation of the injunction, setting out the manner of its violation and adjudging it to be in contempt, and imposed upon it a fine of $1,000. In Fischer v. Hayes, 6 Fed. 63, Mr. Justice Blatchford says (page 70): "It is objected that the order of February 17, 1880, decrees only 'that the defendant is adjudged to have committed the contempt alleged,' without reciting further the offense of which he is guilty. It is insisted that this was necessary; and, further, that the order should have recited that the defendant had disobeyed a lawful order of the court, and was guilty of a contempt of court in so doing. The contempt alleged is set forth with sufficient particularity in the affidavits on which the motion for attachment was founded and in the report of the referee. All the proceedings and the various orders are sufficiently connected together by reference and recital to identify 'the contempt alleged,' without the necessity of reciting at length in the order the particulars of the previous proceedings." We think the order adjudging Franklin Union No. 4 guilty of contempt and assessing the fine against it of $1,000 sufficient.

It is next urged on behalf of the appellants John Mucher, Fred Kitchel, and Charles Smith that, the evidence not having been preserved by bill of exceptions and incorporated in the records filed in their several appeals, the findings incorporated in the orders adjudging them guilty of contempt were not sufficient upon which to base a sentence. These records contain only copies of the order and appeal bond, and from the clerk's certificate attached to each record we are unable to determine whether the evidence in each case was preserved by bill of exceptions or not. In Day v. Davis, 213 Ill. 53, 72 N. E. 682, this court held (page 55 of 213 Ill., page 683 of 72 N. E.): "While it was not the duty of the plaintiff in error to see that the oral proof was preserved either by a certificate of evidence or by a recital of findings in the decree, it was his duty to bring before us all that is in the record on that point before he can ask us to declare that the chancellor erred in ordering that the property should be sold. If we had a complete record of the cause before us, and it should not appear from it that the oral evidence had been preserved, then, unless the decree contained recitals of findings of fact sufficient to sustain the relief granted, the plaintiff in error might insist upon a reversal. In the absence of a complete record, no presumption of error obtains, but the presumptions are in favor of regular and correct action on the part of the chancellor." In view of the above holding, the individual appellants, in the absence of a certificate of the clerk that they have filed a complete record, cannot raise the question that the recitals found in the several orders appealed from are not sufficient upon which to base a judgment of conviction.

Other grounds of reversal have been urged. They are, however, extremely technical in character and without merit. Finding no reversible error in the several records involved in the several appeals here considered, the judgments of the Appellate Court in all of said cases will be affirmed.

Boggs and Scott, JJ., dissenting:

We are unable to concur in the reasoning and conclusion of the majority of the court in this cause. Wage earners have a clear right to organize for the purpose of promoting their common welfare, and, so long as they seek that end by lawful means, they are to be protected. They have likewise the right to strike for the purpose of securing increased compensation, shorter hours of labor, or other amelioration of their condition. For the purpose of making the strike effective and inducing their former employers to comply with their demands, they may seek, by persuasion, to induce others to leave, or refrain from entering, the service of their late master. The employers of the printers had organized an association in Chicago, the Chicago Typothetæ, to enable them to act as an organized body against the workmen; and the law wisely permits the workmen to meet organization with organization, as well as to form organizations for their own purposes in the first instance.

The legislature of our state, the body which makes the law by which courts, as well as the citizens, are to be controlled and governed, has enacted statutes declaring what shall be deemed to be unlawful in the matter of strikes. These statutory enactments are to be enforced by the courts, to the end that the provisions thereof shall govern and protect both employer and employee. The statutory enactments referred to are §§ 158, 159, and 160 of the Criminal Code (Hurd's Rev. Stat. 1903, chap. 38). Section 158 declares it shall be unlawful to combine for the purpose of depriving the owner or possessor of property of its lawful use and management, or of preventing, by threats, suggestions of danger, or any unlawful means, any person from being employed by or obtaining employment from any such owner or possessor of property, on such terms as the parties concerned may agree upon. Section 159 declares it to be unlawful to seek to prevent any other person from working, or from obtaining work, at any lawful business, by threats, intimidation, or unlawful interference. Section 160 makes it unlawful for another to enter the coal bank, mine, shaft, manufactory, building, or premises of another with intent to commit any injury thereto, or by means of threats, intimidation, or riotous or other unlawful doings, to cause any person employed therein to leave his employment. The laboring class has no truer or more powerful friend than public opinion when in its favor, and violations of the public statutes and laws of the state operate to alienate this friendship and to deprive the laboring man of the sympathy of the public. The sentiment which goes out heartily to the cause of the workmen, and is disposed to regard a strike as a laudable effort on the part of men who toil to ameliorate their condition, is the honest sentiment of men who love the law, and who are friends of peace and good order, and who are rudely shocked and their sympathy and support lost by violence or riotous and unlawful conduct on the part of the strikers. Lawlessness and violence are condemned by all good citizens.

The injunction in this cause restrains the defendants, among other things, from inducing by unlawful persuasion any of the employees of the complainants to leave the service of the complainants, and from attempting to prevent others by unlawful persuasion from freely entering the service, or continuing in the service, of the complainants. The term "unlawful persuasion" has no established meaning in the law. Appellees contend that all persuasion is unlawful. If such was the view of the chancellor who granted the writ, the word "unlawful" should have been omitted; while if, in his view, there is persuasion of two kinds, namely, lawful and unlawful, the injunction should have more specifically described the persuasion from which the defendants must refrain, so that it would not have been left to each to determine for himself, at his own peril, what was lawful and what was unlawful. The purpose of the injunction is to advise the defendants what particular acts the court has decided they may not lawfully do. It would seem upon reason, however, that when the argument addressed by the striker to a workman for the purpose of inducing him to leave or refrain from entering a certain employment becomes unlawful, it passes from the domain of persuasion into that of coercion, threat, or intimidation. Having this right of persuasion, it was proper for the strikers to exercise it by accosting in a respectful manner the person whom they desired to address; and they might peaceably, by explanation, argument, entreaty, and reason, seek to persuade such person to leave the employment in question; and the strikers might lawfully do this in the public highway or street so long as they did not obstruct public travel, or at the home of the person they sought to interview, or at any other place where they would have a right to talk with that person about any other legitimate business.

In the case of Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 802, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, there was no question before the court in reference to the right of a striker to induce another to leave, or refuse to enter, the service of an employer; and what is there said in reference to persuasion is, for that reason, inapplicable in this cause. The principle governing such cases as the Doremus Case, in which interference with contract relations has been held unlawful, stands upon a peculiar ground, and does not obtain here. 18 Am. & Eng. Enc. Law, 2d ed. p. 87. The only case prior to the present one in a court of appellate jurisdiction in this state, where the question of persuasion has been squarely before the court, was the case of Beaton v. Tarrant, 102 Ill. App. 124, where the right of striking workmen to use the streets and highways in a manner not inconsistent with public travel, for the purpose of inducing others, by entreaty, argument, and peaceable persuasion, in good faith, to leave or refrain from entering the service of the late employer of the strikers is expressly recognized. To the same effect are the following authorities: 18 Am. & Eng. Enc. Law, 2d ed. p. 87; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3, 90 Fed. 608; Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Asso. 59 N. J.

Eq. 49, 46 Atl. 208; Krebs v. Rosenstein, 31 Misc. 661, 66 N. Y. Supp. 42; Rogers v. Evarts, 17 N. Y. Supp. 264; People v. Kostka, 4 N. Y. Crim. Rep. 429; Master Builders' Asso. v. Domascio, 16 Colo. App. 25, 63 Pac. 782; Reynolds v. Everett, 144 N. Y. 189, 39 N. E. 72; Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310; United States v. Kane, 23 Fed. 748; Union P. R. Co. v. Ruef, 120 Fed. 102; Allis-Chalmers Co. v. Reliable Lodge, 111 Fed. 264. Nor does the fact that the strikers' organization offers to pay the employee whom they desire to have leave the employment for the time he may be out of work render the persuasion wrongful. Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Asso. and Rogers v. Evarts, *supra;* Levy v. Rosenstein, 66 N. Y. Supp. 101.

It is urged by appellees, however, that persuasion necessarily and inevitably leads to disagreements, quarrels, force, violence, and general disorder, and should therefore be enjoined. Affidavits filed by appellees themselves in this cause show that this statement of fact is not accurate, and their conclusion does not follow. The question is not whether persuasion leads to acts of lawlessness, but whether persuasion, in itself, is unlawful. A man should not be enjoined from doing an act merely because that act may lead to the doing of some wrongful act. If such an argument be followed to its logical conclusion, it would be proper to enjoin the strikers from leaving their homes while the strike continues, because, if they are kept at home, no violent encounters will take place between them and those who are in the employment in question, while, if they are permitted to go upon the streets, affrays may occur. The law will be satisfied if the striker be punished when he does a wrongful act. It is not just to punish him for doing an act rightful in itself merely because that act may lead to something wrongful. Appellees misapprehend the effect of the case of London Guarantee & Acci. Co. v. Horn, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526. The precise question determined in that cause is shown by the conclusion of the court which appears in the opinion on pages 507 and 508 of 206 Ill., page 185, 99 Am. St. Rep., and page 531 of 69 N. E. In that case, however, the statement from the opinion in Quinn v. Leathem [1901] A. C. 495, to the effect that "it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference," was quoted, and this court said in reference thereto: "We are of opinion that the contention of appellant in the case at bar, to the effect that competition in trade, employment, or business is such a justification, is in accord with the authorities." In the case now before us, the purpose of the strikers was to rid themselves of competition in employment by causing those who worked in the places they had left to leave the employment, that the strikers might be re-employed under more favorable conditions than those formerly obtaining.

In our judgment the evidence in this record does not show that Franklin Union No. 4, as a corporation, violated the injunction. The bill charges the defendants with criminal conspiracy against the complainants, and appellees contend that the evidence shows a like conspiracy after the issuance of the writ for the purpose of violating the injunction. Persons and corporations may combine to bring about lawful results or ends without each being held liable for the unlawful acts of others of the combination, though such unlawful acts were intended by their authors to secure the lawful end desired to be accomplished. That is to say, if the combination is for a lawful purpose to be attained by lawful means, those only who employ unlawful means to bring it about are liable as violators of the law. If the combination is in violation of a law, all are guilty in forming the combination, and all are answerable for the unlawful acts of each conspirator. It being lawful for the union to join in encouraging and inaugurating the strike, it cannot be deemed guilty because of the unlawful criminal acts of others, unless the union aided, counseled, or advised the commission of such unlawful acts. In the recent case of People ex rel. Deneen v. Sullivan, 218 Ill. 419, 75 N. E. 1005, it is said (page 437, 218 Ill., page 1011, 75 N. E.): "The rule in Illinois, except as modified by statute in actions of slander or libel, is that when a criminal offense is charged in the pleadings, and must be established either to sustain the cause of action or maintain the defense, the presumption of innocence arises, and the crime charged must be proved by evidence which removes every reasonable doubt of guilt. Crandall v. Dawson, 6 Ill. 556; McConnel v. Delaware Mut. Safety Ins. Co. 18 Ill. 228; Harbison v. Shook, 41 Ill. 141; Sprague v. Dodge, 48 Ill. 142, 95 Am. Dec. 523; Germania F. Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489."

An order punishing Franklin Union No. 4 should not have been entered, therefore, unless the evidence offered was sufficient to establish its guilt beyond a reasonable doubt. The complainants sought to sustain their contention almost entirely by affidavits. Some of these affidavits contained direct and positive averments of wrongs done by certain of the strikers, but many of them contained conclusions of the affiants, statements on information and belief, and statements made upon hearsay, so intermingled

with such statements of material fact as were found in the affidavits as to make it impossible to separate that which was legitimate evidence from that which should not be considered. *Ex parte* affidavits, such as these, are the weakest and most unsatisfactory evidence. Pittsburg's Appeal, 79 Pa. 317; State v. Mickle, 25 Utah, 179, 70 Pac. 856; Fullenwider v. Ewing, 30 Kan. 15, 1 Pac. 300; Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co. 32 Fed. 401; Vaughn v. Hann, 6 B. Mon. 338.

In Becker v. Quigg, 54 Ill. 390, it is said (page 394): "One serious objection to the admission of *ex parte* affidavits is that the opposing party is denied the privilege of cross-examination. This is a most efficacious test for the discovery of truth, and should never be departed from except from actual necessity. A witness subjected to this test cannot easily impose on the court or fabricate falsehood."

Again, such affidavits are frequently in the language of the draughtsman rather than in that of the witness; and for this reason it is impossible to know from the affidavit precisely what the witness intended to say. In our judgment, in cases of this kind, the better practice requires that the defendants be confronted by the witnesses for complainants in open court, where cross-examination may be had, and that the same course be pursued with reference to those witnesses who speak in behalf of defendants.

In addition to the affidavits, it appears from the testimony of John M. Shea, who was financial secretary and treasurer of Franklin Union No. 4, called by the complainants, and who was the only witness who testified in open court on their behalf, that the difficulty between the union and the typothetæ originated from the fact that the contract which existed between the members of the Chicago Typothetæ and Franklin Union had not been signed by the members of the typothetæ; that on February 27, 1903, twelve days before the bill herein was filed, Franklin Union held a meeting (a copy of the minutes of which is set out in the majority opinion herein); that in fact the union never did call a strike, but that the controversy ensued upon the men being locked out by their employers. Be that as it may, however, it appears from his testimony that strike benefits were paid to the members who were out of work, by virtue of the authority given at the meeting last mentioned; that Shea paid the strike benefits, and had disbursed in that way $5,000 or $6,000; and that persons who had theretofore been tried for contempt of court in violating the injunction had been defended by Mr. Bloomingston, general counsel for the union, but who retained him so to do does not appear. These facts, taken with those portions of the affidavits which can be seen to be material and competent, are not sufficient to warrant the finding of the superior court.

There is no evidence of any corporate action on the part of the union aside from the minutes of the meeting above referred to. There is evidence by affidavits that persons belonging to the union had violated the injunction in a flagrant manner. There is no evidence that the union, as a corporation, approved or acquiesced in any such violations, or that any executive or controlling committee, or other like power in the union, did so. Proceedings were begun against Shea, the secretary and treasurer, and Woerner, the president, of Franklin Union, for violation of the injunction. They were included as defendants in the petition filed against Franklin Union No. 4, which is now under consideration; but the petition as to them was dismissed by the appellees, from which it would appear that no acts done by them were regarded as violative of the writ. The record of the meeting in question does not show that the union did any wrongful act, or pursued any wrongful method, or that the union contemplated anything but lawful acts and lawful methods; but, even if it were otherwise, it could not be contended that anything done on September 27th afforded evidence of the violation of an injunction issued twelve days later, when it could not be foreseen on September 27th that a bill would be filed or an injunction awarded.

It further appears from the testimony of Woerner and Shea, who are the only persons testifying on the subject, the latter of whom was giving evidence on behalf of the complainants, that the strike committee appointed by the president at the meeting of September 27th never acted, for the reason that the men were locked out before they were prepared to strike. The strike headquarters was near the establishments of the typothetæ, but in the place which had long been used and which was then being used as the place of business of the union, and consequently had not been selected because it was in the vicinity of the places of business of members of the typothetæ. Franklin Union No. 4 has 1,800 members; but 200 of them were involved in the strike. It would seem that the remaining 1,600, at least, should not be punished by a fine inflicted upon the union to which they belong when they have never in any way, by the union or by any executive or other controlling body or officer thereof, countenanced or shown approval of any acts in violation of the writ.

We are also of the opinion that the order, in reserving for determination, after the fine should be collected, the question of paying

the amount, or a part thereof, to the complainants for their costs and expenses, was erroneous: First, because there is no statute in Illinois that affords any warrant for collecting damages and expenses in this way in this suit, and fines for contempt can be so applied only when authorized by statute in cases of this character; and, second, because an order punishing for contempt must be specific, certain, and final. People ex rel. Hinckley v. Pirfenbrink, 96 Ill. 68; State v. Voss, 80 Iowa, 467, 8 L.R.A. 767, 45 N. W. 898. The evidence does not show that Franklin Union No. 4, in its corporate capacity, entered into a combination with any other person or persons to do an unlawful act, or to do a lawful act by unlawful means, or that it did anything in violation of the commands of the writ, and for this reason the judgment as to Franklin Union No. 4 should be reversed.

Petition for rehearing denied April 5, 1906.

GEORGIA SUPREME COURT.

A. S. OLIVER, Plff. in Err.,
v.
D. H. WARREN et al.

(124 Ga. 549, 53 S. E. 100.)

Forthcoming bond—defenses.

In a suit on a forthcoming bond given by a claimant, where its execution is not denied, the main issue to be decided is whether or not there has been a breach of the bond. Neither the legality of the levy nor the authority of the officer to make it is an issuable fact; these issues being concluded by the judgment in the claim case.

(December 22, 1905.)

Headnote by EVANS, J.

ERROR to the City Court of Elberton to review a judgment in favor of defendants in an action brought to enforce liability on a forthcoming bond. Reversed.

Statement by **Evans, J.**:

A fi. fa. in favor of A. S. Oliver and against D. H. Warren, issued from the justice's court for the 202d district, G. M., Elbert county, was placed in the hands of W. H. Irwin, Jr., bailiff of the county court, for the purpose of levy. He proceeded to make a levy on certain cotton as the property of the defendant in fi. fa., who, as the head of a family consisting of himself and four minor children, interposed a claim on the ground that the cotton was exempt from levy and sale, being the proceeds of a homestead taken out for the benefit of his family. In order to retain possession of the property, he also executed and delivered to the levying officer a forthcoming bond, which A. P. Deadwyler signed as security. The claim case resulted adversely to the claimant. Suit was afterwards brought by Oliver in the city court of Elberton upon the forthcoming bond against Warren as principal and Deadwyler as security. The defendants filed a joint answer, in which they set up various defenses, and in which they denied that "any lawful levy was ever made on the property described in the plaintiff's petition under and by virtue of the fi. fa." against Warren. It appeared on the trial that Irwin, the levying officer, had never been sworn in as a constable and did not act as such in making the levy, but as bailiff of the county court. At the close of the plaintiff's testimony, which disclosed the circumstances under which the forthcoming bond was given and the result of the claim case, the presiding judge directed a verdict in favor of the defendants, holding that Irwin, "being bailiff of the county court of Elbert

Case Note.—Right, in suit on forthcoming bond given by execution debtor or claimant, to question the legality of the levy or the authority of the officer making it.—It is very generally held that an obligor, whether principal or surety, in a forthcoming bond in which the levy is acknowledged, will not be allowed to attack the levy or the authority of the officer making it, in an action upon the bond.

In Shaw v. McCullough, 3 W. Va. 260, it was held that parties who voluntarily enter into a forthcoming bond are estopped from all inquiry into the regularity and validity of the levy of the writ of fieri facias upon which the bond was given.

And in Davis v. Jones, 32 Tex. Civ. App. 424, 75 S. W. 63, it was held that, by giving a claimants' bond and proceeding under the statute to test their rights to the property, the claimants waived the manner of the levy.

In Hundley v. Filbert, 73 Mo. 34, it was held that the obligors in a delivery bond given to retain goods levied upon under an execution were estopped from denying the levy, which was set forth in the bond.

In Mead v. Figh, 4 Ala. 279, 37 Am. Dec. 742, it was held that equity would not relieve sureties on a forthcoming bond on the ground that the levy was fictitious; and as authority the court cited Syme v. Montague, 4 Hen. & M. 180, where it was held that the sureties on a forthcoming bond could not be relieved in equity on the ground that the defendant in execution was not the owner of the property levied on.

In Kingsland v. Harrell, 1 Tex. App. Civ. Cas. (White & W.) § 737, it was held that the execution by the plaintiffs of a forthcoming bond to a constable amounted to an admission on their part that the levy was a valid one, and the admission operated as an estoppel to their denial of the legality.

county and levying as such officer, had no authority to levy a justice-court fi. fa." To this ruling and judgment the plaintiff excepts. He claims that the court erred in directing a verdict against him: (1) Because the levy was a valid one, made by an officer having authority to make it; (2) because the defendants had recognized the officer's authority and the validity of the levy by prosecuting the claim case, and the bond sued on was at least good as a voluntary bond, and they were bound thereby, even if his acts were to be regarded as those of a *de facto* officer, and his authority to make the levy could have been questioned by filing an affidavit of illegality; and (3) because Warren, when he filed his claim and gave the forthcoming bond, admitted the validity and completeness of the levy, as well as the authority of the officer to make it, and the defendants, having given the bond, were estopped from denying his authority or the validity of the levy.

Mr. Z. B. Rogers, for plaintiff in error:

Irwin, the county court bailiff, had authority to make levy.

Wade v. Stout, 36 Ga. 95.

In Darland v. The Governor, 2 Bibb, 541, it was held that, after the execution of the replevin bond, the execution debtor could have no right to contest the propriety of the seizure of the property under the fieri facias, or question the correctness of the return.

In Garner v. Clark Bros. 115 Ga. 666, 42 S. E. 56, it was held that when, in resistance to the levy upon personalty of an execution, the defendant replevies the property actually seized by the officer, by giving a bond for its forthcoming, the former is estopped from thereafter setting up that the entry of the levy did not sufficiently describe such property. And the court cites as its authority Hilton & D. Lumber Co. v. Clements, 108 Ga. 791 33 S. E. 951, which applied the same rule in the trial of a claim case.

In Jones v. Kendrick, 94 Ga. 645, 21 S. E. 831, it was held that one who gave to a constable, who had seized personal property under execution against a third person, a forthcoming bond, could not, when sued upon the bond, set up in himself title to the property, and thereby defeat the action; and that he and his sureties were estopped from contesting the constable's title, and thus the legality of his levy.

In Weston v. Ralston, 51 W. Va. 157, 41 S. E. 338, it was held that, where property of the execution defendant had been levied upon at the instance of the defendant, by the officer having the execution, and a bond had been given for the forthcoming and delivery of said property on the day of sale, and such bond was forfeited, such defendant will be estopped from the defense that such property was not subject to levy.

In Bolling v. Vandiver, 91 Ala. 375, 8 So. 290, it was held that when a forthcoming bond was executed, reciting a levy on specified property and binding the bondsmen to have it forthcoming on the day of sale, proof will not be received that there was no such property; and that it is no defense in such a case that the levy was fictitious or invalid for indefiniteness, for such invalidity, if any, would have been cured by the bond.

In Lucas v. Beebe, 88 Ill. 427, it was held that, where the levy had been admitted in the bond, it could not be denied in an action thereon; and a verbal agreement tending to show that the constable agreed to return the goods to the principal could not be set up in such an action for the purpose of showing that there had been no levy.

In Henderson v. Bank at Montgomery, 11 Ala. 855, it was held that a claimant of property, who had given a forthcoming bond to the constable, the levying officer, and thereby secured possession of the property, was estopped by his bond from denying that a levy had been made.

In Portis v. Parker, 8 Tex. 23, 58 Am. Dec. 95, the defendant in execution was held estopped, on a motion to quash the levy and return, to deny that a valid levy had been made on account of the failure of the sheriff to take possession of the property, where defendant's wife had given a forthcoming bond, upon her claim that the property was her separate estate.

In Dowman v. Dowman, 2 Cald. 507, it was held that evidence to show that a levy under a judgment against a dead person of the same name had been made upon the property of the defendant was not receivable in an action on the forthcoming bond given by the defendant.

But in some cases the strict letter of the rule has been modified. Thus, in Long v. United States Bank, Freem. Ch. (Miss.) 375, it was held that, in order to sustain an action upon a forthcoming bond, there must be a substantial levy upon actual, tangible property of the defendant in execution; and that a bond signed in blank by the sureties, and afterwards filled in by the sheriff with conditions for the return of property which did not exist, would be wholly without consideration, and would raise no obligation on the part of the sureties, either legal or moral, to pay it.

And in Atkinson v. Starbuck, 7 Blackf. 420, it was held that the illegality of the levy might be shown under a plea of "no consideration," where the bond did not set forth the judgment upon which the levy was based.

In Olson v. Nunnally, 47 Kan. 391, 27 Am. St. Rep. 296, 28 Pac. 149, it was held that the defendant in execution, by giving a redelivery bond, did not estop himself from thereafter asserting, either directly or collaterally, that the judgment and all things depending upon it, including the levy, were absolutely void.

A constable's title cannot be denied. Giving the bond is an estoppel.

Jones v. Kendrick, 94 Ga. 645, 21 S. E. 831.

Were Irwin without authority, his act would be good as that of a *de facto* officer.

Gunn v. Tackett, 67 Ga. 725; Tietzen v. Merchants' Nat. Bank, 117 Ga. 503, 43 S. E. 730.

The giving of bond admits the regularity, validity, and completeness of the levy.

13 Am. & Eng. Enc. Law, 2d ed. p. 1141; Roebuck v. Thornton, 19 Ga. 149; Cohen v. Broughton, 54 Ga. 296; Scolly v. Butler, 59 Ga. 849; Crine v. Tifts, 65 Ga. 644; Smith v. Camp, 84 Ga. 117, 10 S. E. 539; Hilton & D. Lumber Co. v. Clements, 108 Ga. 791, 33 S. E. 951; Garner v. Clark Bros. 115 Ga. 666, 42 S. E. 56; Stroud v. Hancock, 116 Ga. 336, 42 S. E. 496; Jones v. Kendrick, *supra*.

Messrs. **Van Duzen & Yutt** for defendants in error.

Evans, J., delivered the opinion of the court:

In the various Code sections regulating the practice in a justice's court, there is no specific form of direction of an execution to any particular officer. Mesne process is directed to and served by constables. Civil Code 1895, § 4116. Final process may be executed by any officer empowered to serve mesne process, unless there is a statutory inhibition. Hence constables may levy executions from a justice's court; and, by Civil Code, 1895, § 4381, sheriffs are also empowered to serve and execute both mesne and final process issued from justices' courts. The regular bailiff of a county court is authorized to levy only the processes of the county court. Civil Code 1895, § 4190. He has no authority to levy an execution issued from a justice's court. A levy by a county-court bailiff of a justice-court execution is void, because a levy by an officer without authority of law is no levy at all. Morris v. Tinker, 60 Ga. 466; Collins v. Hudson, 69 Ga. 684. It is not good as a levy by a *de facto* officer, because the county court bailiff, in making the levy, does not assume to act as constable, or as sheriff or lawful deputy. If he did, and his appointment or qualifications were irregular, nevertheless his acts would be good as a *de facto* officer. Twiggs v. Hardwick, 61 Ga. 272; Hinton v. Lindsay, 20 Ga. 746 (3, 4); Gunn v. Tackett, 67 Ga. 725. But where he undertakes to extend the jurisdiction of his office to the execution of process which under the law he has not the power to execute, *quoad hoc* he is a usurper of the functions of another office, and he is not a *de facto* officer.

However, it is insisted that the defendants are estopped from denying the legality of the levy, because Warren, the principal on the bond upon which the suit was predicated, obtained possession of the property, and in the bond recited the *factum* of the levy. It is certainly true that the filing of a claim and the giving of a forthcoming bond estop a claimant and the surety on his bond from denying the completeness and sufficiency of the seizure of the property made by the levying officer. Cohen v. Broughton, 54 Ga. 296; Scolly v. Butler, 59 Ga. 850; Connolly v. Atlantic Contracting Co. 120 Ga. 216, 47 S. E. 575. The estoppel does not extend to the validity of the process (Smith v. Lockett, 73 Ga. 105; Osborne v. Rice, 107 Ga. 283, 33 S. E. 54); nor to the authority of the officer to make the levy (Pearce v. Renfroe, 68 Ga. 194). In the present case the defendants, by signing the bond, estopped themselves from denying that the county-court bailiff made an actual seizure of the property by virtue of the process in his hands. (Id. 196). But on the trial of the claim case they would not have been precluded from showing that such seizure by the county-court bailiff was void, because, as to the act of levy, the bailiff was not an officer, either *de jure* or *de facto*, but a mere usurper of the functions of other officers designated by law to execute this particular process. However, in a suit on a forthcoming bond, where its execution is not denied, the only issue to be decided is whether or not there has been a breach of the bond. O'Neill Mfg. Co. v. Harris, 120 Ga. 469, 47 S. E. 934. Neither the legality of the levy nor the authority of the officer to make it is an issuable fact. As was said by Bleckley, Ch. J., in Anderson v. Banks, 92 Ga. 122, 18 S. E. 364: "It is not allowable for a claimant to defeat a sale by interposing a claim, and then appropriate the property to his own use or suffer it to be appropriated by his surety on the claim bond, and then contest, not in the claim case,—the very case appointed by law for the purpose,—but in a suit on the bond, the right of the plaintiff in execution to sell the property." While a regular county-court bailiff is limited to serving processes issued from the county court (Civil Code 1895, § 4190), and is without authority to levy a justice-court execution, yet, if he does in fact undertake to do so, and a claimant and his surety procure possession of the property seized by giving a forthcoming bond, they cannot defeat a recovery thereon by setting up the defense that the county-court bailiff was not such an officer as could lawfully make the levy. The time for them to raise this point is when the claim case comes on for trial. Had the defendants in the present case urged this objection at the proper time, it is not improbable that, upon the au-

thority of Pearce v. Renfroe, *supra*, the levy would have been dismissed. The claimant litigated the question of title in the claim case. It was the levy which brought the claimant into court. If he was improperly brought there by means of a void levy, he should then and there have protested. After an adverse judgment in the claim case —an adjudication that, as between the defendant in fi. fa. and himself, he had no title to the property—he was no longer concerned about the authority of the levying officer to make the levy, and nothing remained for him to do except to comply with the obligation of his bond. Upon his failure so to do, he and his surety became liable thereon.

The sole question raised in the present bill of exceptions is whether or not the trial judge properly directed a verdict in favor of the defendants upon the ground that the levying officer, being a bailiff of the county court and acting in that capacity, was without authority to levy a fi. fa. issuing from a justice's court. As will have been seen, the defendants were precluded from raising any such objection in a suit upon the bond, and the direction of a verdict in their favor was erroneous. It may not be improper to add that, even had the trial judge been correct in his ruling, he should not have directed a verdict in favor of the defendants; for, as pointed out in Barnes v. Carter, 120 Ga. 895, 48 S. E. 387, if a plaintiff fails to make out a prima facie case, a verdict for the opposite side should not be directed, but a judgment of nonsuit should be rendered.

Judgment reversed.

All the Justices concur.

MISSOURI SUPREME COURT.
(Division No. 2.)

STATE OF MISSOURI, Respt.,
v.
JOHN M. DAVIS, Appt.

(194 Mo. 485, 92 S. W. 484.)

Justice of the peace—jurisdiction.

1. A justice of the peace does not lose jurisdiction of a criminal case submitted to him without a jury by taking it under advisement, where the statute does not prescribe the time within which his judgment must be rendered.

Instruction—form of verdict.

2. Submitting to the jury a form of verdict in a criminal case without instructing them it is to be used only in case they find defendant guilty is not reversible error, where other instructions plainly indicate that such is the fact.

Physician—practising medicine.

3. A physician is practising medicine within the state, within the meaning of a registry law, where he periodically appears at a hotel within the state and for compensation sees and prescribes for patients, although he lives in another state, where his prescriptions are filled and forwarded by express to the patient.

Same—vested right.

4. One who had many years previously been engaged in the practice of medicine within a state, which he subsequently left, is not, upon returning to the state, deprived of a vested right by being required to comply with the registration law as a condition to resuming such practice,—especially where his former practice had not been conducted in accordance with the laws of the state.

(March 6, 1906.)

APPEAL by defendant from a judgment of the Circuit Court for Scotland County convicting him of practising medicine without a license. Affirmed.

Statement by **Fox, J.:**

This cause is here by appeal from a judgment of conviction of the defendant in the Scotland county circuit court for practising medicine without a license or any other authority so to do. This prosecution was begun before a justice of the peace of Scotland county on February 4, 1905. Omitting formal parts of the information, it charges the offense as follows: "John E. Luther, prosecuting attorney within and for the county of Scotland in the state of Missouri, informs John B. Montgomery, a justice of the peace of said county of Scotland, that on the 15th day of December, 1904, at the county of Scotland aforesaid, one John M. Davis did unlawfully practise medicine by then and there prescribing for, issuing medicine to, and treating one Arthur Hoover, for the cure of disease and bodily affliction; the said

Case Note.—What constitutes practising medicine within the state.—This question has frequently arisen in prosecutions of persons coming from other states for violation of a local statute requiring a license or certificate to practise medicine. The following persons have been held to come within the purview of such statutes:

A regular practising physician, who goes at stated intervals from a state in which he is registered to a city in a state in which he is not registered, and has a room there, to which, by advertisements, the public is invited, and where he attends patients who have moved from the former state, and receives new ones (Com. v. Ege, 6 Sadler [Pa.] 583, 20 W. N. C. 73, 9 Atl. 471); the manager of a sanitarium located in Maryland, who goes to the city of Washington, where he advertises to cure alcoholism, morphin-

John M. Davis not then and there being a licensed physician of the state of Missouri, nor having any legal authority to practise medicine or treat the sick and afflicted, against the peace and dignity of the state." This cause was first tried before the justice on an agreed statement of facts on the 4th of April, 1905; the cause being submitted, the justice took it under advisement until the next day, the 5th of April, 1905, when he rendered judgment against the defendant, finding him guilty, and assessing his punishment at a fine of $100. From this judgment defendant prosecuted his appeal to the circuit court of Scotland county. The cause came on for a hearing and trial at the May term, 1905, of the circuit court. Before the trial the defendant filed a motion praying for the discharge of the defendant on the grounds that upon the face of the transcript from the justice it appeared that the justice had lost jurisdiction of the cause before he rendered a judgment, and that when he did render judgment he had no jurisdiction so to do, as this was a criminal cause, and the justice was without authority to take the case under advisement. This motion was by the court overruled, and the trial of the cause proceeded. We have read in detail the testimony introduced at the trial, which was substantially as follows: The state's evidence tended to prove that one Arthur Hoover was suffering from blood poison, and, learning that defendant was a good physician, went to see defendant at a hotel in Memphis, in Scotland county. The defendant told Mr. Hoover that he (defendant) was a physician, and showed Hoover some blanks with questions on them. That defendant then examined Hoover, diagnosed his case, and prescribed for him. That defendant lived in Hamilton, Illinois, and sent bottles of medicine to Hoover by express, from Warsaw, Illinois. That Hoover took the medicine according to defendant's directions and according to the instructions on the bottle, and paid defendant $5 a month. That these payments were made to defendant, and Hoover had an interview with defendant in the hotel in Memphis the first Monday in every month, beginning in November, 1904. That defendant had no diploma, no license from the state board of health, and was not registered as a physician in Scotland county. The defendant's evidence tended to prove that he lived in Hamilton, Illinois, sent medicine to Mr. Hoover by express and by mail. That this medicine was sent when the patient would fill out one of defendant's printed blanks. That defendant had been practising medicine ever since 1857, was formerly located in St. Louis, had practised in Edina, but had not been located in Missouri for a number of years. That he had studied the allopathic system of medicine, but had never registerd in Missouri, and had never been licensed by the state board of health.

At the close of the evidence, the court, at the instance of the state, gave the following instructions: "(1) The court declares the

ism, and nervous diseases, and there sells his compound to such persons as he may examine and pronounce fit subjects for his medical treatment; and who employs licensed physicians to take immediate charge of the patients, the only discretion allowed the latter being in respect to the frequency of the doses and the treatment of any complications which may arise (Springer v. District of Columbia, 23 App. D. C. 59); one who travels through the country selling his own proprietary remedies, holding himself out to the world as a physician, examining patients who ask his services, and diagnosing their diseases (State v. Van Doran, 109 N. C. 864, 14 S. E. 32).

One who travels through the country announcing by advertisements where he may be found, and advertising to cure nervous diseases by present or absent treatment, and to teach self-healing, practises medicine within the meaning of a statute which provides that any person shall be held to be a practising physician, and required to have a license, who shall publicly profess to be a physician and assume the duties, or who shall make a practice of prescribing, or prescribing and furnishing, medicine for the sick, or who shall publicly profess to cure or heal. State v. Heath, 125 Iowa, 585, 101 N. W. 429.

But in Com. v. Townley, 7 Pa. Dist. R. 413, the court held that a physician licensed to practise medicine in Ohio, who rented rooms for an office in a city in Pennsylvania, where he could be found three days in a week for over a year, is a regular practitioner, and not within the purview of a statute prohibiting the opening of a transient office for the practice of medicine without a license.

A physician domiciled and licensed to practise medicine in Massachusetts where he has an office, and who, on stated days each month, meets his patients, for the practice of his specialty, in rooms at a hotel in a city in Rhode Island, where he advertises to receive and treat patients, practises medicine within the meaning of a statute prohibiting an itinerant doctor to practise medicine in the state. Evans v. State Bd. of Health, 19 R. I. 312, 33 Atl. 878.

And in People use of State Bd. of Health v. Blue Mountain Joe, 129 Ill. 370, 21 N. E. 923, the court held that one who styled himself Blue Mountain Joe, and traveled through the country with a band of music, and some Indians, either real or pretended, giving free entertainments, at which he told what diseases his remedies would cure, and his aids sold the remedies among the crowd, practised medicine within the meaning of a similar statute.

law to be that if you find from the evidence that the defendant, John M. Davis, at the county of Scotland and state of Missouri, at any time within one year next before the filing of this information, did publicly profess to be a physician, and that by reason of his publicly professing to be a physician, one Arthur Hoover accepted his services in his professional capacity by calling upon defendant, and defendant prescribed for, treated, and issued medicine to said Arthur Hoover, who was then and there a sick person; and that the defendant, at the time of so prescribing for, treating, or issuing medicine to said Arthur Hoover, was not a registered physician of the state of Missouri, and had no certificate issued by the board of health of the state of Missouri, authorizing him to practise medicine in the state of Missouri, you should find the defendant guilty as charged, and assess his punishment at a fine of not less than $50 nor more than $500, or at imprisonment in the county jail not less than thirty days nor more than one year, or at both such fine and imprisonment. (2) The court declares the law to be that the defendant is presumed to be innocent until proved guilty beyond a reasonable doubt; but a doubt, to authorize an acquittal, must be a substantial doubt of defendant's guilt, and not a mere possibility of his innocence." In submitting the instructions the court submitted a blank form for a verdict of guilty. At the request of the defendant the court instructed the jury as follows: "(5) The information in this cause charges the defendant with unlawfully practising medicine by prescribing for, issuing medicine to, and treating one Arthur Hoover for the cure of a disease and bodily affliction, and that the same was done in the county of Scotland and the state of Missouri; and, unless you so find and believe from the evidence beyond a reasonable doubt, you should acquit the defendant. (6) If your verdict be for the defendant, it may be in the following form: 'We, the jury, find the defendant not guilty. ———, Foreman.'" Defendant requested the court to instruct the jury as follows: "(1) If you believe from all the evidence in the case that the defendant merely examined a patient in the state of Missouri, and afterwards, on the application of the patient, sent him medicine from the state of Illinois when he so ordered and desired it, this is not practising medicine in the state of Missouri in the meaning of the law, and you should find the defendant not guilty. (2) The law is intended to punish only those who prescribe and administer medicine as a profession, within the state of Missouri. It does not apply to physicians who live in another state and, upon application of patients, send medicine into the state of Missouri to be taken by said person, and before you would be authorized to find the defendant guilty you must believe beyond a reasonable doubt that he followed the profession of a physician in the state of Missouri by prescribing medicine within the state as a calling. (3) If you believe from the evidence that the medicine prescribed by the defendant was compounded and prepared by him in the state of Illinois upon the application of patients in Missouri, and was so taken by the patient after the same was sent to Missouri, and that the defendant was a resident of the state of Illinois, then this fact would not make the defendant practising medicine within the state of Missouri, and you should find him not guilty. (4) Before you can find the defendant guilty you must find and believe from the evidence beyond a reasonable doubt that the defendant has practised medicine by treating the sick or those afflicted with bodily infirmities, by prescribing and issuing medicine within this state as charged in the information and without a license so to do; and you must find from the evidence beyond a reasonable doubt that each and all of said facts occurred in this state,—that is, you must find beyond a reasonable doubt that all of the acts usual for physicians of prescribing for, issuing medicine to, and treating the sick took place within the state. If you find that the medicine taken by the patient, young Hoover, was prescribed, compounded, issued, or prepared in another state, and, upon the application of the patient, was sent to this state, and was so taken by the patient after the same was sent to Missouri, then this fact would not make the defendant a practising physician within the meaning of the laws of Missouri, and you should find the defendant not guilty." These instructions were by the court refused. The cause being submitted to the jury upon the evidence and instructions of the court, a verdict was returned by the jury finding the defendant guilty as charged, and assessing his punishment at a fine of $50. Motions for new trial and in arrest of judgment were filed and by the court overruled. Judgment was rendered in accordance with the verdict, and from this judgment defendant prosecutes this appeal, and the cause is now here for our consideration.

Messrs. **Smoot, Boyd, & Smoot**, for appellant:

The statute has recognized the practice of medicine as a vested right, and it is violative of § 15 of article 2 of our state Constitution to pass an act devesting vested rights.

State ex rel. Atty. Gen. v. Miller, 66 Mo. 328; McManning v. Farrar, 46 Mo. 376.

A statute may provide for the future. It may regulate the practice of medicine for those who enter the profession in the future; but the statute must be applied prospectively.

State ex rel. Haeussler v. Greer, 78 Mo. 188; State v. Grant, 79 Mo. 113, 49 Am. Rep. 218; Leete v. State Bank, 115 Mo. 184, 21 S. W. 788; Reed v. Swan, 133 Mo. 100, 34 S. W. 483.

Messrs. **Herbert S. Hadley**, Attorney General, and **N. T. Gentry**, for respondent:

The holding of oneself out as a physician on one occasion, the examination of one patient, or the issuance of one prescription, without complying with the requirements of law, is a violation of the act.

State v. Buswell, 40 Neb. 170, 24 L.R.A. 68, 58 N. W. 728; State v. Vandersluis, 42 Minn. 129, 6 L.R.A. 119, 43 N. W. 789; State v. Van Doran, 109 N. C. 871, 14 S. E. 32.

One does not acquire a vested right to practise medicine by practising in Missouri, and then moving to another state.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Myer Vested Rights, § 952; People v. Phippin, 70 Mich. 6, 37 N. W. 888; Allopathic State Medical Examiners v. Fowler, 50 La. Ann. 1373, 24 So. 809; People v. Fulda, 52 Hun, 67, 4 N. Y. Supp. 945.

Fox, J., delivered the opinion of the court:

The record discloses numerous assignments of error as grounds for the reversal of this judgment.

1. It is insisted by appellant that the justice of the peace lost jurisdiction of this cause and erroneously rendered judgment against the defendant for the reason that said justice had no authority to take the case under advisement from the 4th day of April, 1905, being the day upon which the case was tried and submitted, until the next day, the 5th day of April, 1905; hence the circuit court erred in overruling appellant's motion to discharge him on that ground. We are unable to give our assent to this contention, and we are of the opinion, from an examination of the statute in respect to trials in criminal cases before justices of the peace, that it is without merit. Section 2769, Rev. Stat. 1899, substantially provides that, upon the defendant entering his plea of not guilty, he or the prosecuting witness or prosecuting attorney may demand a jury, but, if no jury be demanded, the case may be tried by the justice. There is no statute applicable to trials before justices of the peace in criminal cases, which undertakes to designate, if the case is tried by the justice, or even tried by a jury, the precise date of the rendition of the judgment or verdict in the cause. It is apparent, if the cause is tried by a jury and submitted to them, that they have the right to deliberate upon it, and there is no time fixed as to how long they may consider the cause as submittted before returning a verdict; and we take it that where a cause is submitted to a jury on one day, and they, in their jury room, consider and discuss the evidence until the next day before returning a verdict, that would not in any way affect the validity of a judgment rendered upon such a verdict. We see no reason why a justice of the peace to whom a cause is submitted may not have a similar right to take the cause under advisement for a reasonable time and then render his verdict and judgment in the cause. The statute by none of its provisions prohibits such a course. The lawmaking power did not even deem it essential to designate, in the trial of criminal cases before justices of the peace, as it has done in civil cases, the precise number of days in which a case shall be decided; therefore we think it is manifest that no such limitations upon the justice in considering a criminal case, which has been tried before him, as is contended for by appellant, was contemplated by the statute regulating trials in criminal causes before justices of the peace. It has been ruled by some of the appellate courts of this state that, if the judgment in a civil case was not rendered within three days, as designated by the statute, it is valid, notwithstanding such statute was not complied with. Herwick v. Koken Barber Supply Co. 61 Mo. App. 454; Pohle v. Dickmann, 67 Mo. App. 381.

2. Appellant treats the form of the verdict in the event the jury find the defendant guilty, which was submitted to the jury among the instructions, as an instruction given by the court to find the defendant guilty. It is insisted that this was error and calculated to confuse and mislead the jury. We confess that it would have been much more appropriate for the court to have prefaced the submission of that form of the verdict with a direction to the jury to use it if they found the defendant guilty; however, we are convinced that the form of the verdict submitted to the jury in the manner that it was did not in any way mislead the jury. It will be noted that the court also submitted a form of the verdict at the request of the defendant, with a direction that if they found the defendant not guilty they would use such form. In addition to this, the court instructed the jury that the defendant was presumed to be innocent, and his guilt must be established beyond a reasonable doubt. The jury were

also told in the instructions that the information charged defendant with practising medicine, treating one Arthur Hoover, and so treating him in Scotland county, and that, unless the jury so found and believed beyond a reasonable doubt, they should acquit the defendant. Considering all the instructions, we are unable to conceive how the jury could have been misled into the belief that the form of the verdict for the state, submitted to them, was a direction by the court to find the defendant guilty.

3. It is insisted by appellant that, under the proof as developed at the trial in this cause, defendant was not practising medicine in this state as contemplated by the statute. The law governing the subject of the practice of medicine and surgery in this state, upon which this prosecution was predicated, will be found in Sess. Acts 1901, pp. 207, 208. Section 1 of that act provides: "It shall be unlawful for any person not now a registered physician within the meaning of the law to practise medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery in the state of Missouri, except as hereinafter provided." Section 4 of that act provides for the recording of the license to practise medicine obtained from the board of health, embracing in the section a provision that for any neglect to record the license in the manner and within the time provided by the statute, the party guilty of such neglect shall be guilty of a misdemeanor. Section 5, which is specially applicable to the charge upon which the defendant was convicted, provides that "any person, except physicians now registered, practising medicine or surgery in this state, and any person attempting to treat the sick or others afflicted with bodily or mental infirmities, without first obtaining a license from the state board of health, as provided in this act, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than $50, nor more than $500, or by imprisonment in the county jail for a period of not less than thirty days, nor more than one year, or by both such fine and imprisonment, for each and every offense, and treating each patient shall be regarded as a separate offense." The evidence in this cause is practically undisputed. The defendant had a room at the hotel in Memphis, Scotland county, Missouri, professed to be a physician, and held himself out as such. Arthur Hoover applied to him at the hotel in Scotland county, Missouri, as a physician for treatment. He diagnosed his case in the usual and ordinary way of practising physicians, and prescribed remedies. His prescription for medicine, however, was in the form of a blank, which was required to be sent to the state of Illinois, and then the defendant would send the bottles of medicine to Hoover by express from Warsaw, Illinois. Hoover took the medicine according to defendant's directions and according to the directions on the bottle. He paid the defendant at the rate of $5 per month for such treatment. The payments were made to defendant, and defendant would come to the hotel for the purpose of seeing his patient, Hoover, the first Monday in every month. This, in our opinion, was clearly practising medicine in this state as contemplated by the statute. The mere fact that the medicine was sent from Illinois did not in any way alter the construction placed upon his acts, that he was a practising physician in this state. The practice of medicine, as contemplated by the provisions of the statute covering that subject, may consist only of the examination of a patient, diagnosing the cause of the trouble complained of, or, by one professing to be a physician, seeing the patient at stated intervals and the indication and prescribing of remedies to be applied, and the acceptance of pay for such services. The mere fact that the remedies indicated and prescribed are sent from another state does not negative the idea that the defendant was practising medicine, or attempting to practise medicine, in this state. It would not be an uncommon occurrence for a regular practising physician of this state to examine his patients, diagnose the cause of their illness, and then say to them, "The remedies I indicate and prescribe you must obtain from the state of New York." This is not a case where the physician does not come to the state and undertake to secure patients, but simply furnishes blanks, which are sent to him in another state and he sends the medicine in accordance with the requests; but here we have a person coming to this state, holding himself out as a physician, has patients visit him, examines them, advises them as to the nature and cause of their trouble, indicates the remedies to be applied, and accepts pay for such services. The bare statement of the two classes of cases makes manifest the distinction between them. The proof in this cause was amply sufficient to show that the defendant was undertaking to practise his profession in Scotland county, Missouri; and, it being conceded that he was not a regularly registered physician in this state, and had no license from the state board of health to practise medicine, the testimony fully warranted the conclusion reached by the jury in their verdict.

4. The instructions of the court given to

the jury for the state and the defendant fully covered every feature of this case to which the testimony was applicable; hence there was no error in refusing the instructions requested by the defendant.

5. This leads us to the final contention of the appellant, that the statute upon which this prosecution is predicated is unconstitutional and void. This contention is predicated upon the claim that this defendant, commencing in 1857, practised medicine in this state for a number of years, and finally moved to the state of Illinois, and was engaged there in the practice of his profession. It is insisted by having once practised medicine in this state he thus secured a vested right to practise in this commonwealth whenever he saw proper. We cannot give our assent to this contention. It is but common knowledge that the people who have ill health, or whose families are troubled with disease, are more easily and can be more readily imposed upon by persons who represent themselves as physicians, claiming that they can give them permanent relief, than any other class; and it may be added that intelligence is no protection from impositions along that line; for, when a man is sick or his family ill, whether he be intelligent or ignorant, they readily give an attentive ear to any sort of a doctor who claims that he can give them relief, and are at all times ready to purchase and swallow all sorts of nostrums because they are recommended by someone who claims to be a physician. The prime object of this law upon the subject of the practice of medicine is the protection of the people from the impositions herein indicated by persons who are not sufficiently skilled in the profession to authorize them to properly administer medicine, and therefore relieve the afflicted. The evidence in this cause nowhere discloses that the defendant was a registered physician under any prior existing statute; in fact, defendant, while on the stand, does not disclose that he was practising his profession in this state in 1857 and subsequent to that time in accordance with the then existing laws governing the practice of medicine; therefore we are unable to conceive how it can be held that he had secured, by virtue of his practice in this state, a vested right; and there is no reason why he should not comply with the law now in force in this state if he desires to practise his profession here and reap the rewards of such practice. It was expressly ruled in People v. Fulda, by the supreme court of New York, 52 Hun, 65, 4 N. Y. Supp. 945, that the fact that, before the enactment of a statute which compelled the taking out of a license, the defendant in that case had been practising medicine, did not prevent the application of the statute to him, which requires as a condition the taking out of a license in order to justify his practice. The court, in that case, in discussing the statute which imposed the condition of taking out a license to practise medicine, used this language: "This was part of the police regulations of the state. It was thought necessary for the protection of the people that these safeguards should be thrown around them in reference to those who assumed to practise medicine in the community. The state has a right to determine upon what conditions and under what circumstances its citizens should be entitled to pursue any vocation. It is in no way interfering with any vested rights, nor is it usurpation of authority which is not possessed." In Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231, the same contention was made by the defendant in that case as is made in the case at bar,—that is, that he had been practising medicine within the state six years before the enactment of the law, and that the statute which undertook to impose certain conditions in order to authorize him to practise his profession deprived him of the vested right, and was a deprivation of property without due process of law. The statute was held valid, and, in discussing it, the court thus stated the law: It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition; and that the right to continue the prosecution of any lawful vocation cannot be arbitrarily taken away any more than real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure, or tend to secure, them against the consequences of ignorance and incapacity, as well as of deception and fraud; and it is only when the qualifications required for the pursuit of any calling or profession have no relation to such calling or profession, or are unattainable by reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

The principles in support of the lawmaking power to enact laws imposing conditions upon those who engage in the practice of medicine are very clearly stated by the supreme court of Louisiana in Allopathic State Medical Examiners v. Fowler (1898)

50 La. Ann., loc. cit. 1373, 24 So. 809. It was said by that court that "whenever the pursuit of any particular occupation or profession requires, for the protection of the lives or health of the general public, skill, integrity, knowledge, or other personal attributes or characteristics in the person pursuing it, the general assembly has the power and the authority to have recourse to proper measures to insure that none but persons possessing these qualifications should pursue the calling. We find this right constantly put in force by the general as well as the state governments." It is apparent that the general assembly of Missouri, in the enactment of the provisions of law regulating the practice of medicine and surgery in this state, intended to fix a standard as to fitness, skill, and qualification which would authorize the practice of that profession. This law does not undertake to deprive any person of a vested right, for there can be no such thing as a vested right in the practice of medicine. It does not undertake to suppress or prohibit the practice of medicine or surgery, nor to prohibit any particular person from practising as a physician or surgeon; but it simply undertakes to require the necessary and essential qualifications for that purpose. The correctness of the conclusions as herein indicated are fully supported by the well-considered cases of this country. Dent v. West Virginia, *supra;* Myer, Vested Rights, § 952; People v. Phippin, 70 Mich. 6, 37 N. W. 888; Allopathic State Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 So. 809; People v. Fulda. 52 Hun, 67, 4 N. Y. Supp. 945. We see no necessity for pursuing this subject further. It is clearly manifest that the defendant had no vested right to practise medicine in this state by virtue of his former practice here in 1857. Upon returning to this state to practise his profession, his qualifications, fitness, and skill to do so must be judged by the law in force at the time he so returns, and before he will be authorized to engage in the practice of his profession and reap the rewards from such practice, there is no reason why he should not comply with the conditions imposed upon him by the law in force at the time he so undertakes to engage in the practice.

We have indicated our views upon the assignments of error as disclosed by the record before us. Nothing remains except to announce the conclusion, and that is that there was no reversible error in the trial of this cause. The statute upon which the prosecution rests is constitutional, and the judgment should be affirmed, and it is so ordered.

All concur.

4 L.R.A.(N.S.)

OKLAHOMA SUPREME COURT.

JAMES DOUGHTY, Receiver, etc., of Union Trust Company of Sioux City, Plff. in Err.,

v.

JACOB P. FUNK.

(— Okla. —, 84 Pac. 484.)

Limitation of actions—cause arising out of state.

Under the provisions of § 3894, Stat. 1893, which provides: "Where the cause of action has arisen in another state or country, between nonresidents of this territory, and, by the laws of the state or country where the cause of action arose, an action cannot be maintained thereon by reason of lapse of time, no action maintained thereon in this territory,"—a cause of action upon a contract made in the state of Kansas, which has been barred by the statutes of Nebraska, while the defendant resided there, is not barred in this territory, when the same is not barred by the laws of the state of Kansas or of this territory.

(September 6, 1905.)

Headnote by GILLETTE, J.

Case Note.—Construction and effect of statute of forum admitting bar of statute of state or country in which cause of action arises or accrues.—The case of Hyman v. McVeigh (Ill.) 10 Chicago Legal News, 157, cited in the foregoing opinion, was followed in Strong v. Lewis, 204 Ill. 35, 68 N. E. 556, holding that by virtue of such statute the bar of the New York statute of limitations was available in an action upon a note made in West Virginia and payable in Virginia, where the maker, after maturity, became a resident of New York, and resided there for the period prescribed by the statute of that state; it appearing that neither the defendant, nor the party in whose favor the action arose, was a resident of Illinois at the time of the maturity of the note.

The decision in Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162, cited in DOUGHTY v. FUNK, was followed in Drake v. Bigelow, 93 Minn. 112, 100 N. W. 664, holding that the provision of the Minnesota statute operated to bar an action in that state upon a note payable in that state but executed in New York by a resident thereof, who, before the maturity of the note, moved to New South Wales, where he resided until the note was outlawed by the laws of that country.

The same phrase in the Nevada statute was given the same construction by Lewis v. Hyams, 26 Nev. 68, 99 Am. St. Rep. 677, 63 Pac. 126 (rehearing denied. 64 Pac. 817), holding that, where a note was executed in California by a firm, one of the partners of which was at all times a resident of that state and the other being at all times a resident of New York, the bar of the New York statute was available to the New York maker in an action against him upon the note in Nevada.

In Drake v. Found Treasure Min. Co. 53

ERROR to the District Court for Kingfisher County to review a judgment in favor of defendant in an action brought to enforce payment of a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. Noffsinger & Hinch, for plaintiff in error:

The right to sue on this note is not barred anywhere except in the state of Nebraska.

Steele v. Rutherford, 70 N. C. 137; Chevrier v. Robert, 6 Mont. 319, 12 Pac. 702; Horton v. Horner, 16 Ohio, 145; Alderton v. Archer, L. R. 14 Q. B. Div. 1; Adams v. Kelley, 2 Wash. Terr. 264, 5 Pac. 601; Northwestern Mut. L. Ins. Co. v. Lowery, 14 Ky. L. Rep. 600, 20 S. W. 607; Bradley v. Cole, 67 Iowa, 650, 25 N. W. 849; Goodnow v. Stryker, 62 Iowa, 221, 14 N. W. 345, 17 N. W. 506; Wurtele v. Lenghan, 1 Quebec, L. R. 61; Jackson v. Coxworthy, 12 Lower Can. Rep. 416.

We must look to the laws of this state to determine whether the action was barred.

Hoggett v. Emerson, 8 Kan. 262; Titus v. Hobart, 5 Mason, 378, Fed. Cas. No. 14,063; Steele v. Rutherford, and Chevrier v. Robert, *supra;* Adams v. Kelley, 2 Wash. Terr. 263, 5 Pac. 601; McCann v. Randall, 147 Mass. 81, 9 Am. St. Rep. 666, 17 N. E. 75.

An action can be maintained in one state, on notes executed in another in which both parties then resided, where the defendant removed from the state before the cause of action was barred by the local statute.

Kempe v. Bader, 86 Tenn. 189, 6 S. W.

Fed. 474, however, the court, without referring to the residence of the defendant, held that the bar of the California statute, where the note in suit was made, was not available under the Nevada statute, upon the ground that the note was made payable in the latter state, and that the cause of action therefore arose in that state.

So, in Robinson v. Moore, 76 Miss. 89, 23 So. 631, *infra*, the court said, *obiter*, that there was much force in the contention that, for the purposes of the Mississippi statute which admits the bar of the statute of another state in which a cause of action has accrued and in which the defendant resided before residing in Mississippi, the cause of action on a note executed in Tennessee, by a resident of that state, accrued in Mississippi because payable therein.

In Janeway v. Burton, 201 Ill. 78, 66 N. E. 337, it was held that the bar of the statute of New Jersey, where the defendants resided, was not available, under the Illinois statute already referred to, in an action of trespass in the latter state to recover goods which defendants seized under a writ of replevin in an Illinois action, and failed to return pursuant to a judgment in the replevin action awarding a return. The court, in sustaining the demurrer to the defendants' pleading setting up the New Jersey statute, said that the bar of a foreign statute, even when pleaded in proper form, is available only when the cause of action accrued in the former state. The implication that the cause of action did not arise in New Jersey may seem somewhat at variance with the construction placed upon the phrase, employed in the Illinois statute, "when a cause of action has arisen," by the Illinois cases already referred to. This case, however, is perhaps distinguishable by reason of the fact that the cause of action grew immediately out of the act of defendants in taking the property, or, at least, in failing to return it pursuant to the judgment; and also perhaps by the fact, which appears in the case, that there was an agent of the defendants within the state, who had money belonging to them in his possession which could be reached by garnishment, thus enabling the Illinois court to acquire jurisdiction.

It will be observed that the provision of the Mississippi statute admitting the bar of the statute of the state in which the cause of action arose is qualified by the condition that the defendant must have resided in that state before he resided in Mississippi. The decision in Robinson v. Moore, *supra*, defeating the bar of the foreign statute, was upon the ground that the defendant had never lived in Mississippi. Upon the other hand, the decision in Louisville & N. R. Co. v. Pool, 72 Miss. 487, 16 So. 753, defeating the bar of the statute of Alabama in an action in Mississippi against a railroad corporation for the killing of cattle in Alabama, was upon the ground that the defendant's plea merely averred that the defendant was a resident of Alabama, which was not necessarily inconsistent with its having had a residence in Mississippi during the period pleaded by it as a bar, since a foreign corporation doing business in the state is suable as a resident.

The Kentucky statute admits the bar of the statute of another state in which a cause of action arises between residents thereof, or between them and the residents of another state. It has been held that this provision does not apply to a cause of action arising in another state between a resident of that state and a resident of Kentucky. Labatt v. Smith, 83 Ky. 599, overruling a contrary intimation in Allen v. Hill, 78 Ky. 119.

So in Croan v. Baden (Kan.) 85 Pac. 532, the residence of plaintiff in Kansas was held to defeat the plea of the statute of another state in which the cause of action arose, under a statute of the forum substantially like that involved in DOUGHTY v. FUNK.

But in McCain v. Gibbons, 7 Wash. 314, 35 Pac. 64, under a similar statute of Washington, it was held that the bar of the statute of another state, in which a married woman's property was converted, was available in an action by her in Washington, where, for the purposes of settling her affairs, she remained in the other state during the period prescribed by the statute of that state,

126; Chevrier v. Robert, *supra*; Crooker v. Pearson, 41 Kan. 410, 21 Pac. 270; McCann v. Randall, and Hoggett v. Emerson, *supra;* Stewart v. Spaulding, 72 Cal. 264, 13 Pac. 661; Minniece v. Jeter, 65 Ala. 222; Wright v. Strauss, 73 Ala. 227; State use of Shipley v. Shipley, 7 Ohio, 246; Smith v. Crosby, 2 Tex. 414; Bryan v. Bouton, 10 Tex. 62; Olcott v. Tioga R. Co. 20 N. Y. 226, 75 Am. Dec. 393; Adams v. Kelley, *supra;* John Shillito Co. v. Richardson, 102 Ky. 51, 42 S. W. 847; Templeton v. Sharp, 10 Ky. L. Rep. 499, 9 S. W. 507, 696; Urton v. Hunter, 2 W. Va. 83; Bonnifield v. Price, 1 Wyo. 223; Horton v. Horner, and Northwestern Mut. L. Ins. Co. v. Lowery, *supra*.

Messrs. **M. J. Kane** and **Charles West**, for defendant in error:

The natural and grammatical import of the language is the action shall be barred in our courts, if it is barred by the laws of another state, when the action is brought in this state.

Hyman v. Bayne, 83 Ill. 256; Hyman v. McVeigh (Ill.) 10 Chicago Legal News, 157; Humphrey v. Cole, 14 Ill. App. 56; Great Western Teleg. Co. v. Stubbs, 55 Ill. App. 210; Osgood v. Artt, 11 Biss. 160, 10 Fed. 365; Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162.

On petition for rehearing.

Section 3894, Okla. Stat. 1893, had become settled by judicial determination prior to its adoption by the territory of Oklahoma.

Hyman v. Bayne, 83 Ill. 256; Hyman v. McVeigh (Ill.) 10 Chicago Legal News, 157;

although her husband had in the meantime removed from that state and become a resident of Washington.

It has been held under the Illinois statute that the bar of the statute of another state, to which the defendant removed from Illinois after the limitation prescribed by the Illinois statute had commenced to run, is not available, in view of the other provision of the Illinois statute, that if, after a cause of action accrues, the debtor departs from and resides out of the state, the time of his absence is no part of the time limited for commencing the act. Wooley v. Yarnell, 142 Ill. 442, 32 N. E. 891; Story v. Thompson, 36 Ill. App. 3; 0; Parks v. Cadwallader, 53 Ill. App. 236.

Humphrey v. Cole, 14 Ill. App. 56, *contra*, has been overruled on this point; and Osgood v. Artt, 11 Biss. 160, 10 Fed. 365, *contra*, is opposed to the foregoing decisions of the state court upon the effect of the statute as applied to a case where the defendant removed from Illinois after the statute had commenced to run.

But it was held in Lloyd v. Perry, 32 Iowa, 144, under the Iowa statute, which admits the bar of the statute of any state or country where the defendant previously resided, unless the cause of action arose in Iowa, that the bar of the statute of another state in which the defendant had resided for the statutory period was available in Iowa, notwithstanding that the defendant, after contracting the debt, came to Iowa from another state, and resided there until after the maturity of the debt, and then removed to the state whose statute is relied upon, remaining there for the statutory period and subsequently removing again to Iowa.

In Allen v. Allen (Cal.) 27 Pac. 30, the court, having held that an action to recover a loan made in New York between residents of that state and secured by a mortgage on land in California was barred by the law of New York, and therefore by the provision of § 361 of California Code of Civil Procedure, which is substantially like the provision involved in DOUGHTY v. FUNK, applied the rule of law in California, which prevents an action to foreclose a mortgage or to redeem from a mortgage when the debt which the mortgage was given to secure is outlawed.

In Gillett v. Hill, 32 Iowa, 220, however, an answer in an action to foreclose a mortgage on land in Iowa given to secure a promissory note, which averred that a right of action on the note was barred by the laws of the other state where the defendant previously resided, was held demurrable, because it did not aver that, by the laws of such state, an action to foreclose the mortgage was also barred, even conceding for the purposes of the point that it is the rule in Iowa that, when the right of action upon a note is barred, the remedy upon the mortgage given to secure the same is also barred.

It is, of course, apparent that, under a statute of the forum like that under discussion, the plea of the statute of the state in which the cause of action arose is unavailing if, by reason of the absence or removal of the defendant from that state, or for any other reason, the bar of that statute is incomplete. Templeton v. Sharp, 10 Ky. L. Rep. 499, 9 S. W. 507, 696; John Shillito Co. v. Richardson, 102 Ky. 51, 42 S. W. 847; Northwestern Mut. L. Ins. Co. v. Lowery, 14 Ky. L. Rep. 600, 20 S. W. 607; Martin v. Wilson, 58 C. C. A. 181, 120 Fed. 202; Bonnifield v. Price, 1 Wyo. 223; Kempe v. Bader, 86 Tenn. 189, 6 S. W. 126.

So, in Wojtylak v. Kansas & T. Coal Co. 188 Mo. 260, 87 S. W. 506, the fact that defendant in an action in Missouri for a tort occurring in Kansas was a Missouri corporation, and therefore, according to the Kansas decisions, "out of the state" within the meaning of the Kansas statute of limitations, was held to defeat the plea of the bar of the Kansas statute, interposed under the Missouri statute declaring that an action shall be barred only when it would be barred by the laws of the state in which it originated.

This form of statute of the forum sometimes operates indirectly to make the bar of a statute of a third state available, where it would be available by the law of the state in which the cause of action arose if the action had been brought there.

Thus, in Holmes v. Hengen, 41 Misc. 521,

Wooley v. Yarnell, 142 Ill. 442, 32 N. E. 891; O'Donnell v. Lewis, 104 Ill. App. 198; Strong v. Lewis, 204 Ill. 35, 68 N. E. 556.

The Oklahoma legislature having adopted this statute with this settled construction, this construction goes with it.

Barnes v. Lynch, 9 Okla. 11, 59 Pac. 995; Stutsman County v. Wallace, 142 U. S. 293, 35 L. ed. 1019, 12 Sup. Ct. Rep. 227.

The construction placed upon the statute by the court is against the overwhelming weight of authority.

Luce v. Clarke, 49 Minn. 356, 51 N. W. 1062; Drake v. Bigelow, 93 Minn. 112, 100 N. W. 664; Patterson v. Patterson, 59 N. Y. 574, 17 Am. Rep. 384; Holmes v. Hengen, 41 Misc. 521, 85 N. Y. Supp. 35; Lewis v. Hyams, 26 Nev. 68, 99 Am. St. Rep. 677, 63 Pac. 126, 64 Pac. 817; Osgood v. Artt, 11 Biss. 160, 10 Fed. 365; Martin v. Wilson. 58 C. C. A. 181, 120 Fed. 202.

Gillette, J., delivered the opinion of the court:

The only question presented for determination in this case is dependent for its determination upon the construction to be given to the limitation laws of this territory.

The action is brought to recover upon a promissory note, dated at Peabody, Kansas, June 1, 1886, payable to Shupe Tresler & Larke, at Philadelphia, Pennsylvania, five years after date. Before the maturity of the note the defendant, maker of the note, removed from Kansas to the state of Nebraska, where he resided when the note matured and until the statute of limitations of that state had barred a recovery on the instrument sued on. The defendant, thereafter removing to the territory of Oklahoma, was sued in the district court of Kingfisher county by plaintiff, as receiver of the Union Trust Company of Philadelphia, Pennsylvania, praying judgment upon and for the amount of said note. One of the defenses in said action stated by defendant set forth the bar of the statute of limitations of the state of Nebraska. This defense was demurred to by the plaintiff, and the demurrer was, by the court, overruled. The plaintiff, standing upon this demurrer, brings the case to this court.

A determination of the question here presented is dependent upon the construction to be given to § 4220 of Wilson's Revised Annotated Statutes of 1903 of this territory, which reads: "Where the cause of action has arisen in another state or country, between nonresidents of this territory, and, by the laws of the state or country where the cause of action arose, an action cannot be maintained thereon by reason of lapse of time, no action maintained thereon in this territory." The question as to whether the language of the foregoing statute in sufficient to bar an action here when the same has been barred by the limitation laws of any other state or country, or is operative only when the action is barred by the statute of the state where the contract was made, executed, and delivered, has been before the courts and determined under statutes of like import with results impossible to harmonize. The case of Osgood v. Artt, 11 Biss. 160, 10 Fed. 365, construing the Illinois statute, which reads: "When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof an action cannot be maintained by reason of a lapse of time, an action thereon shall not be maintained in this state,"—is a leading case upon the

85 N. Y. Supp. 35, under the provision of the Code of Civil Procedure which admits the bar of the statute of the state or country where the cause of action arises, except where the cause of action originally accrued in favor of a resident of the state,—it appearing that the defendant, at the time the cause of action accrued, was a resident of Nebraska, but subsequently became a resident of Texas and remained there for the full period of limitation prescribed by the laws of that state, it was held that the action was barred in New York, in view of the fact that, under the Nebraska statute as construed by the courts of that state, the action under such circumstances would be barred in Nebraska.

But, under a similar statute of Montana, it was held, in Chevrier v. Robert, 6 Mont. 319, 12 Pac. 702, that, where a judgment was rendered in Canada, and the judgment debtor removed to Nevada, where he remained until the judgment was barred by the statute of that state, such bar was not available in Montana.

The time when an action is deemed to have been commenced for the purposes of such a statute of the forum is to be determined by the law of the forum, not by the law of the other state,—the statute of the state where the cause of action arose. Thus, in Collins v. Manville, 170 Ill. 614, 48 N. E. 914, it was held that an action might be maintained in Illinois on a note executed in New York by a citizen of that state if the action was commenced, within the meaning of the Illinois statute, before the cause of action was barred in New York, although, from delay in serving the summons, the action was not commenced, according to the laws of New York, until after the bar was established.

It will be observed that this note is confined to a single one of the various forms of statutory modifications of the general principle of private internal law, that the limitation of actions is governed by the law of the forum. This and other forms are treated exhaustively in a note in 48 L.R.A. 639.

subject, and holds, Blodgett, D. J., writing the opinion, as follows: "The evident intention of the legislature of this state was to say that the removal of debtors into this state should not revive causes of action which had become barred by the laws of other states where they had resided and been subject to suit; that the debtor brought with him the defense he had obtained by his residence elsewhere; and if a debtor leaves this state and takes up his residence elsewhere, and remains there unmolested by suit until suit is barred, it is also barred here."

This conclusion, which holds that an action upon a promissory note, executed in Illinois, which is barred by the statute of any state in which the debtor may have resided, is barred in Illinois, was cited and approved by the supreme court of Minnesota in Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162, where it is held that a cause of action which did not arise in that state, or accrue to a citizen of that state, has come under the operation of the limitation laws of another state, and has been there barred, it is barred in Minnesota. The distinction between these two cases, Osgood v. Artt and Luce v. Clarke, will be observed. In the first the debt was contracted in Illinois, the debtor removed to Missouri and there remained until the debt was barred by the laws of that state, and it was held that the debt was barred in Illinois and elsewhere. In the last case the debt was contracted out of the state of Minnesota, and had become barred by the statute of another state from that in which the debt was contracted. It was held that such a bar was a bar to the prosecution of the action in Minnesota. Upon the subject of this last-cited case, and upon a state of facts identical with the facts there passed upon, the supreme court of Montana, in Chevrier v. Robert, 6 Mont. 319, 12 Pac. 702, holds that the action was not barred; the court stating, in construing a statute similar to our own and that of Minnesota in import: "We believe the legislature intended that the creditor should have the option to say when he would enforce his demand, and that the only statutes he need to regard are those of the forum where he brings his suit and of the place where the debt was contracted." There is a conflict in the authorities wherever this subject has been presented to the courts. We will notice one other. In Powers Mercantile Co. v. Blethen, 91 Minn. 339, 97 N. W. 1056, the court held that a debt contracted in Minnesota which is afterwards, by reason of the removal of the debtor to the state of Washington, barred by the statute of limitations of that state, is not barred in Minnesota because of the bar in the state of Washington. In this case the debtor removed from the state of Minnesota before the debt became due. The court there had under consideration the particular language of their statute. "When a cause of action has arisen in a state or territory out of this state," and, in determining what was meant by the use of such language, the court holds that the word "arisen," as there used, means "originating." This conclusion distinguishes that case from Osgood v. Artt, *supra*, which holds, following Hyman v. McVeigh (Ill.) 10 Chicago Legal News, 157, that the language, "when a cause of action has arisen," should be construed as meaning "when jurisdiction exists in the courts of a state to adjudicate between the parties, upon the particular cause of action if invoked." In Steele v. Rutherford, 70 N. C. 137, the court says: "We do not think that the failure to pay the debt was the cause of action spoken of in the statute, but that the debt itself was the cause of action, and that the expression 'where the cause of action arose' meant where the debt was contracted or originated." In sharp conflict with this last case is the case of Patterson v. Patterson, 59 N. Y. 574, 17 Am. Rep. 384, where that court discussing these same terms, says: "Nor is there room for difference as to what is meant by the phrases 'cause of action has accrued' or 'cause of action has arisen.' . . . They do not mean the contracting of the indebtedness, for a cause of action does not accrue or arise from the making of the contract of indebtedness alone, but out of the nonperformance of it as well."

It will be seen from the authorities here presented that the courts have not been uniform in determining the meaning of language such as is found in the Oklahoma statute of limitations. We must therefore determine for ourselves what construction is to be placed upon the language of our statute: "Where the cause of action has arisen in another state or country between nonresidents of this territory." Does such language mean the place where the debt was contracted, or the state or jurisdiction where a right of action has matured because of a default in complying with the terms of the contract? If the first, the cause of action sued on in this cause is not barred by the statute of Oklahoma, because it was not barred by the statute of Kansas. If the latter, the action cannot be maintained in this territory because of the fact that the defendant removed from the state of Kansas before the debt matured, and the same matured while he was a resident of the state of Nebraska, and, being barred there, is barred here. The words, "cause of action," as used in the statute in the phrase, "Where a cause of action has arisen in another state or country," is defined by Bouvier to mean:

"Matter for which an action may be brought." The same term, "cause of action," in the Cyclopedia is defined as follows: "The term 'cause of action' in law is generally understood as meaning the whole cause of action; that is, every fact which it is necessary to establish in order to support the right to judicial relief,"—citing Cooke v. Gill, L. R. 8 C. P. 107, where it is said: "'Cause of action' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed,—every fact which the defendant would have a right to traverse." If the cause of action is one founded upon contract, it is manifest that the defendant would have a right to traverse the question of the contract, express or implied, as well as the question as to whether or not there had been a default such as would authorize the bringing of a suit to recover thereon. "The cause of action" cannot, therefore, be said to have "arisen" upon contract without there is first shown a contract exists and that there is a default in its fulfilment. Each must exist, or no cause of action has arisen, and the first step—*i. e.*, the making of the contract—is the step out of which a cause of action arises. The word "arise," as defined by Roquet in his work on English Words and Phrases, is used in various senses, with the words "begin, mount, appear, happen, proceed from, exist." The word has therefore not the same significance as the word "accrued," which according to the same author signifies, "Result, add, acquired, received, benefit." The word "accrued," therefore, we think refers to the happening of something subsequent, while "arises" has a broader significance, which includes the beginning. We cannot, therefore, in determining the meaning of the phrase under consideration, hold that a cause of action has arisen only when the remedy and the right occur at the same time. But we do hold that a cause of action arises when the obligation was created which gave rise to a right of action as soon as such right accrued thereon. Following this definition of the word "arisen," or the words "has arisen," as the same are used in the limitation statute in this territory under consideration, and as the same affects the cause of action involved in this case, we must hold that such cause of action arose in the state of Kansas, and is not barred in this territory until the same has become barred in the state of Kansas, or until he resides in Oklahoma a sufficient length of time for the territorial statute to run against that cause of action.

In reaching this conclusion we think we are supported by the history of the limitation law of the territory. By the statute of the territory of Oklahoma, which took effect December 25, 1890 (chap. 70, art. 43, pp. 930, 931), it is provided:

"Sec. 6. The time which the defendant is a nonresident of the territory shall not be included in computing any of the periods of limitation above prescribed.

"Sec. 7. Where a cause of action has been fully barred by the laws of any country or state where the defendant has previously resided, such bar shall be a full and complete defense; but this section shall not apply to causes of action arising in this territory."

It will be observed that this § 7 leaves no ground for controversy as to its meaning, and by its provisions a cause of action is barred here which is barred in any other state of which the defendant has been a resident, unless the cause of action arose in this territory. Here the phrase "cause of action arising" has reference, undoubtedly, to a contract entered into in this territory, and limits the provisions of the statute to causes of action which had their origin out of the territory. If such statute were in force at this time, the contention of the defendant in error could easily be sustained under it; but the legislature of 1893 repealed such provision, and enacted in its stead the provision now under consideration, being § 3894, Stat. 1893, and, following the oft-repeated declaration of the courts that by the repeal of a statute and the enactment of one to take its place a change must have been intended, and not a mere continuation of the previous law (see 26 Am. & Eng. Enc. Law, p. 649), it must be held that a change was intended; but no change was in fact made if we give to the present statute the construction contended for by the defendant in error.

Again, we think that the construction we have given to the statute under consideration is justified by the language of § 3893, and in considering the two sections together. Section 3893 refers to causes of action which have their origin in this territory, and the language is: "If when a cause of action accrues against a person he be out of the territory," etc., the period of limitations shall not begin to run until he comes into the territory. The word "accrues" is here used to denote the time when an action may be brought; that is, when the contract has matured and there has been default. If the legislature intended by the enactment of § 3894 that its provisions should refer to the maturity of a cause of action, it would have used the same language as in § 3893, which was not done; but, instead, the language is "where a cause of action has arisen in another state or country." This must mean something more than is meant by "accrues" as used in § 3893, and means, we think, the

state or country where the contract was made. From the conclusion here reached it follows that the bar of the statutes of the state of Nebraska to a cause of action originating in the state of Kansas cannot be pleaded as a bar against the same cause of action in this territory.

The judgment of the District Court of Kingfisher County will be reversed, and the cause remanded for further procedure in that court.

All the Justices concur except **Irwin, J.**, who presided in the court below, not sitting.

Petition for rehearing overruled January 11, 1906.

MISSISSIPPI SUPREME COURT.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY v. LEE SHACKLEFORD TO USE OF MELTON HARDWARE COMPANY.

(87 Miss. 610, 40 So. 427.)

Carrier—baggage—sample cases.

1. A railroad company which checks sample cases as baggage, knowing their nature, assumes liability for their loss as though they were baggage.

Same—statutory double liability.

2. A statute imposing double liability upon a railroad company for baggage lost by its carelessness does not apply to sample cases transported as baggage.

(April 9, 1906.)

CROSS-APPEALS from a judgment of the Circuit Court for Lauderdale County in favor of plaintiff in an action brought to recover for the loss of sample cases while in defendant's possession for transportation; the defendant appealing from so much as held it liable; and plaintiff appealing from so much as refused to impose the statutory double liability. Affirmed.

The facts are stated in the opinion.

Messrs. **Fewell, Bozeman, & Fewell** for appellant.

Messrs. **Miller & Baskin**, for appellee:

Plaintiff's sample case was baggage.

Yazoo & M. Valley R. Co. v. Georgia Home Ins. Co. (Yazoo & M. Valley R. Co. v. Blackmar) 85 Miss. 13, 67 L.R.A. 646, 107 Am. St. Rep. 218, 37 So. 500; Zeigler Bros. v. Mobile & O. R. Co. (Miss.) 39 So. 811; Kansas City, Ft. S. & M. R. Co. v. McGahey, 63 Ark. 344, 36 L.R.A. 781, 58 Am. St. Rep. 111, 38 S. W. 659.

Whitfield, Ch. J., delivered the opinion of the court:

On the 22d day of April, 1905, **Lee** Shackleford, the appellee and cross-appellant herein, a drummer for the Melton Hardware Company, applied for and obtained from the agent of the appellant, the New Orleans & Northeastern Railroad Company, at Vossburg, Mississippi, a check for his sample case, having supplied himself with a 1000-mile ticket over said road, and, with his mileage ticket and a check for his sample case as baggage, he boarded the train of the said appellant to go from Vossburg to Pachuta. He arrived at Pachuta about 12 o'clock at night. Shackleford went after-

Case Note.—Liability of carrier for loss of drummer's baggage.—A contract to carry a passenger's ordinary baggage is implied in the agreement to carry the passenger himself; but this implication cannot be extended beyond ordinary baggage, or such things as the traveler usually carries with him for his personal convenience. Hawkins v. Hoffman, 6 Hill, 586, 41 Am. Dec. 767; Toledo & O. C. R. Co. v. Bowler & B. Co. 63 Ohio St. 274, 58 N. E. 813.

And if the carrier transports as baggage articles which do not come within the scope of the term ordinary baggage, such as salesmen's samples, and through ordinary negligence fails to deliver them, it cannot be held liable if it has no knowledge of the contents of the parcels checked. Gurney v. Grand Trunk R. Co. 37 N. Y. S. R. 155, 14 N. Y. Supp. 321, Affirmed in 138 N. Y. 638, 34 N. E. 512; Hawkins v. Hoffman, *supra*; Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711.

A common carrier is not bound, as a part of its contract for carriage of a passenger who is employed as a traveling salesman, to carry as his personal baggage a case of sample merchandise; and, where it receives and checks such case without knowledge of its contents, a part of which is afterwards stolen from its baggage room without negligence on the part of the company, the latter is not liable for the value of the articles. Southern Kansas R. Co. v. Clark, 52 Kan. 398, 34 Pac. 1054.

It is the duty of a passenger who checks parcels as baggage to act in good faith in dealing with the carrier, and to inform the carrier if the parcels checked contain articles besides ordinary baggage. Michigan C. R. Co. v. Carrow, 73 Ill. 348, 24 Am. Rep. 248; Humphreys v. Perry, *supra*.

A traveling salesman has no right to check samples of merchandise under the cover of personal baggage; and if he does so, and the baggage is lost through the ordinary negligence of the railroad company, neither the sales agent, nor the owner of the samples, can recover their value from the carrier. Stimson v. Connecticut River R. Co. 98 Mass. 83, 93 Am. Dec. 140.

Stimson v. Connecticut River R. Co. *supra* was relied on in Alling v. Boston & A. R. Co. 126 Mass. 121, 30 Am. Rep. 667, in which

wards in search of his baggage, which had been checked, and was met by the agent of the appellant railroad company at Pachuta and informed that his baggage had been destroyed or stolen, and was asked by the agent to give him the amount of the contents of the said baggage or sample case, which he accordingly did, and the agent forwarded said statement of the contents and value of said sample case to a superior officer of the railroad company. Not having been paid for the sample case and contents, he afterwards, to wit, on the 22d day of September, 1905, instituted his suit before a justice of the peace for double the value of his property, as shown by the record. Thereupon a trial was had before said justice of the peace, and the market value of said property so lost and destroyed was shown to be $78.09, and he obtained a judgment for $156.18; the same being double the value of said property as claimed under § 3569 of the Revised Code of 1892, together with all the costs expended in said cause.

From this judgment there was an appeal taken by the New Orleans & Northeastern Railroad Company to the circuit court, in which court a trial was had, in which it was shown by the testimony of the plaintiff: That he was a drummer and had traveled over the railroad for two years, and that it was customary for the railroad company to check drummers' samples. That in this particular case the agent of the railroad company knew that it was a sample case at the time he gave plaintiff the check for the same, and he offered his check and read it to the jury, and that he had said sample case checked as baggage from Vossburg to Pachuta. He also stated: That the sample case was unlike any other receptacle used in traveling; that is, unlike a suit case or valise. That it was heavy, and at the time that the agent gave him a check for it he spoke of the weight of it; and the agent's testimony shows that he knew it was many times heavier than a valise in which are carried personal effects. The sample case above

the court held that a traveling salesman who delivered to a railroad company a trunk containing samples of jewelry worth $10,000 for transportation as ordinary baggage, which was missent through a fraudulent change in the checks, and the contents stolen, cannot hold the railroad company liable in an action for the value of the trunk and contents.

A traveling salesman who delivers to a carrier a trunk containing jewelry worth $30,000, and checks it as baggage, without informing the carrier as to the character of the contents of the trunk, practises a fraud on the carrier which will bar a recovery for the loss of the trunk by the burning of the baggage car. Michigan C. R. Co. v. Carrow, *supra*.

A carrier of passengers is not liable for the loss, through ordinary negligence, of trunks containing sample jewelry checked as ordinary baggage, and received from a connecting road without the carrier's having any opportunity to ascertain the contents of the trunks. Toledo & O. C. R. Co. v. Bowler & B. Co. *supra*.

Nor is a carrier liable for the loss of valises or sample cases containing samples of stationery used by the salesman in his business, where the former had no notice of what the parcels contained, which the passenger checked as ordinary baggage. Rossier v. Wabash R. Co. 115 Mo. App. 515, 91 S. W. 1018.

A railroad company cannot be held liable for the loss of a drummer's sample cases containing jewelry, checked by a baggage man in violation of a regulation, known to the passenger, not to receive jewelry cases for transportation as ordinary baggage without the execution of a bond to release the company from liability in case of loss. Weber Co. v. Chicago, St. P. M. & O. R. Co. 113 Iowa, 188, 84 N. W. 1042.

If, however, the carrier had notice of the character of the goods, and still undertook to transport them as ordinary baggage, it would be responsible for their safe delivery, even though in fact they were not the baggage of a traveler. Rossier v. Wabash R. Co. *supra;* Stoneman v. Erie R. Co. 52 N. Y. 429.

If a baggage man receives articles for transportation as baggage knowing at the time that such articles are not properly baggage but drummer's samples, the railroad company will be liable therefor as a common carrier, and will be estopped, in an action for their loss, from denying that the same is not baggage. Texas & P. R. Co. v. Capps (Tex.) 16 Am. & Eng. R. Cas. 118.

A common carrier which, without extra compensation, undertakes to transport a passenger and a traveling case which it has notice contains, not baggage, but valuable goods and samples, is liable for the negligent loss of the goods. Saleeby v. Central R. Co. 99 App. Div. 163, 90 N. Y. Supp. 1042.

In Trimble v. New York C. & H. R. R. Co. 162 N. Y. 84, 48 L. R. A. 115, 56 N. E. 532, a common carrier was held liable on an independent agreement for the transportation of a sample trunk as freight, where it was checked without any representation as to its contents and without any release of liability, on payment of the charge for excess baggage, which was the same for sample trunks as for ordinary baggage, and the baggage man had constructive notice of what the parcel contained, although there was a rule of the company prohibiting the checking of sample trunks without a release of liability.

And in Talcott v. Wabash R. Co. 159 N. Y. 461, 54 N. E. 1, a commercial traveler procured a ticket, which he presented to the baggage man and informed him that the trunks which he desired to have checked

mentioned was never delivered to the appellee, nor was any account ever made of it except to report its loss or destruction. Plaintiff asked the court to instruct the jury that, if they found for the plaintiff, their verdict should be for double the fair market value of the property sued for, which instruction was, by the court, refused, and the jury were confined in the consideration of the damages suffered by plaintiff to the fair market value of said property. The jury found a verdict in behalf of plaintiff, and, in accordance with the instruction of the court, gave the plaintiff a verdict for the fair market value of the property sued for. Both the railroad company and the appellee, Shackleford, made motions for a new trial, and the second ground for a new trial in behalf of the appellee, Shackleford, was failure to award double damages. This motion was, by the court, overruled; the court's idea being that plaintiff was not entitled to recover in any event any more than the fair market value of the property sued for.

The testimony makes it plain that the agent knew that Shackleford was a drummer, and that this was a sample case, and not a trunk or valise for ordinary baggage. The agent testifies that he did not know the contents of the sample case, but the jury might very fairly have inferred from his knowledge of the sample case that it was filled with some heavy samples of some sort. It also appears that the railroad company has been in the habit of checking this sample case as baggage for some two years heretofore. This, therefore, is a case unlike Yazoo & M. Valley R. Co. v. Georgia Home Ins. Co. (Yazoo & M. Valley R. Co. v. Blackmar) 85 Miss. 7, 67 L.R.A. 646, 107 Am. St. Rep. 218, 37 So. 500, in which we said: "The railroad knew nothing of these memoranda being in the trunk, and it is not a case where the railroad company has consented to receive or accepted these memoranda as baggage knowingly or in accordance with

contained samples of underwear, and paid the latter $16 for excess of weight, and was given an excess baggage check. In an action for the negligent loss of the trunks by fire, the court allowed a recovery on the separate contract to transport the trunks.

A railroad company which, after weighing trunks and receiving extra charge for overweight, accepted them with notice that they contained drummer's samples of millinery goods, cannot escape liability for injury to the goods by water while in its possession, by showing that the articles carried were not in fact baggage. Ft. Worth & R. G. R. Co. v. I. B. Rosenthal Millinery Co. (Tex. Civ. App.) 29 S. W. 196.

The mere fact that the parcels checked were called sample cases is not conclusive that the carrier knew that they contained salesman's samples. Rossier v. Wabash R. Co. *supra*.

And the fact that a trunk of ordinary size and shape weighed about 135 pounds, and was bound on the outside with heavy iron braces, clamps, and hinges, is insufficient to show that the baggage agent knew that the trunk was a commercial traveler's sample case, when it was checked as ordinary baggage. Alling v. Boston & A. R. Co. 126 Mass. 121, 30 Am. Rep. 667.

The fact that a passenger is obliged to pay for the extra weight of a trunk is not notice to the carrier that the trunk contains drummer's samples, or something which cannot be classified as baggage. Illinois C. R. Co. v. Matthews, 114 Ky. 973, 60 L.R.A. 846, 102 Am. St. Rep. 316, 72 S. W. 302.

In Rider v. Wabash, St. L. & P. R. Co. 14 Mo. App. 529, the court said that the fact that a trunk was of the size and shape of sample trunks carried by traveling salesmen would not be conclusive that the carrier knew that it did not contain ordinary baggage.

But knowledge on the part of the carrier as to the contents of certain trunks checked as ordinary baggage may be inferred, where it appears that plaintiff, who was a traveling salesman, had for six years been making trips with his trunks over this railroad, four times a year, carrying samples of merchandise in cases which differed in style and shape from ordinary trunks, and a witness testified that the baggage man who checked the cases stated that the plaintiff was a dress man, and that he had ladies' dresses brought from Paris. Amory v. Wabash R. Co. 130 Mich. 404, 90 N. W. 22.

Notice that a trunk contains drummer's samples may be inferred from its size and external appearance, the fact that the railroad company was in the habit of checking such trunks, that the number taker in the baggage room designated it as a sample trunk, and the fact that the sales agent had been in the habit of leaving the station where the trunk was checked from six to eight times a year for twelve years. Trimble v. New York C. & H. R. R. Co. *supra*.

The rule against liability for loss of drummers' samples carried as ordinary baggage does not apply in the case of a catalogue prepared by a traveling salesman at his own expense, and which is his own individual property, and carried with him as an article of convenience and necessary for use in his business; and for its loss through the negligence of the carrier he may recover when lost with other articles contained in a valise. Staub v. Kendrick, 121 Ind. 226, 6 L.R.A. 619, 23 N. E. 79.

A steamship company is liable to a commercial traveler for the loss of a price book used by him in his daily business, on the ground that such an article is baggage within the rule of a carrier's liability. Gleason v. Goodrich Transp. Co. 32 Wis. 85, 14 Am. Rep. 716.

any usage or custom of the railroad." This case falls precisely within the principles announced in the very able opinion of Battle, J., in Kansas City, Ft. S. & M. R. Co. v. McGahey, 63 Ark. 344, 36 L.R.A. 781, 58 Am. St. Rep. 111, 38 S. W. 659, and in Sloman v. Great Western R. Co. 67 N. Y. 208. In the first-named case the court says, at page 348 of 63 Ark., page 783 of 36 L.R.A., page 113 of 58 Am. St. Rep., and page 660 of 38 S. W.: "When a passenger presents to the carrier for transportation his goods and chattels, and makes known what they are, or exposes them to view, or packs them in a way to give to anyone concerned good reason to understand and know that they are not usually carried as baggage, and demands transportation of them as his luggage and the carrier receives and carries them accordingly, he will be responsible for them as baggage, notwithstanding he was not bound to accept and transport them as such. If he wishes to avoid responsibility for them as baggage, he must refuse to receive them in that way. St. Louis S. W. R. Co. v. Berry, 60 Ark. 433, 28 L.R.A. 501, 46 Am. St. Rep. 212, 30 S. W. 764; Minter v. Pacific R. Co. 41 Mo. 503, 97 Am. Dec. 288; Sloman v. Great Western R. Co. *supra*; Great Western R. Co. v. Shepherd, 8 Exch. 30; Mauritz v. New York, L. E. & W. R. Co. 23 Fed. 765; Waldron v. Chicago & N. W. R. Co. 1 Dak. 356, 46 N. W. 456; Oakes v. Northern P. R. Co. 20 Or. 392, 12 L.R.A. 318, 23 Am. St. Rep. 126, 26 Pac. 230; Hannibal & St. J. R. Co. v. Swift, 12 Wall. 262, 20 L. ed. 423; Texas & P. R. Co. v. Capps, 2 Tex. App. Civ. Cas. (Willson) § 35; Hamburg-American Packet Co. v. Gattman, 127 Ill. 598, 20 N. E. 662." In the last-named case the facts were: A boy eighteen years of age was employed as a traveling agent to sell goods by sample. He had two large trunks containing the samples and a valise for his personal baggage. The trunks did not present the appearance of ordinary traveling trunks. They were 30 inches long, 27 deep, and 24 wide. One was covered with oil cloth and the other was of wood. "He delivered the trunks to a baggage master at a railroad depot, and, when asked where he wanted them checked to, replied that he did not then know, as he had sent a despatch to a customer at Fentonville to know if he wanted any goods; if not, he wanted them to go to Rochester, where he expected to meet some customers. Soon after he had them checked to Rochester, paying $2, and receiving a receipt ticket for them headed 'Receipt Ticket for Extra Baggage, etc. [and Dogs].'" The court held that the jury were authorized by these facts to infer that the baggage master understood that the agent was traveling for the purpose of selling goods, and that these trunks contained his wares, and that he was not entitled to have them carried as ordinary baggage, and further held that the railroad company, having this notice, was responsible for the loss of the trunks and their contents. And in Kansas City, Ft. S. & M. R. Co. v. McGahey, it is further said: "Some courts hold that, where a railroad company receives for transportation property which it is not bound by its contract with the passenger to transport as personal baggage, of which it has notice, it must be considered to assume, with reference to such property, the liability of a common carrier of merchandise (Hannibal & St. J. R. Co. v. Swift and Sloman v. Great Western R. Co. *supra*); while others say that, if it receives the property under such circumstances as baggage, it will be responsible therefor as a common carrier, and will be estopped from denying that it was baggage. Texas & P. R. Co. v. Capps and Minter v. Pacific R. Co. *supra*; Hoeger v. Chicago, M. & St. P. R. Co. 63 Wis. 100, 53 Am. Rep. 271, 23 N. W. 435; Chicago, R. I. & P. R. Co. v. Conklin, 32 Kan. 55, 3 Pac. 762; Butler v. Hudson River R. Co. 3 E. D. Smith, 571; St. Louis S. W. R. Co. v. Berry, 60 Ark. 433, 28 L.R.A. 501, 46 Am. St. Rep. 212, 30 S. W. 764. It seems to us the latter view is sustained by the better reason and weight of authority. But, be that as it may, the liability of the carrier for loss and damage in transportation in either case is the same."

The action of the court and the finding of the jury were correct on the direct appeal.

Section 3569, Rev. Code 1892, is in the following words: "If a railroad company carelessly or wilfully injure, or allow to be injured or lost, any trunk or baggage, either by improper handling or otherwise, it shall be liable to the owner in a sum not less than double the amount of the actual damage." The court below refused to give a charge for double damage, and we think correctly. This statute is a highly penal statute, and was clearly meant to apply only to such baggage as in a proper sense personal baggage,—articles of wearing apparel, etc., contained in the usual trunk carried for personal convenience as a receptacle for wearing apparel and the like. It was never in the mind of the legislature to visit this penalty upon the railroad companies in a case like this, where the articles are not in a proper legal sense baggage, and where the liability of the railroad company arises from the fact that it knew the character of the articles, and consequently that they were not strictly baggage, and yet agreed and contracted to transport them as baggage; in other words, out of the estoppel arising against the railroad company in such case to deny that the

articles were baggage and to be transported as such.

The result is that the judgment of the court below is affirmed on appeal and cross-appeal.

MARYLAND COURT OF APPEALS.

JAMES T. HAYS, Appt.,
v.
EMILY E. CRETIN.

(102 Md. 695, 62 Atl. 1028.)

Mortgage—redemption under dower right.

1. The execution by a man of a second mortgage upon his land, in which his wife does not join, does not defeat her right to redeem, under her unassigned right of dower, from a first mortgage in which she joined.

Same—satisfaction of claims.

2. A widow, in redeeming from a first mortgage on her deceased husband's property in which she joined, is not bound to pay a second mortgage and an open account held by the purchaser at the execution sale against her husband for which she was not liable.

(January 24, 1906.)

APPEAL by defendant from a decree of the Circuit Court for Frederick County in plaintiff's favor in a suit to redeem from a mortgage foreclosure. Affirmed.

The facts are stated in the opinion.

Messrs. **Vincent Sebold** and **William P. Maulsby, Jr.**, for appellant.

Messrs. **Milton G. Urner, Milton G. Urner, Jr.**, and **Hammond Urner**, for appellee:

A wife has a right to redeem.

Mantz v. Buchanan, 1 Md. Ch. 204; Bank of Commerce v. Owens, 31 Md. 325, 1 Am. Rep. 60; 2 Jones, Mortg. § 1067; 1 Scribner, Dower, pp. 459 et seq.; 4 Kent, Com. 162; 3 Pom. Eq. Jur. § 1220, and note; note to Kerse v. Miller, 4 Am. & Eng. Dec. in Eq. 461.

The husband may assign the quality of redemption, but no act of his can deprive the widow of the right to redeem, to which she is entitled under the common law.

Bank of Commerce v. Owens, *supra*.

She is not bound to pay debts for which she is not liable.

Brown v. Stewart, 56 Md. 421; Gelston v. Thompson, 29 Md. 601; Lee v. Stone, 5 Gill & J. 22, 23 Am. Dec. 589.

Briscoe, J., delivered the opinion of the court:

This is a suit in equity, brought in the circuit court of Frederick county by the appellee, the widow of John T. Cretin, de-

Case Note.—Widow's right to redeem from mortgage because of her dower interest.—In a note to Mackenna v. Fidelity Trust Co. 3 L.R.A.(N.S.) 1068, the question whether a wife's inchoate right of dower will entitle her to redeem, during her husband's lifetime, from a mortgage, paramount to her dower right, is discussed, and authorities are cited. The present note deals with the allied question whether, after the death of the husband, the widow's dower rights are sufficient to entitle her to redeem from a mortgage paramount to her dower; and it may be said that the great weight of authority gives her such right.

In McArthur v. Franklin, 15 Ohio St. 485, it was held that a widow who had united with her husband in a mortgage whereby she had relinquished her right of dower is entitled in equity to redeem, and the foreclosure of the mortgage by a suit in chancery during the lifetime of the husband, to which the wife was not a party, was not a bar to such right; and this decision was approved and followed when the case again came before the court in 16 Ohio St. 193.

In Simonton v. Gray, 34 Me. 50, where plaintiff's husband had mortgaged lands during coverture, and plaintiff had, in the mortgage deed, released her dower rights, it was held that after her husband's death plaintiff had a right of dower in the equity of redemption, which entitled her to redeem.

And in Possiter v. Cossit, 15 N. H. 38, it was held that a widow had a dower right in an equity of redemption against all persons except the mortgagee and those claiming under him; but that she could not be endowed as against them except by payment of the mortgage.

In Wilkins v. French, 20 Me 111, it was held that, where the mortgagor was a freeholder and owner of real estate, and had power to convey subject only to the rights of the mortgagee, the dowress might, under an assignment of dower by the judge of probate, enter and hold the same, and be considered as entitled to redeem.

And in Merselis v. Van Riper, 55 N. J. Eq. 618, 38 Atl. 196, where property had been mortgaged by a husband while single, it was held that the widow was entitled to redeem from the mortgage for the protection of her life estate in the premises, even though she was in possession of a specific portion under quarantine, and the action was brought before dower was assigned her.

In Gibson v. Crehore, 5 Pick. 146, the owner made a mortgage, and his wife released her dower rights in the land, and after the death of the owner his administrator sold the equity of redemption, and the widow thereafter offered to redeem, but the offer was refused, and she then brought suit to redeem. The court held that she had a dower right in the equity of redemption and was entitled to redeem; and further that an assignment of dower was not necessary to perfect such right. And this decision is

ceased, against the appellant, as assignee of a mortgage from Cretin and wife to Clayonia F. Maynard and Fanny Noonan, for an injunction to restrain the assignee from selling the mortgaged real estate and to enforce her equity of redemption as the alleged owner of a dower interest in the land. The injunction and the relief asked by the bill were granted by the court below, and from a decree so granting the relief an appeal has been taken.

It will be necessary for us to briefly state the material facts disclosed by the record, in order to obtain a clear and proper understanding of the case. The bill avers that John T. Cretin, of Frederick county, died intestate on the 6th of December, 1903, seised and possessed of a tract of land situate in

closely followed by Eaton v. Simonds, 14 Pick. 98. And the rule as to the widow's right to redeem, laid down by these Massachusetts cases, was followed by McCabe v. Bellows, 1 Allen, 269.

The same general rule was illustrated by Loughran v. Lemmon, 19 App. D. C. 141, a case which is not entirely in point. The husband and wife held an estate by the entireties, and united in a deed of trust of the land, by which the right to occupy and receive rents and profits was reserved to the husband alone, and by which there was reserved to the husband and his heirs the right of redemption. The court held that such a deed would not be construed as conferring all the beneficial interest upon the husband and giving him an independent estate, and that the wife might, after his death, redeem the estate and take it entire.

And in Posten v. Miller, 60 Wis. 494, 19 N. W. 540, where a wife had joined with her husband in a mortgage and at his death became his sole heir, it was held that she had a right to bring an action in equity to redeem against the mortgagee in possession.

The rule seems to be followed, also, in Canada. In Carrick v. Smith, 34 U. C. Q. B. 389, it was held that a dowress is in the same position as a tenant for life, and, though she has released her dower by joining with her husband in the mortgage, nevertheless she is entitled to redeem.

In Opdyke v. Bartles, 11 N. J. Eq. 133, a mortgage was given during coverture, in which the wife did not join, and after the death of her husband the widow brought suit in equity to redeem. The court held that the bill could have been sustained if the mortgage had been superior to her right but that she had a right of dower in the whole mortgaged premises, and not in the mere equity of redemption, as she had not joined in the mortgage, and that it was not necessary for her to redeem to entitle her to dower; and that is the only ground why she had a right to redeem.

In Law v. Citizens' Bank, 85 Minn. 411, 89 Am. St. Rep. 566, 89 N. W. 320, while it is mere *dicta*, the court said that one who has dower rights is entitled to redeem. And in Denton v. Nanny, 8 Barb. 618, although this particular point was not raised, the court said that a widow is entitled to dower in an equity of redemption, as well when the mortgage was executed before the marriage as when it was executed by the husband and wife during coverture; and she is entitled to redeem, as against the mortgagee and those claiming under him, upon payment of the mortgage debt.

The rule is similar as regards the rights of the widow to redeem from a purchase-money mortgage. Thus, in Wheeler v. Morris, 2 Bosw. 524, where a man gave a purchase-price mortgage in which the wife did not join, it was held that there was vested in the husband an equity of redemption in which the wife, if she survived the husband, might have dower, and by virtue of which she was entitled to redeem.

So, in Wing v. Ayer, 53 Me. 138, where the wife had not joined with the husband in a purchase-money mortgage, nor otherwise relinquished her dower, it was held that the widow's estate was a continuation of her husband's estate, and, so far as the mortgage was concerned, she had the same rights as would pertain to him were he living; and one of those rights was the right to redeem.

In Fletcher v. Holmes, 32 Ind. 497, it was held that a widow did not have a right to redeem from a mortgage given for the purchase price of property, in which she did not join, and was not a proper party in proceedings to foreclose the mortgage. But this decision was rendered by a divided court; and, the case having come before the court again in May v. Fletcher, 40 Ind. 575, the former decision was overruled, and it was held that a widow, under such circumstances, did have a right to redeem. And this case is cited with approval, and followed, in Barr v. Vanalstine, 120 Ind. 590, 22 N. E. 965, where the facts are very similar.

In McGough v. Sweetser, 97 Ala. 361, 19 L.R.A. 470, 12 So. 162, where the wife joined in a mortgage with her husband, and in proceedings for the foreclosure of the mortgage was not made a party, she was allowed, after the death of her husband, to redeem upon the payment of the entire mortgage debt.

In Walden v. Speigner, 87 Ala. 379, 6 So. 81, it is held that, as widows were not included in the classes of persons entitled, under the statute, to redeem, and as a previous decision of the court had held that only persons specifically mentioned in the statute had such right, the widow could not redeem; but in this case the widow sought to redeem, not because of her dower interest, but because the mortgaged property was the family homestead at the time of the mortgage, at the death of her husband, and at the time of sale. It would seem that the same reasoning would apply were she seeking to redeem by right of her dower interests. The judge writing the opinion stated that he was dissatisfied with the ruling, but felt bound to follow the former decision.

that county, containing 200 acres, more or less; that the appellee is his widow, and as such is entitled to a dower estate in the land; that on May 24, 1889, Cretin and his wife executed a mortgage of this farm to secure the payment of two promissory notes, dated the 24th day of May, 1889, payable five years after date, and given by Cretin to Maynard and Noonan, each for the sum of $2,000; and that the mortgage was subsequently assigned to the appellant. The mortgage debt being overdue, the appellant advertised the property to be sold at public sale on the 13th of February, 1904, to pay the mortgage debt. The bill then avers that on the 10th of February, 1904, the appellee, as owner of the dower interest, offered to redeem the mortgage, and tendered the defendant the sum of $4,300 in legal tender currency in payment and redemption of the mortgage debt, interest, and costs; but the defendant declined to accept the tender and refused to permit her to redeem. The prayer of the bill, in addition to the prayer for general relief, is, first, that the defendant may be enjoined and restrained by injunction from executing the power of sale contained in the mortgage, and from selling or assigning the mortgage debt, pending the proceedings; and, second, that the appellee's equity of redemption may be enforced, and the defendant be required to accept the amount of the mortgage debt, interest, and costs, so tendered and paid into court, and that the appellee may be subrogated to the rights of the mortgagee. The defendant, in his answer, admits the allegations contained in the first, second, and third paragraphs of the bill, but denies that the appellee has such a beneficial interest and estate in the mortgaged land as entitles her to redeem. The answer avers that the alleged tender and offer to redeem is not for the purpose of protecting any beneficial interest in the real estate, but is a fraudulent scheme on the part of the appellee to defeat and destroy the rights and interests of those who have a legitimate beneficial interest in and to the land; that the estate of the decedent is largely indebted on other claims, including a second mortgage, in which the widow did not join, of $300, and an unsecured balance due and owing to the appellant. The answer then avers that to grant the relief prayed by the bill would defeat the appellant's rights as second mortgagee and creditor of the estate, and would also destroy the interests of the heirs at law and the other general creditors of the estate.

It appears, then, according to the pleadings and the conceded facts of the case, the principal question raised for our consideration is the legal right of the appellee, the widow of Mr. Cretin, to redeem her interest in the equity of redemption from the first mortgage, in which she joined with her husband. There can be no difficulty, we think, as to the general proposition that a widow who has joined in a mortgage has the undoubted right to redeem, notwithstanding the fact there has been no legal assignment of the dower. This proposition is well settled upon reason and authority, because of the wife's inchoate right of dower and of her interest in the estate. In Jones on Mortgages, vol. 2, § 1067, it is said that a widow who has joined in a mortgage in release of dower may redeem, for she is entitled to dower as against every person except the mortgagee and those claiming under him. She has an undoubted right to redeem, although she has released her dower. And even a wife having only an inchoate right of dower may redeem land from a mortgage in which she has joined with her husband to release dower. In Gatewood v. Gatewood, 75 Va. 413, the court, after citing a number of authorities to sustain the position that a tenant in dower may insist upon the redemption of a mortgage, says, that the dower interest of the wife in the husband's estate is such as entitles her to redeem seems too clear for controversy. And it was also said that it may be laid down as a rule of almost universal acceptance that, when there is a mortgage upon real estate, any person who has the right to redeem such mortgage, and actually does redeem it, is entitled for his indemnity to be subrogated to the lien of the mortgage and to hold the land until he is reimbursed to the amount so paid. The case of Davis v. Wetherell, 13 Allen, 60, 90 Am. Dec. 177, and Lamb v. Montague, 112 Mass. 352, are express decisions on this point. In Mantz v. Buchanan, 1 Md. Ch. 202, the chancellor said: "There can be no doubt that a wife, notwithstanding she joins her husband in the mortgage, may nevertheless take her dower in the lands subject to the mortgage, and that she has a right to redeem, and may call on the personal representatives of her deceased husband to apply the personal assets to the extinguishment of the mortgage debt, so as to free her dower from the encumbrance." And the doctrine enunciated by the court in this case is approved in Lynn v. Gephart, 27 Md. 547; Bank of Commerce v. Owens, 31 Md. 327, 1 Am. Rep. 60; Glenn v. Clark, 53 Md. 603; McNiece v. Eliason, 78 Md. 176, 27 Atl. 940; Pom. Eq. Jur. 1220; 2 Story, Eq. Jur. § 1023.

But it is contended earnestly by the appellant that the right of redemption in this case should be denied, because the husband, in the year 1896, executed a second mortgage to the appellant for $300, by which he conveyed away his equity of redemption in

the property in question, and at the time of his death he was not seised of such an estate as the wife could be dowable. The cases cited and relied upon by the appellant do not maintain the proposition asserted by him. In Bank of Commerce v. Owens, 31 Md. 325, 1 Am. Rep. 60, this court said: "But in this case it must be remembered the husband was seised of a legal title, upon which the wife's inchoate right of dower attached by the common law. And can it be said that, pledging this right to secure her husband's indebtedness, she thereby puts it in his power or that of his creditor to defeat it altogether? To this view we cannot yield our assent. The husband may assign the equity of redemption, but no act of his could deprive the widow of the right to redeem to which she is entitled under the common law." Glenn v. Clark, 53 Md. 603. The case of Smith v. Hall, 67 N. H. 200, 30 Atl. 409, is directly in point. In that case the husband and wife executed a mortgage on certain lands to secure a note given by the husband to the Farmington Savings Bank for $641.78. Subsequently the husband executed a second mortgage, in which the wife did not join, to secure a promissory note of $1,000. It was held that the wife was entitled, on redeeming the bank mortgage, to hold the whole estate until the defendant shall repay her the amount of the mortgage, when she will be entitled to have a homestead assigned; that her right to the equity of redemption was not affected by the second mortgage, to which she was not a party. The right of the wife in the case at bar to redeem the land from the first mortgage, in which she joined, notwithstanding the making of the second mortgage by her husband, rests upon her contingent right of dower and her interest in the land. She is entitled to exercise this right in order to protect her dower interest and to prevent a sale of the property. It would be a useless right, indeed, if it could be defeated and destroyed by the bare making of a second mortgage by the husband without her uniting therein. In Pollard v. Noyes, 60 N. H. 184, it is held that a sale of the equity of redemption by the husband did not defeat the wife's homestead right in that equity.

As to the contention that the appellee should be required to pay the second mortgage and the open account due the appellant, we need only say that these claims are not her debts, and she is not liable therefor. Brown v. Stewart, 56 Md. 431; Gelston v. Thompson, 29 Md. 595.

There can be no serious contention as to the tender made by the appellee. The tender was made in the bill and the money was paid into court. The defendant, by his answer, refused to accept the money as tendered, and denied the right of the appellee to redeem.

It will be seen, from what has been said, that we have disposed of all the questions determined by the decree. We concur in the views expressed in the opinion of the court below, that, "as to the interests of the heirs at law, they are not parties to the present proceeding, and we do not see that we are required to consider their rights in the determination of the single question of the right of redemption, as distinguished from that of subrogation." As the view we have taken is decisive of the case, the decree will be affirmed.

Decree affirmed, with costs.

MICHIGAN SUPREME COURT.

BYRON HULETT et al.
v.
MARINE SAVINGS BANK et al., Appts.

(— Mich. —, 106 N. W. 879.)

Note—fraud.

1. One induced by fraud to sign a promissory note which is represented to be merely a part of a contract of a different nature, which he intends to sign, and which is so concealed that its true character is not discovered, is not liable thereon,—at least to one not a bona fide holder,—in the absence of such negligence on his part as will estop him from asserting his defense.

Collateral security—cancelation—objection.

2. A bank holding notes as collateral security cannot prevent their cancelation for fraud in their inception where it cannot suffer therefrom because the principal obligation is collectible.

(March 5, 1906.)

Case Note.—Is holder of note as collateral security entitled to the rights of a bona fide holder when principal obligation is collectible?—Ordinarily, the bona fide holder of a note as collateral security may enforce it without first resorting to the original debtor, the liability of the maker thereon not being conditioned on the nonpayment of the principal debt, but being primary and absolute. Delaware County Trust, S. D. & Title Ins. Co. v. Haser, 199 Pa. 17, 85 Am. St. Rep. 763, 48 Atl. 694; Jones, Pledges and Collateral Securities, 2d ed. § 664.

The doctrine of the case in hand, that the bona fide holder of commercial paper as collateral security will not be permitted to enforce it where the pledgeor cannot do so, and where he will not suffer thereby, while commending itself as working substantial justice to the parties concerned, and obviating the necessity of bringing an action by the maker against the pledgeor, curtails the generally established right of the pledgee to

APPEAL by defendants from a decree in equity of the Circuit Court for Grand Traverse County canceling certain promissory notes. Affirmed.

Statement by Grant, J.:

The 12 complainants filed this bill to restrain the collection, negotiation, and to secure the cancelation, of three promissory notes for $800 each, signed by them, on the ground that their signatures had been obtained by fraud, misrepresentation, and without consideration; that they did not sign them knowing that they were promissory notes; that they signed them on the representation by those who procured them that they were merely a preliminary contract of which they formed a part, and from which they had been separated so as to form three promissory notes. The active participants in the fraud were alleged to be the defendants John and Titus Lyons, D. C. Smith, and Harvey G. Wilson. The Marine Savings Bank was made defendant as claiming to be the holder of the notes, and the Bank of Kingsley was made the defendant, as the custodian thereof. The Marine Savings Bank claims to be the bona fide owner and holder of the notes. The Bank of Kingsley is the mere custodian, and has no interest in the matter. Defendant Margaret Lyons was not made a party to the original bill, but was subsequently made a party as the one who had given her own note to the Marine Savings Bank for $1,400 to which as collateral security the notes in dispute had been assigned. The defendants the Marine Savings Bank and Margaret Lyons alone answered and made defense. Decree was entered for the complainants upon pleadings and proofs taken in open court. In September, 1903, defendant John Lyons, who with his wife then lived in Marine City, owned a stallion, which he testified had cost him about $600, and which he had owned for about six months. He had made one attempt to syndicate the animal. By "syndicating" is meant the organization of

resort to any and all sources available for the satisfaction of his debt, and initiates a considerable innovation in the law governing commercial paper. The same principle would seem equally applicable wherever a bona fide holder seeks to enforce against the maker a negotiable instrument which would be subject to equitable defenses as against an indorser who is financially responsible.

Such doctrine is directly opposed by the decision in Third Nat. Bank v. Harrison, 3 McCrary, 316, 10 Fed. 243, in which it was held that a bank which had received in good faith a note which was subject to equities in favor of the maker while in the hands of the payee, as collateral security for a demand note, was not precluded from collecting the note so pledged, by the fact that both before and after suit brought the pledgeor had on deposit funds sufficient to satisfy the principal debt.

It is also indirectly contradicted by an uncontroverted line of decisions to the effect that a pledgee cannot be compelled to resort first to other collateral in order to save the rights of the maker against the pledgeor.

Thus, it was held in Dallemand v. Bank of Nova Scotia, 54 Ill. App. 600, that the maker of a note held as collateral cannot compel the pledgee to resort to other collateral so as to make a right of set-off against the payee available; the court saying that equity must regard the interests of creditors as well as of debtors, and will throw no obstacles in the way of recovery.

In Prout v. Lomer, 79 Ill. 331, it was held that an injunction cannot be granted against the collection of accommodation notes held as collateral security, on the ground that the pledgee has other security; and that the principle of equity, that when a party has a lien or interest in two funds, out of either of which his debt can be paid, and another party has a lien or interest on only one of the funds for his debt, the latter has the right in equity to compel the former to resort to the other fund in the first instance for satisfaction whenever it will not trench upon the rights, or operate to the prejudice, of the party entitled to the double fund, is applicable to sureties only.

And in Lord v. Ocean Bank, 20 Pa. 384, 59 Am. Dec. 728, it is held that the possession of other collateral security by the pledgee of an accommodation note will not affect his right to recover thereon.

But where a pledgee takes as collateral security a note made by the pledgeor which he knows to be indorsed for accommodation, he must first resort to other collateral before he can enforce such note against an accommodation indorser; as in such case the indorser is deemed to stand in the relation of surety. Goodwin v. Massachusetts Loan & T. Co. 152 Mass. 189, 25 N. E. 100.

In Haas v. Bank of Commerce, 41 Neb. 754, 60 N. W. 85, it is held that the maker of a note which has been obtained by fraud cannot require a pledgee first to exhaust other collateral; and that the doctrine of marshaling securities against which various persons have claims is not applicable.

And in Strong v. Bowes, 102 Wis. 542, 78 N. W. 921, it was held that the pledgee of a note will not be deprived of the rights of a bona fide holder by the fact that he has applied other collateral security taken by him to the payment of another loan made after the maturity of the note in question.

But where a pledge is made upon the express condition that the collateral note should not be sued upon until the pledgee has made every legal effort to collect the principal debt, the pledgeor's solvency is available as a defense to the maker of the note. Barr v. Kane, 32 Ind. 416.

a corporation, issuing stock to the individual incorporators, and when the transaction is completed the title to the animal is transferred to the corporation. Defendants Wilson and Smith, who up to that time were strangers to Lyons, made an arrangement with him to syndicate the animal for $2,400; and after payment of expenses which were not to exceed $400, the money was to be divided between them. Smith and Wilson went to the township of Kingsley, Grand Traverse county, and there undertook to form a syndicate of farmers. The plan was to get 12 stockholders each to put in $200, and receive his certificate of stock for that amount. Smith and Wilson prepared the papers with which to approach the complainants. They first went to the complainant Fenstermacher and with Fenstermacher to complainant Hulett. Fenstermacher and Hulett, at the request of Smith and Wilson, went with them and introduced them to other complainants. The claim of the complainants is that Smith and Wilson represented to them that the papers they were signing were merely a contract agreeing to get together, form a syndicate or corporation, and each then to pay cash $200 or give his note therefor, and purchase the stallion; that no money obligation was incurred by the papers they signed; and that they were to meet at a certain place and time, inspect the stallion, and then complete the arrangement if they were satisfied. All testified that the papers they signed were attached and were a part of one and the same contract. The complainants signed them usually in the field or on the highway, and did not have the papers spread out before them. Their testimony is that Wilson held the paper sometimes upon his knee, and always with the papers so covered that only the signatures could be seen. It appears that four papers were in fact signed,—one reading as follows: "Milt Henry, No. 5180. [Name of Stallion.] John Lyons and Harvey G. Wilson, agree to sell the above-named stallion for $2,400 to the other undersigned subscriber, who, wishing to improve their stock, agree to pay John Lyons, Harvey G. Wilson, $200 for each share in said stallion. Capital stock, $2,400. No. shares, 12. Payment to be made cash; or one third in one year, one third in two years and one third in three years, secured by notes, with interest. 1st payment September 14th, 1904; 2d payment September 14th, 1905; third payment September 14th, 1906. Lyons and Wilson." Then follow the names of the complainants, each subscribing for one share. The notes attached thereto read as follows: "On September 14th, 1904, after date, for value received, I promise to pay to the order of Harvey G. Wilson and John Lyons, eight hundred dollars, at the Bank of Kingsley, Michigan, with interest at six per cent payable annually." [Signed by all the complainants.]

All the complainants testified that Wilson and Smith assured them that the papers signed were merely a part of one contract, and that they signed them without any idea that they were signing promissory notes. About the time that Smith and Wilson commenced their syndicate operation in Kingsley township, the stallion was shipped to Kingsley and placed in the stable of complainant Fenstermacher who kept a livery, and was put in a box stall, under lock and key, under the exclusive control of Smith and Wilson. The animal was in fact defective, and was of little worth. The representations of Smith and Wilson as to the condition and value of the stallion were false. When Smith and Wilson had secured the 12 signatures, they telegraphed defendant John Lyons to come to Kingsley and complete the arrangement. That was the day fixed for the meeting of the subscribers to form a corporation and to complete the preliminary agreement as they understood it, and as it had been represented to them by Smith and Wilson. Mr. Lyons arrived at Kingsley about 12 noon on Friday. The meeting of the stockholders was to take place that afternoon. Wilson had the notes, and he and Lyons hired a livery and drove 14 miles to Traverse City, instead of taking the cars. Took the train for Marine City, and there disposed of the notes on the following Monday, in the manner hereinafter stated. Meanwhile, the subscribers met, Mr. Wilson had flown, though he had agreed to meet them. The stallion was then brought out from the stable, and his defects disclosed. Mr. Smith who was then present, informed them that they had executed promissory notes; that Wilson had taken them and gone; that they were probably negotiated before then; threw down the key to the stall where the stallion was kept, and departed. On arriving at Marine City on Saturday, Lyons and Wilson took the notes to the Marine Savings Bank and offered them to Mr. Carmon, the cashier, at a discount. Mr. Carmon refused to take them, and told him that if the defendant Mrs. Lyons would indorse them they would cash them. It was finally arranged that Mrs. Lyons was to give her note for $1,400, and these notes should be left with the bank as collateral. The entire arrangement was made with Mr. Lyons, and for his benefit, except he testified it was understood that when these notes were collected, the balance over and above what was due the bank was

to be applied to an indebtedness of Mrs. Lyons. Mrs. Lyons never had possession of the notes. After Mr. Lyons had consummated the arrangement at the bank, Mr. Saph. one of the directors, went to the hotel kept by Mr. Lyons, secured Mrs. Lyons's signature to the note for $1,400, paid her the cash. She immediately returned it to him. He took it back to the bank, and Mr. Wilson and Mr. Lyons disposed of it according to their previous arrangement. The complainants immediately filed this bill of complaint.

Mr. John W. Patchin, for appellant Lyons:

The bona fide holders in this case should be protected on the ground that the complainants have not shown such freedom from negligence on their part as they were in duty bound to do.

Soper v. Peck, 51 Mich. 563, 17 N. W. 57; Green v. Wilkie, 98 Iowa, 74, 36 L.R.A. 434, 60 Am. St. Rep. 184, 66 N. W. 1046; McDonald v. Johnson, 46 N. Y. S. R. 838, 19 N. Y. Supp. 443; Ort v. Fowler, 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580; Kellogg v. Curtis, 65 Me. 59; Lindley v. Hofman, 22 Ind. App. 237, 53 N. E. 471; Walton Guano Co. v. Copelan, 112 Ga. 319, 52 L.R.A. 268, 37 S. E. 411; American Gas & Ventilation Mach. Co. v. Wood, 90 Me. 516, 43 L.R.A. 485, 38 Atl. 548; Hurt v. Ford, 142 Mo. 283, 41 L.R.A. 823, 44 S. W. 228.

Messrs. Avery & Walsh for appellant Marine Savings Bank.

Messrs. Pratt & Davis, for appellees:

If these complainants signed their names on the express understanding that they were signing a preliminary contract and not notes; and the papers were so joined together, or placed or held in such manner, as to represent one paper; and that it was a contract that required to be signed in three places, and not a note or notes: and that the same was only preliminary to the transaction which was to follow, and was to be canceled; the papers had since been separated, making them promissory notes.—then it follows that such notes are void even in the hands of a good-faith purchaser.

Gibbs v. Linabury, 22 Mich. 479, 7 Am. Rep. 675; Foster v. Mackinnon, L. R. 4 C. P. 704; Whitney v. Snyder, 2 Lans. 477; Walker v. Ebert, 29 Wis. 194, 9 Am. Rep. 548; Taylor v. Atchison, 54 Ill. 196, 5 Am. Rep. 118; Wait v. Pomeroy, 20 Mich. 425, 4 Am. Rep. 395; Anderson v. Walter, 34 Mich. 113; Soper v. Peck, 51 Mich. 563, 17 N. W. 57; Laprad v. Sherwood, 79 Mich. 525, 44 N. W. 943; Green v. Wilkie, 98 Iowa, 74, 36 L.R.A. 434, 60 Am. St. Rep. 184, 66 N. W. 1046; Briggs v. Ewart, 51 Mo. 245, 11 Am. Rep. 445; Detwiler v. Bish, 44 Ind. 70; Cline v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357; Kagel v. Totten, 59 Md. 447; First Nat. Bank v. Lierman, 5 Neb. 247; De Camp v. Hamma, 29 Ohio St. 467; Porter v. Hardy, 10 N. D. 551, 88 N. W. 458; First Nat. Bank v. Carter, 138 Mich. 421, 101 N. W. 585.

Grant, J., delivered the opinion of the court:

That a gross fraud was perpetrated upon the complainants is fully established by the evidence. No one disputes their version of the representations made to them by Smith and Wilson, and the manner in which their signatures were obtained. Smith and Wilson were not produced by the defendants as witnesses. Their absence is unaccounted for. Probably like all criminal birds of passage, they had flown. Complainants were induced to sign written instruments which were a part of one contract, or were so attached as to appear so, but were afterwards separated so as to appear valid promissory notes. Smith and Wilson resorted to representations and devices to prevent the papers being read by the complainants before signing and while they were signing arranged to cover the written and printed parts above so that they should not be observed by the signers. It is not easy to determine the mysterious manner in which these signatures were obtained without the signers obtaining information of just what they were signing. Criminals of this sort always work in mysterious ways, and resort to methods and schemes often difficult to understand. They are undoubtedly familiar with the decisions of the courts on papers obtained by fraud, and practise the greatest ingenuity and shrewdness to avoid the decisions, and to enable purchasers to say that they obtained them in good faith.

The scheme, as represented to the complainants under their testimony, was reasonable. Twelve men were required to constitute the syndicate or organization. No one of the 12 knew anything about the stallion. Only one, Fenstermacher, ever had seen him. Smith and Wilson were strangers to them. If their representations as to the character, quality, and value of the horse were true, each was willing to put in $200 in the purchase of the stock of the syndicate. If 12 such men were found they were then to meet, examine the horse, and if found as represented they would then form the syndicate, take the stock, and purchase the horse. The scheme as found in the agreement and notes is utterly unreasonable, and it is difficult to conceive that even the most ignorant and unwary would knowingly make such an agreement. Per-

sons of even less than average common sense do not buy property without seeing it, especially from total strangers, and that a piece of property of so much greater value than usual. Besides, it is altogether improbable that these men would have signed a note on which each was individually liable for the whole amount. The object of the conspirators was to prevent the examination of the property and the instruments they were signing, and to secure the names of the complainants to promissory notes which they could dispose of as such. We are not so concerned with the mysterious methods by which this was accomplished as we are by the fact that it was accomplished. The defense is good unless complainants are estopped to assert it by their own gross negligence. The law governing such transactions is well settled by the decisions of this and other courts. The only difficulty arises in applying the law to the facts of the particular case. The first case upon this subject in this court is Gibbs v. Linabury, 22 Mich. 479, 7 Am. Rep. 675, wherein the court quoted with approval the English case of Foster v. Mackinnon, L. R. 4 C. P. 704, in which it was said: "The defendant never intended to sign that contract [a bill of exchange] or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the actual contents of the instrument." This court in that case where three papers were signed said: "Now, when a party never designed to put, or cause to be put, any sort of negotiable paper in circulation, when the thought of doing so never entered his mind, when he has never bargained to do so, when he has never consciously been privy to any attempt to set such paper afloat, how can it be said that his will in any way assented to the concoction of such a contract so as to make him an object of the rule?" In Anderson v. Walter, 34 Mich. 113, the defendant signed two papers which he had only heard read, and neither was a note. The court says: "No man has a right to suppose that a crime is about to be committed, or that he is going to be defrauded by having a paper of an entirely different tenor substituted in the place of one he has just heard read and is about to sign, nor that a negotiable promissory note will be lurking in the depths of an instrument like those referred to. And he is not therefore required to take any steps to guard against such a contingency." In Soper v. Peck, 51 Mich. 563, 17 N. W. 57, the court, speaking through Justice Cooley, said: "It cannot be disputed that defendant's evidence tended to show that he had had a fraud practised upon him, and that very probably he had been made to put his name to a note when he supposed he was signing something different. If the jury believed this he was entitled to their verdict, unless his negligence was so gross as to preclude his making the defense as against a bona fide purchaser of the paper."

It is true that there are some discrepancies in the testimony of the witnesses who were subjected to a rigid cross-examination. One testified that he read the papers, but he also testified that the papers produced were not like the ones that he signed. The learned circuit judge found that the representations testified to by complainants were made by Smith and Wilson; that they were deceived thereby; that the papers were not what Smith and Wilson represented them to be; and that they were free from such negligence as would bar their defense. We think his conclusions in this respect were correct. Mr. Lyons was not a witness for the defendants, but was called in rebuttal by the complainants. Smith and Wilson were acting for him as he testified, and he is responsible for their acts. Mrs. Lyons was the mere willing stool pigeon for her husband, or the conduit through which he and Wilson succeeded in making the arrangement with the bank. He testified: "I arranged with Mr. Carmon [the cashier] in my second interview that he would let me have $1,400, that I would have to have my wife sign a note to that amount, and to turn over these notes as collateral." She is financially responsible. The bank is not the absolute owner of the notes. They were taken simply as collateral. It is quite probable that Mr. Lyons and Mr. Wilson, finding that the bank would not purchase the notes with their indorsement, and having been unable to dispose of them at Kingsley, resorted to the scheme of getting them into the hands of the bank as collateral, hoping in this way to make the bank bona fide holder. Mrs. Lyons is not a bona fide holder. The notes were never assigned to her. She never had them in her possession or control. She knew of the alleged sale of the stallion to the farmers. She was connected in the livery business with her husband; he owning some of the horses and she others.

It is unnecessary to determine the doubtful question whether the bank is a bona fide holder. Mr. Carmon (its cashier) was cognizant of several things which might be held to put a reasonably prudent man upon inquiry. But the bank cannot suffer. Mrs. Lyons is financially responsible, and the bank only holds the notes as collateral security. It is urged that Fenstermacher and Hulett were as active in procuring the sig-

natures of the other complainants as were Smith and Wilson, and that they were as guilty of fraud practised upon the others as were Smith and Wilson. It is true that they went around with Smith and Wilson to see other parties; that Fenstermacher took them around with a team from his livery. We find no evidence that they participated in the false representations, or that they themselves knew, or had good reason to know, that the representations were false and fraudulent.

We think the decree of the court was correct, and it is affirmed, with costs.

WEST VIRGINIA SUPREME COURT OF APPEALS.

WILLIAM B. BURKHEIMER, JR.,
v.
NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION OF NEW YORK, Appt.

(— W. Va. —, 53 S. E. 372.)

Building association—suspension of dues.

1. Suspension by a building and loan association of the payment of dues on its stock by its members for an unreasonable time, so as to work a material departure from its general plan and scheme of satisfying loans made to its members of the ultimate value of their shares of stock by maturing the stock, affords ground for dissolution of the contractual relations existing between it and a member to whom such loan has been made.

Same—dissolution—estoppel.

2. A borrower is not estopped from demanding such dissolution, under such circumstances, by his having voted for an amendment to the by-laws of the association conferring upon its directors power to suspend payment of dues.

Same—termination of contract—settlement.

3. When, by reason of gross mismanagement of a building and loan association, a member, who has borrowed from it the ultimate value of the stock subscribed by him, has the right to sever his relations with it and elects to do so, he is to be charged with the amount of the loan and legal interest thereon from the date on which he received the money, and credited with the interest and premium paid, until the date on which his right to withdraw accrued, and the value of his stock as of said date, as nearly as the same can be ascertained, making due deductions for his share of the expenses and losses sustained up to that date; and on the balance thus found to be due from him he is to be charged with interest and credited with all payments thereafter made by him, whether on ac-

Headnotes by POFFENBARGER, J.

Case Note.—Change of plan of building and loan association; effect on contract.—Since the articles of association of a building and loan association, which show the scheme of the organization and define the obligation of the association and the rights of members, constitute a contract (see Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Asso. 148 N. Y. 281, 35 L.R.A. 289, 42 N. E. 710; Agnew v. Macomb Bldg. & L. Asso. 197 Ill. 256, 64 N. E. 260; Miller v. Eastern Bldg. & L. Asso. [Tenn. Ch.] 53 S. W. 231, and Christie v. Northern Counties Permanent Ben. Building Soc. L. R. 43 Ch. Div. 62), it necessarily follows that no alteration in the plan of such organization may be made which will affect the rights of the members, unless they expressly consent thereto (see Synnott v. Cumberland Bldg. Loan Asso. 54 C. C. A. 553, 117 Fed. 379), or impliedly do so by becoming members of an association in which the right of amendment is reserved (see Bearden v. People's Bldg. Loan & Sav. Asso. (Tenn. Ch. App.) 49 S. W. 64; Stilwell v. People's Bldg. Loan & Sav. Asso. 19 Utah. 257, 57 Pac. 14).

Thus, it was held in Eyre v. Building Asso. 17 Phila. Leg. Int. 148, that a resolution of the association that the value of all stock borrowed on shall be allowed to such holders as wish to redeem, cannot be rescinded to the prejudice of a member who had made application to withdraw, and had refrained from paying his monthly dues in the belief that his application had been accepted.

And a building association cannot, in violation of the principle of mutuality among its members, pledge its assets for payment of one class of stock in preference to others. Latimer v. Equitable Loan & Invest. Co. 81 Fed. 776.

Where charter provisions were illegally abrogated by a vote of the stockholders from which all borrowing members were excluded, a borrowing member may maintain a bill for an accounting according to the provisions in force at the time he became a member. Sullivan v. Jackson Bldg. & L. Asso. 70 Miss. 94, 12 So. 590.

And a stockholder may maintain a suit to enjoin the closing out of a series of shares before maturity in violation of the by-laws. Fisher v. Patton, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096.

A building and loan association cannot dissolve itself by its own resolution until the expiration of a period limited for its existence in the articles of association, unless all the stockholders consent to the dissolution. Barton v. Enterprise Loan & Bldg. Asso. 114 Ind. 226, 5 Am. St. Rep. 608, 16 N. E. 486.

Where a building association, by a change in its charter and by-laws so as to authorize it to cease making assessments on stock of nonborrowing members and to change the basis of settlement of all borrowing members, places it beyond its power so to man-

count of dues, interest, or premium; and, in applying credits before, on, and after said date, the rule governing partial payments is to be observed and followed.

Same—premiums.

4. A building and loan association contract of loan, stipulating for the payment of a monthly premium, limited to a certain number of payments, is not violative of the provision of § 26 of chapter 54 of the Code of 1899, relating to the premium in such contracts.

Same—foreign association.

5. Failure of a foreign building and loan association to comply with the provisions of § 30 of chapter 54 of the Code of 1899 does not preclude it from transacting business in this state.

Bill—answer.

6. An allegation in a bill, which, by reason of its vagueness and uncertainty, fails to show materiality of its subject-matter, need not be answered.

(Sanders, J., dissents.)

(March 6, 1906.)

APPEAL by defendant from a decree of the Circuit Court for Cabell County in plaintiff's favor in a suit to settle plaintiff's account with the defendant association. Reversed.

The facts are stated in the opinion.

Messrs. **Wyatt & Graham**, for appellant:

Members of a corporation are bound, in matters pertaining to their rights and duties as such, by every by-law lawfully adopted.

Endlich, Bldg. Asso. § 260.

The association had the right to change its by-laws and to suspend the payment of dues.

Thomson v. Ocmulgee Bldg. & L. Asso. 56 Ga. 350; Johnston v. Elizabeth Bldg. & L. Asso. 104 Pa. 394.

Messrs. **Simms & Enslow** and **L. D. Isbell**, for appellee:

Where one party, by his acts, renders a contract impossible of performance, the other party is discharged, and may sue for a settlement.

9 Cyc. Law & Proc. p. 639; Co. Litt. 20 b; Telegraph Despatch & Intelligence Co. v. McLean, L. R. 8 Ch. 658.

When an association suspends operations by reason of its insolvency, a borrowing member of such association is released from any further liability to carry out the covenants of his mortgage, and is entitled to have his mortgage released on paying the sum justly due.

Thornton & B. Bldg. & Loan Asso. § 390; Hampstead Bldg. Asso. No. 11 v. King, 58 Md. 279; Blakeley v. El Paso Bldg. & L. Asso. (Tex. Civ. App.) 26 S. W. 292; Lime

age its affairs as to allow borrowing members benefits of their contracts to which they are entitled, it cannot enforce such contract against the borrower beyond the amount of the original debt and interest. National Bldg. & L. Asso. v. Braden (Tex. Civ. App.) 32 S. W. 704.

And where an association sells its assets and retires from business, rendering impossible the performance of a contract with its borrowing members, and so destroying its mutuality, the right of rescission thereby accrues to the borrowing shareholders who own unmatured stock, and who do not agree to the sale. North Texas Bldg. & L. Asso. v. Hay, 23 Tex. Civ. App. 98, 56 S. W. 580; North Texas Sav. & Bldg. Asso. v. Jackson (Tex. Civ. App.) 63 S. W. 344.

A borrowing stockholder is unaffected by the attempt to transfer the loan to another association. Cobe v. Lovan, 193 Mo. 235, 92 S. W. 93.

And even where the winding up of the affairs of an association long before the time set for the closing of its business is by common agreement of all parties, the contracts of the several parties are to be deemed abandoned, since it is impossible that they be performed. City Loan & Bldg. Asso. v. Goodrich, 48 Ga. 448, in which the court says: "Each of these contracts—not only those of the borrowers but also of the non-borrowers—has as one of its fundamental, essential elements that it shall only be performed by monthly payments which are to extend over the entire period of the existence of the corporation and until under its regular working it will wind up. If it is to close now at an arbitrary period by agreement, these contracts are necessarily to be abandoned, and the parties are to stand without any agreed rule to adjust their relations to each other."

In Sumter Bldg. & L. Asso. v. Winn, 45 S. C. 381, 23 S. E. 29, it is held that a resolution to divide the cash assets of the association among its nonborrowing members before the time fixed in its charter for dissolution is a palpable infraction of its contract with its borrowing members, and that, by carrying such resolution into effect, it thereby loses its right to sue the borrowing member for nonpayment of monthly instalments and interest.

In Waverly Mut. & Permanent Land, Loan, & Bldg. Asso. v. Buck, 64 Md. 338, 1 Atl. 561, it is held that, where an association practically ceases its business, most of which is transferred to a newly organized association conducted by the same officers and directors, there is such an infraction on the part of the association of the stipulations entered into as to terminate the reciprocity existing between the contracting parties, and release the borrowing member from his peculiar obligations, and change the relation existing between the parties to that of debtor and creditor. The court

City Bldg. Loan & Sav. Asso. v. Black, 136 Ind. 554, 35 N. E. 829; Lime City Bldg. Sav. & Loan Asso. v. Wagner, 122 Ind. 78, 17 Am. St. Rep. 342, 23 N. E. 689; Windsor v. Bandel, 40 Md. 172.

Poffenbarger, J., delivered the opinion of the court:

On a bill in equity, filed by William M. Burkheimer, Jr., against the National Mutual Building & Loan Association of New York, for a settlement and adjudication of the amount due on the loan made by said association to him, on the basis of a simple, straight loan, by application to the debt of all sums paid as dues, interest, and premiums, under the rule of partial payments, on the theory that the contract between the plaintiff and said association never was a legal building and loan association contract, or, if it ever was such, that, by misconduct on the part of the association, or departure from its plan, the contract has ceased to be a building and loan association contract, and for the cancelation of the deed of trust by which payment of the loan is secured, the circuit court of Cabell county adjudged and decreed, in conformity with the prayer of the bill, that there was due said association the sum of $1.50, which amount, with interest thereon from the date of the decree, was decreed in its favor, and it has appealed, claiming a much larger amount.

In Thompson v. National Mut. Bldg. & L. Asso. 57 W. Va. 551, 50 S. E. 756, the validity of the contracts of the appellee was assailed, because of the provisions of its by-laws and form of contract respecting payment of the premium, and an effort was made to defeat the enforcement of its contract, under the principles announced by this court in Gray v. Baltimore Bldg. & L. Asso. 48 W. Va. 164, 54 L.R.A. 217, 37 S. E. 533; Floyd v. National Loan & Invest. Co. 49 W. Va. 327, 54 L.R.A. 536, 87 Am. St. Rep. 805, 38 S. E. 653, and other similar cases. But, on examination of the contract, this court concluded that, as the premium stipulated for was not payable indefinitely and until maturity of the stock, as in the other contracts, held to be usurious for that reason, but was limited to 96 payments, it was sufficiently definite and certain, being a fixed premium payable in instalments, and therefore was not violative of the building and loan statute of this state. This ground of invalidity, though set up in the bill, is not relied upon here.

Failure of the appellant to record in the secretary of state's office its articles of association and by-laws, as required by § 30 of chapter 54 of the Code of 1899, is alleged as ground for holding the contract in-

says: "It must be remembered that few persons become members of building associations solely for the purpose of obtaining loans of money. There are other and important advantages had in contemplation; and the assurance of obtaining these advantages operates as the impelling motive for contracting the obligations imposed in each case. The primary objects which induce the formation of these associations are too well known to require a specific enumeration. In addition to the sums borrowed, those objects constituted a valuable consideration for a contract between the appellant and appellees; and, if the former has, by its own action, rendered the attainment of those objects impossible, there has been such an infraction of the contract existing between the parties as renders its rigid enforcement inequitable."

In Cook v. Kent, 105 Mass. 254, it is held that, where all bonds, mortgages, assets, and unredeemed shares of a building and loan association are sold to one person, the association is so incapacitated from carrying out the provisions of its articles that a borrower will be released from all obligations, except for the repayment of the amount due at the time of such transactions on the mortgage given for the sum advanced.

Where a building and loan association ceases active operations before the proper time for it to terminate, the right to demand the weekly dues as such will cease, the covenant to pay them being regarded as having been made in contemplation of the fact that the association should continue in active operation with the view to effectuating the objects and purposes of its organization, until its accumulations shall be sufficient to enable it to close its operations upon the basis of a solvent corporation according to the law under which it was created; and the liability of a borrowing member is limited to the amount of the original loan with accrued interest, less all amounts theretofore paid in. Peter's Bldg. Asso. No. 5 v. Jaecksch, 51 Md. 198.

But where the change in the articles of association is not such as to make any change in the rights of the borrowing member, he will not be released from his obligations. See Hekelnkæemper v. German Bldg. & Sav. Asso. 22 Kan. 549, in which it is held that, where the Constitution of the building and loan association originally provided that the holder of unpledged shares might stop dues at any time by giving notice of withdrawal, the adoption, after all holders of unpledged shares had given such notice, of amendments providing that no dues be thereafter required from unpledged shares, and changing the manner of paying off such shares, will not furnish ground for releasing the borrowing member from any of the obligations of his contract.

valid, on the theory that the appellant has not acquired the right to do business in this state as a building and loan association. In Thompson v. National Mut. Bldg. & L. Asso. cited, this precise question was raised, and it was expressly held, on principles announced in Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37, that such failure did not deprive the corporation of the right to do business in the state as a building and loan association. No reason is perceived why, in respect to this requirement, a building and loan association should be regarded as standing otherwise than as other foreign corporations. It is not the purpose of this statute to discriminate between foreign corporations on the ground of their character or the nature of their business. It has no special application to building and loan associations. It is a general statutory regulation, applicable to all foreign corporations, not denying to them the right to do business in the state, but subjecting them to fines and penalties for noncompliance therewith.

Another ground of attack is failure of the association to comply with the laws of the state of New York. Just what is meant by this allegation is not very clear. It is both general and uncertain. It reads as follows: "The plaintiff now, however, alleges and charges that said association has not complied with the statutory requirements of the state of New York, so as to permit said association to come within the benefits granted by the statute of the state of New York to building and loan associations, but that it has failed to properly file and record its articles of association as provided by the laws of the state of New York, which is a prerequisite before it is permitted to do business as such building and loan association in the state of West Virginia." It is not alleged that there has been a failure to file and record the articles of association, but only that they have not been properly filed and recorded. The bill does not charge that any law of the state of New York requires articles of association to be filed and recorded as a prerequisite to the right to do business as a building and loan association in the state of New York, or to the right of a New York building and loan association to transact business in another state, but only that it is a prerequisite to the right to do business as a building and loan association in the state of West Virginia. No statute of this state, so far as we are able to see, denies to a foreign corporation the right to do business here because of failure to strictly comply with every regulation prescribed by the laws of its own state. But, if we had such a statute, this allegation is too indefinite and uncertain. The bill admits the corporate existence of the defendants. It is sued as such, and the only fault found with it is its failure to file and have recorded its articles of association in some office or place not specified or indicated. Where and how are they to be filed? In alleging failure to perform duty, the bill must show what that duty is. It may be affirmed as "an elementary rule of the most extensive influence that the bill should state the right, title, or claim of the plaintiff with accuracy and clearness, and that it should in like manner state the injury or grievance of which he complains." Story, Eq. Pl. § 241. If it alleged that by the laws of the state of New York such articles of association are required to be filed in a particular office, and that they have not been so filed, then the court could look to the laws of that state as evidence to sustain the allegation, and the defendant would be apprised of what is relied upon as a failure of duty, working fatal infirmity in its organization or contract. Can it be forced by such a general allegation to produce evidence of strict and full compliance with every statutory provision of the laws of New York, relating to corporations? How can it know whether the omitted act is material, without an indication as to what it is? Some statutes are mandatory, and some directory. What is the character of the one which is said to have been violated? How can anybody tell? The opposite party is entitled to notice. He is not required to respond to a drag-net allegation. Certainty is one of the essentials of pleading. Story, Eq. Pl. §§ 28, 240, 241; Wellsburg & S. L. R. Co. v. Pan Handle Traction Co. 56 W. Va. 18, 48 S. E. 746, 750; Billingsley v. Menear, 44 W. Va. 651, 30 S. E. 61; Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553; Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. 611; Pyles v. Riverside Furniture Co. 30 W. Va. 123, 2 S. E. 909; Newberger v. Wells, 51 W. Va. 624, 639, 42 S. E. 625. That quality is wholly wanting in so much of the bill as relates to this matter.

A serious matter is presented, however, by the charge that the building and loan association has practically abandoned its whole plan and scheme, by an indefinite suspension of dues, continued for the long period of nearly seven years, to wit, from the 1st day of June, 1898, until the 29th day of April, 1905, when its answer was filed in this cause. The loan was made in 1893, from which date the plaintiff paid dues, interest, and premiums until May 31, 1898, but not regularly and promptly. On the 20th day of April, 1898, the by-laws of the

association were amended, so as to confer upon the directors authority to suspend payment of dues on all shares at any time, by a two-thirds vote, for such period of time as to them might seem best. Under the authority thus conferred, they did suspend payment of dues on all shares, borrowed and unborrowed, from the 1st day of June, 1898, and, so far as this record shows, have never resumed the collection thereof. But they required the payment of interest and premium on the loan during the period of suspension, and gave to the borrowers the right to make such payments, on account of the principal of their debts, as they might wish to pay, and represented that there should be a consequent reduction in the interest and premium to be collected. Under this arrangement, the plaintiff continued to pay interest and premiums until the 17th day of July, 1900, and also to pay money in lieu of dues until the 9th day of June, 1900, amounting to the sum of $180. He having ceased to make further payments, the directors, on the 12th day of June, 1900, ascertaining the value of his stock to be $456.44, applied said sum as a credit on the loan of $1,200, and claimed a balance due the association on that date of $864.49. Being of the opinion that by the suspension of the payment of dues the association had forfeited its right to enforce the contract as a building and loan association contract, the circuit court treated the whole transaction as an ordinary loan, giving the plaintiff credit on the debt for all sums paid.

As the contract was originally a valid one, it is difficult to see how a breach thereof on the part of the building and loan association could make it void *ab initio* or change its character. Up until the 1st day of June, 1898, the association, for anything that appears in this record, literally and strictly complied with all the terms of the contract. All payments made prior to that date were confessedly made under the contract, and under a valid contract. The effect of a breach of the contract or failure of duty by the association on that date would be, not to devest rights which had already attached, nor to undo things which had been done in conformity with the contract, but only to vest in the injured party a right of action for damages or specific performance, if he wished to stand upon his contract right, and, if he did not, to demand a rescission of the contract or a settlement by way of withdrawal. These are elementary principles of law, which the courts cannot disregard, however harsh their operation may be. Relief from a contract cannot be given by the courts merely because it is a hard one, or an improvident one, or to punish somebody for wrongdoing. Courts of equity have large powers, it is true; but they are limited to the effectuation of equity and justice, not in disregard of contracts or contractual rights, but upon certain equitable grounds, springing out of the conduct of the parties or fortuitous circumstances. But in all such instances, they are careful not to do injustice, not to ignore vested rights and interests, and never to depart from the letter of a contract, further than is necessary to the effectuation of right and justice, as they spring out of inequitable conduct of some of the parties. Their office is not to execute vengeance or punish the wicked.

In becoming a stockholder in the association and borrower from it, the plaintiff entered into contractual relations, not only with the association as a distinct corporate entity, but with all its other members; and these may have been numerous. There were expenses to be borne, losses to be sustained, and profits anticipated. All those who took stock, paid in their money, and borrowed money, put themselves in the same situation as the plaintiff, and have rights and equities as meritorious and sacred as his. He may be one of a thousand men who stand in practically the same situation. To give him back all the money he has paid in by way of credit on the amount borrowed by him would relieve him from the burden of all the expenses of the association and from liability to contribute to its losses; and, if one after another of the stockholders and borrowers should be permitted thus to withdraw, the fund would be exhausted in a short time. Five hundred of the 1,000 would come out whole, while the remaining 500 would lose everything. The association management may have been corrupt or inefficient, and the losses may be heavy by reason thereof. But can a court of equity say that, because this man has been wrongfully treated, his money wasted and squandered by inefficient or corrupt directors, he shall be permitted to throw the whole loss upon his associates? That is not the basis of settlement adopted by this court in the case of the insolvency of building and loan associations, in consequence of which a similar state of affairs exists. All are required to contribute proportionately to the loss sustained. In Young v. Improvement Loan & Bldg. Asso. 48 W. Va. 512, 38 S. E. 670, this court laid down the following rules applicable to such a situation: "Upon the insolvency of a building association the dues paid on stock by borrowing members are not to be credited on the debts of such members. Upon insolvency of a building association, in winding up its affairs a borrowing member must be charged with his debt and in-

terest, and credited with all moneys paid in by him except dues on stock. After payment of debts he gets his share of residue, in the final distribution of what remains after payment of expenses of winding up and debts. If it be safe to all interests and practicable to ascertain the present value of the stock, the court may, for the present relief of a borrowing member, credit that value of his stock on his indebtedness, without deferring its application till the final wind-up."

Whether the plaintiff may sever the relations existing between him and the association, otherwise than in the manner provided by the by-laws, depends upon the nature of his contract and his conduct in reference to the matter of which he complains, namely, the suspension. At the time of the amendment of the by-laws, somebody held his proxy and voted for the amendment. Assuming that the holder of his proxy had authority to vote for an amendment so materially affecting the contract, it does not follow that the plaintiff assented to all the consequences which have resulted from that amendment. The vesting of authority in the directors to suspend the payment of dues, and the suspension itself, may have been entirely proper and promotive of the best interests of the association and all its stockholders, including the borrowers. That the directors should have such power may be altogether proper and wise. The possession of that power by the directors is the remote, not the immediate and direct, cause of the injury of which complaint is made. The suspension covers a long period of time, and there is no suggestion in the record of any intention or purpose to resume payment of dues. For aught that appears here, it is a permanent suspension, with a view to winding up and dissolving the corporation. It has been held that a temporary suspension affords the borrower no ground of defense against the enforcement of the obligation of his contract. Johnston v. Elizabeth Bldg. & L. Asso. 104 Pa. 398; Thomson v. Ocmulgee Bldg. & L. Asso. 56 Ga. 350. But this could hardly be deemed a mere temporary suspension. The effect of it is to cause the borrower to pay a large amount of interest not contemplated at the time of entering into the contract. It also denies him the privilege of reducing his debt in the manner contemplated, postpones for years the maturity of the stock, and renders it doubtful as to whether it will ever mature. The directors in this instance have not only required the borrowers to pay interest on the debt, but the premium in addition thereto. These items amount to $12 a month, $72 a year, nearly $500 for the period of nearly seven years. This is a considerable amount of money to exact on a small transaction like this in a manner not contemplated at the inception of the contract, and there is no suggestion that there will be any cessation of it. The continuance of the business and the execution of the contract substantially, according to its terms, was expected and relied upon by the plaintiff in entering into it. He supposed that at the end of the eight years his stock would mature and thereby satisfy the debt. In this way he could, by small periodical payments extending over a considerable period of time, pay what was to him, no doubt, a considerable debt, without greatly burdening himself. Twelve years have passed, and during more than one half of that period there has been an abandonment of that part of the contract which it was supposed would largely contribute to the satisfaction of the debt at the end of the contemplated period. This is material, and ought to afford ground of relief. 7 Thompson on Corporation, § 8796, says: "In return for the undertakings of the borrower in the transaction of loan or advancement as they have been pointed out, there is an implied undertaking on the part of the association that the borrower shall have the advantage of the building association scheme in the liquidation of the whole of his indebtedness; *i. e.*, that it shall be by means of gradual payment, and that he shall participate, and have the opportunity of reducing his liability by his participation, in the profits of a continuing business, to be carried on to a fixed end. Where, through bad management, financial misfortunes, loss of membership, or any other cause, the career of the association is brought to a premature close, the borrower is compellable forthwith to pay the balance due from him on his security, although in terms only given for instalments. He is therefore deprived of some proportion of the advantages, the prospect of which induced him to assume the burden of his original obligation. There remains nothing to compensate him for his liability to make up the premiums, to keep up stock payments, to pay fines, etc. The consideration of the liability failing, the liability itself must, in a proportionate degree, fail also."

As a case of dissolution or inability to carry out the contract is not here fully disclosed, what has just been quoted may not be applicable in its full extent to this case; but it asserts a principle within which the case falls. There has been such a departure from the plan, and such an abandonment of some of its essential features for so long a time, as to deprive the borrower of a substantial part of the original consideration, in consequence of which he is entitled,

upon well-settled principles of law, to a severance of his relations with the association on some equitable and just basis. Though there may be no cause for dissolving the corporation and winding up its affairs, there is ample cause for dissolving the relations subsisting between him and the corporation, just as one partner may, for cause, dissolve a copartnership or withdraw from it, leaving it subsisting as between the other partners, if they desire to carry it on. In such case it may be that there is a technical dissolution, since the settlement must be made on the same basis as in the case of final dissolution and distribution of all the assets. But in every practical sense it may be a mere withdrawal by one member of the copartnership, and no reason is perceived why such withdrawal cannot be effected in a corporation, when the circumstances warrant it. Many of the principles of copartnership enter into the relations subsisting between the members of a corporation. On dissolution and settlement the same principles apply, except that ordinarily there is no liability for unpaid debts, and the legal title to the assets is not in the members of the corporation as it is in the members of a copartnership. A dissolution of a partnership for cause puts an end to it, but its termination does not imply that it never had any existence. When the cause which gives right to a dissolution arises, it does not vitiate the contract from the beginning. On settlement it is treated as having been a valid, binding obligation from the beginning until the date of dissolution.

In the application of general principles, some variation must always be made to accommodate them to the nature of the case and its peculiar circumstances. This is not a copartnership, nor it is an ordinary corporation. The borrowing stockholder sustains a dual relation to the corporation, and, through it, to his corporate associates. In one aspect he is a debtor, the amount due from him constituting part of the assets of the corporation to which its creditors may look for satisfaction of their demands, and to which, after the satisfaction of the claims of creditors, payment of expenses, and deduction for losses, all the stockholders, he included, may look for their distributive portions on dissolution or consummation of the enterprise. In another aspect, he is a stockholder, contributing to the capital stock of the corporation, along with his corporate associates, all in some form sharing the burden of expenses and the risk of losses and dividing the profits earned. But a peculiar feature of the arrangement is that each borrowing member hopes and expects that his stock, with the profits earned, will ultimately pay the debt he owes. Each borrower pays an enormously high rate of interest, but knows that every other borrower is doing the same thing, and that their money, kept continually loaned at a high rate of interest, collected weekly or monthly, and reloaned, and thus compounded, will produce large profits to the association to be apportioned to the stockholders as additions to the stock values, thus accelerating and hastening the maturity of the stock and consequent payment of the debt. The statute allows such collection of interest for the very reason that the borrower profits by the arrangement. It hastens the day of maturity of the stock, and comes back to each stockholder in proportion to the amount of his stock. Though not the ordinary legal rate of interest, it is a lawful rate which the law permits the members of building and loan associations to establish among themselves for their mutual benefit.

Upon these considerations, it might be just and fair to give the association the benefit of the premiums paid, or which ought to have been paid, up to the date of the suspension, and allow the borrower to take, as a credit on his debt, the full actual value of his stock at that date. But he agreed to pay that premium as a consideration for the opportunity given him to satisfy the loan by maturing the stock within the time contemplated. He did not agree to pay, as premium, 50 cents per share for such length of time as the association might be solvent or properly conduct its business, but for the whole period of eight years, as consideration for the satisfaction by the association of his debt at or near the end of that period by maturing the stock. The premium is not, in a legal sense, additional interest, though it practically amounts to that. Legally, it is the purchase money of the right to take from the association as a loan the ultimate value of the borrower's stock, to be paid and satisfied by the maturing of that stock. When the association becomes insolvent, or, by its misconduct, makes it necessary or proper for the borrower to dissolve his relations with it, the consideration for the agreement to pay that premium fails, and the borrower may elect to withhold it, and to claim, as a credit on his debt, such portion of it as has been paid. In some jurisdictions the premium is apportioned according to the time which has elapsed; such part of the premium as is proportionate to that time being called the "earned premium," and the residue the "unearned premium." In other jurisdictions the reasonable view of a total failure of the consideration for the premium is adopted, and the borrower is allowed credit for all the premium paid. This court, in Young v. Building Association, followed that line

of decisions which allows the borrower credit for all the premiums paid. Here, inasmuch as the borrower has shown himself to be entitled to go out of the association, not by way of withdrawal, in the manner prescribed by the by-laws, but as of right, as in the case of a dissolution, the same principle ought to be applied.

Endlich on Building Associations, after reviewing the decisions in the different states, says, at § 531: "Upon the basis of all the decisions examined, it may be safely laid down that the clear weight of authority rejects the enforcement of any part of the premium. And in reason and fairness this must be so. The premium is not a payment in advance. The contract concerning it is that it shall be made up by the borrower in the association's hands, and that, upon his final settlement with the association, when the work of both shall be accomplished and their reciprocal duties fulfilled, it shall be relinquished to and appropriated by the association. The contract, therefore, is an entire one. It does not contemplate a stoppage at any intermediate point and an apportionment of the premium accordingly. No part of it is earned until the whole scheme has been carried out. Hence, if at any stage the society, breaking down, fails to perform its part of the bargain, the promise to pay it the premium loses the consideration upon which it was based, and ought to be regarded as wholly abrogated. To attempt to apportion the premium is simply to treat it as additional interest. To regard it as something with which the borrower has parted, as something which the society has earned, as assets in its hands before it has done that which entitles it to retain the premium, is to misconceive its true character and office. It must be true, therefore, that the basis of the borrower's indebtedness is to be taken to be the amount of money actually passing into his hands with legal interest thereon. But it cannot be true that he is to be allowed as deductions therefrom all that he has paid into the society. That would be overlooking his duty as a member to contribute to the losses and expenses of the common enterprise. What he has paid as interest is to be allowed him as paid upon interest. If he has paid interest upon the premium bid by him, he has overpaid his interest, and the excess ought to go in reduction of his debt. . . . When a building association's affairs are in the hands of a receiver, acting under the direction and supervision of a court of equity, there can be no difficulty in determining, or at least approximating, what its receipts, profits, and losses have been, what its liabilities are, and what is the value of every share of stock presently held advanced or unadvanced in it, and how much every member must lose upon every dollar paid in by him upon his stock, making a proper allowance for the expenses of settlement. If that can be ascertained, the amount per share to be credited upon the borrower's indebtedness—that is, upon the amount actually received by him originally—has been found, and if he pays the balance, with interest (being credited with past interest payments), he has discharged all he owes the society or his fellow members. If these preliminary calculations can be made to yield only an approximately correct result, a corresponding credit ought to be allowed for the borrower's stock, and his right preserved to reclaim what, on a final settlement, he shall appear to have overpaid."

This law seems to be justly and fairly applicable to the present case: but at what time ought the application of it to be made? Since June 1, 1898, nothing appears to have been done but receiving interest and premium on the loans and collecting assets. The plaintiff has not paid, nor been permitted to pay, any dues, and it seems to be admitted that none had been paid by any person. He has made payments corresponding in amount to the dues, but with the understanding that these payments were to be credited upon his debt. Hence it appears that there has been a cessation since June 1, 1898, of some of the most important functions of the association. What disposition has been made of the collections does not appear. Whether they have been reloaned and profits made, or have been consumed in the payment of withdrawals, nothing in the record indicates. It is fair to presume that, had the association regained its normal and healthy condition, this state of affairs would not exist. It would be exercising all its functions and working towards maturity of the stock. Something must still be radically, and perhaps incurably, wrong. All this argues that such was the condition at the date of the suspension. The logic of the situation and circumstances disclosed by the record is that a process of liquidation has been carried on for all these years by the directors. Hence, the adjustment between the plaintiff and defendant ought to be made as of June 1, 1898. He should be charged with the amount of the loan and interest thereon from the time at which it was received, and all payments made by him as interest and premium should be credited and applied on the debt and interest thereon, according to the rule governing partial payments, and the actual value of his stock, as nearly as it can be ascertained, as of June 1, 1898, should be credited also. Then, starting with the balance thus ascertained, he-

should be charged with interest thereon, and credited with all payments of interest and dues, or sums paid in lieu of dues, under the rule governing partial payments, and required to pay the amount remaining due as thus ascertained, and, upon the payment of said amount, the association should be required to execute a release of the deed of trust. How far the result, so to be determined, will differ from that at which the court below arrived in treating the loan as an ordinary one, depends largely upon the value of the stock. The dues paid up to June 1, 1898, amounted to $388.80; but it seems that several payments were omitted, in consequence of which the value of the stock at that date would probably be considerably less than that of other shares, the dues on which were kept promptly paid. The incompleteness of the record respecting the status and value of the stock at the time aforesaid may render it necessary to conduct an inquiry in respect thereto. It may also appear, upon full investigation and disclosure of all the facts, that credit for the full book value of the stock on that date would not be equitable and just. Therefore the matter of what should be credited as the value of the stock at the time aforesaid will be left open for determination by the circuit court upon ascertainment of the necessary facts.

For the reasons above given, the decree complained of will be reversed, and the cause remanded for further proceedings, in accordance with the views herein expressed and the principles and rules governing courts of equity.

Sanders, J., dissenting:

The decree of the circuit court is based upon the theory that at the time the defendant became a member of the association, and at the time the loan was made to him, certain by-laws of the association were in force, providing that monthly dues should be collected from all members and stockholders of the association, and that sometime thereafter the by-laws were changed, so as to permit the directors to indefinitely suspend the payment of such dues, which they did, in pursuance thereto, thereby changing the contract entered into between the plaintiff and the association, and defeating the entire purpose and object thereof, and destroying its features as a building and loan association; and that, this being done, the loan made should be treated as a simple loan, bearing the legal rate of interest. This conclusion of the circuit court, I think, is eminently correct, and I would affirm the decree.

The conclusion reached by the court in its majority opinion and that reached by the circuit court differ only in respect to the basis of settlement; it being held here that the indefinite suspension of dues amounted practically to a dissolution of the association, and that the settlement should be governed by the principles announced in the case of Young v. Improvement Loan & Bldg. Asso. 48 W. Va. 512, 38 S. E. 670. It does not appear from the record that the association, at the time of the suspension of the payment of dues, was insolvent, or that it is now insolvent, or has been dissolved; nor is there any such claim, but, so far as the record shows, it is perfectly solvent and continuing. Therefore it is improper to hold that the settlement made with the plaintiff should be upon the theory that the association is not a going concern. So far as we know, this plaintiff is the only member complaining of such suspension, and the only one who seeks a settlement and desires to withdraw. This being so, the question arises, Must he be required to fulfil the contract on his part by paying dues upon his stock until the time of such suspension? The association, by the indefinite suspension of dues, has entirely changed the contract of the plaintiff, by necessarily extending the maturity of his stock to a time far beyond that at which it would have matured, if the contract had been carried out as entered into, and had been continued upon the plan and scheme of a building and loan association. This being so, the plaintiff should only be required to repay to the association the amount of the loan, with 6 per cent interest, giving him credit upon the plan of partial payments for all payments he has made. It is said that he should be required to pay dues up to the time of the suspension, because to hold otherwise would be a hardship on the other stockholders and members of the association. Why is this so? He repays to the association the sum of money which it advanced to him, as a loan, with 6 per cent interest. It is in no worse condition. The money that it advanced has been repaid, with its legal interest. When the plaintiff entered into his contract, the by-laws of the association entered into and formed a part of it, and these provided for the payment of dues, premium, and interest in monthly instalments until the maturity of the stock, but premium not to exceed eight years. By this plan there was a chance that the association, if its affairs were honestly administered, would mature its stock within this term from the earnings of the company. This the suspension of dues effectually prevents. The association disabled itself to perform its contract. It does not appear from the record but that the other stockholders have assented to and acquiesced in the change. The

plaintiff cannot be bound by their acquiescence, nor is he required to contribute to the support of the association the dues paid by him to the time of the change, on the assumption that to hold otherwise would be a hardship on the other, and, so far as we know, assenting stockholders. The consideration for his contract has failed absolutely, and he has the right to treat it as abrogated, which he has done. This being so, nothing more should be required of him than the interest on the money received; but that, together with the principal, he should pay.

KANSAS SUPREME COURT.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Plff. in Err.,
v.
P. D. SCHRIVER.

(— Kan. —, 84 Pac. 119.)

Carrier—shipper's order.

1. It is the duty of a railway company which has received from the owner for carriage a quantity of goods consigned to shipper's order to deliver in accordance with such order, and only in accordance with such order; and a failure or refusal, without lawful excuse, so to deliver, will render the carrier liable in conversion for the value of the goods.

Same—order for diversion.

2. An order from the shipper of goods consigned to shipper's order, duly accepted by the carrier and noted on the original bill of lading by its agent, directing a diversion of the goods from one destination to another, is equivalent to a demand for delivery.

Same—delivery to person to be notified.

3. The fact that a person to be notified of the arrival of goods consigned to shipper's order takes them from the carrier's possession without its knowledge or consent, and detains them in his own warehouse, will afford no justification for the carrier's failure to comply with an order from the shipper diverting the consignment.

Flour sacks—furnished for filling—title to.

4. The general rule that an accession falls to the principal applies to sacks supplied by a dealer in flour to a manufacturer, to be used in the production of sacks of flour for the market; and the claim of a dealer to the sacks of a car load of sacks of flour which a carrier has received from the manufacturer for transportation according to the shipper's order will not justify the carrier in withholding delivery according to such order.

Carrier—representations of notify consignee.

5. The fact that such a claimant repre-

Headnotes by BURCH, J.

Case Note.—Liability of carrier for property removed by, or delivered to, one whom it was directed to notify.—It is well settled that a direction in a bill of lading or shipping receipt, to notify a certain person of the arrival of goods which are consigned to the order of the consignor or of a third person, does not justify the carrier in delivering the goods to the person whom it is directed to notify, without the production of the bill or shipping receipt properly indorsed; and, if the carrier does deliver the goods to him under such circumstances, it is liable for the value thereof to the holder of the bill or shipping receipt. Northern Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266; Southern R. Co. v. Atlanta Nat. Bank, 56 L.R.A. 546, 50 C. C. A. 558, 112 Fed. 861; Arkansas S. R. Co. v. German Nat. Bank (Ark.) 92 S. W. 522; Illinois C. R. Co. v. Southern Bank, 41 Ill. App. 287; Libby v. Ingalls, 124 Mass. 503; Union Stock Yards Co. v. Westcott, 47 Neb. 300, 66 N. W. 419; Bank of Commerce v. Bissell, 72 N. Y. 615; Wright v. Northern C. R. Co. 8 Phila. 19.

In Witt v. East Tennessee & W. N. C. R. Co. 99 Tenn. 442, 41 S. W. 1064, however, a carrier which delivered the goods to the person whom it was directed to notify, and who was the purchaser and ultimate consignee, without the production of the bill of lading by him, was exonerated from liability to the shippers, to whose order the goods were consigned, it appearing that the bill of lading was attached to a draft drawn upon such person and sent through a bank for collection, and that he did in fact pay the amount of the draft to the bank, in part before and in part after the delivery of the goods to him, although the bank subsequently became insolvent and failed to remit the proceeds.

But in General Electric Co. v. Southern R. Co. 72 S. C. 251, 51 S. E. 695, the court affirmed the action of the trial court in striking from the answer of a carrier, in an action by the consignor for the value of goods shipped under a bill of lading to the order of the consignor, but delivered by the carrier to the person whom it was directed to notify without the production of the bill by him, a clause which alleged, in effect, that the goods were shipped to such person on a conditional sale, and that the consignor intended that they should be delivered upon the payment of a draft for a portion of the purchase price, which was sent through a bank for collection, and that the defendant at the time of delivering the goods, received the amount of such draft, which it thereby tendered to the plaintiff. The court said in support of its ruling that it was the duty of the carrier to await the production of the bill of lading and let the indorsement thereon govern the delivery of the shipment. The judgment rendered in this case for the

sents to the carrier that he expects to be able to arrive at an understanding with the shipper within a few days will not justify it in withholding delivery according to the shipper's order.

Same—conversion—defense of suits.

6. After a shipper of goods consigned to shipper's order has elected to treat the property as converted on account of the carrier's wrongful neglect or refusal to deliver according to his order, and has notified the carrier of such election, he is no longer under obligation to defend suits relating to the property, or to aid the carrier in disposing of it.

(January 6, 1906.)

ERROR to the District Court for Marion County to review a judgment in favor of plaintiff in an action brought to recover for the alleged conversion of property in defendant's possession for transportation. Affirmed.

The facts are stated in the opinion.

Messrs. **W. R. Smith, O. J. Wood,** and **Alfred A. Scott,** for plaintiff in error:

The defendant performed its whole duty in the premises.

Where the original taking was lawful, and the detention only is illegal, a demand and refusal to deliver must be shown.

Adams Exp. Co. v. McConnell, 27 Kan. 238; Rubin v. Wells Fargo Exp. Co. 85 N. Y. Supp. 1108; Wamsley v. Atlas S. S. Co. 168 N. Y. 533, 85 Am. St. Rep. 699, 61 N. E. 896.

Where goods in transit are taken from the possession of a common carrier by valid legal process, it is a good defense to any action which may be brought against it for failure to deliver the same according to contract.

5 Am. & Eng. Enc. Law, p. 236; Hutchinson, Carr. § 396; Landa v. Holck, 129 Mo. 663, 50 Am. St. Rep. 459, 31 S. W. 900; McVeagh v. Atchison, T. & S. F. R. Co. 3 N. M. 327, 5 Pac. 457; Merz v. Chicago & N. W. R. Co. 86 Minn. 33, 90 N. W. 7; Savannah, G. & N. A. R. Co. v. Wilcox, 48 Ga. 432.

Messrs. **Kellogg & Madden,** for defendant in error:

It is the carrier's duty to deliver according to the terms of his expressed or implied contract.

2 Am. & Eng. Enc. Law, p. 884.

The question of negligence in the performance of this duty is immaterial, for his warranty as insurer is broken by nondelivery.

Hall v. Boston & W. R. Corp. 14 Allen, 439, 92 Am. Dec. 783; Forbes v. Boston & L. R. Co. 133 Mass. 154; Newcomb v. Boston & L. R. Corp. 115 Mass. 233; Finn v. Western R. Corp. 102 Mass. 283; McEwen

full value of the goods was accordingly affirmed.

In Raleigh & G. R. Co. v. Lowe, 101 Ga. 320, 28 S. E. 867, the carrier, without the production of the bill of lading, delivered the goods to a firm for whom it had reason to believe they were ultimately intended, taking from such firm an indemnifying check against loss by reason of the unauthorized delivery. Subsequently the bill of lading, indorsed to such firm and attached to a draft, was stolen from the bank which held the paper for collection by a person whom the carrier was directed by the bill of lading to notify. The firm to which the goods had been delivered procured the stolen bill of lading from such person by paying him for the goods, believing he was the rightful owner, and exhibited the bill to the carrier, and the carrier, supposing the transaction was ended, surrendered the indemnifying check. It was held that, even if the bank was guilty of negligence in losing possession of the bill of lading, it was not a matter of which the carrier had any legal right to complain; and that, upon the bank's reimbursing the consignor for the loss of the goods, an action in the latter's name for the bank's use was maintainable against the carrier.

In Wright & C. Wire Cloth Co. v. Warren, 177 Mass. 283, 58 N. E. 1082, the plaintiff took a bill of lading from a railroad company, by which the goods were consigned to the "order of" plaintiff, care of a certain steamship company (the defendant), with directions to notify a certain firm therein named. The railroad company left the goods in the sheds on the defendant's wharf, delivering to it a freight bill in the same form as the bill of lading, whereupon the defendant, without the production of the bill of lading, delivered to the firm a permit addressed to its receiving clerk, directing him to receive the goods from the firm, under which permit the firm removed the goods from the wharf to the defendant's vessel, and received in lieu of the permit a receipt signed by defendant's receiving clerk acknowledging the receipt of the goods for shipment upon the vessel. It was held that the direction in the bill of lading with reference to notifying the firm did not authorize the defendant to treat the firm as the consignee; and that, as its acts amounted to a delivery to the firm, it was liable to the plaintiff as for a conversion, notwithstanding that it acted in good faith, and with reasonable grounds, by reason of certain correspondence of which the plaintiff, however, had no knowledge, to believe that the goods were a part of a consignment to the firm to be shipped on the defendant's vessel.

In Schopp Fruit Co. v. Missouri P. R. Co. 115 Mo. App. 352, 91 S. W. 402, a carrier having received 180 barrels of apples consigned to the shipper under a bill of lading directing it to notify a third person and al-

v. Jeffersonville, M. & I. R. Co. 33 Ind. 368, 5 Am. Rep. 216; Houston & T. C. R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116; Libby v. Ingalls, 124 Mass. 503.

Fraud, imposition, or mistake to which the carrier is subjected will not excuse a misdelivery.

2 Am. & Eng. Enc. Law, p. 888; Price v. Oswego & S. R. Co. 50 N. Y. 213, 10 Am. Rep. 475; Viner v. New York, A. G. & W. S. S. Co. 50 N. Y. 23; American Merchants' Union Exp. Co. v. Milk, 73 Ill. 224; Edmunds v. Merchants' Despatch Transp. Co. 135 Mass. 283.

Misdelivery by the carrier is held to amount to a conversion of the property.

2 Am. & Eng. Enc. Law, p. 890; Bowlin v. Nye, 10 Cush. 416; Newhall v. Central P. R. Co. 51 Cal. 345, 21 Am. Rep. 713; Furman v. Union P. R. Co. 106 N. Y. 579, 13 N. E. 587; Pennsylvania R. Co. v. Stern, 119 Pa. 24, 4 Am. St. Rep. 626, 12 Atl. 756; Wolfe v. Missouri P. R. Co. 97 Mo. 473, 3 L.R.A. 539, 10 Am. St. Rep. 331, 11 S. W. 49; Louisville & N. R. Co. v. Hartwell, 99 Ky. 436, 36 S. W. 183, 38 S. W. 1041.

There could be no delivery except in accordance with the bill of lading.

Dows v. National Exch. Bank, 91 U. S. 618, 23 L. ed. 214; Stollenwerck v. Thacher, 115 Mass. 224.

The owner may direct a change in place of delivery.

Michigan S. & N. I. R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; Strahorn v. Union Stock Yard & Transit Co. 43 Ill. 424, 92 Am. Dec. 142; Melbourne v. Louisville & N. R. Co. 88 Ala. 443, 6 So. 762.

Burch, J., delivered the opinion of the court:

On September 22, 1903, the plaintiff delivered to the defendant at Florence a car load of flour for shipment, consigned to "shipper's order, notify D. B. Kirk & Co., Kansas City, Mo." On the following day the plaintiff drew on Kirk & Company for the price of the flour, attaching the bill of lading to the draft. On September 25th the draft was dishonored on account of a claimed defect in the quality of the flour. The plaintiff then recalled the draft and bill of lading, took the bill of lading to the defendant's agent at Florence, and ordered the flour diverted to Nashville, Tennessee. On October 2d the bill of lading was changed according to direction, and the order of diversion was duly transmitted to the company's agent at Kansas City. On October 5th, when the defendant attempted to comply with the order of diversion, it found the flour in the possession of Kirk & Company. It seems that the employees of Kirk & Company had discovered the car on a side track leading to the firm's warehouse, and had taken possession of it and unloaded it without the knowledge of their superiors and without the knowledge of the defendant. In consequence of this fact, the defendant was unable to comply with its contract to transport to Nashville. The defendant, through its agent at Florence, then conferred with the plaintiff, and, after explaining the situation, gave the plaintiff the impression that the Kirk & Company draft would be taken up if it were returned to Kansas City. The agent further said there would be a speedy adjustment of the claim, he thought; that officials were coming to Florence for that purpose, and suggested that the plaintiff return the draft and bill of lading to Kansas City for collection. The plaintiff consented to do as the agent advised, but stated to him at the time that it would hold the defendant responsible for the flour. Afterward the defendant regained possession of the flour, but did not forward it according to the shipper's order. Kirk & Company, having furnished the sacks in which the flour was contained, claimed title to them, and also claimed they expected to come to an understanding with the plaintiff within a few days. The second draft was

low inspection, placed the car containing the apples on a switch track in the rear of such person's warehouse, and permitted an inspection by him. The latter, without having paid the draft drawn by the shipper upon him, or received the bill of lading attached thereto, and without the knowledge of the carrier, removed 4 barrels of apples from the car, but subsequently returned them. It was held that such facts were insufficient to show a delivery by the carrier which would render it liable as for a conversion.

In Sloan v. Carolina C. R. Co. 126 N. C. 487, 36 S. E. 21, where a carrier received a shipment of cotton under a bill of lading "to order, notify S. B. Tanner, treasurer" (referring to the treasurer of cotton mills for whom the shipper had purchased the cotton), it was sought to hold the carrier liable for permitting an inspection of the cotton by the mills, as a result of which the mills refused to receive the cotton or accept a draft drawn against the same. It was urged by plaintiff that the form of the bill of lading was notice that the plaintiff retained ownership until the production of the bill of lading by the treasurer of the mills. The court said that the point might be well taken if the action were for wrongful delivery to the cotton mills, but that the request "to notify" certainly conferred upon the cotton mills as full right to inspect the cotton as if it had been the consignee; and that, consequently, the carrier could not be held responsible for permitting such inspection.

not paid, and on October 10th Kirk & Company commenced an action of replevin against the defendant for the sacks, which action resulted, on October 27th, in a judgment for the defendant. On October 29th Kirk & Company garnished the flour in the defendant's possession, and a portion of it was afterward sold to satisfy orders made in the case. The plaintiff was duly notified by the defendant of the pendency of both the Kirk & Company suits, but declined to appear or defend. After a request upon the plaintiff for instructions, the remainder of the flour was disposed of by the defendant under the statutes of the state of Missouri, and the net proceeds held for the plaintiff's use. After a demand upon the defendant for the full value of the car of flour, the plaintiff brought suit, and obtained a verdict and judgment. In answer to special questions the jury found the material facts of the controversy. The plaintiff furnished the only evidence relating to the drawing of the second draft. From that evidence the jury found the draft was made under the advice of the defendant. The statement to defendant's agent that the plaintiff would hold it responsible for the flour occurred in the same conversation, and was not denied. Hence the finding fairly may be construed to exclude, as the evidence and general verdict clearly do, the notion that the plaintiff waived any of its rights, or in any manner released the defendant from liability, by making and sending forward the second draft with the bill of lading attached.

With the record in the condition noted, the case may be determined upon the broad ground marked out by counsel for defendant, *viz.*: Did the defendant do its whole duty, and was the plaintiff's loss the result of its own laches? The defendant's contract was to deliver according to the shipper's order, and, when it allowed Kirk & Company to obtain possession of the flour without presentation of the bill of lading, it was guilty of a misdelivery. The request for a diversion of the consignment from Kansas City to Nashville was a demand for the property—an order from the shipper—with which it was the defendant's duty to comply. That it could not do so was the result of its own wrongful act. Except for the inexcusable loss of possession, it might have diverted the car immediately upon receiving instructions to that effect; and all subsequent complications were the result of that original fault. The fact that the bags, when furnished to the plaintiff, belonged to Kirk & Company, gave the latter no right to the possession of them, much less the right to detain the entire consignment of flour. The bags were voluntarily turned over to the plaintiff to be filled with flour. In a certain sense the process of manufacturing flour for market is not entirely complete until the flour is incased in sacks. At least the product is not merchantable until that or its equivalent is done, since, the commodity cannot be handled in bulk. When once a bag has been filled with flour, the two cannot be separated without loss; and it is not contemplated that they shall be separated except as the flour is finally consumed. For all practical commercial and legal purposes, the bag and its contents become inseverable. They are no longer independently identified as so many pounds of flour and a bag, but they become united in a single entity, a sack of flour. The flour, however, is the principal thing. The sack is but a minor accessory to the flour, and, in comparison with it, is of an almost negligible value. Therefore, under ordinary circumstances and in the absence of an express agreement to the contrary, a party supplying sacks will be held to consent that his subsidiary and relatively unimportant contribution to the final product shall become an accession to the contribution of the manufacturer. If by accident, inadvertence, mistake, or other conduct not involving fraud, a sack be improperly filled, the result is the same as if it were lost or destroyed. The remedy is not by replevin, but through an action for damages, since the law, as a means of justice, will not jeopardize the overwhelming mass and value of the article for that which is insignificant and incidental. Merritt v. Johnson, 7 Johns. 473, 5 Am. Dec. 289; Wetherbee v. Green, 22 Mich. 311, 320, 7 Am. Rep. 653; Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582; Arnott v. Kansas P. R. Co. 19 Kan. 95. From this it follows that the claim of Kirk & Company to the sacks furnished no justification for the defendant's failure to obey the order of diversion.

The defendant having suffered itself to be deprived of the property, and having offered an impotent excuse for not complying with the demand lawfully made upon it, the plaintiff had the right to treat the property as converted. 6 Cyc. Law & Proc. p. 472. This it did on October 6th, and so notified the defendant. Although the defendant regained possession of the flour, it neither offered to perform the contract of carriage, nor to return the property. It merely notified the plaintiff to defend certain suits. These suits having been commenced after the plaintiff had elected to hold the defendant responsible in damages, and had so advised the defendant, they did not concern the plaintiff, and it was not guilty of laches in ignoring them. "Where a common carrier fails and refuses to deliver to the consignee property shipped over its line, the

consignee has a right to elect to claim damages for the value of the property, and to waive all title to it; and, after the carrier has been notified of such election, the property belongs to it, and is not subject to attachment in its hands as being the property of the consignee." Hamilton v. Chicago, M. & St. P. R. Co. 103 Iowa, 325, 72 N. W. 536. For like reasons, the plaintiff was not obliged to direct the disposition to be made of the remnant of the property in the defendant's custody after the execution sale, and the conclusion upon the whole matter must be that the defendant was guilty of a breach of duty, while the plaintiff was free from fault.

A carrier is not warranted in refusing a rightful claim to property because one whose title is shown to be invalid by its mere description represents that he expects to be able to arrive at an understanding with the owner within a few days. Therefore the first instruction asked by the defendant was properly refused. The fourth instruction asked was incorrect, for reasons already set forth; and, in view of the facts found, and concerning which there is no controversy, the instructions which were given and which are now assailed could scarcely be prejudicial, even if it be conceded they are erroneous.

The judgment of the District Court is affirmed.

All the Justices concur.

IOWA SUPREME COURT.

J. H. COWNIE GLOVE COMPANY
v.
MERCHANTS' DISPATCH TRANSPORTATION COMPANY, Appt.

(— Iowa, —, 106 N. W. 749.)

Carrier—means of transportation.

1. The ownership of the means of transportation is not necessary to constitute one a common carrier.

Carrier—importation in bond—liability.

2. A carrier who fails to comply with its undertaking to transport goods from a foreign country and deliver them in bond at an inland port of entry, clearing them at the port of first arrival, by failure to procure such clearance, is liable for injury to the goods while detained at such port, not arising from inherent quality of, or defect in, the goods, the act of God, of the owner, or of the public enemy.

(April 4, 1906.)

APPEAL by defendant from a judgment of the District Court for Polk County in plaintiff's favor in an action brought to recover damages for injuries to a package of merchandise while in defendant's possession for transportation. Affirmed.

The facts are stated in the opinion.

Messrs. **Carr, Hewitt, Parker, & Wright,** for appellant:

The bill of lading is controlling, and does not require defendant to file papers in New York, or pay the duty there.

Burgher v. Chicago, R. I. & P. R. Co. 105 Iowa, 335, 75 N. W. 192.

Messrs. **Parrish & Dowell,** for appellee:

The ownership of railroads and steamships is not essential to constitute a common carrier.

Ray, Negligence of Imposed Duties, pp. 6, 7; Lawson, Contracts of Carr. § 233; Merchants' Despatch Transp. Co. v. Bloch Bros. 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881.

The common carrier is an absolute insurer, except for loss occasioned by (1) the act of God; (2) the public enemy; (3) the act of the owner; (4) an inherent quality or defect in the goods shipped.

Hart v. Chicago & N. W. R. Co. 69 Iowa, 485, 29 N. W. 597; Kinnick Bros. v. Chicago, R. I. & P. R. Co. 69 Iowa, 665, 29 N. W. 772; McCune v. Burlington, C. R. & N. R. Co. 52 Iowa, 600, 3 N. W. 615; St. Clair v. Chicago, B. & Q. R. Co. 80 Iowa, 304, 45 N. W. 570; Chapin v. Chicago, M. & St. P. R. Co. 79 Iowa, 582, 44 N. W. 820; Ray, Negligence of Imposed Duties, §§ 2, 10.

The carrier is liable for damage arising even from an inherent quality or defect in the goods shipped, if the damage could have been avoided by reasonable care; and the burden is upon defendant to establish the defense.

Betts v. Chicago, R. I. & P. R. Co. 92 Iowa, 343, 26 L.R.A. 248, 54 Am. St. Rep. 558, 60 N. W. 623; Beard v. Illinois C. R.

Case Note.—Liability for failure to forward bonded merchandise.—The above case presents a unique question, and one which does not seem to have been adjudicated before, as no case just like it can be found. The following, however, are somewhat analogous:

In Farmers' Loan & T. Co. v. Northern P. R. Co. 57 C. C. A. 533, 120 Fed. 873, a railroad company contracted to ship a quantity of lead from New York city to Japan *via* Tacoma, Washington, and expressly agreed that the same should go forward by a ship scheduled to sail from the latter port on a day certain. This ship belonged to a steamship company which, by a traffic agreement

Co. 79 Iowa, 518, 7 L.R.A. 280, 18 Am. St. Rep. 381, 44 N. W. 800.

A carrier cannot abrogate or alter an oral contract for shipment by a subsequent delivery of a bill of lading.

Merchants' Despatch Transp. Co. v. Furthmann, 149 Ill. 66, 41 Am. St. Rep. 265, 36 N. E. 624; Ray, Negligence of Imposed Duties, Freight Carr. p. 134; Stoner v. Chicago G. W. R. Co. 109 Iowa, 551, 80 N. W. 569.

Sherwin, J., delivered the opinion of the court:

The plaintiff is an importer of gloves, and in March, 1901, it entered into an oral contract with the defendant, by which the defendant undertook to transport a case of gloves from the city of Erlangen, Germany, to Des Moines, Iowa, and deliver the same to the plaintiff in bond. For the purpose of carrying out the contract and to enable the defendant to direct and control the shipment, the plaintiff executed and delivered to the defendant a writing as follows: "Jacob Wiessner, Erlangen, Germany. Hereafter, and until further orders, please forward all of our goods in accordance with instructions you will receive from the Merchants' Dispatch Transportation Co., or their representative." Following the signature of the plaintiff to this order, the following also appears: "Please follow instructions relative to forwarding goods covered by above order in accordance with our letter of this date, and note—upper

with the railroad company, was bound to supply vessels according to the exigencies of the latter company's traffic. The shipment was made under the contract, and was delivered at the port aforesaid to the steamship company, and was loaded on the ship specified. In the meantime the railroad company's agent had received payment for the freight from the shipper, and had delivered to the latter's clerk a bill of lading in the usual printed form, but upon which were stamped the words, "Subject to delay." The clerk received it without any objection to its terms, and it was not read or examined by him or any officer of the shipper. On the day of sailing a deputy collector of customs refused to clear the vessel while the lead was aboard, claiming that it was contraband of war, and wired for instructions to the collector who was stationed at another port. The lead was unloaded and the ship sailed without it. On the next day the collector, by wire, instructed the deputy to permit the shipment, and it went forward by a later vessel, but, in consequence of the delay, the purchaser refused to accept it, and the shipper was obliged to sell it at a loss. The railroad company made no attempt to prevent the unloading of the lead for the short time necessary to obtain instructions from the collector of customs, nor did it try to secure any delay in the sailing of the vessel, or to arrange to have the lead reloaded in case of a favorable reply from the collector. It also negligently failed, for six days thereafter, to notify the shipper of the delay. During the negotiations leading up to the making of the contract the railroad company had become aware of the damages likely to result to the shipper from a delay in forwarding the lead. The court held that the railroad company was bound to provide for the clearance of the vessel, and that therefore it was liable to the shipper for the loss occasioned by the delay in its being held by the deputy collector.

The judgment of the circuit court of appeals was affirmed by the United States Supreme Court in 195 U. S. 439, 49 L. ed. 269, 25 Sup. Ct. Rep. 84. In the latter court the defendant insisted that the action of the deputy collector in refusing to grant a clearance to the ship while the lead was on board made the performance of the agreement unlawful, and for that reason the defendant was absolved from its agreement to ship the lead by that vessel. The court said: The contract was not unlawful when made. It may be assumed that the lead was contraband of war, but that fact did not render the contract of transportation illegal, nor absolve the carrier from fulfilling it. No law was violated by making or executing the contract, though, of course, the sailing of the vessel without a clearance would have been unlawful. The deputy collector had the power to refuse to grant the clearance, and he did refuse unless the lead were taken off. In so doing he undoubtedly violated his duty. This constituted no defense to the action, since the contract was made in contemplation of trouble arising from this very cause that the lead might be contraband of war. The company took the risk in making the contract, and it ought to be held to it. As the act of the deputy collector was an erroneous one, and a clearance should have been given while the lead was on board the vessel, his refusal ought not to be at the expense of the shippers, who had obtained this contract for transportation while all parties actually knew the difficulties that might concern the exportation of the lead from Tacoma. There was no intervention of the government of the United States; and it was therefore not an act of the state which prevented the sailing of the vessel, within the true meaning of such a term, but a mistaken act of a subordinate official, not justified by law, and not sufficient as an excuse for the nonperformance of the contract under the circumstances. If the bill of lading is to be regarded as applicable for this purpose, the refusal of a clearance did not constitute a "restraint of princes, rulers, or people," within that clause of the bill.

The opinion in Pennsylvania Co. v. Canadian P. R. Co. 107 Ill. App. 386, seems to assume the liability of a carrier for loss or injury to the goods shipped by it, arising

part of order to be filled out by consignee, lower part will be completed by Merchants' Dispatch Transportation Co., New York, when order is sent to their foreign representatives." The plaintiff subsequently ordered a case of gloves of said Wiessner, which was delivered to the defendant in the city of Erlangen, about the 12th day of March, 1901. The goods were shipped from Hamburg for New York in the latter part of March, to be from there transported in bond to Des Moines, which is a port of entry for imported goods. The goods were landed in New York in proper season, but, owing to a failure to comply with the customs regulations, they were kept there by the customs officials until late in the fall of the same year, and when they reached the plaintiff in Des Moines they were so badly damaged as to be of but slight value. The plaintiff claims that the contract required the defendant to deliver the goods in bond in Des Moines, and that this necessarily involved the duty of providing the papers necessary to clear them at the seaport entry, while the defendant insists that such duty rested on the plaintiff. The appellant alleges a large number of errors, and we shall discuss them without regard to the order of representation in its brief.

1. The gloves were shipped "to order" and a draft made on the plaintiff, with bill of lading attached. The appellant therefore claims that title thereto did not vest in the plaintiff until payment of the draft and surrender of the bill of lading, and that the evidence does not show that the gloves were damaged after they became the

from their being held for customs duties, though the case was decided on other grounds. The facts out of which this case arose are these: The plaintiff had contracted to forward oil from Cleveland, Ohio, to consignees in a small village in Manitoba. The defendant was the final carrier in the course of transportation. The oil was dutiable under the laws of Canada, and, when transferred to the defendant at the Canadian boundary line, the cars containing it were sealed and tagged to show that the goods were in bond, and when the oil arrived at the farthest port of entry on the way to its destination, but at a distance of 130 miles therefrom, it was under the control of the customs officers, and could not be forwarded to its destination until properly entered, cleared, and the duties paid. This could not be done except by the consignees themselves or their duly authorized attorneys. The invoice accompanying the oil from the boundary line was, upon the arrival of the oil at the said port of entry, delivered to the customs officers. It did not appear that it was the duty or custom of the carrier at this point to pay duties on goods imported into Canada. While passing over the various connecting lines the names of the consignees had become misspelled through no fault of the defendant, and the notices mailed by it to the supposed consignees did not reach the proper persons. The defendant made no further effort to locate them, nor did it appear that it ever applied for further information to the plaintiff or to the original consignors. It was shown, however, that the consignees made inquiry of the defendant's agent at the place of destination, and were told that no goods consigned to them had been received by the defendant. The real consignees not being found, the defendant had the oil taken from the cars in which it was shipped, and which were leaking, and had it stored in tanks, from which it was either sold by the defendant or leaked away. At all events, it entirely disappeared. Previous to the beginning of this suit the plaintiff had been held liable to the consignees for the nondelivery and loss of the oil, and in this action sought to recover from the final carrier what it had paid as damages, but was unsuccessful in the trial court, the jury having been instructed to find for the defendant, "apparently on the ground that the statute of limitations had run when the suit was commenced." This the appellate court held to be error, and remanded the cause. To quote from the opinion: "The duty of appellee [the final carrier], after it had received the oil for transportation, was primarily to carry it to its destination, and there deliver it to the consignees. If the latter failed to take the goods, or were not found after reasonable efforts on the part of appellee to perform its contract, then appellee was at liberty, and it was its duty, to 'hold the goods for the use of the consignor,' or to store them in a reasonably safe place for a reasonable time if not called for. If, as seems to have been the case, the governmental power prevented the carriage of the oil to its destination until the duties were paid, then it was appellee's duty to take all practicable means to notify the consignees, and, failing in that, to notify the shippers, of the situation. Meanwhile, appellee was at liberty to turn the oil over to the customs officers, or to store it in a suitable and reasonably safe place." Having failed to do either, the natural inference to be drawn from the opinion is that the final carrier was liable for the loss occasioned by its omission of duty in this regard.

In Smith Bros. v. New Orleans & N. E. R. Co. 106 La. 11, 54 L.R.A. 923, 87 Am. St. Rep. 285, 30 So. 265, it appeared that one of the defendant railroad companies contracted to carry a consignment of imported rice in bond from Charleston, South Carolina, to New Orleans, and that it agreed with the other defendant railroad company, "the Plant System," to have the rice come over the two roads in bond because the plaintiff did not wish to pay the customs duties at Charleston. "The Plant System"

property of the plaintiff. The gloves were damaged while they were in the custom house in New York, and the evidence was sufficient to warrant the finding that the damage occurred after the plaintiff acquired ownership thereof. The evidence also sufficiently showed that the defendant was a common carrier, and that the gloves were delivered to it as alleged. To constitute a common carrier, it is not essential that the person or corporation undertaking such service own the means of transportation. If the contract is that the goods will be carried and delivered, it makes the one so contracting a common carrier, regardless of the name or the ownership of the line or lines over which the service extends. Ray, Negligence of Imposed Duties, pp. 6, 7; 6 Cyc. Law & Proc. p. 369; Buckland v. Adams Exp. Co. 97 Mass. 124, 93 Am. Dec. 68; Merchants' Despatch Transp. Co. v. Bloch Bros. 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881; Lawson, Contracts of Carr. § 233.

The customs law (act June 10, 1880, chap. 190, 21 Stat. at L. 173, U. S. Comp. Stat. 1901, p. 1963) provided that dutiable goods consigned to and destined for interior ports might immediately pass the port of first arrival without appraisement and liquidation of duties at the latter port, upon compliance with the requirements of § 4 of the act, and under the restriction of § 9 thereof, which were as follows:

"Sec. 4. That §§ 2853 and 2855 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1901) be, and the same are hereby, so amended as to require

was not a bonded railroad, and it took the goods out of bond, paid the duties thereon at Charleston, and so shipped them, and the railroad company with whom the plaintiff had contracted for the carriage refused to deliver the rice to the plaintiff without the payment of the freight and customs charges. These the plaintiff paid under protest. The fact that the rice was not in bond forced the plaintiff to sell it at a loss. The supreme court held both the defendant railroads liable for such loss, and directed judgment against them *in solido*. In the language of the opinion, "the damages resulting from the breach might have been foreseen. The loss in the value of the goods was a direct consequence of the breach of the obligation. . . . The carrier who takes goods of a merchant out of bond without instructions and despite the circumstances indicating that they had a value in bond is not in the situation of one who could not have foreseen the possibility of accruing damages."

In Mellier v. St. Louis & N. O. Transp. Co. 14 Mo. App. 281, the defendant had been a duly authorized common carrier of United States bonded goods on its line of boats between New Orleans and St. Louis, but had ceased to do business as such except in respect to consignments already made to it; and of these it had arranged with its successor to take charge. Before it went out of business, a consignment of wine was made to it for the plaintiffs at St. Louis, and the defendant's agents at New Orleans received the usual bill of lading and the usual consular certificate, but the goods did not reach New Orleans until after the defendant had quit business. Its successor refused to ship the goods on the ground that it was not going to carry wine on its boats. There were no other boats in port authorized to carry bonded goods, and the defendant's agents at New Orleans and its customs attorney there consulted with the agent of the new line as to what was best to do; and in good faith, thinking it best for plaintiff's interests, they took the goods out of bond and shipped them to the consignees at St. Louis on a boat that was not bonded. It was held that taking them out of bond and shipping them on an unbonded vessel was a conversion. The court said: "The rule is that the carrier must carry the goods according to the contract, . . . and if, in any of these particulars, he assumes to violate the shipper's instructions, he takes the risk of loss or damage; and the ground on which he is liable is that he has not executed his contract with the owner." And when defendant saw from the bill of lading that the goods were to be shipped in bond it might have declined the service, if it did not have the means of so shipping them. "Yet, having undertaken it, it took upon itself the obligation of shipping them according to its terms, and is liable for the damages which the plaintiffs have sustained by its failure to do so."

In Mitchelson v. Minneapolis, St. P. & S. Ste. M. R. Co. 67 Minn. 406, 69 N. W. 1106, the plaintiff had instructed his Canadian agent to ship a quantity of tobacco to St. Paul. The agent's clerk prepared the proper papers to be presented to the United States consul, as required in importations to this country. These papers stated that it was intended to make entry of the goods at Sault Ste. Marie. The goods were addressed to the plaintiff at St. Paul, and delivered to the connecting line of the defendant for carriage, which company issued its bill of lading containing a condition that all goods for the United States were subject to customs charges. The papers as prepared were forwarded to the agent of the defendant at Sault Ste. Marie, and, with the goods, passed into the hands of the deputy collector of customs at that port. The defendant's agent made entry of the goods as for "immediate consumption," and paid the duty thereon as required by the customs officers. It was held that the act of the agent was justifiable, and that it was not his duty to enter the goods for "transportation" to St. Paul in order to permit the payment of the customs duties there; and it was further held that the defendant had a lien on the goods for the amount so paid.

that all invoices of merchandise imported from any foreign country and intended to be transported without appraisement to any of the ports mentioned in the 7th section of this act, shall be made in quadruplicate; and that the consul, vice-consul, or commercial agent, to whom the same shall be produced, shall certify each of said quadruplicates under his hand and official seal in the manner required by § 2855 of the Revised Statutes, and shall then deliver to the person producing the same two of the quadruplicates, one to be used in making entry at the port of first arrival of the merchandise in the United States, and one to be used in making entry at the port of destination, file another in his office, there to be carefully preserved, and as soon as practicable transmit the remaining one to the collector or surveyor of the port of final destination of the merchandise. . . .

"Sec. 9. That no merchandise shall be shipped under the provisions of this act after such merchandise shall have been landed ten days from the importing vessel, and merchandise not entered within such time shall be sent to a bonded warehouse by the collector as unclaimed, and held until regularly entered and appraised."

A consular invoice was made as required by this act, but a quadruplicate thereof was not filed with the customs officials at the port of New York, and, as a consequence of such neglect, appraisement and liquidation of duties was required at said port, occasioning the delay of which we have spoken, and the consequent damage to the gloves. If, under the contract of carriage, it was the defendant's duty to clear the goods at the port of New York, it is liable for the damages caused by their detention there, unless the plaintiff was bound to release them by payment of the duty. The plaintiff does not allege in its petition, nor is there evidence tending to show, an express agreement as to the filing of clearance papers by either party, and, if that duty rested on the defendant, it was because of its contract to deliver the goods in bond in Des Moines, and because of its agreement to take exclusive charge of the shipment and to release the plaintiff from any care in connection therewith,— so far at least as the clearance of the goods at New York was concerned. A careful examination and consideration of the evidence on this question satisfies us that the jury was warranted in finding therefrom that the defendant undertook to clear the goods at the port of first arrival, and that it was at fault in not doing so. A common carrier is an insurer, except for a loss occasioned by the inherent quality of or defect in the goods shipped, the act of God, or of the owner, or the act of the public enemy. And the law casts upon the carrier the burden of proving that the loss resulted from one or more of these causes. Ray, Negligence of Imposed Duties, §§ 2, 10; Hart v. Chicago & N. W. R. Co. 60 Iowa, 485, 29 N. W. 597; St. Clair v. Chicago, B. & Q. R. Co. 80 Iowa, 304, 45 N. W. 570.

If Des Moines had not been a port of delivery, a simple contract to transport the goods from Erlangen to that destination would have created no obligation on the part of the carrier to pay the duties thereon, and a failure on the part of the owner thereof to do so would be an act excepting the carrier from liability; and, in this connection, we may as well notice the contention of the appellant that the plaintiff was bound to pay the duty when he learned that the goods could not be cleared at New York without such payment. The court so instructed, and, whether right or wrong, it is the law of the case, so far as the appeal is concerned. We think, however, that the question whether the plaintiff could or should have paid the duty sooner, in the exercise of due diligence, was properly submitted to the jury and that its finding should not be disturbed.

It is urged there was such inconsistency between instruction 1, which told the jury what the plaintiff must prove to make its case, and instruction 6, which stated that if the defendant contracted to transport the goods and deliver them in bond in Des Moines, it was its duty to procure and file clearance papers, as to confuse and mislead the jury to the defendant's prejudice. There is no such inconsistency, as we view the record, for the latter instruction simply covered the defense insisted upon by the appellant. It is also said that the same instruction was erroneous because an agreement to deliver in bond in Des Moines did not impose on the defendant a duty to procure a clearance of the goods at New York: but what we have heretofore said disposed of the contention.

There is no merit in the appellant's contention that instruction 7 assumed that there was a contract for the shipment of goods.

Some of the other instructions are criticized, but we think that as a whole they were fair and fully presented the questions in the case, and are sustained by what has already been said on the main proposition.

Complaint is made of the refusal to give some of the instructions asked by the defendant, but we find no error in the denial. So far as they contained the law applicable

to the case, they were embodied in those given.

We have given the whole record and arguments careful examination, and find no error for which there should be a reversal of the case.

The judgment is therefore affirmed.

Bishop, J., took no part.

NORTH CAROLINA SUPREME COURT.

JOHN N. HOGGARD, Admr., etc., of Mary C. Jordan, Deceased, Appt.,
v.
CHARLES E. JORDAN et al.

(140 N. C. 610, 53 S. E. 220.)

Election by widow—effect on administrator.

The administrator of a widow will not be permitted to sell land as belonging to her for the payment of debts, where, although it originally belonged to her, she, for a period of nine years, had acted upon her election to accept the terms of her husband's will, which dealt with the property as his, and her heirs had acquiesced in her election for eight years after her death.

(March 27, 1906.)

APPEAL by plaintiff from a judgment of the Superior Court for Bertie County denying a petition to sell real estate for the payment of debts. Affirmed.

Statement by Connor, J.:

This was a petition by the administrator of Mary C. Jordan, deceased, to sell land for the purpose of making assets with which to pay debts. The defendants are the devisees of Jesse N. Jordan and heirs at law of his widow, Mary C. The petitioner alleged that his intestate, Mary C., died seised of the lands described in the petition. This was denied by defendants. The cause was, upon issue thus joined, transferred to the civil issue docket for trial. By consent his Honor found the facts. On the 18th day of May, 1877, Mary C. Jordan, being the owner of a share of a tract of land descended from her father, joined with her husband, Jesse N. Jordan, in a conveyance of said share to her sister, Florence Hancock, and her husband, R. E. Hancock. On the same day the said Florence and her husband joined in a conveyance of her interest in said land to the said Mary C. and her husband, Jesse N. Jordan, who died during the month of October, 1887, leaving a last will and testament nominating the said Mary C. executrix thereto. Item 1 of his will is in

Case Note.—When beneficiary deemed to have elected to take under a will assuming to dispose of his property.—The courts are practically unanimous in holding that a beneficiary under a will, by accepting the bounty of the testator, thereby binds himself to ratify every provision of the instrument; and that, where property is given to one by a will in which the donee's property is also disposed of by the testator as if it were his own, the beneficiary must choose between keeping his own and taking what is given by the will. The cases are numerous in which the acts of such persons have been held to be an election to surrender all claim to their own property and to take that given by the testator. In these but little variance is found in the application of the principle to the facts of each case, though a few of the courts seem to require more to establish such election than is demanded in HOGGARD v. JORDAN.

Where the testator devised land to his son, and by the same instrument disposed of other land to which his son claimed title; and the will was admitted to probate and the decree of distribution had in accordance with its terms; and the son appeared in court and agreed thereto,—it was an election on his part to take the land devised to him by the will; and he was thereby estopped from urging his title to the other land. Noe v. Splivalo, 54 Cal. 207.

Where a husband, by a trust deed, conveyed land to the use of his wife for life, but by his will devised a portion only of the same land to her; and she was appointed and acted as executrix of his will, described the property as the separate estate of her deceased husband, submitted to a division of it as provided in the will, sold her interest in it as devised to her, reciting in the conveyance thereof that it was her land by virtue of her husband's will "and of her separate property," and never made any claim under the trust deed for twenty years,—it was held that she had "duly elected to take under said will according to the terms thereof." Burroughs v. De Couts, 70 Cal. 361, 11 Pac. 734.

Where a husband made a homestead entry in the name of his first wife, and, by his will, devised said land to his second wife for life with remainder to his son by the second wife, and provided for his children by the first wife by specific and residuary legacies which they accepted, such acceptance was an election on the part of the first wife's children to take under the will; and an injunction will lie to restrain them from prosecuting an action of ejectment for the recovery of the land from the second wife's son, he having succeeded thereto as remainder-man under his father's will. Wilbanks v. Wilbanks, 18 Ill. 17.

Where a testator devised his wife's land to a son, and his own land to his other children, and the latter accepted their devises; but his wife elected to take under the will, and in her petition for assignment of dower described the premises so devised to the son as part of the lands belonging to her hus-

the following words: "I leave to my beloved wife, Mary Catherine, during her natural life, my entire personal property of every kind and description, to use as she may think best, together with all of my real estate, consisting of the Hancock tract of land and the two stores and lots situated in Lewiston, to lease or rent as she may think best for the interest of herself and younger children." He gave the same property, upon the death of his wife to his children, who were also the children of his wife, Mary C. The value of the personal estate of said Jesse N. was, at the time of his death, $200. The said Mary C. proved the will and qualified as executrix thereto, taking into her possession the personal estate, and occupying the land until her death during the month of March, 1896. She left no will. Petitioner qualified as her administrator, January 4, 1904. She was indebted in the sum of $75. His Honor, upon the foregoing facts, being of the opinion that the said Mary C. took under the will but a life estate in the lands, rendered judgment for defendants, to which plaintiff excepted and appealed.

Messrs. **Winston & Matthews** for appellant.

Messrs. Day, Bell, & Dunn and **J. B. Martin**, for appellees:

One cannot accept a benefit given by the testamentary instrument, and evade its burdens.

Underhill, Wills, § 726; Tripp v. Nobles.

band at the time of his death; and the land set off to her for dower embraced said premises, and she occupied them until her death, —it was held that the widow had elected to take under the will, and after her death intestate the other children could not maintain an action for partition against the heir of the son, to whom the land was devised by her husband. Buchanan v. McLennan, 192 Ill. 480, 61 N. E. 448.

Where the testator bequeathed to his wife for life, with remainder over, certain bank stock which he had, before the execution of the will, transferred to her absolutely, and made other devises and bequests to her by the will, which she accepted, such acceptance was an election by her to take under the will; and, if she sold the stock after making such election, the remainder-man could maintain an action against her estate for its conversion. Moore v. Baker, 4 Ind. App. 115, 51 Am. St. Rep. 203, 30 N. E. 629.

Where a devisee, by a title adverse to that of his testator, claims land that, by the same instrument, has been devised to another; but accepts other property devised and bequeathed to him by the same will,—he will be deemed to have elected to take under that instrument, and cannot set up his adverse title to the other land. Gore v. Stevens, 1 Dana, 201, 25 Am. Dec. 141. See Smart v. Baugh, 3 J. J. Marsh. 363; Haydon v. Ewing, 1 B. Mon. 111; and Field v. Eaton, 16 N. C. (1 Dev. Eq.) 283, which are to the same effect, and in which the circumstances are altogether similar, except that title to slaves, and not to land, was involved.

Where the testator bequeathed property to his wife and children in equal shares, "the property which has accrued to me from my wife and what is yet due her, being considered part of my estate;" and his wife survived him by more than six years, and never renounced the will, but seemed to acquiesce therein and to hold under it, and never claimed any right to dower or distribution as a widow unprovided for by an approved will,—it was held that she elected to "approve and uphold the will in all its objects and provisions" as interpreted by the court. Clay v. Hart, 7 Dana, 1.

Where land was devised to a married woman by her father, upon which she and her husband lived and continued to live, and the latter, by his will, devised this land of his wife to her, together with certain slaves, for her natural life, remainder over to his children; and she resided on the land until her death, and claimed, held, and enjoyed the other property so devised to her; and, in a suit by her against her codevisees under her husband's will, she exhibited that instrument, recited its provisions, and showed a thorough knowledge of her rights thereunder,—it was held that these facts showed all the requisites of a valid election on her part to take and hold under her husband's will, and that thereby she devested herself of any right to the land under her father's will. Dawson v. Hayes, 1 Met. (Ky.) 460.

Where a devisee under a will is required to convey to others certain land of which he holds the title, his acceptance of the devise to him will be deemed an election to surrender all title to such land, and to convey it in accordance with the terms of the will. McQuerry v. Gilliland, 89 Ky. 434, 7 L.R.A. 454, 12 S. W. 1037.

Where the holder of land under a mortgage title disposed of it by will as if it were his absolutely, and bequeathed other property to the mortgagee, which the latter accepted, such devisee and mortgagee could not maintain a bill in equity to redeem the mortgage, because, by his acceptance and retention of the bequest, he had elected to hold under the will. Hyde v. Baldwin, 17 Pick. 303.

Where the testator devised land of his daughters to other children, and bequeathed to the daughters a specified amount of money as their full share of his estate, the appearance of these daughters in court, and their renunciation of all claim to the land, amount to an election to take under the will. O'Reilly v.

Where

land

136 N. C. 99, 67 L.R.A. 449, 48 S. E. 675; Syme v. Badger, 92 N. C. 706; Gray v. Williams, 130 N. C. 53, 40 S. E. 843.

Connor, J., delivered the opinion of the court:

We had occasion to consider the general principle involved in this record in the case of Tripp v. Nobles, 136 N. C. 99, 67 L.R.A. 449, 48 S. E. 675; and upon a rehearing in 138 N. C. 747, 51 S. E. 1038. The plaintiff insists that a distinction may be drawn between that case and the facts presented in this appeal; he also suggests that the very able dissenting opinion "is more in harmony with decisions and justice." It must be conceded that in some cases there is an apparent hardship in the application of the well-settled doctrine of election, but a careful examination of the numerous cases to be found in our own and the English courts shows a solicitude on the part of the judges to so administer the doctrine that the rights of all persons interested shall be protected; decrees are so molded that, when possible, compensation is directed to be made and forfeitures of estates prevented. The doctrine of election between inconsistent dispositions of property in wills and other instruments is peculiarly of equitable origin and its administration in the jurisdiction of courts of equity "by reason of the inflexible, inelastic, and cramped procedure of the common-law courts." An examination of the will of Jesse N. Jordan, made but a few months prior to his death, discloses a

land belonging to him, or, in lieu thereof, dower in his estate; and his wife, at the time of the execution of the will, signed a writing incorporated in the will, whereby she professed to relinquish her own land and all her claim upon the land directed to be sold with her land; and, after the lapse of nearly two years from the probate of the will, the widow filed with the judge of probate her written dissent to the will, and also her petition asking for dower in both of the tracts of land as belonging to the estate of her deceased husband; and the probate judge denied her right to have dower under the statute, but adjudged her entitled to dower as provided by the will, and directed that it be so allotted to her, which was done, the dower being just what she would have received had there been no will; and the executors sold her land as directed in the will,—she was held to have elected to take under the will, and not to be able to maintain an action for the land so sold against the vendee thereof. Sigmon v. Hawn, 87 N. C. 450.

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Where the testator, whose wife had predeceased him leaving an only daughter, by will devoted to charitable purposes money held by him in trust for his wife as if it were absolutely his own, and devised to his daughter his homestead with the household furniture, and directed that a certain sum out of his personal estate should be invested to the best advantage and the income thereof be paid to the daughter for her support; and the daughter knew that her father, by his will, intended to dispose of his wife's estate as well as his own; and, after the will was probated, she presented an account against the estate, which was allowed and paid; and she took possession anl used the household furniture and continued to reside on the homestead until she sold it; and she received and used the money from the sale; and the executors set apart a trust fund, and paid her the income thereof for thirteen years, during ten of which she made no claim to them for her mother's estate,—it was held that she had elected to take under the will. Drake v. Wild, 70 Vt. 52, 39 Atl. 248.

Where a husband and wife had no children by their union, but each had children by a former marriage; and each, by a will, devised to the other the entire estate of both, and further bequeathed out of his and her property such sum as should be necessary for the support of certain minors until their majority; and the wills also provided that all the property left that belonged to either should be equally divided between the legal heirs of both, one half to the husband's heirs and one half to the wife's; and each named the other as executor; and the wife died first, and the husband offered her will for probate, qualified as executor thereunder, and administered

the following words: "I leave to my be loved wife, Mary Catherine, during her natural life, my entire personal property of every kind and description, to use as she may think best, together with all of my real estate, consisting of the Hancock tract of land and the two stores and lots situated in Lewiston, to lease or rent as she may think best for the interest of herself and younger children." He gave the same property, upon the death of his wife to his children, who were also the children of his wife, Mary C. The value of the personal estate of said Jesse N. was, at the time of his death, $200. The said Mary C. proved the will and qualified as executrix thereto, taking into her possession the personal estate, and occupying the land until her death during the month of March, 1896. She left no will. Petitioner qualified as her administrator, January 4, 1904. She was indebted in the sum of $75. His Honor, upon the foregoing facts, being of the opinion that the said Mary C. took under the will but a life estate in the lands, rendered judgment for defendants, to which plaintiff excepted and appealed.

Messrs. **Winston & Matthews** for appellant.

Messrs. Day, Bell, & Dunn and **J. B. Martin**, for appellees:

One cannot accept a benefit given by the testamentary instrument, and evade its burdens.

Underhill, Wills, § 726; Tripp v. Nobles.

band at the time of his death; and the land set off to her for dower embraced said premises, and she occupied them until her death, —it was held that the widow had elected to take under the will, and after her death intestate the other children could not maintain an action for partition against the heir of the son, to whom the land was devised by her husband. Buchanan v. McLennan, 192 Ill. 480, 61 N. E. 448.

Where the testator bequeathed to his wife for life, with remainder over, certain bank stock which he had, before the execution of the will, transferred to her absolutely, and made other devises and bequests to her by the will, which she accepted, such acceptance was an election by her to take under the will; and, if she sold the stock after making such election, the remainder-man could maintain an action against her estate for its conversion. Moore v. Baker, 4 Ind. App. 115, 51 Am. St. Rep. 203, 30 N. E. 629.

Where a devisee, by a title adverse to that of his testator, claims land that, by the same instrument, has been devised to another; but accepts other property devised and bequeathed to him by the same will,—he will be deemed to have elected to take under that instrument, and cannot set up his adverse title to the other land. Gore v. Stevens, 1 Dana, 201, 25 Am. Dec. 141. See Smart v. Baugh, 3 J. J. Marsh. 363; Haydon v. Ewing, 1 B. Mon. 111; and Field v. Eaton, 16 N. C. (1 Dev. Eq.) 283, which are to the same effect, and in which the circumstances are altogether similar, except that title to slaves, and not to land, was involved.

Where the testator bequeathed property to his wife and children in equal shares, "the property which has accrued to me from my wife and what is yet due her, being considered part of my estate;" and his wife survived him by more than six years, and never renounced the will, but seemed to acquiesce therein and to hold under it, and never claimed any right to dower or distribution as a widow unprovided for by an approved will,—it was held that she elected to "approve and uphold the will in all its objects and provisions" as interpreted by the court. Clay v. Hart, 7 Dana, 1.

Where land was devised to a married woman by her father, upon which she and her husband lived and continued to live, and the latter, by his will, devised this land of his wife to her, together with certain slaves, for her natural life, remainder over to his children; and she resided on the land until her death, and claimed, held, and enjoyed the other property so devised to her; and, in a suit by her against her codevisees under her husband's will, she exhibited that instrument, recited its provisions, and showed a thorough knowledge of her rights thereunder,—it was held that these facts showed all the requisites of a valid election on her part to take and hold under her husband's will, and that thereby she devested herself of any right to the land under her father's will. Dawson v. Hayes, 1 Met. (Ky.) 460.

Where a devisee under a will is required to convey to others certain land of which he holds the title, his acceptance of the devise to him will be deemed an election to surrender all title to such land, and to convey it in accordance with the terms of the will. McQuerry v. Gilliland, 89 Ky. 434, 7 L.R.A. 454, 12 S. W. 1037.

Where the holder of land under a mortgage title disposed of it by will as if it were his absolutely, and bequeathed other property to the mortgagee, which the latter accepted, such devisee and mortgagee could not maintain a bill in equity to redeem the mortgage, because, by his acceptance and retention of the bequest, he had elected to hold under the will. Hyde v. Baldwin, 17 Pick. 303.

Where the testator devised land of his daughters to other children, and bequeathed to the daughters a specified amount of money as their full share of his estate, the appearance of these daughters in court, and their renunciation of all claim to the land, amount to an election to take under the will. O'Reilly v. Nicholson, 45 Mo. 160.

Where the testator directed that certain land belonging to his wife, together with other land of his own, should be sold to pay his debts, and the residue divided among his wife and children; and, by the same instrument, provided for her support out of other

136 N. C. 99, 67 L.R.A. 449, 48 S. E. 675; Syme v. Badger, 92 N. C. 706; Gray v. Williams, 130 N. C. 53, 40 S. E. 843.

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Where the testator devised to his son "my farm subject to my wife's thirds," which farm was his wife's and not his; and gave all his personal property to his wife; and his wife was the executrix of the will, and was well acquainted with the amount of his estate, both real and personal, and in her account as executrix took credit "by balance of personal property retained by the executrix according to the will," and for thirty-seven years kept and used the same without offering to return it,—she was deemed to have elected to take under the will, even though some time before her death she declared that she was holding the farm as her own, and that it belonged to her. Cox v. Rogers, 77 Pa. 160.

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wise plan for the disposition of his estate, by which his widow is enabled to use both her own and his property "for the best interest of herself and younger children." To this end he gives her a life estate in the Hancock land to which it is not improbable he thought he was entitled to one half, "two stores and lot in Lewiston, N. C.," and his entire personal estate. It will be noted that, at the time of his death, four of his children were under fourteen years of age, and all were minors. At her death he gives to each child a share in the property. It was stated on the argument that she, for some reason, did not get the stores. We are concluded in this respect by the record,—the petition states that she died seised of the Hancock land and "two stores and lot situate in Lewiston, N. C." His personal estate was worth but $200, to all of which she would have been entitled as her year's support. There is nothing in the record to show the value of the land or the stores, nor that the latter did not belong to the testator. We are of the opinion that, upon the facts found, Mrs. Jordan was put to her election, either to claim under the will as a whole, or to claim against it, surrendering any other than her dower right in the stores and her year's support in the personalty. She knew the contents of the will, proved it, and qualified as executrix, remained in possession of the property until her death in 1896, and her children went into possession under the will. Thus for nine years she, by her conduct in proving

her estate, and in various actions arising out of the will laid claim to all the residue of her estate in accordance with the terms of her will,—it was held that these acts on his part were an election to take under the will. Allen v. Boomer, 82 Wis. 364, 52 N. W. 426.

The same rule of law is applied to those cases where the testator has at least a partial interest in the property of another, attempted to be disposed of by the will as if it were entirely the testator's own.

Where the testatrix devised land to her children, a part of which she owned in fee and a part of which belonged to her children in common as heirs of a deceased brother; and one daughter took a portion of the land, and another, another portion; and the latter daughter died intestate, and this piece of land descended to her minor children, for whose benefit it was mortgaged by a lawful order of the probate court; and the first-mentioned daughter disposed of her share of land under her mother's will, and kept the proceeds, and obtained deeds from her brother and sister of their interest in the lands so devised to her dead sister, which deeds gave her such title to the mortgaged land as the grantors inherited from their brother; and she recognized the mortgagee's right by paying interest on the mortgage,—it was held that she had made an election to hold under her mother's will, and could not set up the title so acquired to defeat the mortgage. Farmington Sav. Bank v. Curran, 72 Conn. 342, 44 Atl. 473.

Where land was conveyed to one for life, remainder in fee to his sons; and the donee for life devised the same to his wife for life, and after her death to one of his seven sons for life, remainder in fee to the children of such son; and the son and his mother took possession of the whole land so devised, and afterwards conveyed the same with a warranty of title in fee; and, many years after such conveyance, the son died intestate (his mother having predeceased him),—it was held, in an action by his children to recover the land from their father's grantee, claiming the same as remaindermen under the will of their grandfather, that they were entitled to the land because their father, in sharing with his mother the full estate for his own life in the whole of the land, and in recognizing the title derived from the will by conveying all of it, had elected to hold the same under the will, and his grantee must abide by his election. Brown v. Ward, 103 N. C. 173, 9 S. E. 300.

Where the testator devised land of which he was alleged to be a life tenant to two of his nephews, charged with the payment of a certain sum of money to the heirs of the testator's deceased brothers and sisters, a receipt to his executors for a sum of money "for inheritance," signed by one of such heirs, was held to be an election on the part of such heir "to stand by the provisions of the will," and to estop him from setting up title to the land as a remainderman. Fenstermacher v. Moyer, 35 Pa. 354.

Where the testator devised to his sons and daughters certain land which he had received under a will that permitted him to leave it to his sons only, and also devised other lands with personal estate to the sons; and they fully assented to the will, and received all the benefits conferred upon them thereby, and united with their sisters in an amicable parol partition,—the sons, and all deriving title from them to the lands in question, were held to be estopped to deny the title of their sisters to the portions of the land allotted to them in the said partition. Spaulding v. Ferguson, 158 Pa. 219, 27 Atl. 945.

Where land was conveyed by a trust deed to the grantee for life, and after his death to be equally divided among his wife and children; and he devised the same to his son and daughter for life, with remainder to their children living, and cross-remainders in event of either dying without issue living, and devised and bequeathed other property to his wife and his other children; and, four years after the testator's death, and after they had accepted the devise under the will, and were even then in the enjoyment of the same, one of the testator's daughters and her husband filed a bill in equity against the testator's wife and his surviving children, but without joining the grandchildren.

the will and qualifying, and by using the property, acquiesced in the disposition made by her husband. For eight years since her death the only persons who could have been benefited by electing to take as her heirs and against the will have likewise acquiesced in it. Certainly, after so long acquiescence in the provisions of the will, her administrator, against the consent of her real representatives, will not be permitted to make an election for her by simply filing a petition for the sale of the land. Her conduct brings the case clearly within the observation of Lord Hardwicke in Tomkyns v. Ladbroke, 2 Ves. Sr. 593, that the courts will not "disturb things long acquiesced in by families upon the foot of rights, which those in whose place they stand, never called in question." The vice chancellor, in Dewar v. Maitland, L. R. 2 Eq. 834, said: "Although the court compels persons to elect, yet election itself is a voluntary act. The doctrine has been established for the peace of families and of the public, that, if property has been long enjoyed according to a certain mode and rights, this court will be very slow to disturb such enjoyment. The heir in this case chose to enjoy the property devised by his father,—whether properly devised or not,—and upon the footing of his will." In Worthington v. Wiginton, 20 Beav. 67, the question was discussed by Sir John Romilly, M. R., saying: "Two things are essential to constitute a settled and concluded election by any person who takes an interest under a will,

of one of the surviving daughters, seeking by the bill compensation for an alleged inequality in the dispositions under the will as compared with the rights intended by the trust deed, and stating that the complainants were unwilling to take under the will, and claiming the benefit of the provisions of the trust deed, and further stating that they were unwilling to disturb the family arrangements contemplated by the testator in his will, and alleging that certain real estate which had been held by the testator under another trust deed similar to the one mentioned above had been in the possession of one of the complainants, testator's son-in-law, for ten years under an agreement with the testator to purchase the same, and that he had paid nearly the whole of the purchase price, and asking that the same be sold and the proceeds be paid to the said complainant to be invested in slaves to be held by him in accordance with the terms of the will; and, by consent of all the parties to the bill, a decree was made affording the relief sought, —it was held that these circumstances exhibited "a clear intent to perpetuate the provisions made by the will so far as the rights of the objecting parties would permit," and did not operate as an election to take under the trust deed. McGowan v. Lowrance, 3 S. C. N. S. 356. The court said that, considering that the only parties defendant to the bill were the widow and her daughter and the latter's husband, and that the decree was based upon a consent of such defendants, "it is clear that the proceeding is to be regarded as an application to the court to sanction by its decree a compromise made between these parties, by which [the complainants] were to receive a pecuniary compensation in lieu of the interest intended under the [trust] deed, the provisions of the will to stand in all other respects."

In such a case, however, there must be a clear intention on the part of the testator to devise the property not owned by him, and, if the will can be construed as passing only his share of an undivided estate, it will be given that effect; and where, by a contract to partition certain lands, the share of one of the parties thereto was to be conveyed to herself and husband as tenants in common, but the scrivener, by the directions of the husband, made out the deed to him alone, and it was so executed by the grantor, and the wife received no consideration therefor, and this fact was not discovered by her until after the death of the husband, who left a will devising his wife certain other real estate and bequeathing her a specified amount of money in lieu of dower, and giving to others all the residue of his estate, including the wife's share of such land, and the wife accepted the provisions of the will, —it was held that this acceptance was not such an election to hold under the will as would preclude her from setting up a claim to one half of the land so conveyed to her husband, since there was no mention in the will of any specified parcel of land to be covered by the residuary clause, and nothing to show that her husband intended to give residuary legatees anything but his own property. Haack v. Weicken, 118 N. Y. 67, 23 N. E. 133.

Where the testator seeks to dispose of the proceeds of a policy of insurance payable at his death, and by the same instrument bequeaths other property to the beneficiary of the policy, the latter is called upon to make a choice between the legacy and the insurance money; and his acts in regard thereto will be subject to the same interpretation as those of legatees in the other cases before noted.

Where the testator devised certain land in fee simple to his wife, and also bequeathed her certain insurance money payable to her on his death, with directions as to its expenditure; and, in an action for a construction of the will, the wife laid claim to the land so devised to her,—it was held that she thereby elected to take the land under the will, and must therefore expend the insurance money as directed. Jackson v. Bevins, 74 Conn. 96, 49 Atl. 899.

Where the testator devised land to his wife, and to his daughter by a former wife bequeathed a portion of the proceeds of a policy of life insurance payable to his wife and her children, the widow's acceptance of the devise was an election to take under the

which disposes of property belonging to that person. There must be, in the first place, clear proof that the person put to his election was aware of the nature and extent of his rights; and, in the second place, it must be shown that, having that knowledge, he intended to elect. In this case, I think that the widow was aware of what her rights were; she was fully aware of the contents of her husband's will, she was the sole executrix named in it, and had proved it; and she had made use of her character of executrix to enforce payment of money due to her late husband and to arrange with the landlord for the surrender of the five leaseholds. She must, therefore, on the one hand, have known that her husband had, by his will, specifically bequeathed the stock standing in their joint names, and that by it he gave her only a life interest in that stock. . . . She knew that the will disposed of her property, she knew that she could withdraw it from the operation of the will."

The discussion and review of the authorities are full and exhaustive. In Adsit v. Adsit, 2 Johns. Ch. 448, 7 Am. Dec. 539. Chancellor Kent said: "Taking possession of property under a will or other instrument, and exercising unequivocal acts of ownership over it for a long time, will amount to a binding election." Penn v. Guggenheimer, 76 Va. 839; Pom. Eq. Jur. 513; Fetter, Eq. 56. We have discussed the question upon the theory that the widow in her lifetime, or her heirs at law at her

will, and estopped her from claiming that portion of the insurance money bequeathed to the daughter of the former wife. Huhlein v. Huhlein, 87 Ky. 247, 8 S. W. 260.

Again, where the testator directed that the proceeds of all policies of insurance upon his own life which were payable to his children, except those wherein a certain daughter was named as beneficiary, should be divided among his children other than the said daughter; and by a codicil reaffirmed such provision, but devised to the said daughter certain real estate, which she accepted,—it was held that she had thereby elected to take under her father's will, and was estopped from setting up any claim to the money realized from the policies of insurance and directed by the testator to be divided among the other children. Van Schaack v. Leonard, 164 Ill. 602, 45 N. E. 982.

Where the testator devised land to his children, and, by the same instrument, directed in what manner his executor should expend the proceeds of a policy of insurance payable upon his death, to his children, their acceptance of the devise was an election to take under the will; and they could not afterwards lay claim to the proceeds of the policy. Hartwig v. Schiefer, 147 Ind. 64, 46 N. E. 75.

It follows that, where land is devised by will, which the testator had contracted to sell, and by the same instrument other property is given the vendee, the latter must elect between the legacy and the enforcement of the contract, and his acts may be deemed such an election.

Thus, where the testatrix devised certain land to her son, and by the same instrument bequeathed a certain sum of money to her daughter, which was paid to her by her mother's executor; and, after the expiration of two years, the executor rendered an account of his trust to the proper court, which was approved and the estate was declared settled, and the executor was discharged,—it was held that the daughter had elected to take under the will, and was estopped to enforce a parol agreement of the testatrix to give her the land. Gorham v. Dodge, 122 Ill. 528, 14 N. E. 44.

Where land was purchased by a father with the understanding that it was to be conveyed to one of his sons upon the father being reimbursed for its purchase price; and the son took possession and made improvements thereon, and paid back to his father the greater part of the purchase price; and the father, by his will, directed that this piece of land with others should be equally divided among his children subject to the condition that the said son should be reimbursed for improvements made by him not exceeding a certain amount; and the said son was appointed executor, and qualified as such, and assumed the duties of the office without questioning the devise of said land, and, with his coexecutor, made an inventory of it as if it belonged to his father's estate, and estimated the value of his improvements thereon, and asserted a claim to the other lands devised by his father,—he was deemed to have elected to take under the will, and was estopped from demanding the specific performance of his father's contract to sell the land to him, even though he retained possession thereof without accounting to the other devisees for the rents and profits. Woolley v. Schrader, 116 Ill. 29, 4 N. E. 658.

Of course no election can be implied from the conduct of a beneficiary who is in ignorance of any title to the property other than that which has been conferred by the will; and it has accordingly been held that the election can be made only with the full knowledge of the facts; and, if a legatee whose property had been devised by the testator in ignorance of the rule of law as to election, but, upon being informed thereof before the settlement of the estate and before the rights of any person had been affected, returned his legacy to the executor and informed him that he elected not to take it, such legatee would not be deemed to have elected to hold under the will. Watson v. Watson, 128 Mass. 152.

In short, to be binding upon the beneficiary, "the election must be made understandingly, with a knowledge both of the

death, were seeking to claim her land devised by Jesse N. Jordan. It would seem that, if such were the case, they would, under the circumstances, be held to have elected to claim under the will after the unequivocal acts of ownership and long acquiescence in the disposition made by her husband. However this might be, we are unable to perceive how, in the light of the facts appearing in the record, where all of the parties interested, or, who, if no disposition had been made of the land by the husband, would have been interested, are still acquiescing in and claiming under the will, the administrator of Mrs. Jordan can treat the election to claim against the will as having been made, and subject the land to sale. It is conceded that the only purpose in seeking to sell the land is to pay a debt contracted by Mrs. Jordan after the death of her husband. She was certainly under no legal or moral obligation to the creditor to dissent from her husband's will or elect to take against it. The status of her property was a matter of record when the debt was contracted, and no question raised until eight years after her death. The children, it is to be presumed, upon the death of Mrs. Jordan took possession of the land under their father's will. It is difficult to see how, against their consent, a court, in a statutory proceeding, having no equitable element in it, can proceed to sell the land. If sold for a price in excess of the debt, to whom and in what right would the excess be paid? Certainly, if the

facts and of his rights under the will." Huston v. Cone, 24 Ohio St. 11.

While the following cases in no way question the binding force of the doctrine of election, they seem to require a very clear indication of that purpose on the part of the beneficiary where the election is sought to be established from his conduct alone.

In Clark v. Hershy, 52 Ark. 473, 12 S. W. 1077, the court was disposed to hold that a long delay on the part of a devisee "in making inquiry about her rights and in taking steps to enforce them would, of itself, probably, and certainly in connection with other facts tending to show her election to take under the will, establish that election if it were not for" the fact that such delay occurred during the Civil War, when the courts were to a great extent closed and business partly suspended, and the devisee's husband was a refugee.

Where the testator devised to his son land belonging to his wife, and devised to her for life the use of one third of his real estate, and gave her certain personalty and the right to occupy his dwelling house, and no one opposed the probate of the will, and the family lived together upon the estate until the death of the widow without making any division of the estate or setting off dower, and the children continued to live there together after their mother's death, it was held that these facts did not show an election by the widow to take her land under the will of her husband, and that her heirs were entitled to a partition of the lands. Fitts v. Cook, 5 Cush. 596. The court added: "In looking at the provisions of this will, it will be seen that they are so little a departure from what would have been the legal rights of," the widow "without the will that little can be inferred from her subsequent use of the property in the manner set forth."

Where the claimant to land devised to another under a will by which a sum of money was also bequeathed to such claimant, demanded and collected her legacy, but never abandoned her efforts to recover the land claimed by her, and consulted numerous counsel in regard to her rights to the land, none of whom informed her as to the legal effect of her acceptance of her legacy; and it did not appear that she herself was aware of it,—she was not thereby deemed to have elected to abide by the will, but could maintain her action to recover the land so claimed provided she would return the money with interest, and provided, further, that no equity had arisen in favor of those claiming the land under the will. Young v. Young, 51 N. J. Eq. 491, 27 Atl. 627.

Where the testator, among other things, devised land of his wife to his children, and charged the lands with an annuity to his wife, and the devisees divided the land according to the terms of the will, and the widow lived some of the time with a daughter and the rest of the time until her death with a son, and made no will or deed of the land, it was held that these facts were not sufficient proof of an election by her to take under her husband's will, though it was also shown that she had declared the will should stand, and expressed a desire that the necessary papers should be drawn and signed; there being no satisfactory evidence that she ever received the annuity bequeathed to her, or that she intended to make any election. Davis v. Davis, 46 Pa. 342.

Where the testator, by will, disposed of property which he had, before the execution of his will, conveyed to a trustee for the sole and separate use of his wife for life, the mere fact that the wife qualified as administratrix with the will annexed was not an election by her to take under the will and not to take under the trust deed, she having, within a year from the testator's death, executed a deed of renunciation of her rights under the will. Taylor v. Browne, 2 Leigh, 419.

In Allen v. Allen, 58 Wis. 202, 16 N. W. 610, it is said in the closing paragraph of the opinion that, where a testator devised to his wife his son's land, and in the same will devised to the son real estate which the testator owned, and which by a decree of the proper court was distributed to the son and accepted by him, the son was not thereby estopped to urge his claim devised to the testator's wife. Here it seems clear that

land is sold as her property, the excess after paying the debt should be paid to her heirs, and not the devisees of her husband. There can be no partial election to claim against the will. It is well settled that the election, when made, must be complete and final. Rights of property and family settlements made with the consent of husband and wife, or, at least, acquiesced in by the survivor, would be insecure, if, after so many years, they could be disturbed in this summary method. To the suggestion that Mrs. Jordan made no will, it would seem an answer that she acquiesced in the disposition of her land made by her husband. As we have said in Tripp v. Nobles, *supra*, the creditor cannot reasonably complain; he extended credit with the condition of the title disclosed on the records. Whether Mrs. Jordan preferred to abide by the will of her husband, and take the $200 in personalty under the will by reason of an arrangement made between them, or out of respect to his wishes, or for any other reason, is not material. She, by her conduct, showed that she was content with the disposition of her property; and his will, approved by her, should not now be disturbed. To do so would not "be in harmony with decisions and justice."

We have given the case a careful consideration, and re-examined the authorities, and find no reason for disturbing the decisions heretofore made by us. It may be proper to say that all of the authorities disclose a purpose to give to the widow, claiming dower in land devised to her, the largest possible latitude both in regard to the construction of the will and the time within which she is required to elect. As said by Romilly, V. C., in Worthington v. Wiginton, *supra*, "the cases relative to dower have no application to the present."

The judgment of the court below must be affirmed.

Walker, J., concurring in result:

This case is not like Tripp v. Nobles, 136 N. C. 99, 67 L.R.A. 449, 48 S. E. 675. Here there was a substantial benefit conferred by the will which forced the plaintiff's intestate to choose between the acceptance of that benefit and the retention of the property, already her own, which is attempted to be disposed of by the same instrument. There was no such benefit received under the will construed in Tripp v. Nobles. It would seem but just to require that the benefit bestowed should be a substantial one, in order to put the donee to an election; and that it should not consist merely of property which he would have received under the law if the will had not been made. Further investigation confirms me in the view entertained and stated in my dissenting opinion in that case. The principle was adopted and applied in Tyler v. Wheeler, 160 Mass. 206, 35 N. E. 666, where it was held that an executor is not estopped by qualifying under the will of his wife to claim his legal interest in her estate; and in Register v. Hensley, 70 Mo. 189, the court decided that a widow's renunciation of the provisions of her husband's will, made in lieu of dower, was not invalidated by her not surrendering personal property, which she had previously received under the will, where the amount was the same as that which she would receive under the administration law. The case of Loring v. Craft, 16 Ind. 110, also sustains the same view, as the court held that a surviving wife is entitled to the statutory provision of $300 "notwithstanding she may have accepted the provisions made for her by the will of her husband." Corriell v. Ham, 2 Iowa, 552; Wilber v. Wilber, 52 Wis. 298, 9 N. W. 163. The language used in Fitts v. Cook, 5 Cush. 601, seems to fit the case: "In looking at the provisions of this will," the court said, "it will be seen that they are so little a departure from what would have been the

the court entirely ignored the doctrine of election. See, however, a later case in the same jurisdiction, Allen v. Boomer, 82 Wis. 364, 52 N. W. 426, which is altogether irreconcilable with the earlier opinion, and fully recognizes the binding force of the principle of election.

The foregoing cases assume that, where a legacy is given to one whose property is, by the same will, bequeathed to another, the latter need not resort to a court of equity to compel an election on the part of the former if he claims under the will and at the same time seeks to hold or claim his own property. But in Marriott v. Badger, 5 Md. 306, the court holds contrary to the weight of authority in other states, that one who claims under the will, and also claims his own property which the will undertook to dispose of adversely to his title, cannot be deemed to have made an election; but that resort to a court of equity is necessary in order to compel him to make an election.

It would seem that in those jurisdictions where an election by a legatee may be inferred from his conduct this principle is as equally applicable at law as in equity, since it has been held, in an action of tort for breaking and entering a close, that the defendant cannot set up title to the land under a deed from his father, who, by his will, had devised this land to the plaintiff and other lands to the defendant, since the latter, by accepting and holding the estate given him by the will, had elected to abide by its terms. Smith v. Smith, 14 Gray, 532.

legal rights of Joanna Cook without the will, that little can be inferred from her subsequent use of the property in the manner set forth in the agreed statement." The court then held that there was no binding election or estoppel. The law is thus stated in Bigelow on Estoppel, 676: "This doctrine of election is never applied in the law of wills when, if an election is made contrary to the will, the interest which would pass from the testator by the will cannot be laid hold of in equity to compensate the disappointed donee. Some free disposable property must be given to the electing donee which can become compensation for what the testator sought to take away."

It was held in Re Gwin, 77 Cal. 313, 19 Pac. 527, that "a widow is not estopped to make an election to take under the law by causing the will of her husband to be probated and by becoming the executrix thereof." To the same effect is Re Frey, 52 Cal. 658. The court decided in Collier v. Collier, 3 Ohio St. 369, that "a widow electing to take under a will, containing provisions for her, expressed to be in lieu of dower and all other claims on the estate of the testator, is not barred of her right to the year's support, provided by law, from the estate of the testator." So it was held in Taylor v. Browne, 2 Leigh, 419, that, by taking administration with the will annexed, the widow will not be held to have elected to claim under the will instead of under a deed of settlement formerly made by her husband for her use and benefit, and which contained a disposition of the property different from, and more beneficial to her than, the provisions of the will. Taking under the will, says the court in Hubbard v. Russell, 73 Ala. 578, will not deprive the widow of her exemption of $1,000 allowed her by the law, for she substantially and practically takes what already belongs to her. Election being a matter of equitable cognizance, the ordinary principles of equity must apply, one of which is that the court will never decree anything to be done which is plainly unfair, oppressive, or unconscientious,—especially when the rights of others will not be materially affected by a refusal to do so. It also regards more the substance than the mere form of things. The authorities, it seems to me, clearly establish that the widow's year's provision, or any other interest created by the law and independent of the disposition of the husband, cannot be considered as a bounty conferred, and therefore no election can arise in such a case. It would appear to be against equity so to hold. The proving of her husband's will by her as executrix, under such circumstances, should not therefore put her to an election. There is not in such a case a single equitable element to support an estoppel and it is so held in the other states, and I think in decisions of this court, as I have shown in my former opinion. The cases in our reports, which are relied on in Tripp v. Nobles to show the contrary, are clearly distinguishable from that case. In Tripp v. Nobles it appeared that the intestate could take nothing under the will which was not already hers by force of the law. The testator therefore had no free, disposable property to give her; and whether he has or not is the test by which to determine whether a case of election is presented.

Upon the doctrine of compensation, I will add to the authorities cited in my dissenting opinion in Tripp v. Nobles the following: In Bell v. Culpepper, 19 N. C. (2 Dev. & B. L.) 20, this court, by Gaston, J., said: "The rule of election, in the sense in which it is insisted on by the defendant, is confined exclusively to courts exercising equitable jurisdiction, which have it in their power to restrain men from the unconscientious assertion of acknowledged legal rights. They hold that it is against conscience for a man to take a benefit under a will or other instrument, and at the same time disappoint other plain provisions of that will, made in favor of third persons. Of course he may keep, if he pleases, what was before his own; for the mistake of the donor cannot take away his property. But, if he will insist on enjoying the interest given him by the instrument, they will by proper decree provide that, so enjoying it, he shall give effect as far as he can to the other provisions of the instrument." And in Alston v. Hamlin, 19 N. C. (2 Dev. & B. L.) 124, this court, by the same judge, said: "If the defendant can avail himself of the implied election which was insisted on at the trial, it must be before a tribunal competent to decide upon the equity of such election. The principle of election, as here asserted, is a principle of equity, proceeding on the doctrine of an implied condition, of which a court of equity in a proper case will enforce the performance by compelling the legatee, if he elects to take the bequest, to make compensation out of his own property to the disappointed legatees."

It does not appear in the case at bar what is the value of the land, nor what is the value of the "Lewiston lots;" so that the principle of compensation could not be applied, even if there had not been a binding election to take under the will, but an election had been so made as to call for the application of that principle; and even if equitable relief can be administered in this statutory proceeding and by the court

where it originated. Vance v. Vance, 118 N. C. 864, 24 S. E. 768.

While I differed from the majority of the court in the case of Tripp v. Nobles as to the questions of estoppel and election involved, yet, having fully stated what, in my opinion, is the correct principle of law, as it should have been declared and applied to the facts, henceforth that decision shall be the law with me, for it may be right, though the conclusion reached by the court, I must think, and this is said with the utmost deference, is not supported by the best precedents or by the weight of authority.

NORTH DAKOTA SUPREME COURT.

ROBERT B. BLAKEMORE, Exr., etc., of Louis A. Kedney, Deceased, et al., Respts.,
v.
JOHN COOPER et al., Appts.

(— N. D. —, 106 N. W. 566.)

Equity case—trial by court.

1. The issues in this case are purely equitable, and the case was properly tried to the court without a jury under § 5630, Rev. Codes 1899.

Tax deed—right of executor.

2. Executors are the "assigns" of their testator within the meaning of § 110, chap. 100, p. 271, Laws 1891, which authorizes the issuance of a tax deed to "the purchaser, his heirs or assigns."

Headnotes by YOUNG, J.

Same—evidence—contract.

3. The assurance held out by the state to purchasers at tax sales by the revenue laws of 1890, as amended in 1891, that the tax-sale certificates and tax deeds issued to them would be prima facie evidence of the regularity of the tax proceedings, although relating to the remedy, constituted a substantial inducement to the purchase, entering into the contract with the state, and so materially affecting its value that it cannot be taken away by subsequent legislation without impairing its obligation.

Tax sale—redemption.

4. The right to redeem from a tax sale made under chapter 132, p. 376, Laws 1890, was a "right accrued," and was perpetuated as it existed under that act, including the provisions for terminating and exercising the right, by the saving provisions contained in § 2686, Rev. Codes 1895, notwithstanding the repeal of the 1890 revenue laws by the Revised Codes of 1895.

Statute—repeal—prospective operation.

5. The general rule of construction applicable to repeals and revisions of revenue laws is that they are to have a prospective operation only, unless the intent of the legislature to the contrary clearly appears.

Same—redemption from tax sale.

6. The provisions of the Revised Codes of 1895, and of chapter 126, p. 256, Laws 1897, and of chapter 166, p. 221, Laws 1901, relating to redemption from tax sales, are prospective, and do not apply to certificates issued under former statutes.

Same—notice to terminate right.

7. The provisions of chapter 132, p. 376, Laws 1890, which required the service of

Case Note.—Change of law as to effect of tax certificates as evidence of title.—The cases involving the question as to the validity of the change of a law respecting the weight to be given to a tax certificate as evidence of the regularity of the tax proceedings are not very numerous.

In Smith v. Cleveland, 17 Wis. 556, it was held that a tax deed executed under a statute which made it conclusive evidence of the regularity of all prior proceedings, excepting the liability of the land to taxation, the nonpayment of taxes, and the non-redemption of the land after sale, could not, by a subsequent statute, be reduced to mere prima facie evidence of such fact. And this case is quoted with approval by Marx v. Hanthorn, 30 Fed. 579; but this latter case distinguishes between a statute making such a deed conclusive evidence and a statute which makes it merely prima facie evidence. The court says, where the deed is only prima facie evidence, the purchaser takes it subject to the right of any party adversely interested to overcome this presumption by proof to the contrary; and the matter is left open to investigation, and thus the legislature may regulate it by shifting the burden of proof back onto the purchaser. And the ruling in this case is followed by Tracy v. Reed, 2 L.R.A. 773, 13 Sawy. 622, 38 Fed. 69.

The decision in Strode v. Washer, 17 Or. 50, 16 Pac. 926, went even further than the last two cases and held contrary to Smith v. Cleveland, *supra*, that a law providing that a tax deed should be conclusive evidence of the regularity of the levy, assessment, collection of taxes, and sale of the property, might be amended so as to destroy the conclusive effect of the tax deed as to these points; and that this amendment would not impair the obligation of the contract, but that it would be simply a change in the rules of evidence. On a rehearing the court adhered to its decision, but said that the question approached very near the dividing line between the remedy and the obligation of the contract.

In Herrick v. Niesz, 16 Wash. 74, 47 Pac. 414, where the law declared a tax deed to be conclusive evidence of all proceedings up to the execution of the deed, and that law was amended, requiring notice to be given to the owner of the land at least sixty days prior to the expiration of the time for redemption, it was held that the mere production of the deed afforded neither proof nor presumption of a compliance with the provisions of the amendment requiring notice to be given.

notice in order to terminate the right of redemption, is still in force as to sales made under that chapter; and deeds issued without such notice are void.

Tax sale—publication of notice—newspaper.

8. A notice of tax sale published in a newspaper, legally designated and otherwise qualified to make such publication, is not illegal because of the failure of the owner or manager to file with the county auditor an affidavit setting forth its qualifications, as required by § 2, chap. 120, p. 346, Laws 1890.

Evidence.

9. The evidence offered by defendants to prove that the notice of sale did not describe the property held insufficient.

(December 18, 1905.)

APPEAL by defendants from a judgment of the District Court for Cass County in plaintiffs' favor in a proceeding to determine adverse claims to certain real estate. Modified.

The facts are stated in the opinion.

Mr. J. E. Robinson for appellants.

Messrs. Newman, Holt, & Frame, for respondents:

A statute can in no manner extend the period of redemption so far as the tax purchaser is concerned for the reason that such extension would impair the obligation of his contract.

State ex rel. Davenport v. McDonald, 26 Minn. 145, 1 N. W. 832; State ex rel. Stieff v. Bradshaw, 39 Fla. 137, 22 So. 296.

The right of the property owner to redeem the premises in controversy was taken away by the legislature by the repeal of chapter 132, Laws of 1890.

Muirhead v. Sands, 111 Mich. 487, 69 N. W. 826; Negus v. Yancey, 22 Iowa, 59; 25 Am. & Eng. Enc. Law, p. 410; Robinson v. Howe, 13 Wis. 342; Cooley, Taxn. 1st ed. p. 364; Merrill v. Sherburne, 1 N. H. 190, 8 Am. Dec. 52; Butler v. Palmer, 1 Hill, 324; Smith v. Packard, 12 Wis. 372; People ex rel. Fleming v. Livingston, 6 Wend. 526.

Young, J., delivered the opinion of the court:

The plaintiff brought this action under chapter 5, p. 9, Laws 1901, to determine adverse claims to the north 50 feet of lot 6, in block 37, Keeney & Devitt's second addition to the city of Fargo. The plaintiff's interest therein was acquired through purchase at three separate tax sales, to wit, the sales for the 1890, 1892, and 1893 taxes, and upon which tax deeds were issued in 1902. The sales were made to Louis A. Kedney, and tax-sale certificates issued to him. The deeds were issued to "Robert B. Blakemore, executor, and Laura B. Kedney, executrix." The complaint alleges that Louis A. Kedney died in 1898; that in his last will and testament he named Robert B. Blakemore as executor, and his widow, Laura B. Kedney, executrix; that the persons so named duly qualified and have not been discharged; that the said Louis A. Kedney devised his entire estate, real, personal, and mixed, to Robert B. Blakemore and William C. Macfadden in trust for the use and benefit of his wife, Laura B. Kedney, during her widowhood, the remainder to his children *per stirpes* when they shall have attained the age of twenty-two years; that Laura B. Kedney was duly appointed guardian of the persons and of the estate of the three children, who are all minors. All of the persons above named are joined as plaintiffs, and allege that they had "an estate and interest in and encumbrance upon" the property above described, and that the defendants claim "certain interests or estates in, or liens or encumbrances upon, said premises adverse to these plaintiffs." The prayer is in the statutory form, except that neither possession nor compensation for the use are asked for. The defendants, John Cooper and George McCauley, answered jointly, and expressly deny that the plaintiffs have any right, title, or interest in or lien upon the land in question, and allege that in May, 1903, McCauley was the owner in fee of said land, and, under a patent from the United States government, that he conveyed the same to his codefendant Cooper; and that the latter is now the owner in fee simple and in possession. When the case was called for trial counsel for defendants demanded a trial by jury, stating that the action is, in effect, an action in ejectment. The request was denied, and the case was tried under § 5630, Rev. Codes 1899. The findings of the trial judge were in all respects favorable to the plaintiff, and judgment was entered thereon quieting and confirming plaintiff's title, and adjudging that the adverse claims of the defendants are null and void, and enjoining them from further asserting them, and for costs. Defendants have appealed from the judgment, and demand a review of the entire case in this court under the above section.

The preliminary question urged by counsel for defendants in his brief, that the defendants were entitled to a trial by jury, does not merit or require discussion. This contention is inconsistent with their attitude upon the record which they have prepared and presented to this court. They have demanded a trial anew under § 5630, Rev. Codes 1899. This section does not authorize retrials in jury cases. In demanding a retrial they necessarily assume that the action is not properly triable to a jury. It is entirely clear, however, that the relief

sought in this case is purely equitable, and that the case was properly tried under § 5630, *supra*. The plaintiffs rested their case upon the tax-sale certificates and tax deeds. It is urged by counsel for the defendants that the deeds are void because they are issued to "Robert B. Blakemore, executor, and Laura B. Kedney, executrix," instead of Blakemore and Macfadden, who are named in the will as devisees in trust for the benefit of the widow and children. This contention cannot be sustained. Section 110, Laws 1890, as amended by chapter 100, p. 266, Laws 1891, in addition to providing a form of deed, authorized the issuance of the same to "the purchaser, his heirs or assigns," we are of opinion that the executor and executrix are the assigns of the testator within the meaning of the above section. An assign or assignee is one to whom an assignment has been made. Assignees are either assignees in fact or assignees in law. An assignee in fact is one to whom an assignment has been made in fact by the party having the right. An assignee in law is one in whom the law vests the right, as an executor or administrator. Bouvier, Law Dict. "Assignee." "An executor may be deemed as assignee, in law, to the testator. Dyer, 5. That is, he takes without any appointment of the person, but by operation of law. The testator names the individual as executor, but it is the law that makes him the assignee of the property." Hight v. Sackett, 34 N. Y. 451. The word "assignee" is applied most frequently to assignees in fact, but it is also applied to assignees in law; and we are of opinion that it must be considered as used in its most comprehensive sense in the above statute, including, as applied to this case, the executor and executrix. Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1031; Douglas v. Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583; Brown v. Crookston Agri. Asso. 34 Minn. 545, 26 N. W. 907.

It is also contended that the introduction of the certificates and deeds did not make out a prima facie case. This contention is likewise untenable. It is true that, "in the absence of an enabling statute, it is incumbent upon any person who claims title to land derived from a sale thereof for taxes to prove affirmatively and by proper evidence that every mandatory provision of the law under which the sale was effected was strictly complied with; that each step in the proceedings from the assessment of the taxes to the execution of the deed was formally and regularly taken by the officers or persons thereto legally authorized, and that he or his grantor was the purchaser at the sale. . . . And this obligation is not met, in the absence of an enabling statute, by the mere production of the tax deed. The deed of conveyance would not stand for this evidence. It would prove its own execution, nothing more." Black, Tax Titles, §§ 443, 444; 2 Cooley, Taxn. 3d ed. 1004. The common-law rule of proof was abrogated by the statute under which the sales in question were made. The several sales were made in 1891, 1893, and 1894, under chapter 132, p. 376, Laws 1890, as amended by chapter 100, p. 266, Laws 1891. Section 71 of the 1890 act prescribed a form of certificate to be delivered to the purchaser, and § 72 of that act provided that "such certificate shall in all cases be prima facie evidence that all the requirements of the law in respect to the sale have been duly complied with, and that the grantee named therein is entitled to a deed therefor after the time for redemption has expired." The 1890 revenue law made no provision for the issuance of a tax deed. The amendatory act (chap. 100, p. 266, Laws 1891) cured this defect, and, among other things, provided for the issuance of deeds, "which shall vest in the grantee an absolute estate in fee simple, . . . which shall be conclusive evidence of the truth of all the facts therein recited, and prima facie evidence of the regularity of the proceedings from the valuation of the land by the assessor up to the execution of the deed." All of the sales were made under the statute as amended.

The deeds, however, were not issued until 1902. The revenue law under which the sales were made was expressly repealed in 1895, and it is contended that the assurances made to purchasers by the former statute as to the evidential force of certificates and deeds, is, therefore, not available. This contention was urged in Fisher v. Betts, 12 N. D. 197, 207, 96 N. W. 132, and was overruled. It was contended in that case that, because of the repeal of the revenue laws of 1890 and 1891 in 1895, a tax deed issued thereafter had no force as evidence that the tax proceedings were regular, and that the regularity of all acts of all of the taxing officers must be affirmatively established. It was claimed that the repeal in this respect related solely to the remedy, and that the legislature has a right to change existing remedies. We denied that the repeal had the effect contended for, in the following language: "Such contention would not be disputed if the change referred to the remedy only; but, if the change of remedy or change in the rules of evidence goes further in its results, and affects contract rights, such changes are inhibited. The legislature will not be permitted, under the guise of changing a remedy or a rule of evidence, to impair a vested right under an existing contract; and the presumption that

all requirements of law with respect to the sale have been complied with, raised by the delivery of the tax certificate, was raised in favor of the tax purchaser by the law in force at the time of his purchase. This presumption was perpetuated by the deed, was a vested matter of right, and could not be taken away by a repeal of these laws. Cooley, Const. Lim. 347. Speaking of § 1639 of the Compiled Laws of 1887, which was practically the same as the section under consideration, this court said, in Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049: 'This statute entered into the contract of purchase, and became a part thereof.'"

Counsel for defendants vigorously challenges the soundness of the above decision, contending that the statute stated a mere rule of evidence, relating to the remedy, and that remedies are always under legislative control. It has been held in a number of cases that "rules of evidence are at all times subject to modification and control by the legislature, and changes thus made may be made applicable to existing causes of action," and that the repeal of a statute under which purchases at tax sales have been made effectually deprives the purchaser of the assurances contained in it as to the evidential effect of the deed. The following cases so hold: Hickox v. Tallman, 38 Barb. 608; Howard v. Moot, 64 N. Y. 262; Roby v. Chicago, 64 Ill. 447; Gage v. Caraher, 125 Ill. 447, 17 N. E. 777; Gibbs v. Gale, 7 Md. 76; Strode v. Washer, 17 Or. 50, 16 Pac. 926; Marx v. Hanthorn, 30 Fed. 579, 587. We have no quarrel with the rule, and it is a general rule, that the legislature may control remedies; but the rule is subject to the exception, which is as firmly fixed as the rule itself, that the legislature cannot, by a repeal or change of remedies, impair the obligation of a contract. The protection against the impairment of the obligation is absolute, and all legislative acts which work that result, whether by directly changing its terms or indirectly by rendering it ineffective, and of less value through a change of remedies, are prohibited. This is well stated in 2 Story on the Constitution, 5th ed. § 1385: "It is perfectly clear that any law which enlarges, abridges, or in any manner changes, the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it. The manner or degree in which this change is effected can in no respect influence the conclusion; for, whether the law affect the validity, the construction, the duration, the discharge, or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all the supposed cases."

The views of the Supreme Court of the United States upon this question are clearly set forth in the language of Mr. Justice Swayne in Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793: "The Constitution of the United States declares that 'no state shall pass any . . . law impairing the obligation of contracts.' A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done. The lexical definition of 'impair' is 'to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate.' Webster's Dict. 'Obligation,' is defined to be 'the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath, or contract,' etc. . . . The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' . . . It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement. Von Hoffman v. Quincy (United States ex rel. Von Hoffman v. Quincy) 4 Wall. 535, 18 L. ed. 403; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397. In Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547, this court said, touching the point under consideration: 'It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests.' 'One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force.' Planters' Bank v. Sharp, 6 How. 301, 12 L. ed. 447. It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account. These rules are axioms in the juris-

prudence of this court. We think they rest upon a solid foundation. . . . The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void."

Again, in Von Hoffman v. Quincy (United States ex rel. Von Hoffman v. Quincy) 4 Wall. 550, 18 L. ed. 408, Mr. Justice Swayne, speaking for the court, said: "It is also settled that the laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. . . . It is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution, and to that extent void."

The question then is, not whether the repeal related to the remedy, but whether it impaired the obligation of the purchaser's contract with the state, by making it less effective and less valuable. In Fisher v. Betts, *supra*, we hold that it did, and we are still of the same opinion. The state was one of the contracting parties. It promised to those who would purchase the lands of tax debtors at its sales that it would give to them deeds which would be prima facie evidence of their title. Under this assurance, the purchasers parted with their money. If the proceedings were in fact regular, the prima facie effect of the deed was an unassailable assurance of title in the grantee and his successors forever. But if the purchaser be deprived of this assurance the deed evidences nothing. Neither he nor his successors are in that event protected by the fact that the proceedings were regular. They must be prepared to furnish (sometimes an impossible thing) the actual evidence of regularity whenever their title is challenged. That this change goes to the very life and value of the contract is, we think, apparent; and we cannot believe either that the legislature intended that its promise should be meaningless, or that purchasers did not in fact rely upon it as a strong, if not controlling, inducement to part with their money.

The necessity which gave rise to statutes like this is well stated in Black on Tax Titles at § 448, in the following language: "The application of the common-law rule, casting the burden of proving every step upon the claimant under a tax title, was found to operate very much to the disadvantage of purchasers at tax sales. Aside from the difficulty of the undertaking,—to prove every item in a long and technical course of proceedings,—it was an arduous task to collect and preserve all the necessary fragments of evidence. Many of these were of a perishable nature, subsisting only in the files of newspapers, or fugitive documents: and the lapse of a considerable number of years, from the time of the first assessment, frequently put it beyond the power of the purchaser to fortify his claim with the evidence that was required of him. This fact, taken in conjunction with the strict and minute compliance with the statutory direction that was demanded of all the officers concerned, and with the extreme probability that some flaw, some slight omission or irregularity, could be detected in the proceedings, tended to make tax sales entirely nugatory. It became proverbial that a tax title was no title at all. And, indeed, transactions of this character came as near being an outright mockery as was possible for anything having the sanction of law."

In our opinion, the statute in question entered into, and was a substantial part of, contracts of purchase. It was framed to be relied upon by purchasers. To permit the state to repeal it would be to impair its obligation to the purchaser. This it cannot do. In our opinion it is within the mischief which the Constitution was intended to prohibit. We must decline, therefore, to follow those courts which have sustained such repeals upon the ground that the change effected was merely a rule of evidence. It follows from what has been said that the burden was upon the defendants to overcome the prima facie case made by the introduction of the tax-sale certificates and tax deeds. Have they sustained that burden? We are of opinion that they have as to the tax deeds, but not as to the tax certificates.

The invalidity of the deeds is established by proof that no sufficient notice of the expiration of the redemption period was given. The property in question is the "north 50 feet of lot 6, in block 37, in Keeney & Devitt's second addition to Fargo." One of the notices described it as "lot 6, block 37, Keeney & Devitt's second addition to Fargo" (failing to describe the part of the lot). Another described it as the "north 50 feet of

lot 6, block 37, Keeney & Devitt's addition to Fargo" (instead of "second addition to Fargo"). The third notice did not describe the part of the lot or correctly describe the addition in which the property is situated. The notices were clearly insufficient because of their failure to correctly describe the property. The three notices referred to are set out in full in the abstract which is presented as a basis for our decision. True, they are notices which were personally served upon the defendant. They are, however, notices prepared under the hand and seal of the county auditor; and we cannot disregard them, and assume, for the purpose of sustaining the tax deeds, that the county auditor prepared and served, either personally or by publication, other notices which were sufficient.

Counsel for plaintiff contend finally that no notice was necessary, and that the validity of the deeds is therefore not affected by the insufficiency of the notices. This presents a question of some difficulty. The sales were made under chapter 132, p. 376, Laws 1890. All sales under that act were subject to redemption. The purchaser's lien could ripen into title only after service of notice of the expiration of the redemption period, and the owner's title could not be devested, or his right of redemption terminated, until the statutory notice was given. The purchaser could, by a timely service of the notice, limit the right of redemption to three years. By failing to serve it the period was extended and the right preserved until sixty days after such notice was given. Chapter 132, p. 376, Laws 1890, was expressly repealed by § 12 of repeals, Rev. Codes 1895, which took effect on January 1, 1896. Section 1264 of the revenue laws contained in the Revised Codes of 1895 fixed the redemption period at two years from the date of sale, and did not require notice of expiration. Two of the sales in question were made more than two years before the 1895 Code took effect. If the repeal was effective in terminating the purchaser's obligation to give notice, and the landowner's right to notice under the 1890 law, and the provisions of the Revised Codes fixing the redemption period at two years are applicable to these certificates, it is clear that the purchaser became entitled to a deed upon two of the certificates upon demand and without redemption notice when the Revised Codes took effect, for in each case more than two years had elapsed since the date of sale; and, as to the third certificate, the right of redemption expired on December 4, 1896, and without notice. Plaintiff's counsel contend that the repeal had this effect. We are unable to agree with this contention. It is true, chapter 132, p. 376, Laws 1890, was expressly repealed. But it does not follow that all the provisions of the repealed act were abrogated as to rights which had accrued under them. As to a purchaser at a tax sale, it is well settled that the statute in force at the time of the sale becomes a part of his contract; and it is beyond the power of the legislature to sweep it away to his disadvantage by subsequent legislation. Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Fisher v. Betts, 12 N. D. 198, 96 N. W. 132. In Minnesota it has been held, and apparently for the same reason, that the redemptioner's rights are also governed by the statute under which the sale was made. In Merrill v. Dearing, 32 Minn. 479, 21 N. W. 721, that court said: "The right of property acquired by the purchaser at this sale, and the right of redemption remaining to the owner, must both be governed by the law in force at the time of sale. Neither, in our judgment, could be either abridged or enlarged by subsequent legislation. This is unquestionably so as to the right of the purchaser. The same rule ought to apply in favor of the owner as against any statute shortening the time to redeem, as it is equally unjust to legislate against the owner of the land as in his favor. State ex rel. Davenport v. McDonald, 26 Minn. 145, 1 N. W. 832; Hillebert v. Porter, 28 Minn. 496, 11 N. W. 84; Fleming v. Roverud, 30 Minn. 273, 15 N. W. 119; State ex rel. Wheeler v. Foley, 30 Minn. 350, 15 N. W. 375; Cooley, Taxn. 370." See also Gaston v. Merriam, 33 Minn. 271, 281, 22 N. W. 614; Kipp v. Johnson, 73 Minn. 34, 75 N. W. 736.

Other courts point out that the tax debtor has no contract with the state for any definite period in which to redeem; that the state has the power to sell his land without any right of redemption, and that the right to redeem and the time for exercising it are accorded as a matter of grace, and not of right; and conclude, for these reasons, that the legislature has the power to reduce the redemption period and to otherwise modify the right in substantial particulars by subsequent legislation. Negus v. Yancey, 22 Iowa, 57; Muirhead v. Sandis, 111 Mich. 487, 69 N. W. 826; Baldwin v. Ely, 66 Wis. 171, 28 N. W. 392; Black, Tax Titles, § 353; 25 Am. & Eng. Enc. Law, p. 410; Robinson v. Howe, 13 Wis. 341, 342.

We do not find it necessary to express an opinion upon these conflicting views at this time, for we are of opinion that the legislature, in enacting the Revised Codes of 1895, saved the right of redemption as it existed under chapter 132, p. 376, Laws 1890. The effect of the repeal by the Code of 1895 must be considered in connection with the

general saving provisions contained in § 2686 of that Code, which reads as follows: "No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions; but the proceedings therein must conform to the requirements of this Code so far as applicable." This section preserves "actions" which had been commenced, "proceedings" which had been commenced, and "rights" which had accrued when the Revised Codes of 1895 took effect. The proceedings were thereafter required to conform to the provisions of the 1895 Code "so far as its provisions are applicable." We are agreed that the right of redemption, as it existed under chapter 132, p. 376, Laws 1890, was a "right accrued," and was preserved by the above section. The saving provisions contained in this section, while general in terms, are such as usually accompany a revision of revenue laws. 1 Cooley, Taxn. 3d ed. 499, 500, 501, and cases cited. And they are generally held to perpetuate pre-existing laws so far as they are necessary to protect and enforce the right of the tax debtor as well as the purchaser. For cases in point, see Fletcher v. Post, 104 Mich. 424, 62 N. W. 574; Re Munn, 165 N. Y. 149, 58 N. E. 881, also Greensboro v. McAdoo, 112 N. C. 359, 369, 17 S. E. 178; Wilmington v. Cronly, 122 N. C. 388, 30 S. E. 9; Puget Sound Nat. Bank v. King County, 62 Fed. 546; Indianapolis v. Morris, 25 Ind. App. 409, 58 N. E. 510.

In the recent case of Hagler v. Kelly, 13 N. D.——, 103 N. W. 629, my associates were of opinion that the lien of a tax judgment in favor of the state was a "right accrued," and was preserved by the above section, notwithstanding the repeal of the statute which created it. I expressed no opinion upon the point. My doubt rested upon the belief that the lien was a remedy, and not a right. As to the present case there can be no doubt, and I fully agree with my associates that the right of redemption as it existed under chapter 132, p. 376, Laws 1890, was a "right accrued," and was perpetuated through the saving clause, notwithstanding the repeal. It is equally clear that the provisions of the 1890 law, regulating the termination of the right of redemption by the purchaser,—*i. e.*, by notice of expiration, and the manner of effecting redemption by the tax debtor,— were also continued in force, and govern in this action, unless they have been superseded by other subsequent provisions which are applicable. This is true under the language of the saving clause and also under the general rule of construction applicable to a revision or repeal of revenue laws, which is that the repeal or revision is to have a prospective operation only, unless the intent of the legislature to the contrary clearly appears. Smith v. Humphrey, 20 Mich. 398; Clark v. Hall, 19 Mich. 356; People ex rel. Auditor General v. Monroe County, 36 Mich. 70: Thomas v. Collins, 58 Mich. 64, 24 N. W. 553; Hall v. Perry, 72 Mich. 202, 40 N. W. 324; Oakland v. Whipple, 44 Cal. 303: Smith v. Kelly, 24 Or. 464, 33 Pac. 642; 1 Cooley, Taxn. 3d ed. 2681, and cases cited.

This rule of construction is expressly made applicable to the Revised Codes of 1895. Section 2681 of that Code reads as follows: "No part of this Code is retroactive unless expressly so declared." There is nothing in § 1264 of the 1895 Code which will authorize us to hold that it relates to redemptions under former sales. It clearly relates to redemptions from sales made under the 1895 revenue law, of which it is a part. The same rule of construction also requires us to hold that § 106, chap. 126, p. 295, Laws 1897 (§ 1289, Rev. Codes 1899), and chapter 166, p. 221, Laws 1901, are prospective, and do not apply to certificates issued under previous statutes. The statutes in force when the sales here in question were made, relating to redemption, required notice of expiration as a condition to obtaining a deed. No notice has been given. The deeds are therefore invalid.

The defendants also attack the validity of the tax sales: First, upon the ground that the owner or manager of the newspaper in which the notices were published failed to file the affidavit with the county auditor, required by chapter 120, p. 346, Laws 1890: second, because of the alleged insufficiency of the notices published. Neither of these contentions can be sustained. Chapter 120, p. 346, Laws 1890, consists of three sections. The first prescribes the qualifications of a newpaper which may do public printing and publish legal notices. Section 2 makes it the duty of the "owner or manager" of a newspaper, before it can be awarded a contract, to file with the county auditor a statement setting forth its qualifications. Section 3 subjects the person or corporation publishing notices or doing printing without filing such statement to a fine of not less than $25 nor more than $100, and also a "forfeiture of all pay for any such printing. . . ." It is not claimed that the newspaper was not in all respects qualified under § 1 of this act. The only objection is that the owner did not make a sufficient affidavit. It is apparent that this failure did not invalidate the publication. Section 3 designates the consequences for such failure, namely, a fine and forfeiture visited upon the person or corporation owning the newspaper which is at fault, and names no other consequences. We find no

warrant for holding that the legislature intended to declare notices void which are published in a newspaper which is qualified in fact, because the owner or manager fails to file the affidavit. On the contrary, we think the effect of such failure is that prescribed by § 3, to wit, liability to fine and forfeiture, and nothing more.

It is also claimed that the notices of sale did not contain a sufficient description of the property, and were therefore void. No proof of any kind was offered as to the notice of sale for 1894, and as to the other years the evidence does not show that the notices were insufficient. The notices of sale for the years 1891 and 1892 were published in the Fargo Republican. Defendants' counsel took the stand in their behalf, and offered in evidence, over objection, two printed slips of paper, which he testified were cut from newspapers in his possession purporting to have been published on November 1, 1891, and November 1, 1893, respectively. These clippings contain only a small part of the tax-sale notices. The descriptions are not as intelligible as they would be if the entire notice had been offered in evidence, and it is very doubtful whether a sufficient foundation was laid for the introduction of this evidence,—a question we need not decide, for we are agreed that the description contained in each of the papers offered is sufficient. In each, underneath the headlines: "Name, description, lot, block," the following appears: "G. W. McCauley, N. 50 ft. 6—37," and on each the foregoing description follows the general heading, printed in large letters: "Keeney & Devitt's second addition to Fargo." The objection is based upon the fact that between the general heading and the rest of the description of the property in question, *i. e.*, the name, lot, and block, certain other headings appear; on one: "Magill's subdivision of lot 1 and 2, block 33;" on the other, "Bond's subdivision of lots 6 and 7, block 30." A casual inspection shows that these notices do not contain a misdescription or a misleading description. The headings just described do not include "block 37 of Keeney & Devitt's second addition to the city of Fargo," in which the lot in question is situated. On the contrary, they cover the other blocks in this addition, which are designated by number, expressly excluding block 37. Apparently some of the blocks in this addition have been subdivided, and appropriate subheads were inserted designating those which were subdivided. Upon their face, the subheads do not apply to the property in question, the description of which, concededly otherwise sufficient, appears under the heading "Keeney & Devitt's second addition to Fargo."

It follows that the attack upon the sales must fail, and the certificates must be held valid. The District Court is directed to modify its judgment to correspond with the conclusions herein set out. Appellants will recover their costs on this appeal.

All concur.

INDIANA SUPREME COURT.

PITTSBURGH, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, Appt.,
v.
GEORGE W. HIGGS.

(— Ind. —, 76 N. E. 299.)

Carrier—stipulation against liability.

1. Carrying a passenger at a reduced fare does not entitle a railroad company to stipulate for an exemption from liability for negligently injuring him.

Proof of allegations of considerations for transportation.

2. A passenger is not bound to make strict proof of the amount alleged to have been received by the carrier for his transportation, in an action to recover damages for negligently injuring him.

Instruction—scope.

3. A court, in charging a jury, is not bound to cover all the questions or phases in a case in one instruction.

Carrier—proof of collision—negligence.

4. Proof of a collision between trains on a railroad makes a prima facie case in favor

Case Note.—Right of passenger carrier to stipulate against liability in consideration of reduced fare.—That a passenger carrier cannot limit its liability for its own or its servants' negligence in respect to passengers who pay the regular fare is beyond question. But it is also well settled by the weight of authority that, where a purely gratuitous pass is bestowed upon a traveler, no consideration, direct or indirect, being paid, a contract exempting the company from liability is valid. 4 Elliott, Railroads, § 1608, p. 2515; 2 Fetter, Carr. Pass. § 393. Yet, in some states the right of a passenger carrier to exonerate itself from liability for negligence, even in the case of purely gratuitous passengers, is denied. And even in those states where the right is sustained there is some question as to who are gratuitous passengers, the fact that the passenger is traveling on a pass not being considered conclusive proof that he is not a passenger for hire. Thus, it is held by the weight of authority that a person traveling on a drover's pass is not a gratuitous passenger, but one for hire. So, it has been held that a stipulation against liability in a pass issued, not as a mere gratuity, but as part consideration for the leasing to the employer of the person using the pass of a pleasure resort owned by the railroad company, is in-

of an injured passenger, which the carrier must rebut by showing it could not have been avoided by the exercise of the highest practical care and diligence on its part.

(December 5, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for Cass County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. George E. Ross, for appellant:

The plaintiff must recover *secundum allegata et probata*, or not at all.

Louisville N. A. & C. R. Co. v. Renicker, 8 Ind. App. 404, 35 N. E. 1047; Baltimore & O. S. W. R. Co. v. Ragsdale, 14 Ind. App. 406, 42 N. E. 1106; Callaway v. Mellett, 15 Ind. App. 366, 57 Am. St. Rep. 238, 44 N. E. 198; Arcade File Works v. Juteau, 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326; Diltz v. Spahr, 16 Ind. App. 591, 45 N. E. 1066; Sanders v. Hartge, 17 Ind. App. 243, 46 N. E. 604; Cleveland, C. C. & St. L. R. Co. v. Dugan, 18 Ind. App. 435, 48 N. E. 238; Richardson v. League, 21 Ind. App. 429, 52 N. E. 618; Stewart v. Cleveland, C. C. & St. L. R. Co. 21 Ind. App. 218, 52 N. E. 89; Barrows v. Wampler, 24 Ind. App. 472, 56 N. E. 935; Pennsylvania Co. v. Walker, 29 Ind. App. 285, 64 N. E. 473; Paris v. Strong, 51 Ind. 339; Boardman v. Griffin, 52 Ind. 101; Terry v. Shively, 64 Ind. 106; Thomas v. Dale, 86 Ind. 437; Lake Shore & M. S. R. Co. v. Bennett, 89 Ind. 457; Hall v. Pennsylvania Co. 90 Ind. 459; Bartlett v. Pittsburgh, C. & St. L. R. Co. 94 Ind. 281; Cleveland, C. C. & I. R. Co. v. Wynant, 100 Ind. 160; Bremmerman v. Jennings, 101 Ind. 253; Hannon v. Hilliard, 101 Ind. 310; Hasselman v. Carroll, 102 Ind. 153, 26 N. E. 202; Brown v. Will, 103 Ind. 71, 2 N. E. 283; Armacost v. Lind-

valid by the law of New Jersey. Camden & A. R. Co. v. Bausch, 4 Sadler (Pa.) 518, 7 Atl. 731.

So, it has been held in some cases, though there is a conflict of authority on this point, that an express messenger carried by a railroad under contract with the express company is not a gratuitous passenger. And a mail agent has been held to be a passenger for hire, so that the railroad could not stipulate against liability for negligence causing injury to him. On the other hand, it has been held by some cases that permitting a passenger to ride in a freight car, which the company was under no duty to do, is a sufficient consideration for a release by the passenger of the company from liability.

On the exact question of the right of the carrier to stipulate against liability in consideration of a reduced rate of fare, there is very little authority, and the few cases that have considered the question are not in harmony. It has been held in Oregon that a passenger's agreement to absolve the transportation company from all liability as a common carrier while riding as a passenger upon its freight train, entered into in consideration of his securing a railway ticket at a reduced rate, is unenforceable with respect to such freight trains as are designated by the carrier to carry passengers generally. Richmond v. Southern P. Co. 41 Or. 54, 57 L.R.A. 616, 93 Am. St. Rep. 694, 67 Pac. 947. The court in this case said: "A special engagement was entered into between the parties; but such agreement was not wholly a matter of accommodation to the plaintiff. It was rather for their mutual advantage, for it may safely be assumed that, when passenger tickets can be secured at low rates, many persons who would not otherwise travel purchase them for their own advantage. Such purchases necessarily increase passenger traffic, and, if the rate established leaves a margin of profit above the cost of transportation, the increase in the number of passengers ordinarily results in advantage to the railroad company; so that the purchase and sale of the ticket in question may be considered as a source of profit to each party. The question whether the defendant sustained the relation of a common carrier to the plaintiff at the time he was injured, and therefore is liable to him for the damages sustained, notwithstanding his agreement to assume the risk of injury and to absolve the defendant from all liability therefor, must hinge upon a proper solution of the inquiry whether it was the defendant's business and duty to carry him on its freight train between the stations indicated. . . . Plaintiff having paid value for his ticket, the contract of carriage could not be canceled at pleasure by the defendant; and we do not think a rebate in the price of a local ticket affords a sufficient consideration for the assumption of the risk undertaken where no special privileges are conferred; for, if this were so, it would follow that the smallest remission from the regular price of a ticket might suffice for exemption from liability."

So, in Crary v. Lehigh Valley R. Co. 203 Pa. 525, 59 L.R.A. 815, 93 Am. St. Rep. 778, 53 Atl. 363, where the plaintiff had purchased at a reduced rate an excursion ticket containing a stipulation against liability, the court said that, by the purchase and acceptance of the ticket at a reduced rate with the condition indorsed on it, there was an agreement between the passenger and the railroad company that the common-law rule making the common carrier an insurer of safety should be set aside, and that he would be bound by the agreement as the law defining the duty and liability of the company in carrying him; but held that it was well settled that, by such an agreement, the common carrier could not relieve itself from liability for its negligence. Neverthe-

ley 116 Ind. 265, 19 N. E. 138; Chicago St. L. & P. R. Co. v. Burger, 124 Ind. 275, 24 N. E. 981; Cincinnati, I. St. L. & C. R. Co. v. McLain, 148 Ind. 188, 44 N. E. 306; Insurance Co. v. Lake Erie & W. R. Co. 152 Ind. 333, 53 N. E. 382; Thompson v. Citizens' Street R. Co. 152 Ind. 461, 53 N. E. 462; Borders v. Williams, 155 Ind. 36, 57 N. E. 527.

When an action is brought to recover damages for the breach of an implied contract, no recovery can be had thereunder upon proof of an express contract.

Sanders v. Hartge, *supra;* Parrill v. Cleveland, C. C. & St. L. R. Co. 23 Ind. App. 638, 55 N. E. 1026; Evansville & T. H. R. Co. v. Kevekordes (Ind. App.) 69 N. E. 1022; Indianapolis & C. R. Co. v. Remmy, 13 Ind. 518; Jeffersonville, M. & I. R. Co. v. Worland, 50 Ind. 339; Lake Shore & M. S. R. Co. v. Bennett, Hall v. Pennsylvania Co. and Bartlett v. Pittsburgh, C. & St. L. R. Co., *supra;* Snow v. Indiana, B. & W. R. Co. 109 Ind. 422, 9 N. E. 702; Armacost v. Lindley, *supra;* Toledo, St. L. & K. C. R. Co. v. Levy, 127 Ind. 168, 26 N. E. 773; Terre Haute & L. R. Co. v. Sherwood, 132 Ind. 129, 17 L.R.A. 339, 32 Am. St. Rep. 239, 31 N. E. 781; Lake Erie & W. R. Co. v. Holland, 162 Ind. 406, 63 L.R.A. 948, 69 N. E. 138.

Where the action is upon an implied contract, or for an alleged breach of the carrier's common-law duty, and it is proved on the trial that the goods are being carried under a special contract, the plaintiff cannot recover.

Indianapolis, D. & W. R. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138; Baltimore & O. S. W. R. Co. v. Ragsdale; Stewart v. Cleveland, C. C. & St. L. R. Co.; Pennsylvania Co. v. Walker; Evansville & T. H. R. Co. v. Kevekordes; Lake Shore & M. S. R. Co. v. Bennett; Hall v. Pennsylvania Co.; and Bartlett v. Pittsburgh, C. & St. L. R. Co.,—*supra;* Fry v. Louisville, N. A. & C. R.

less, it was held that, to hold the carrier responsible for an injury received by the passenger while riding on such ticket, he must show affirmatively that the carrier was guilty of negligence causing the injury.

On the other hand, it is held in Boswell v. Hudson River R. Co. 5 Bosw. 699, 10 Abb. Pr. 442, that the fact that a person who was injured while riding on a railway train by reason of the negligence of the servants of the railway company was riding under a special contract made between him and the company, evidenced by a pass or free ticket given to him by the defendant, upon the face of which was printed a condition that the ticket was issued to the owner of live stock or his agent to enable him to take the entire charge of his stock while on the defendant's railway, and as part of the contract for transporting the same; and that by accepting or using it, the holder expressly released the company, in consideration of the pass and the reduction of price below the tariff rates, from all liability for injury to the stock from crowding, trampling, etc., or for injury to his person or stock arising from any cause whatsoever,—was a good defense to an action for the injury, where not caused by any fraudulent, wilful, or reckless act, or misconduct, or gross neglect, or default, on the part of the company.

And the right of a carrier to stipulate, in consideration of a reduced rate, against liability for injury to a passenger, is sustained in Bissell v. New York C. R. Co. 25 N. Y. 442, 82 Am. Dec. 369. In this case a contract had been made between the carrier and the owners of certain stock to transport the stock at a reduced rate, the stock owners taking upon themselves the risk of injuries to the cattle, and it being also further agreed that the persons riding free to take charge of the stock should do so at their own risk of personal injury from whatever caus. One of the owners accompanied the stock, riding on a free ticket, which contained a notice that the person using it assumed all risk of accident, and expressly agreed that the company should not be liable under any circumstances for any injury to the person, or for any loss or injury to the stock. The passenger was killed by the negligence of the company; and it was held by a divided court that the carrier was not responsible therefor. Selden, J., who wrote the main opinion, argued that, even if he were considered, not as a gratuitous passenger, but as one riding on a reduced fare, the company was not liable; saying: "The principle being established that railroads may, by contract, relieve themselves from the negligence of their servants in the carrying of passengers when carried gratuitously, I can discover no rule of law or public policy to prevent their doing it on any other terms which may be agreed upon between them and their passengers, and which shall furnish a consideration to the passengers for the risk which they assume. All the arguments which have been urged against the propriety and safety of allowing carriers to make such contracts apply with as much force to cases where passengers are carried gratuitously as where they are carried for reward. So far as the public are concerned, the question of reward is one of indifference; and, so far as the parties are concerned, if they are allowed to make the contract at all, they are the judges of the amount of consideration which will compensate them for assuming the risk, whether the whole fare, or half, or an eighth, or any other proportion, or other consideration. I apprehend it is entirely safe to leave them to fix the terms. . . . I refer, of course, to actual contracts, and not to attempted limitations of the carrier's responsibility, by means of indorsements upon tickets not assented to by the passengers who received them. . . . On the offer by a passenger of the fare pre-

Co. 103 Ind. 265, 2 N. E. 744; Snow v. Indiana, B. & W. R. Co. and Lake Erie & W. R. Co. v. Holland, *supra*.

Common carriers can lawfully contract, limiting their strict common-law liability.

Louisville, N. A. & C. R. Co. v. Nicholai, 4 Ind. App. 119, 51 Am. St. Rep. 206, 30 N. E. 424; Indianapolis, D. & W. R. Co. v. Forsythe, *supra;* Reid v. Evansville & T. H. R. Co. 10 Ind. App. 385, 53 Am. St. Rep. 391, 35 N. E. 703; Wright v. Gaff, 6 Ind. 416; Indiana C. R. Co. v. Mundy, 21 Ind. 48, 83 Am. Dec. 339; Thayer v. St. Louis, A. & T. H. R. Co. 22 Ind. 26, 85 Am. Dec. 409; Adams Exp. Co. v. Reagan, 29 Ind. 21, 92 Am. Dec. 332; Indianapolis, P. & C. R. Co. v. Allen. 31 Ind. 394; Michigan S. & N. I. R. Co. v. Heaton, 37 Ind. 448, 10 Am. Rep. 89; Adams Exp. Co. v. Fendrick, 38 Ind. 150; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; St. Louis & S. E. R. Co. v. Smuck, 49 Ind. 302; Jeffersonville, M. & I. R. Co. v. Worland, *supra;* United States Exp. Co. v. Harris, 51 Ind. 127; Bartlett v. Pittsburgh, C. & St. L. R. Co. *supra;* Western U. Teleg. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 713; Rosenfeld v. Peoria, D. & E. R. Co. 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. 344; Louisville, N. A. & C. R. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869; Terre Haute & L. R. Co. v. Sherwood, *supra;* Insurance Co. of N. A. v. Lake Erie & W. R. Co. 152 Ind. 333, 53 N. E. 382.

If a person sees fit to make a special contract by which special rights and privileges are given him in consideration that he assumes the risks which, as a common carrier, the law imposes upon the carrier, such contract makes the carrier as to such person a special carrier in the performance of the contract, and such contract is not against public policy.

Louisville, N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 38 L.R.A. 93, 58 Am. St. Rep. 348, 44 N. E. 796; Pittsburgh, C. C. & St. L. R. Co. v. Mahoney, 148 Ind. 196, 40 L.R.

scribed by law, the company is bound to transport him and to assume all the risks which fall within the appropriately stringent rules above adverted to; and, in case of refusal, such company is made liable for all damages resulting from such refusal. . . . But, if anyone wishes to travel with greater economy than by paying the fare which the legislature has prescribed . . . as the reasonable compensation for transportation and risk, and prefers to pay less, or to pay nothing, . . . I do not think there is either danger or impropriety in allowing it to be done; and there is no principle upon which my mind can rest to justify the position that courts shall recognize such a contract as valid, when the company, in consideration of the passenger's assuming the risk, agrees to carry such passenger without fare, and declare it void when, for the same consideration, the company agreed to carry him for half fare. The 2 cents a mile which the defendant is allowed by law to charge for carrying way passengers, and 3 cents a mile for other passengers, is what the law adjudges . . . to be a reasonable compensation for the expense of carrying the passenger, including the risk imposed by law, of his qualified insurance against injury. To hold that the defendant and the passenger may lawfully agree that the former shall be relieved from the risk, and the latter assume it, and then to add that no such agreement shall be valid unless the defendant gives to the passenger for assuming the risk the full compensation which the law allows it to receive for risk and transportation united, would not seem to be reasonable. I should regard it as far more rational to deny to the parties all power to contract on the subject. Like all contracts, to render such a one valid, it is indispensable that it have some consideration which it would not have if the passenger paid the full fare fixed by law. That is all which the company is allowed to receive for the service and the risk united; and it can no more demand the full compensation of both for the service alone than it could demand the fare for 100 miles for carrying a passenger 50 miles. If the service is reduced, the amount of reward must be reduced in proportion; and, if the company is relieved from the risk, it must make compensation for that relief by the reduction of fare or otherwise. The amount of such compensation, like the consideration for all contracts, must be left to the agreement of the parties." Gould, J., and Smith, J., who concurred in holding the company not liable, said nothing about the effect of riding on a reduced fare, but considered the question solely on the supposition that the passenger was riding gratuitously, and not as a passenger on a reduced fare. Denio, Ch. J., and Wright and Sutherland, JJ., dissented on the ground that the passenger was not a free passenger on the theory that the price of his passage was embraced in the amount to be paid for the transportation of the stock. And Denio, Ch. J., argued against the theory that a reduced fare validated a stipulation against liability as follows: "Suppose they should prepare a set of passenger tickets for which only one half, or three fourths, or any other proportion, of the usual price should be asked, and which should contain a stipulation similar to the one printed upon the back of the passenger ticket furnished to the deceased in the present case. No passenger expects in his individual case to be injured or destroyed in the course of his journey; but the pecuniary advantage held out to him by such a ticket as I have supposed is direct and immediate. I have no doubt but that a large proportion of the persons traveling by railroad would purchase the cheaper tickets, and agree to become their own insurers. To the precise extent to which this arrangement should prevail, the pecuniary inducements of the cor-

A. 101, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464; Russell v. Pittsburgh, C. C. & St. L. R. Co. 157 Ind. 305, 55 L.R.A. 253, 87 Am. St. Rep. 214, 61 N. E. 678; Payne v. Terre Haute & I. R. Co. 157 Ind. 616, 56 L.R.A. 472, 62 N. E. 472; Blank v. Illinois C. R. Co. 182 Ill. 332, 55 N. E. 332; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; Griswold v. New York & N. E. R. Co. 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261; Quimby v. Boston & M. R. Co. 150 Mass. 365, 5 L.R.A. 846, 23 N. E. 205; Kinney v. Central R. Co. 34 N. J. L. 513, 3 Am. Rep. 265; Rogers v. Kennebec S. B. Co. 86 Me. 261, 25 L.R.A. 491, 29 Atl. 1069; Crary v. Lehigh Valley R. Co. 203 Pa. 525, 59 L.R.A. 815, 93 Am. St. Rep. 778, 53 Atl. 363.

On petition for rehearing.

Appellee's only right to be upon appellant's train being under a special contract, proof alone "that the train on which he was riding collided with another train raises no presumption that the injury was the result of some act or omission of the defendant.

Baltimore & O. S. W. R. Co. v. Hudson. 25 Ky. L. Rep. 2154, 80 S. W. 454; Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Boering v. Chesapeake Beach R. Co. 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515; Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663; Duncan v. Maine C. R. Co. 113 Fed. 508; Wilson v. Atlantic Coast Line R. Co. 129 Fed. 774; Long v. Lehigh Valley R. Co. 65 C. C. A. 354, 130 Fed. 890; Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525, 106 Am. St. Rep. 187, 74 N. E. 705; Mann v. Pere Marquette R. Co. 135 Mich. 210, 97 N. W. 721; Boaz v. Central R. Co. 87 Ga. 463, 13 S. E. 711; Scott v. Wood, 81 Cal. 403, 22 Pac. 871; Kahn v. Triest-Rosenberg Cap Co. 139 Cal. 345, 73 Pac. 164.

poration to the exercise of the high degree of care and vigilance which the peculiar nature of this mode of transit requires might be expected to be relaxed." And he also says, as to the distinction between the right to restrict liability for the carriage of goods and the right to restrict liability for injuries to passengers, that there is a manifest distinction between the case of property and that of persons. That, as to the former, the carrier is an insurer against all accidents, except in two well-known cases, and may often be held liable without any actual fault on his part or on that of his servants; while a carrier of passengers can only be made responsible for actual negligence of himself, or of those for whose acts and omissions he is responsible. That it is quite consistent to allow one who, in the absence of a contract, is a general and almost universal insurer, to qualify his liability by an agreement with the other party, and still hold that, where the law for the better protection of life and member has attached a certain consequence to actual negligence, the parties cannot, by convention, dispense with so salutary a rule.

But in a very similar case, where a contract had been made with a railroad company for transportation of certain stock, the contract reciting that they were carried at a reduced rate in consideration of the owner's assuming certain specified risks in respect to their safety during the transit; and also that it was further agreed that the persons riding free to take charge of the stock should do so at their own risk of personal injury from whatever cause,—it was held that the company was liable for the death of the person accompanying the stock, resulting from the derailment of the train because of the use of a flat wheel, notwithstanding such stipulation. Smith v. New York C. R. Co. 24 N. Y. 222. This decision was also by a divided court, two of the five judges out of those who concurred in sustaining the liability of the company expressing the opinion that a contract which would exempt the company from liability for any negligence, however gross, would be against public policy, even when no fare was paid; although in this case the passenger was not regarded as riding gratuitously. But Allen, J., who wrote the dissenting opinion, argued that, if a special contract could be made exempting the company from liability, the amount or nature of the consideration was immaterial; saying: "Where a special contract, a contract out of the usual and ordinary course of things, is made, and for a consideration other than that of the usual and ordinary fare for the carriage of passengers, the liabilities may be regulated by that contract. Whether the consideration upon and for which the traveler takes upon himself in discharge of the company certain risks is the whole fare, or half fare, or any outside and independent consideration, is not material. It is enough that a special contract is made upon a consideration which the parties have agreed to be adequate. Most certainly, the courts will not, in an action upon a policy of insurance, inquire into the sufficiency or adequacy of the premium as a consideration for the risks assumed. The deceased here agreed, in consideration that the defendants would take his stock at a given rate for transportation and permit him to ride free over the road without additional charge to take charge of the stock, that he would assume and bear all the risks of the journey; and who shall sit in judgment upon this contract and say it was without consideration, or that the consideration was unlawful, or that the contract was against public policy?"

Messrs. **Nelson & Myers**, with Mr. **Charles E. Yarlott**, for appellee:

A carrier of passengers for hire cannot contract for relief from its negligence.

Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Baltimore & O. S. W. R. Co. v. Ragsdale, 14 Ind. App. 406, 42 N. E. 1106; Parrill v. Cleveland, C. C. & St. L. R. Co. 23 Ind. App. 638, 55 N. E. 1026; St. Louis & S. E. R. Co. v. Smuck, 49 Ind. 302; Bartlett v. Pittsburgh, C. & St. L. R. Co. 94 Ind. 281; Rosenfeld v. Peoria, D. & E. R. Co. 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. 344; Payne v. Terre Haute & I. R. Co. 157 Ind. 616, 56 L.R.A. 472, 62 N. E. 472; Louisville, N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 38 L.R.A. 93, 58 Am. St. Rep. 348, 44 N. E. 796.

Jordan, J., delivered the opinion of the court:

On July 13, 1903, appellee filed a complaint in the Cass circuit court, whereby he charged that appellant railroad company was, at the time therein mentioned, a corporation owning and operating a railroad known as the "Panhandle," extending from the city of Chicago, Illinois, through the state of Indiana, to the city of Cincinnati, Ohio; and that said railroad company was a common carrier of passengers for hire. The complaint further averred that on April 22, 1903, said defendant railroad company, in consideration of the sum of $10, received the plaintiff, appellee herein, as a passenger over its said railroad from Chicago, Illinois, to Cincinnati, Ohio, and while on its cars, on his journey, at or near the village of Kouts, in the state of Indiana, by and through the negligence of the said defendant and its servants in running and managing its railroad and trains of cars thereon, the train on which plaintiff was riding collided with another train, which was being run and operated by the defendant. Plaintiff was then and there and thereby, and because of such collision, suddenly and forcibly thrown out of his seat, whereby one of his ribs was broken, his head was bruised, spinal column strained and injured, all because of said collision. That he was rendered senseless for some time, and his injuries were of such a nature and character that it became necessary for him to have the immediate attention of a physician, and that ever since he has suffered great pain and mental anguish. Other facts are alleged, disclosing his age, occupation, good health, and condition at the time of the accident, and his inability thereafter to perform any work, etc. The complaint closes with the demand for $15,000 damages. A demurrer thereto for want of facts was overruled, and thereupon appellant filed an answer in three paragraphs: First. A general denial. Second. Alleging that on April 20, 1903, the plaintiff and the Northern Pacific Railway Company entered into a special contract at Spokane, state of Washington, by which the plaintiff was entitled to ride as a second-class passenger over the lines of said Northern Pacific Railway Company from said city of Spokane to Chicago, Illinois, and from Chicago, Illinois, to Cincinnati, Ohio, over the lines of the defendant, the Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company. Other lines of railway over which plaintiff was entitled to ride on said ticket to Nicholasville, Kentucky, are stated. It is then averred that "the plaintiff agreed and undertook to assume all risks of accident and damage to his person or property while so traveling or being carried over said lines of railway; that said agreement was in the form of a ticket, and delivered to plaintiff by the said Northern Pacific Railway Company, and was the only evidence of his right to ride or be carried over said lines; that, in pursuance of the said agreement as expressed in the ticket, the plaintiff started from said Spokane, and was so traveling on said ticket, and not otherwise, at the time he is alleged to have been injured, as charged in the complaint," etc.; wherefore defendant says the plaintiff ought not to recover in this action. The third paragraph is substantially the same as the second; and thereon and thereby appellant alleged and set up as a defense to the action that, "by the terms of said contract, the plaintiff agreed and undertook to assume all risks of accident and damage to his person or property while so traveling or being carried over said several lines of railroad." No copy of the contract or agreement referred to is filed with or made a part of either of the paragraphs of answer.

A demurrer by appellee for want of facts was sustained to the second and third paragraphs. The cause, being at issue upon the complaint and answer of general denial, was tried by a jury, and a general verdict, finding in favor of appellee, and awarding him damages in the sum of $300, was returned by the jury. Along with this general verdict, the jury returned answers to a number of interrogatories. By their answers to the latter the jury found, among other things, substantially as follows: That the plaintiff got upon one of the defendant's passenger trains at the city of Chicago, Illinois, about midnight on April 22, 1903, his final destination being Nicholasville, Kentucky. Before he boarded said train, he had purchased a ticket which entitled

him to ride over the defendant's railroad. This ticket was purchased by the plaintiff at Spokane, in the state of Washington, of the Northern Pacific Railway Company, and was a special limited second-class contract ticket. Interrogatory No. 11, with the answer of the jury thereto, is as follows: "Interrogatory No. 11. Was the plaintiff, George W. Higgs, received by the defendant at Chicago, and being carried over its railroad from Chicago, Illinois, to Cincinnati, Ohio, April 23, 1903, under a special contract in writing, signed by him and entered into with the Northern Pacific Railway Company at Spokane, Washington? Answer. Yes. Meredith Tyner, Foreman." Over appellant's motion for a new trial and for judgment on the special findings of the jury, the court rendered judgment on the general verdict.

Appellant appeals, and assigns and argues for reversal certain alleged errors of the trial court.

The following facts appear to be clearly established by the evidence: Appellant is a corporation, owning and operating a railroad extending from Chicago, Illinois, through the state of Indiana, to Cincinnati, Ohio, and is a common carrier of freight and passengers for hire. On April 20, 1903, appellee purchased of the agent of the Northern Pacific Railway Company at the city of Spokane, state of Washington, a coupon second-class ticket, which entitled him to be carried as a passenger from said city of Spokane to Nicholasville, Kentucky; the latter being the home town of appellee. One of the coupons of this through ticket entitled him to be carried as a passenger over appellant's railroad from Chicago, Illinois, to Cincinnati, Ohio. The price which he paid for this through ticket was $53. The evidence does not expressly disclose the precise amount of money which appellant was entitled to receive from the railroad company selling the ticket for the distance which it carried appellee over its line of railway, but it is shown that it would be entitled to receive a proportionate part of the price for the ticket; the exact amount being a matter of calculation on the arrangement which it had with the railroad company which sold the ticket. Appellee appears to have started on his journey from Spokane on Sunday night, and arrived at Chicago the following Wednesday, being April 22, 1903. On the latter day, about midnight, he boarded one of appellant's passenger trains at the said city of Chicago, intending to become a passenger thereon from said city to the city of Cincinnati, Ohio. He went into the ladies' car, and took a seat about the center of that coach. He appears to have utilized two seats, one of which was turned over; that, as he was tired and sleepy from the effects of his long journey, he used these two seats for the purpose of lying down thereon, and soon after reclining upon his seat he fell asleep. After the train had left Chicago, the conductor in charge thereof came through the passenger car where plaintiff was, examined his ticket, and thereupon punched the coupon which entitled him to be carried from Chicago to Cincinnati. After sleeping for some time, appellee was awakened by a severe and sudden jolt, which gave forth a "dead sound." All he appears to have remembered on being awakened was that there was much confusion in the car, some of the ladies were screaming, and he, in the excitement and confusion at the time, made a dash for the door of the car, and was there informed by someone that the train on which he was riding and a freight train on appellant's road had collided with each other at a point near Kouts, Indiana. He returned to his seat, laid down thereon, felt sick, became very pale, great beads of sweat stood upon his face, and he complained of being injured, and evidence of the fact that he was severely injured and was suffering appears to have been evident to some of his fellow passengers. The conductor, on learning of appellee's injury, telegraphed to Logansport to the company's physician to attend upon appellee and give him medical attention when the train arrived at the city. This appears to have been done. The physician gave appellee some medicine and put plasters on his back to alleviate his suffering. Medicine also appears to have been administered to him between Logansport and Cincinnati. At the latter city, being unable to help himself, he was assisted from the train, and conveyed to a station, where he was placed on a train to carry him to Nicholasville, Kentucky. After reaching home, physicians were called to examine him, and they discovered that one of his ribs was broken or fractured, and that he was injured in other parts of his body. He continued to be disabled for quite a length of time, and was under medical treatment.

That the injuries which appellee received were the result of the collision in question, and that said accident was the proximate cause thereof, is fully sustained by the evidence. It is shown that the train upon which appellee was being carried collided with a freight train which appellant owned and was operating upon its railroad, and which at the time was in charge of its agents and servants. This fact is undisputed. The conductor in charge of the passenger train upon which appellee was being

carried at the time was introduced at the trial as a witness in behalf of appellant, and his testimony goes to prove that the cause of the wreck or collision was the failure of the engine attached to the freight train to properly steam, and the breaking of a coupling. The collision was with such great force as to demolish the pilot of the engine of the passenger train upon which appellee was being carried, and to completely wreck the caboose attached to the freight train. That the collision in question was due to the negligence of appellant is, under the evidence, beyond controversy. There is also an entire absence of any evidence to show that appellee was in any manner guilty of contributory negligence; hence this element of the case may be dismissed without any further serious consideration.

Appellant's counsel argue that the complaint in this action is based upon an implied contract, while, as he asserts, the jury, by their answers to interrogatories, have found that appellee was being carried at the time of the accident under a contract which was evidenced by a special limited contract ticket. An examination of the complaint, however, fully reveals that it is not predicated on a contract, either express or implied, but the pleader relies wholly on a breach of duty imposed by law on appellant company as a carrier of passengers for hire. That the action presented by the complaint sounds wholly in tort is manifest. What is averred therein as to the consideration which appellee paid for his transportation as a passenger over appellant's road is but a mere inducement to the action to disclose or show his right to sue as a passenger. 15 Enc. Pl. & Pr. p. 1124; 4 Elliott, Railroads, § 1693. As a general rule, in determining whether an action like this is predicated on contract or tort, the court will look to the nature of the action alleged in the complaint, and, if no special contract is therein set out, it will construe the pleading as based on the tort of which the plaintiff complains. 4 Elliott, Railroads, § 1694. Unless the facts alleged in plaintiff's complaint are of such a character as to show that he assumed the risk, so as to be legally binding on him, or that the liability of appellant carrier is limited by some special contract, the latter, if it relied upon such an agreement or contract, must specially plead it as a defense to the action. Citizens' Street R. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55; 4 Elliott, Railroads, § 1696.

Appellant's learned counsel in his argument apparently travels on the assumption that the complaint in this action is founded on the implied contract, and from this standpoint of assumption he proceeds to argue that, inasmuch as the jury found by interrogatories that appellee was being carried over appellant's road under a special limited second-class contract ticket, which he had purchased at Spokane of the Northern Pacific Railroad Company, therefore he cannot recover in this action, and that appellant's motion for judgment on the interrogatories of the jury should have been sustained. In support of this argument we are cited to a class of cases like Lake Shore & M. S. R. Co. v. Bennett, 89 Ind. 457, Hall v. Pennsylvania Co. 90 Ind. 459, and Indianapolis, D. & W. R. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138, which were actions arising out of the loss or destruction of goods and chattels which had been delivered by the shipper to the carrier for transportation under such bills of lading. In these cases the plaintiff appears to have ignored the bills of lading containing a special contract under which the goods were shipped, and sued on the implied contract of a common carrier. The court in these cases held that, inasmuch as the evidence disclosed that the goods in suit were shipped under the terms or provisions of a special contract, consequently there could be no recovery by the plaintiff upon an implied contract, but that the causes should have been based on the bill of lading; and for that reason it was held that there was a fatal variance between the complaint and the proof. These decisions, however, have no application to the case at bar. As previously stated, the cause of action is not based on a contract, express or implied, but sounds wholly in tort, and the liability incurred by the appellant under the facts alleged in the complaint and proved on the trial is not such from which it may legally exempt or relieve itself by contract. In Indianapolis, D. & W. R. Co. v. Forsythe, *supra*, which was an action for the recovery of goods destroyed by fire while in transit, Judge Reinhard, speaking for the appellate court, said: "If, then, the liability is one from which the carrier might relieve himself by contract, and such a contract was in fact entered into, there can be no doubt, under the Indiana authorities, that the action must be upon the contract, and not upon the common-law liability. The contract is, of course, not conclusive as to the right of recovery. After it is introduced in evidence, it then remains to be seen from the facts showing the loss whether such loss was or was not occasioned by some cause

within the exception; but the burden of showing negligence in such case is upon the plaintiff,"—citing authorities. It is true the evidence shows, and the jury specially found by their answers to interrogatories, that the ticket which appellee purchased at Spokane was a second-class limited ticket, which entitled him to be carried from the latter place to Nicholasville, Kentucky. The respective coupons of this ticket were all taken up by the railroad companies operating the lines over which appellee traveled, and at the time this action was instituted the ticket was not in his possession. Neither it, nor any part thereof, was introduced in evidence on the trial; and as to what were the special stipulations, limitations, or conditions therein contained, if any, is not disclosed by the evidence. In fact, there is nothing shown by the evidence which would authorize the assertion that appellee was required to predicate his cause of action upon the ticket in question, instead of basing it on the breach of duty imposed by law on appellant. Both the facts alleged in the complaint and those established by the evidence disclosed that at the time of the collision in question the relation of carrier and passenger for hire existed between him and appellant company. The purchase of the ticket in controversy and appellant's accepting appellee thereon as a passenger on its train certainly invested him with all of the rights of a passenger for hire. The negligence of the railroad company, as shown, from which the injury resulted, was a breach of duty which it owed to him under the law as a passenger. Ordinarily, a railroad ticket for passage is but a mere token, receipt, or voucher, as evidence that the passenger has paid the required fare. Where, however, in addition to its usual form, the ticket contains some reasonable stipulation, or limitation, or condition, which has been assented to by the purchaser, then to this extent it may be said to constitute a contract. Indianapolis Street R. Co. v. Wilson, 161 Ind. 153, 168, 100 Am. St. Rep. 261, 66 N. E. 950, 67 N. E. 993, and authorities there cited. Where the ticket contains provisions which can avail the carrier as a legitimate defense in an action by a passenger, founded on a breach of duty on the part of the carrier, it is its privilege or right to set up or interpose such defense to the action. We may assume that, had the ticket herein in controversy contained any provision or stipulation which inured to the benefit of appellant company, the latter would have taken the necessary steps to have properly availed itself of the benefit thereof.

While it is true, as previously stated, the evidence does not show that appellee paid directly to appellant $10 as a consideration for his carriage over its road, still it does appear that he purchased a through coupon ticket, and that one of said coupons (the one which was taken up by appellant company) entitled him to be carried over its railroad as a passenger for hire from Chicago, Illinois, to Cincinnati, Ohio. The exact part of the purchase price which appellant was entitled to receive from the selling company does not clearly appear. However, it is shown that it was entitled to receive its proportionate part of the purchase price of the ticket, and that whatever the amount might be was a mere matter of calculation under the arrangement which it had with the railroad company selling the ticket to appellee. Whether this amount was $10, as alleged in the complaint, or less, is not material to appellee's recovery.

Appellant's contention that he must recover *secundum allegata et probata* is a well-recognized principle, which requires that the recovery, if at all, must be on the cause of action alleged in the complaint. But, under this rule, a plaintiff is only required to prove the substance of the material facts constituting his cause of action. Terre Haute & I. R. Co. v. Sheeks, 155 Ind. 74–93, 56 N. E. 434.

It is evident that the trial court committed no error in sustaining appellee's demurrer to the second and third paragraphs of answer, for the reason that each of these paragraphs set up as a defense the alleged fact that, under a contract or agreement entered into between appellee and the Northern Pacific Railroad Company, appellant was thereby exempted or relieved from liability of the negligence to which appellee in his complaint attributed his injuries. The doctrine is settled beyond dispute that where a railroad company is under a duty to carry a passenger, as in the case at bar, and it undertakes for hire or reward to perform that duty, it cannot by contract legally exempt or relieve itself of liability arising out of the negligence of itself or servants. Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Louisville, N. A. & C. R. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869; Rosenfeld v. Peoria, D. & E. R. Co. 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. 344; Indiana C. R. Co. v. Mundy, 21 Ind. 48, 83 Am. Dec. 339; 4 Elliott, Railroads, § 1645.

Counsel for appellant refers to Payne v. Terre Haute & I. R. Co. 157 Ind. 616, 56 L.R.A. 472, 62 N. E. 472, in support of his contention that, under the agreement or

contract set up in the answer, appellee assumed the risk of appellant's alleged negligence. The latter case must not, however, be confused with cases like the one at bar. The plaintiff in the Payne Case was injured while being carried by defendant railroad company over its road on a free pass. The carriage of the plaintiff in that case was wholly gratuitous; hence the decision therein has no application whatever to the case under review.

Appellant complains of certain instructions given and refused. Some of these, however, were applicable to the question of contributory negligence; but, as heretofore said, there being an entire absence of any evidence to establish that issue against appellee, it must follow that, as the verdict of the jury is clearly right under the evidence upon that question or feature of the case, the rulings of the court in giving or refusing instructions relative to contributory negligence, even if erroneous, would be harmless.

By charge No. 3 the court, among other things, advised the jury to the effect that, if plaintiff proved a collision of the train upon which he was riding with another train owned and operated by the defendant upon its railroad, then the presumption arose that the injury was the result of some act or omission of the defendant, and that this presumption must be overcome by clear and explicit proof, and that the burden of overcoming the presumption was on the defendant. This instruction is criticized for several reasons. It is asserted by appellant's counsel that the court thereby informed the jury: First. That the occurrence of the accident was negligence *per se*. But the charge, however, is not open to this criticism. Second. That the court ignored therein the consideration of plaintiff's right on the train. Third. The question of contributory negligence. Fourth. That it invades the province of the jury by advising them that the presumption must be overcome by clear and explicit proof. Fifth. That it ignores the question of proximate cause. While the charge in question is not strictly accurate in some respects, especially in stating to the jury that the presumption or prima facie case made by plaintiff must be overdone by the defendant by clear and explicit proof, nevertheless, in regard to the other objections that it ignores certain points involved in the case, it may be said that a court in charging a jury is not required to cover all the questions or phases of a cause in any one instruction, where, as in this case, the jury has been advised in regard to such points or questions in other parts of the court's charge. Atkinson v. Dailey, 107 Ind. 117, 7 N. E. 902. It is true that, if it appears from the evidence that the train upon which appellee was being carried as a passenger over appellant's road collided with another train operated by it on its railroad, then, under the circumstances, a prima facie case of negligence, by the aid of a legal presumption, would be presented against appellant from the mere fact of the collision, and the burden would be upon it, in order to rebut or overcome this presumption or prima facie case of negligence, to prove that the accident in controversy could not have been avoided by the exercise of the highest practical care and diligence on its part. Louisville N. A. & C. R. Co. v. Faylor and Terre Haute & I. R. Co. v. Sheeks, *supra;* Indianapolis Street R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201. But, nevertheless, the burden was upon appellee throughout the trial to maintain the affirmative of the issue of appellant's negligence. Terre Haute & I. R. Co. v. Sheeks, *supra*. While it is true that this court, in Louisville, N. A. & C. R. Co. v. Miller, 141 Ind. 533, 37 N. E. 343, by McCabe, J., asserted that the presumption arising in favor of the plaintiff in a case like the one at bar "must be overcome by clear and explicit proof on the part of the carrier," still, all which can properly be said to be necessary is that the proof made by the carrier should be such as will operate to rebut the prima facie or presumptive case presented in favor of the plaintiff on account of the accident, by showing that it could not have been avoided by the exercise of the highest practical care and diligence on the part of the carrier. Indianapolis Street R. Co. v. Schmidt, *supra*. While it may be conceded that the instruction in controversy is not strictly accurate, nevertheless, as it clearly appears from the evidence that it did not in any manner operate to mislead the jury to the prejudice of appellant, the error in giving it was harmless. Springer v. Bricker, at this term.

Under the evidence, we fail to recognize how the jury would have been justified in returning a verdict adverse to appellee. We have considered all of the questions presented by appellant, but discover no reversible error; in fact, we are fully satisfied that the merits of this case have been fairly tried and determined in the trial court.

The judgment is therefore affirmed.

Petition for rehearing denied.

INDIANA SUPREME COURT.

WABASH RAILROAD COMPANY, Appt.,
v.
JOHN W. YOUNG.

(162 Ind. 102, 69 N. E. 1003.)

Statute—title—discharged employees.

1. A title, "An Act for the Protection of Discharged Employees," will not cover a provision for the protection of those who have voluntarily left their employment.

Pleading—interference with employment.

2. A general averment in an action by one against his former employer, that he prevented plaintiff from obtaining employment and caused him to be discharged from positions secured, states no cause of action, since it is too general.

Same—libel.

3. An averment that defendant accused plaintiff of being a labor agitator, and blacklisted him, is not sufficient to state a cause of action for libel in the absence of anything to show that the words "labor agitator" bear an actionable meaning, or that blacklisting imputed to plaintiff the commission of a crime or other conduct exposing him to public hatred, punishment, disgrace, or derision, and that the fact of his being blacklisted was wrongfully communicated to some person or persons.

Libel—labor agitator.

4. It is not libelous *per se* to accuse one of being a member of a labor union and a labor agitator.

Pleading—interference with occupation.

5. A cause of action for unlawful interference with plaintiff's occupation is not shown by an allegation that defendant communicated to intending employers the fact that plaintiff belonged to a labor organization and was a labor agitator, in the absence of anything to show that there was any con-

Subject Note.—Liability growing out of the giving or refusing of information affecting the character or reputation of servant.

I. Duty of master to give certificate of character to a servant.
 a. Master not bound to give a character to his servant, 1092.
 b. Master's duty as affected by statute, 1096.

II. Defamation of a servant's character by his master.
 a. Right of servant to leave a master who defames his character, 1098.
 b. Right of servant to maintain an action for damages against his master for defamation of character, 1099.
 c. What defamatory statements concerning a servant are actionable.
 1. Written or printed statements, 1099.
 2. Oral statements, 1100.
 3. Suspension of servant not actionable as being injurious to his character, 1104.
 d. Absolute privilege as a defense, 1104.
 e. Qualified privilege, 1105
 f. Privilege in cases where the statement was made in compliance with a statutory duty, 1106.
 g. Privilege in cases where the statement was made in response to inquiries by third persons, 1106.
 h. Privilege in cases where the statement was made voluntarily.
 1. Statements made by the plaintiff's former master to a person who contemplates hiring, or has already hired, the plaintiff, 1107.

II. h.—continued.
 2. Statements made by the plaintiff's master to other employees, 1108.
 3. Statements made by the plaintiff's master to a person on whose recommendation the plaintiff had been hired, 1108.
 4. Statements made by the plaintiff's master to a relative of the plaintiff, 1108.
 5. Statements made by the plaintiff's master to a person employed by him to investigate the plaintiff's conduct, 1108.
 6. Statements made by the plaintiff's former master to persons having commercial or financial dealings with the master, 1108.
 7. Statements made by the plaintiff's master to a guarantor of the plaintiff's honesty, 1109.
 8. Statements made by a director of the company of which the plaintiff is employee, to the directors of another company by which he is also employed, 1109.
 9. Statements made by the governing body of a corporation to its shareholders with regard to the plaintiff, an employee of the corporation, 1109.
 10. Statements made by the shareholders of a company with regard to the conduct of a servant of the company, 1109.
 11. Statements made to the plaintiff's official superior by a person appointed by a higher authority to ex-

nection between the statements and the failure to secure employment.

Same—malicious interference.

6. A complaint does not show such a malicious interference with plaintiff's business as to state a cause of action at common law which states that, in response to inquiries by an intended employer, a former employer made statements which, for all that appears from the complaint, were true; although it is also shown that plaintiff did not secure the position.

(February 3, 1904.)

APPEAL by defendant from a judgment of the Circuit Court for Miami County in plaintiff's favor in a proceeding to review a judgment secured against plaintiff in an action brought to recover damages for alleged wrongful interference with plaintiff's business. Reversed.

The facts are stated in the opinion.

Messrs. **Stuart, Hammond, & Simms** for appellant.

Mr. **D. E. Rhodes** for appellee.

Dowling, J., delivered the opinion of the court:

This is a proceeding by the appellee against the appellant for the review of a judgment against him. The case is here for the second time. Wabash R. Co. v. Young, 154 Ind. 24, 55 N. E. 853. Upon the reversal of the judgment first rendered in this proceeding, the appellee filed an amended complaint in the trial court. A demurrer by the

II. h.—continued.
amine into the alleged misconduct of the plaintiff, 1109.
12. Statements made by an official superior of the plaintiff to the governing body of an institution in which both were employed, 1109.
13. Statements made at a meeting of a public, or quasi public, corporation with regard to the plaintiff, an employee of the corporation, 1109.
i. Same subject further discussed, 1110.
j. Circumstances under which statements are not privileged.
1. Making of statement to improper person, 1111.
2. Language going beyond the reasonable requirements of the occasion, 1113.
3. Statements made without a reasonable belief in their truth, 1114.
4. Repetition of statement, 1114.
5. Information imparted solely for the benefit of the maker of the instrument, 1114.
k. Privilege avoided by proof of express malice, 1114.
l. Circumstances from which malice may be inferred, 1115.
III. Blacklisting of servants.
a. Generally, 1118.
b. Notices exchanged between different employers in the same line of business.
1. Actions for libel, 1119.
2. Actions for conspiracy, 1119.
3. Actions on the case, 1120.
4. Suits for an injunction, 1121.
c. Notices circulated among the coemployees of the persons to whom they relate, 1121.
d. Statutes with regard to blacklisting, 1123.

III.—continued.
e. Defacement of written characters or licenses, 1124.
IV. Liability in other cases.
a. Liability for giving or procuring a false character.
1. Civil liability, 1125.
2. Criminal liability, 1126.
b. Liability of recipient to giver of information regarding a servant, 1126.

I. Duty of master to give certificate of character to a servant.

a. Master not bound to give a character to his servant.

The doctrine of the English and American courts is, that a master is morally, but not legally, bound to give a character to his servant when he is discharged from or leaves the employment. Pullman v. Hill [1891] 1 Q. B. 524, 60 L. J. Q. B. N. S. 299, 64 L. T. N. S. 691, 39 Week. Rep. 263, per Lord Esher.

For some remarks as to the injustice of refusing a character to a faithful servant, see Paley, Moral and Political Philosophy, book III. part 1, chap. 11.

A modern text writer has undertaken to justify the common-law rule in the following manner: "The reason for this rule is to be found in the consideration that, if a master were compelled to give a character, it would necessarily follow that he must be held to the proof of the character he gives. The burden thus cast on the master would often give rise either to much litigation on the one hand, or to the giving of false characters on the other." Parkyn, Mast. & S. 132.

No authorities are cited for this theory by the learned author. It is not easy to see why the consequence here held out *in terrorem* would necessarily follow, if the present rule were changed. So far as appears, the burden of proving the falsity of the character given would in any event continue to rest on the servant. It follows, therefore, that the master's refusal to furnish a character does not constitute a cause of ac-

appellant for want of facts was overruled, and, upon its refusal to plead further, judgment was rendered in favor of the appellee reversing the judgment reviewed. The demurrer to the amended complaint questioned the sufficiency of that pleading as a whole, and also separately, in detail, as it related to the first and second paragraphs of the complaint in the original action. Error is assigned upon the several rulings on these demurrers.

The action in which a review of the proceedings and judgment is sought was for damages for the alleged blacklisting of the appellee by the appellant, and for certain wrongful acts charged to have been done by the appellant whereby the appellee was prevented from obtaining employment, and from retaining employment when secured by him. Counsel for appellee insist that the complaint is sufficient both under the statute (Acts 1889, § 7077, p. 315, Burn's Rev. Stat. 1894) and under the rule of the common law. On the other hand, counsel for appellant argue that the statute does not apply to the case made by the complaint, and that no common-law liability is shown.

The title of the act of March 9, 1889, *supra*, in force at the time the supposed grievances occurred, was "An Act for the Protection of Discharged Employees, and to Prevent Blacklisting." The section of the act relied upon by appellee is as follows: "Sec. 2. If any railway company, or any other company, or partnership, or corporation, in this state, shall authorize or allow

tion in favor of the servant, however faithfully and efficiently he may have performed his duties, and however clear and specific may be the proof of the injury resulting from such refusal.

The earliest reported case in which an explicit recognition of this rule is found seems to be Carrol v. Bird, 3 Esp. 201, 6 Revised Rep. 824, 17 English Ruling Cases, 245, in which it was shown that, after the plaintiff's wife was dismissed from defendant's service, another party, who was willing to employ her upon the presentation of satisfactory information regarding her character, declined to take her into his service on account of defendant's failure to give her a character. Upon the admission of the plaintiff's counsel that he had no precedent for such an action, Lord Kenyon said that there was no case; nor could the action be supported by law. By some old statutes, regulations had been established respecting the character of laborers; but in the case of domestic and menial servants there was no law to compel the master to give the servant a character. It might be a duty which his feelings might prompt him to perform; but there was no law to enforce the doing of it.

That the obligation of a master to give a servant a character belongs to the imperfect class, and is not enforceable by law, has been held in Scotland also. Fell v. Ashburton, 1 Fac. Dec. 446, cited in Fraser, Mast. & S. p. 129.

To the same general effect, see Moult v. Halliday [1898] 1 Q. B. 125 (per Hawkins, J., *arguendo*); Limbeck v. Gerry, 15 Misc. 663, 39 N. Y. Supp. 95; Illinois C. R. Co. v. Ely, 83 Miss. 519, 35 So. 873, and cases cited below.

The withholding of the requested statement cannot be treated, for the purposes of enabling the servant to maintain an action, as an act which is equivalent to a slander. New York, C. & St. L. R. Co. v. Schaffer, 65 Ohio St. 414, 62 L.R.A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036.

The extreme severity with which the rule may sometimes operate has recently been shown in a very striking manner by its application in that class of cases in which several employers in a certain line of business enter into a mutual agreement that no person who has previously been in the service of one of them shall be hired by any other, unless he can produce what is known as a "clearance card" from his last employer. Although it is evident that an arrangement of this kind may render it extremely difficult, or even virtually impossible, for a servant who has not received the requisite certificate to obtain work similar to that which he has been doing, the courts have declined to qualify the common-law doctrine.

In Cleveland, C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. Rep. 296, 51 N. E. 811, the court thus discussed the rights of the servant: "From the evidence produced on this question, and from the judicial notice which we take of the ordinary general management of railroads, it is apparent that what is known as a clearance card is simply a letter, be it good, bad, or indifferent, given to an employee at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment. A letter of recommendation, on the contrary, is, as the term implies, a letter commending the former services of the holder, and speaking of him in such terms as would tend to bring such services to the favorable notice of those to whom he might apply for employment. . . . An action for failure to give an employee either of the above forms of letters must be based either upon the common law or the statute, or arise out of the contract of employment, or be required by usage or custom. By the common law no such duty was imposed upon the employer. . . . A character is not given for the benefit of the ex-employee, although he may

any of its. or their, agents, to blacklist any discharged employees, or attempt by word or writing, or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left said company's service, from obtaining employment with any other person or company, except as provided in § 1 of this act, such company or copartnership shall be liable in treble damages to such employee so prevented from obtaining employment, to be recovered by him in a civil action."

An act of the legislature can embrace but one subject and matters properly connected therewith, which subject must be expressed in the title. If any subject is embraced in an act which is not expressed in its title, such act is void as to so much thereof as is not expressed in its title. Section 19, art. 4, Const. The subject of the act of March 9, 1889, *supra*, is the protection of discharged employees. The prevention of blacklisting of discharged employees was a matter properly connected with this subject. But the subject of the protection of discharged employees does not include the protection of employees who have not been discharged, or who voluntarily quit the service of their employer. Nor is the protection of employees who voluntarily quit their employment matter properly connected with the subject of the protection of discharged employees. Every section of the act refers to employees who have been discharged, and only in the 2d section is any provision found which relates to employees who have volun-

be either injured or benefited by reason of such a character being given; nor does the right to give such a character arise out of a duty to the employer; but the right or moral duty, such as it is, is a duty in the interest of society and the public good, and neither the proposed employer nor the employee has a legal right to demand it. Such communications have been made, not only by an ex-employer, but also by any person possessing the information and the belief that such information is true. They may be made either with or without request, in the interest of the public good and as a moral duty to society, when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such a relation to him as to make it a reasonable duty, or at least proper, that he should give the information." In the lower court (see 70 Ill. App. 415) the decision, which was reversed by the above judgment, was put upon the ground that the evidence warranted the inference that there was a general custom prevailing on all roads, including that of the defendant, to issue, on discharge, and demand the presentation before employment, of clearance cards. It was admitted that, in the absence of proof of such a custom, the action could not have been maintained. But it was held that, as the existence of the custom must be taken as proved, and as the evidence showed that the railroad company had no other causes of complaint against the employee than that several indictments were brought against him, under all of which he had been found "not guilty," and that previously he had served the company with a good record for ten years, the company had violated its duty in refusing to give him a clearance card.

In Hebner v. Great Northern R. Co. 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128, the court remarked that "the real purpose of the service card is to assist men to obtain employment when going from one company to another, although such a card might prove a very serious obstacle to securing a new position when presented by a man discharged for cause, or supposed cause, because the reason for such discharge would be stated. It is also beyond question that such a card may or may not be shown by one seeking employment, for this is a matter optional with the holder."

The lawful act of refusing the clearance card is not converted into a tort by the fact that the refusal in such cases is the result of the mutual understanding previously arrived at by the employers.

In New York, C. & St. L. R. Co. v. Schaffer. 65 Ohio St. 414, 62 L.R.A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036, commenting upon the charge of the trial judge to the jury. that the plaintiff could recover if the defendant, in pursuance of conspiracy with other railway companies, refused to furnish a statement of his record, with intent to prevent the plaintiff from obtaining employment from any or all of those companies, the court said: "It is the undoubted and unabridged natural right of every individual not to employ, or to refuse to employ, whomsoever he may wish; and he cannot be called upon to answer to the public, or to individuals, for his judgment. Nor can the motives which prompt his action be considered. In general terms, such right is as much inherent in corporate bodies as in natural persons. But whatever one person may lawfully do, two or more persons may join in doing. There can be no such thing as a conspiracy to do a lawful thing unless by unlawful means. If one railroad company may lawfully refuse to continue in its employ a person who has been engaged in a war upon its interests, called a strike, or who has shown himself to be negligent, incompetent, inefficient, or dishonest, there does not appear to be any good reason why a number of railroad companies might not agree among themselves not to employ such a person. . . . If the defendant, by fraud, falsehood, or force, had brought about a refusal to employ the plaintiff, it would have committed a positive wrong against the plaintiff which would have been actionable. Of this, however, there is not a scintilla of proof. But an agreement to tell the truth about the plaintiff, or a refusal to say anything about him, would not make an other-

tarily left the service of an employer. This single provision is the prohibition of any attempt, by word, writing, or other means, to prevent a discharged employee, or any employee who may have voluntarily left such service, from obtaining employment with any other person, except as authorized in the 1st section of the act. So far as the provision just referred to applies to any employee who may have voluntarily left the service of an employer, it is not embraced in the subject of the act as expressed in its title, nor is it properly connected therewith. The protection of discharged employees was a proper and complete subject for an act of the legis'ature. But, under that title, provisions for the protection of employees who had not been discharged could not be included without a violation of § 19, art. 4, of the Constitution. The blacklisting prohibited by § 2 of the act is expressly confined to discharged employees. The complaint does not allege that the appellee was a discharged employee of the appellant, but, on the contrary, it avers that he voluntarily left the service of the company. Therefore, he does not come within the purview and protection of the statute, and his action cannot be maintained under its provisions. Indianapolis & G. Rapid Transit Co. v. Foreman, 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669.

The question remains whether the complaint is good under the rule of the common law in such cases, either as charging the appellant with libel or with a wrongful inter-

wise legal concert of action an illegal one, and authorize a recovery against the defendant."

In McDonald v. Illinois C. R. Co. 187 Ill. 529, 58 N. E. 463, the declaration, after alleging a conspiracy between the railway companies having lines running into Chicago, to the effect that the employees of any and all of said companies would not be employed by any of them without a clearance given by the railway company by which any employee was last employed, alleged that the defendant company refused to give the plaintiff employee such an instrument as would "enable him to obtain employment in the railroad business." The plaintiff insisted that the point for decision was, whether it was lawful for all the employers in any line of industry to combine for the purpose of punishing a man who leaves their service during a strike, by refusing him employment unless his former master gives his consent to his employment. But the court held that no such question was presented by the pleadings, and that, as there was no allegation that the company refused to grant the plaintiff a "clearance card" setting forth truthfully all the facts proper to be stated in a "clearance card," or that it had been agreed by the two defendant companies that the consent of either should be the prerequisite of employment by the other, the declaration did not state a cause of action. This ruling, in so far as it implies that, if the declaration had embraced these allegations, it would have stated a cause of action, is inconsistent with the last-mentioned case, and is not easy to reconcile with the decision of the same court, cited *supra*.

On both principle and authority, it is clear that, if the existence of a custom on the part of employers of a certain class to give character to their servants is proved, this custom enters into every contract of service; and a refusal to give a character constitutes breach of duty for which an action will lie. Hundley v. Louisville & N. R. Co. 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429, and cases cited below.

To justify the admission of an exception to the general rule on this ground, it must appear that the alleged custom is established, uniform, general, and presumptively known to the parties to the contract.

In Cleveland, C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. Rep. 296, 51 N. E. 811, the following points were decided: That it is the duty of a court to hold, as a matter of law, that an alleged usage or custom is not established where the proof consists of a few isolated transactions; that a letter of recommendation by a railway company to an employee, which is purely personal, and shows on its face it is not a general form which would be given to other employees, does not tend to establish a custom on the part of the company to issue clearance cards to employees leaving the service; that the fact of a railway company's requiring the production of certificates of recommendation by persons seeking employment does not create any legal duty on its part to issue the same to retiring employees, nor tend to establish a custom of issuing them.

It must also be shown that it is not contrary to good morals or public policy .

In Thornton v. Suffolk Mfg. Co. 10 Cush. 382, a discharged employee relied on the employer's breach of an implied agreement, arising from custom, to the effect that, if she faithfully performed her duties for the term of at least twelve months, she could, upon giving a fortnight's notice, be entitled to leave, and to receive from her employer "a line" or honorable discharge, by means of which she might obtain employment in the other mills in a given city. The court, in sustaining a nonsuit, said: "The ground relied on is, in consideration of services, the employer engages that, if the operative remains in the service a certain time, he will give her an honorable discharge; or, in other words, that her service and conduct have been good and satisfactory. Were such a contract made in express terms, intended to be absolute, it seems to us that it would be bad in law, as plainly contrary to good morals and public policy. Such a discharge is a certificate of a fact; but if the fact is otherwise, if the conduct of the operative has not been satisfactory, it would be the

ference with appellee's occupation. The material facts alleged against the appellant in the first paragraph of the complaint are that, shortly after the appellee voluntarily left its employment, the railroad company, by its agents, falsely accused him of being a "labor agitator," and that by letters, words, and influence the appellant caused the discharge of the appellee after he had obtained employment, and by the same means prevented him from obtaining employment. It is not stated where he was employed, by whom, in what capacity, for what time, or at what wages, or any other particulars concerning the employment of which he was deprived or which he was prevented from obtaining. The general allegations that the appellant caused him to be discharged from employment he had obtained, and had prevented him from obtaining employment, are not averments of substantive facts, but are conclusions of the pleader. A further and more specific charge is made that the appellant prevented the appellee from being employed by the Atchison, Topeka & Santa Fé Railroad Company, at Denver, Colorado, in November, 1894, by representing and stating to that company that the appellee was a "labor agitator," and unfit for said company to have in its employment, and that he was connected with the Order of Railroad Telegraphers of North America. The second paragraph of the complaint in the original action states substantially the same facts as the first, although with a little more particularity. It alleges

certificate of a falsehood, tending to mislead and not to inform other employers. Besides, if such a custom were general, such a discharge would be utterly useless to other employers and utterly worthless to the receiver. It could give other employers no information upon which they could rely. To avoid such illegality, it must be taken with some limitation and qualification,' to wit, that the conduct of the operative has been such in all respects, including not only skill and industry in the employment, but conduct in point of morals, temper, language, and deportment, and the like, so that a certificate of good character would be true. Then it stands upon the same footing with the custom which governs most respectable persons in society, upon the termination of the employment of a servant, to give him a certificate of good character if entitled to it. In such case, it is for the employer to give or withhold such certificate, according to his own conviction of the truth, arising from his own personal knowledge or from other sources. . . . If an assurance of an employer on engaging a servant, that at the end of the time he will give him a certificate of good character, if he should then think him entitled to it, could in any respect be deemed a contract, and not the promise of an ordinary act of courtesy, it would be no breach of such contract to aver and prove that the servant, after the termination of the service, demanded such certificate and was refused it." It was also observed: "The fact that, on account of the peculiar situation of the various companies in Lowell in relation to each other, the common interest they have in maintaining their discipline, the certificate of good character is of so much more importance to the servant than elsewhere, can make no difference to the servant in regard to his rights. In the same proportion in which it is important to the servant out of employ to hold a certificate of good character and honorable discharge, it is important to corporations, their agents and servants, and all interested in them, to be cautious and conscientious in giving such discharges and recommendations when they are honestly deserved, and in withholding them when they are not."

In a case where a servant has been successful in an action for wrongful dismissal, it is apparently proper, as a general rule, for the trial judge to order the master to restore the character handed to him by the servant when he entered the employment. Such an order was made by Hill, J., in Gordon v. Potter, 1 Fost. & F. 644.

But a custom by which an employer whose servant is leaving him to take another situation should be bound to hand over to the new employer the character brought by the servant has been pronounced unreasonable.

In Moult v. Halliday, 77 L. T. N. S. 794 [1898] 1 Q. B. 125, 67 L. J. Q. B. N. S. 451, 46 Week. Rep. 318, 62 J. P. 8, Hawkins, J., thus referred to a point which had been incidentally discussed in the lower court: "I cannot say I think that would be a reasonable custom. There is no obligation on a master or mistress to give a character to a servant; but, if a character is given, it should be a true one. A character may be true this month and false next. A servant may come into service with a good character, and yet during the first month circumstances may come to the master's knowledge which show that it was undeserved and should be forfeited. It would be a scandalous thing if the master was bound after that to hand over the character which he knew was false. If the good character which the servant brought with her is handed over, it must be handed over in good faith. I think, therefore, that such a custom would be unreasonable, and, indeed, not honest, and therefore bad."

b. Master's duty as affected by statute.

In some jurisdictions the common-law rule has been modified by statutes applicable either to employers generally, or to employers of a particular class; and there seems to be good reason to anticipate that enactments of this type will be greatly multiplied in coming years. The desirability of thus supplying the deficiencies of the common law cannot be consistently disputed by anyone who is of opinion that it is proper

that the appellee was a member of the Order of Railroad Telegraphers of North America, and that he assisted in the further organization of that association after he left the service of the appellant, by receiving into that order a large number of telegraphers employed by the appellant and by other railroad companies. This paragraph contains the further allegation that in August, 1894, appellee applied to the officers of the Denver & Rio Grande Railroad Company for employment on said railroad, and that his application was accepted, subject to reference to the appellant; that the appellant, by its agent, wrote to the officers of the Denver & Rio Grande Railroad Company a letter containing the words following: "If you want a man who is strictly a labor agitator, this is your man" (meaning the appellee); that by reason of this false statement the appellee was refused said employment.

The general averments in each paragraph of the complaint, that the appellant prevented the appellee from obtaining employment, and that it caused him to be dismissed from positions secured by him, constituted no cause of action against the appellant. They are not indefinite and uncertain merely; they state no facts; they show no wrongful acts on the part of the appellant; they disclose no legal injury to the appellee. The more particular averments that the appellant accused the appellee of being a "labor agitator" and that it blacklisted him, in the absence of allegations that the words "labor agitator" bore an actionable

to protect employees by legislation against "blacklisting." See III., *infra*. Manifestly the refusal to give a character may often be virtually the equivalent of "blacklisting" so far as regards the injury inflicted on the servant. The statutes which have already been passed may be conveniently classified under two heads:

(1) Those which cover both cases in which servants have been discharged, and cases in which they have voluntarily left the employment.

A very comprehensive specimen of this class is the employers' and employees' act of 1890, of Victoria (Australia), in which it is provided, under the penalties specified:

§§ 20, 21. That every servant shall receive, at the termination of his service, a certificate of discharge.

§ 22. That the servant shall produce the certificate on any new hiring.

§ 23. That a servant shall not be hired without the production of the certificate.

§ 24. That false certificates shall not be given.

Nearly two hundred years ago it was provided by the Irish statute, 2 Geo. I. chap. 17, § 4, that, "on the discharge or putting away of any servant from his or her service, or upon such servant's regularly leaving his or her service, the master or mistress of such servant shall give a certificate in writing, under his or her hand, that such person who is therein named was his or her servant, and that he or she is discharged from the said service, and shall in the said discharge certify, if desired, or such master or mistress think fit, the behavior of such servant." This statute, however, seems to have remained virtually a dead letter for a century and a half, as the court stated in Handley v. Moffatt, Ir. Rep. 7 C. L. 104, 21 Week. Rep. 231, that no action in which its provisions had been relied upon had been brought during that period.

(2) Those which deal only with the duty of employers to servants whom they have discharged.

Georgia.

By statute passed in 1890 (1 Acts 1890, 1891, p. 188) railroad, express, and telegraph companies were required to give to their discharged employees or agents the causes of their removal or discharge, when discharged or removed, and the amount of $5,000 was fixed as the penalty or damages for noncompliance with this requirement. In Wallace v. Georgia, C. & N. R. Co. 94 Ga. 732, 22 S. E. 579, this act was declared unconstitutional.

The provision now in force (Code 1895, § 1875) is that any employer, after having discharged any employee, shall, upon written demand by such employee, furnish to him, within ten days from the application, a full statement in writing of the cause of his discharge; and that, if any employer shall refuse, within ten days after demand, to furnish such statement, it shall be ever after unlawful for him to furnish any statement of the cause of such discharge to any person or corporation, or in any way to blacklist or to prevent such discharged person from procuring employment elsewhere.

The penalty of treble damages in a civil action is imposed for a breach of this provision (§ 1874).

Indiana.

The enactment in Horner's Anno. Stat. 1901, § 5206r is in part similar to that in the second of the Georgia statutes. But it is also provided that the written cause of discharge, when furnished at the request of the discharged employee, shall never be used as the cause for an action for slander or libel, either civil or criminal, against the employer.

Kansas.

By Gen. Stat. (Dassler) 1901, §§ 2422, 2423, employers of labor are required, upon the demand of a discharged employee, to furnish in writing the true cause or reason for the discharge. Any employer who violates the provisions of the act is declared to be guilty of a misdemeanor, and also liable to the party injured for treble damages.

Montana.

The provisions in the Political Code of 1895, § 3392, are essentially the same as those in the second Georgia statute.

meaning, or that "blacklisting" imputed to the appellee the commission of crime, or other conduct exposing him to public hatred, punishment, disgrace, or derision, and that the fact of such blacklisting was wrongfully communicated to some person or persons, were not sufficient in law to render the appellant liable for a libel.

Nor was either paragraph of the complaint good as a charge of unlawful interference with appellee's occupation. It appears that no act was done by the appellant through its agents except to inform the officers of the Atchison, Topeka, & Santa Fé Railroad Company and the Denver and Rio Grande Railroad Company that the appellee was a member of a labor organization, and that he was a labor agitator. It is not alleged that a charge of this nature was calculated to injure the appellee, or that any odium attached to members of such orders or to labor agitators. The charge was not libelous *per se*, and no connection is shown between the statements alleged to have been made by appellant's agents and the failure of the appellee to obtain employment or his loss of any position. Besides, while the complaint avers that the statements alleged to have been made by the appellant were false, by other averments of each paragraph of the pleading it is admitted that the appellee was, in fact, a member of a labor organization, and that he did actively engage in organizing such an association, and in receiving into it the telegraphers employed on appellant's railroad and on other

Ohio.

The same description is applicable to the statute in this state (87 Ohio Laws, § 1).

By § 128(1) of the English merchant shipping act of 1894 (57 & 58 Vict. chap. 60), it is provided, under penalty, that the master shall sign and give to a seaman discharged from his ship, either on his discharge or on payment of his wages, a certificate of his discharge in a form approved by the board of trade, specifying the period of his service and the time and place of his discharge.

The same section (cl. 2) also prescribes that the master shall, upon the discharge of every certificated officer whose certificate of competency has been delivered to and retained by him, return the certificate to the officer.

Section 129 (1) provides that where a seaman is discharged before a superintendent, the master shall make and sign, in a form approved by the board of trade, a report of the conduct, character, and qualifications of the seaman discharged, or may state in the said form that he declines to give any opinion upon such particulars or upon any of them; and the superintendent before whom the discharge is made shall, if the seaman desires, give to him, or indorse on his certificate of discharge, a copy of such report (in this act referred to as the report of character).

The first of the above paragraphs is substantially the same as § 172 of the merchant shipping act of 1854 (17 & 18 Vict. chap. 104).

By U. S. Rev. Stat. § 4551 (U. S. Comp. Stat. 1901, p. 3089), it is provided that, upon the discharge of any seaman, the master of the ship shall sign and give him a certificate of discharge, specifying the period of his service and the time and place of his discharge, in a prescribed form.

By § 4553 (U. S. Comp. Stat. 1901, p. 3090), that, upon every discharge effected before a shipping commissioner, the master shall make and sign, in a prescribed form, a report of the conduct, character, and qualifications of the persons discharged.

Where a statute of this kind merely imposes a penalty for its violation, the question whether a servant who has been injured by such violation can maintain an action for damages against the delinquent employer is determined with reference to the considerations discussed in § 800 of Labatt's treatise on Master and Servant.

In Handley v. Moffatt, Ir. Rep. 7 C. L. 104, 21 Week. Rep. 231, where an action was brought for improperly dismissing a servant without giving him a certificate of character, as prescribed by the statute referred to *supra*, it was shown that the statute also provided that, if the master or mistress refused to give a discharge, the servant might procure a certificate from a justice of the peace or chief magistrate of the town, "to all intents and purposes as good as if the same had been given by the master or mistress." For this reason, it was held that the act which created the duty also gave the remedy for its violation; and that the party aggrieved had no other.

In Vallance v. Falle, L. R. 13 Q. B. Div. 109, 53 L. J. Q. B. N. S. 459, 51 L. T. N. S. 158, 32 Week. Rep. 769, 5 Asp. Mar. L. Cas. 280, 48 J. P. 519, it was held that the only remedy for a breach of the duty imposed by the provision of the English merchant shipping act of 1854, which is referred to *supra*, was by proceedings for the penalty specified.

In Crall v. Toledo & O. C. R. Co. 7 Ohio C. C. 132, a similar decision was rendered with respect to the statute of Ohio.

II. Defamation of a servant's character by his master.

a. Right of servant to leave a master who defames his character.

A master who makes false defamatory statements regarding his servant's character is manifestly guilty of a breach of duty which entitles the servant to leave the employment. No English or American decisions directly affirming this doctrine have been found. But is is sufficiently affirmed by analogy, and is enunciated, in a Scotch treatise of high authority. See Fraser, Mast. & S. p. 128.

railroads. Just what constitutes a labor agitator does not appear. Ordinarily the term would justly apply to one actively engaged in promoting the interest of laboring men. It does not imply the use of unlawful or improper means. For all that is shown in the complaint, the statement made by the appellant's agents concerning the appellee was true, and, if true, it could not render the appellant liable. It is also shown by the complaint that the information given to the officers of the Denver & Rio Grande Railroad Company was not volunteered by the appellant, but was given in answer to an inquiry made by the last-named company. The complaint does not describe and allege such a malicious interference by the appellant with the business of the appellee as created a liability at common law. Chipley v. Atkinson, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934. The demurrers to the complaint should have been sustained.

Judgment reversed, with directions to the court to sustain the demurrers to the complaint, and for further proceedings in accordance with this opinion.

b. Right of servant to maintain an action for damages against his master for defamation of character.

In the following subdivisions general principles will be referred to only in so far as it may be necessary to do so for the purpose of elucidating the cases cited. For a detailed review of those principles, the reader will consult the various standard treatises on the law of slander and libel.

The different elements to be considered in an action brought by a servant to recover damages from a person who has defamed his character are indicated by the following passage in a well-known judgment delivered by Parke, B.: "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defense depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." Toogood v. Spyring, 1 Cromp. M. & R. 181.

c. What defamatory statements concerning a servant are actionable.

1. Written or printed statements.

The circumstances under which a servant is entitled to maintain an action against the publisher of a written or printed statement are defined by the general rule, that any such statement is prima facie libelous which is injurious to the character or credit (domestic, public, or professional) of the person concerning whom it is uttered, or in any way tends to cause men to shun his society, or to bring him into hatred or contempt, or ridicule. Pollock, Torts, *206. See also Odgers, Libel & Slander, 4th ed. p. 16.

Libelous statements.

A letter to a servant's employer, using language such as must have been understood by the employer as charging the servant with having obtained goods from the writer by fraudulent means, is libelous. Over v. Schiffling, 102 Ind. 191, 26 N. E. 91.

A statement which is fairly susceptible of the meaning that a manager of a newspaper was unfaithful to his employers in attempting to start a fresh newspaper while still in their employment is libelous. Butcher v. Payton, 9 New Zealand L. R. 240. In this case a verdict for the defendant was allowed to stand, for the reason that the words were merely to the effect that the plaintiff was "about to start" a new paper, and that these did not necessarily imply that he intended to do this while still in his employment.

Nonlibelous statements.

On the ground that the statute of limitations is an honorable defense, it has been held that it is not libelous *per se* to write to a servant's employer a letter in which it is stated that the servant, having no other defense to a claim for medical services, has cowardly slunk behind that of the statute of limitations; and that such a course is not in accordance with the writer's idea of strict integrity. Hollenbeck v. Hall, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 170, 72 N. W. 518 (action against president of employing company for publishing letter).

But it was held in another action against the writer of the letter that special damages might be recovered on the ground that the writing of the letter had induced the plaintiff's employer to discharge him. Hollenbeck v. Ristine, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355. See also 114 Iowa, 358, 86 N. W. 377.

A statement in a recommendation of a former employee, that, "like many others, he left our service during the strike," is not libelous or actionable *per se*, so as to constitute a cause of action without special damages. Kansas City, M. & B. R. Co. v. Delaney, 102 Tenn. 289, 45 L.R.A. 600, 52 S. W. 151, distinguishing an unreported case of St. Louis & I. M. R. Co. v. Johnson (decided by the same court at its April term, 1897), in which the libel charged was "that plaintiff had been discharged for insubordination, as well as being at the head of a disreputable mob not hesitating to do anything to the injury of the company's property," etc. The court held this language libelous *per se;* and

that it was unnecessary to allege or prove special damages, since the charge was necessarily hurtful; and that, if false, plaintiff might recover general damages. In that case this court affirmed a judgment in favor of the plaintiff for $1,500.

A clearance paper given to a discharged railroad employee at his request, reciting, "Cause for leaving service, unsatisfactory service. Conduct good,"—is not libelous on its face. In order to show that it is so in fact, the employee has the burden of proving that it is untrue, known to be false, and published from malicious motives. Illinois C. R. Co. v. Ely, 83 Miss. 519, 35 So. 873.

A publication stating that defendant has dispensed with the service of plaintiff as advertising manager of a newspaper for his "general careless manner of attending to business," and that his place will be filled by a competent man, who will attend to the affairs in a more businesslike manner, has been held not to be libelous as charging the plaintiff with unfitness or incompetency, and cannot be made so by innuendo. Ratzel v. New York News Pub. Co. 67 App. Div. 598, 73 N. Y. Supp. 849, Reversing 35 Misc. 487, 71 N. Y. Supp. 1074. The court relied on the theory that the imputation of carelessness did not warrant the inference that incompetency was imputed, and that nothing was shown to have been published by which the plaintiff could be injured in his business. This seems to be a rather strong case, to say the least of it. What impression would the words have produced upon the "average man?"

In an action for words in a letter, imputing dishonesty and bad conduct to a servant, by which she has lost a place, evidence of antecedent good conduct is admissible. King v. Waring, 5 Esp. 13, per Lord Alvanley.

In an action for defamation, in falsely representing that the plaintiff was the defendant's indentured apprentice in the printing art, it was held that recovery might be had, upon proof of the allegations in a complaint which averred that the representations were made "to H. B. & Co., the proprietors of the Tribune office, in which said plaintiff was employed as a printer, . . . warning . . . [them] not to employ him, or continue him in their employment; by means whereof said plaintiff was discharged from his said employment, . . . and has lost the emoluments and support therefrom ever since;" and that, "by reason of said false and malicious representations . . . to said Tribune office and other printing offices in Mobile, plaintiff has been deprived and prevented from obtaining any employment in his business as a printer ever since." Clark v. Goddard, 39 Ala. 164, 84 Am. Dec. 777.

For a case involving similar circumstances, in which a statement of this kind was held not to be libelous, but to furnish ground for an action on the case, see Blumenthal v. Shaw, 23 C. C. A. 590, 39 U. S. App. 490, 77 Fed. 954, III., b, *infra*.

Accordingly, a presumptive right to recover damages is established as soon as the servant has shown that the words in question were published by the defendant, and that they were untrue.

For a general collection of the cases relating to publication, see Odgers, Libel & Slander, 4th ed. chap. 6; Townshend, Slander & Libel, chap. 6.

It may be mentioned that the disclosure of a libel on a domestic servant to the wife of the defendant has been held not to be evidence of publication. Wennhak v. Morgan, L. R. 20 Q. B. Div. 635.

In Scotland no publication to a third person is necessary to render a defamatory statement actionable. Odgers, Libel & Slander, 4th ed. p. 151, note. For a case illustrating this rule, see Cunningham v. Petherbridge, 32 Scott, L. R. I.

Where the defendant's voluntary act in parting with possession of a defamatory letter was so done, though merely by accident, as to have a tendency to injure the plaintiff's reputation, he cannot rely, as an element rebutting malice, on the absence of intention. Fox v. Broderick, 14 Ir. C. L. Rep. 453. There the defendant pleaded that the letter containing the libel was intended to come into the hands of the plaintiff himself, but, by mistake, was directed by the defendant, and delivered through the post-office, to the plaintiff's employer, instead of to the plaintiff. It was held, on demurrer, that this plea was bad, as the letter was not a privileged communication, and the legal inference of malice would have arisen even though the letter had been addressed and delivered to the plaintiff. The case of King v. Paine, 5 Mod. 163, in which the delivery of a defamatory paper, by the writer, to an individual, in mistake for another paper, was held not to be a publication, was distinguished on the ground that the uttering or parting with the possession of the defamatory writing was not voluntary or intentional on the part of the writer.

A servant's character is not privileged from production under an order for discovery. Webb v. East, L. R. 5 Exch. Div. 23 (order for an inspection made).

2. Oral statements.

No action can be maintained for the publication of an oral statement, even though it is defamatory and false, unless the servant either (1) proves that he has suffered special damage as result of the publication.

Where words are spoken which are of a defamatory nature, yet such that the law will not imply damage from them, still they are actionable if they are shown actually to cause (as their legal and natural consequence) damage of a character which the law will recognize. Foulger v. Newcomb, L. R. 2 Exch. 327.

In an action for slanderous words, by reason of which the plaintiff was turned out of her lodging and employment, it appeared that the defendant complained to E., the mistress of the house, who was his tenant, that her lodgers, of whom the plaintiff was one, behaved improperly at the windows;

and he added that no moral person would like to have such people in his house. It was held that the action was maintainable, the special damage being the consequence of the words used. Knight v. Gibbs, 1 Ad. & El. 43.

In Kelly v. Partington, 5 Barn. & Ad. 645, the second count of the declaration stated that the defendant, contriving and intending to injure the plaintiff as a shopwoman and servant, maliciously spoke of her, as such, the following words: "She [meaning the plaintiff] secreted 1s. 6d. under the till; stating, these are not times to be robbed." The declaration alleged as special damage that one S., by reason of the words, refused to take the plaintiff into his service. After a general verdict for the plaintiff, it was held that the words in the second count, if actionable at all, were so only by reason of the special damage. "I have always understood," said Patteson, J., "that the special damage must be the natural result of the thing done. . . . There is no innuendo stating whose money it was that she secreted; it might be her own. Then it is said that the words are actionable because a person, after hearing them, chose, in his caprice, to reject the plaintiff as a servant. But, if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must, in their nature, be defamatory."

If a wife is living apart from her husband, as a servant in the family of A., and so maintaining herself, and she is dismissed from the service of A. in consequence of a letter written by B. reflecting on her character, her husband may maintain an action for special damage. But if A. dismisses her colorably, intending to take her back again, the action will not lie. Coward v. Wellington, 7 Car. & P. 531.

In an action for slander, the servant, to show special damage, may give in evidence the contents of a letter written by the person to whom the slander was uttered, to his partner, advising him to discharge the servant from their employ, and stating the substance of the writer's conversation with the defendant, although the letter did not cause the discharge of the servant, but only an examination of his trunks. Fowles v. Bowen, 30 N. Y. 20.

Or (2) brings his claim within one of the exceptions to the rule which makes his recovery dependent on proof of such damage. Under the common law, those exceptions are three in number, *viz.*: (a) Where the words charge the plaintiff with commission of a crime; (b) where they impute to him a contagious disease tending to exclude him from society; (c) where they are spoken of him in the way of his office, profession, or trade.

A statement charging the plaintiff, a subordinate of the defendant, with having sent through the postoffice to the defendant's wife a printed paper advertising and recommending certain articles for the prevention of conception and for the procuring of abortions, was held to be slanderous *per se*, as imputing an indictable offense, involving moral turpitude. Halstead v. Nelson, 36 Hun, 149.

See Odgers, Libel & Slander, 4th ed. p. 37; Starkie, Slander & Libel, p. 98; Pollock, Torts, *206; Cooley, Torts, *196.

In the absence of a statute, words imputing unchastity to a woman are not actionable in themselves. See Odgers, Libel & Slander, p. 67; Starkie, Slander & Libel, 105; Townshend, Slander & Libel, § 172.

In England it is now provided by the slander of women act of 1891 that "words spoken and published, which impute unchastity to any woman or girl, shall not require special damage to render them actionable." Statutes of a similar tenor are in force in Alabama, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, New York, North Carolina, South Carolina, and probably others of the American states.

To say of one's former clerk that he "has robbed me of all the profits, which amounted to several hundred dollars,"—charges a fraudulent conversion of the property of another, within a statute making such conversion a crime, and is actionable *per se*. Allen v. Brady, 26 Ky. L. Rep. 1173, 83 S. W. 565.

The only one of these exceptions which can be said to have any special relevance to a discussion of the remedial rights of a servant, in his capacity as a servant, is the third. The rule which it embodies may be stated briefly in this form: "From spoken words which impute misconduct in an office, trade, profession, or business, the law implies actionable damage." Foulger v. Newcomb, L. R. 2 Exch. 327, per Channell, B., in a judgment delivered for the whole court.

The phraseology adopted by the New York court of appeals is that the words must impute "some matter in relation to the servant's particular trade or vocation, which, if true, would render him unworthy of employment." Kinney v. Nash, 3 N. Y. 177.

The reason of the rule is that the law presumes such a probability of pecuniary loss from such imputation, in that office, or employment, or profession, that it will not require special damage to be shown. Alexander v. Jenkins [1892] 1 Q. B. 797, per Lord Herschell.

In Wright v. Moorhouse, Cro. Eliz. pt. 1, p. 358, an action was brought for these words: "Before the plaintiff came to the service of the merchant taylors, he dwelt in Shrewsbury, and set the town together by the ears; and so long as he was there they were never in quiet; but afterwards they lived quietly; and he, being clerk to the merchant taylors, was of consent and counsel with W. Goodlaw to deliver the books of the corporation which he had in his keeping, to the intent that thereby some of the lands of the same corporation might be found concealed." On demurrer, it was held that these words were prima facie action-

able, as they touched the plaintiff in his office and credit.

In Seaman v. Bigg, Cro. Car. 480, it was held that, although generally an action will not lie for calling one "cozening knave," yet, where the words are spoken of one who is a servant and accomptant, and whose credit and maintenance depend upon his faithful dealing, and he by such disgraceful words is deprived of his livelihood and means of maintenance, there is good reason it should bear an action, that he may have recompense for loss of his credit and means.

To accuse a servant, who is employed in an office of trust, of having "cozened his master," is actionable; for it shall be intended in his office. Reignald's Case, Cro. Car. 563.

In Langmuir v. Thompson, 11 Sc. Sess. Cas. 1st series, 571, damages were awarded for falsely accusing a servant of theft.

Words spoken of the plaintiff, while in the employ of the defendant's firm as a clerk, and addressed to a subsequent employer, to the effect that the plaintiff had become such a notorious liar that they could place little or no confidence in him; that they were so strongly impressed with his dishonesty that they had written to a person named to employ a police force to watch him, etc.,—must be understood as relating to him in his capacity as clerk; and, being spoken of him in connection with his business, they are actionable *per se*. Fowles v. Bowen, 30 N. Y. 20.

Words imputing to a certificated master mariner drunkenness while in command of a vessel at sea are actionable without special damage. Irwin v. Brandwood, 2 Hurlst. & C. 960.

It is actionable to say of a servant girl: "You are not aware, Mrs. C., what kind of a girl you have in your service, for I can assure you, she is often out with our married man." Rumsey v. Webb, 11 L. J. C. P. N. S. 129.

In an action for oral slander it was alleged that the defendant spoke and published of the plaintiff, whose employment was that of a female domestic servant, the following words, in relation to her employment: "I was so incensed with that girl for coming to hire with me after having had a miscarriage at Mrs. B.'s house, and sent away by her in a car; and she afterwards to give the girl a good discharge!" No special damage was alleged. It was held (on demurrer) that the words were actionable *per se*, as relating to the plaintiff's employment. Connors v. Justice, 13 Ir. C. L. Rep. 451. "Can anyone," said Monahan, Ch. J., "doubt that chastity is an essential requisite in a female domestic servant? And can anyone doubt that the master or mistress of a family would be justified in dismissing, without the usual month's notice, a female domestic servant for unchaste conduct? In the present case, the slander is, that the plaintiff's mistress (Mrs. Berry) dismissed her in consequence of her having discovered the unchaste conduct of the plaintiff. Coupling this with the allegation that chastity is a necessary qualification, can there be any doubt entertained that the imputation was one of misconduct rendering her unfit for her situation?" The case was therefore held not to be within the principle laid down in Lumby v. Allday, 1 Cromp. & J. 301, III., b, *infra*. The doctrine applied by the Irish court finds a singularly apt support in the words which, more than a century before the case was decided, an eminent novelist had put in the mouth of a maid servant: "To be sure, ma'am, one's virtue is a dear thing, especially to us poor servants; for it is our livelihood, as a body might say." Fielding, Tom Jones, bk. VII. chap. 7. (Fielding was a lawyer, as well as a novelist; but it may be presumed that he is here speaking simply as a sound philosopher.)

Where the charge is not necessarily connected with the plaintiff's office or business, the declaration is essentially defective, unless it shows how the words were connected by the speaker with that office or business. James v. Brook, 9 Q. B. 7, where a judgment in favor of a superintendent of police was arrested after verdict, there being merely an allegation of the speaking of the words: "I" (meaning defendant) "saw a letter, two or three days since, regarding an officer of the L. police force" (meaning plaintiff), "who" (meaning plaintiff) "had been guilty of conduct unfit for publication." The case was declared to be indistinguishable from Ayre v. Craven, 2 Ad. & El. 2, where a physician was accused of adultery, and, although the words there used were very likely to injure, the court held that they were not actionable, as they did not necessarily import that the plaintiff had been guilty of adultery in the course of exercising his profession.

An averment in an answer to the suit of a clerk for the *quantum meruit* value of his services, that he is so notoriously unreliable and unworthy of trust that he cannot obtain employment where he is known, filed in the court and read in the presence of many witnesses, is libelous and slanderous if untrue. Weil v. Israel, 42 La. Ann. 955, 8 So. 826.

Where a cook got into a squabble with her master in the kitchen of a hotel, and they both lost their temper, and, in order to browbeat her, he called out several times in the hearing of several of the guests: "You are drunk,"—it was held that there was no such defamatory language used as would support an action for damages, the *animus injuriandi* being absent under such circumstances. MacDonald v. Rapprecht, 21 Sc. Sess. Cas. 4th series, 389. But *quære*, as to the correctness of this decision.

The animus, it is submitted, is immaterial. See also the following subdivisions, where numerous cases are cited in which the slanderous character of the words spoken was taken for granted, and the only question discussed was, whether the occasion was privileged.

The mere imputation of want of ability to discharge the duties of an office of profit

is sufficient to support an action. It is not necessary that there should be imputation of immoral or disgraceful conduct. Alexander v. Jenkins [1892] 1 Q. B. 797, per Lord Herschell.

But, in order that the rule may be applicable, "it is necessary that the words (being capable of having reference to the business) should in fact be spoken of him [the servant] in respect of his business." It must also appear that "they tend to prejudice him in that business." This result, as well as the question whether the words are capable of having reference to the business, depends upon the nature of the business. Foulger v. Newcomb, L. R. 2 Exch. 327.

It follows, therefore, that no legal liability is incurred by the speaker of defamatory words, unless they charge the servant with the want of some general requisite, as honesty, capacity, fidelity, etc., or else connect the imputation with the office which he holds or the trade or business in which he is engaged. Lumby v. Allday, 1 Cromp. & J. 301. See further, as to this case, III., *infra*.

That is to say, in order to support an action, the statement complained of "must be either something said of him in his office or business, which may damage him in that office or business, or it must relate to some quality which would show that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office." Alexander v. Jenkins [1892] 1 Q. B. 797, per Lord Herschell (p. 801).

No recovery can be had where the imputation conveyed does not imply the want of any of those qualities which a servant occupying such a position as the plaintiff ought to possess, and has no reference to his conduct as a servant. Lumby v. Allday, *supra*. See further as to this case, III., *infra*.

The general effect of most of the decisions seems to be, that any words must be regarded as actionable *per se* which falsely impute to a servant such conduct or qualities as would, if the words were true, justify his master in discharging him, or render it appreciably more difficult for him to obtain employment. The criterion is distinctly recognized in Alexander v. Jenkins, *supra*, and Connors v. Justice, 13 Ir. C. L. Rep. 451, *supra*.

But in a few cases, the facts of which might seem to have been not inappropriate for the application of this doctrine, the right to recover has been denied. The principle relied upon was that, if the words complained of, although they are false and malicious, are not in themselves slanderous, the mere fact that the servant may probably suffer damage in consequence of their having been spoken will not render them actionable, even though damage has actually resulted.

In one case the court proceeded on the assumption that the want of chastity, and frequenting the company of dissolute women, do not constitute any objection to a man for the position of clerk to a gas company. Lumby v. Allday, *supra*. There the defendant said to the plaintiff: "You are a fellow; a disgrace to the town; unfit to hold your situation, for your conduct with whores." Plaintiff alleged that the words were spoken of him in regard to his business or office as clerk. The court held the words not actionable.

In Connors v. Justice, *supra*, the court criticized the decision with good reason as a strong one, as the defendant himself had declared that the plaintiff was unfit for his situation, and, as a matter of fact, had actually been discharged in consequence of the speaking of the defamatory words.

In Miller v. David, L. R. 9 C. P. 118, the declaration alleged that the defendant falsely and maliciously spoke of the plaintiff, a working stone mason, "He was the ringleader of the nine-hour system;" and, "He has ruined the town by bringing about the nine-hour system;" and, "He has stopped several good jobs from being carried out, by being the ringleader of the system at L.,"—whereby the plaintiff was prevented from obtaining employment in his trade at L. It was held that, the words not being in themselves defamatory, nor connected by averment or by implication with the plaintiff's trade, and the alleged damage not being the natural or reasonable consequence of the speaking of them, the action could not be sustained. The court expressed its approval of the general rule laid down by Bayley, B., in Lumby v. Allday, 1 Cromp. & J. 301.

In Cowles v. Potts, 34 L. J. Q. B. N. S. 247, a statement that a person then occupying the position of farm bailiff had left the parish under discreditable circumstances, and without settling with his creditors, was declared to be "plainly" not actionable without special damage, although he lost his situation in consequence of the statements having been made.

In all the above-cited cases the injury suffered by the plaintiff was certainly one which might well be expected to follow from the statements; and it is difficult to see any satisfactory ground upon which it can be maintained that the statements were not prejudicial to the plaintiff in his calling. But the cases are consistent with two others, which, although they do not relate to servants in the strict sense of the word, are sufficiently in point to refer to. In one of these, it was held not to be actionable, without special damage, to say of a woman who taught young women to dance: "She is as much a man as I am; she got J. S. with child; she is an hermaphrodite." Wetherhead v. Armitage, 2 Lev. 233. In the other it was laid down that words imputing adultery to a physician were not actionable. Ayre v. Craven, 2 Ad. & El. 2.

But the latter case was referred to by Alderson, B., in Gallwey v. Marshall, 9 Exch. 294, in terms which show that he was not altogether satisfied with the doctrine applied.

"The rule as to words spoken of a man in his office or trade is not necessarily confined to offices and trades, of the nature and

duties of which the court can take judicial notice. The only limitation . . . is, that it does not apply to illegal callings." The declaration alleged that it was the duty of the plaintiff, as a gamekeeper, not to kill foxes, that he was employed on the terms of his not doing so, and that a person killing foxes would not be employed as gamekeeper; that the defendant, knowing the premises, falsely and maliciously said of the plaintiff, as such gamekeeper, that he killed foxes. Special damage was alleged. It was held, on demurrer, a good declaration, even without the allegation of special damage. Foulger v. Newcomb, L. R. 2 Exch. 327.

3. Suspension of servant not actionable as being injurious to his character.

A servant who has been suspended, together with other employees, while certain alleged irregularities in the office where he has been working are being investigated, cannot maintain action against his employer, if it is apparent that no aspersion has been cast upon his character, except such as may be inferred from his suspension. Henry v. Pittsburgh & L. E. R. Co. 139 Pa. 289, 21 Atl. 157 (employee was suspended during an investigation into certain irregularities, and was afterwards discharged).

d. Absolute privilege as a defense.

In England a defamatory statement as to an employee of the government is absolutely privileged when it is made in a communication sent, in the course of official duty, by one officer of the state to another. Chatterton v. Secretary of State [1895] 2 Q. B. 189 (statements in a despatch recommending the removal of the plaintiff to the half-pay list of the Army), reviewing the earlier cases. For the decisions as to absolute privilege, see Odgers, Libel & Slander, 4th ed. chap. 9; Townshend, Slander & Libel, 4th ed. §§ 217 et seq.

This immunity is also accorded to statements made by a military man, in the course of military inquiry regarding the conduct of another military man, even though it should be proved that the defendant acted mala fide, and without any reasonable or probable cause. Dawkins v. Rokeby, L. R. 7 H. L. 744.

In Dawkins v. Paulet, L. R. 5 Q. B. 94, where the defamatory matter had been inserted in the report of the superior officer to the adjutant general, the plaintiff was held not to be entitled to recover. But Cockburn, Ch. J., delivered a very weighty dissenting judgment, maintaining that it was merely a case of qualified privilege. In an earlier case, Dickson v. Combermere, 3 Fost. & F. 527 (action for causing the removal of a colonel of militia by false charges), the learned chief justice had left to the jury the question of malice; and in Dickson v. Wilton, 1 Fost. & F. 419 (action for libel arising out of same facts), Lord Campbell had left it to the jury to say whether the words had been uttered from a sense of duty.

Mr. Odgers (Libel & Slander, p. 220) suggests that the actual effect of these two cases is, that private letters written by the commanding officer of a regiment to his immediate superior on military matters, as distinct from his official reports, are not absolutely privileged; and that, if they cannot be distinguished from the Dawkins Case on this ground, they must be regarded as overruled by it.

The supreme court of Maryland has declined to follow the Dawkins Case, in one which involved similar facts. M., a professor at the United States Naval Academy, placed his resignation in the hands of W., then superintendent of the academy, to be forwarded to the Secretary of the Navy for his decision. W. was required by law to indorse his opinion thereon. The resignation was forwarded by W. with his indorsement thereon of reasons why it should be accepted. It was held that the indorsement was merely privileged to the extent that the occasion of making it rebutted the presumption of malice. Maurice v. Worden, 54 Md. 233, 39 Am. Rep. 384.

It may be that the doctrine of absolute privilege is also a protection to a government official in the civil service, who in the course of an investigation into the alleged misconduct of a subordinate employee, communicates the fact of that misconduct to the immediate superior of the supposed delinquent.

In Waterbury v. Dewe, 3 Pugsley (N. B.) 670, the defendant, a postoffice inspector, had been sent to examine into certain alleged thefts of registered letters in the city of A., and, after suspending the plaintiff, a clerk, had imparted the circumstances to the postmaster. It was held by judges that, if his plea had sufficiently disclosed his authority to make the investigation, his words would have been absolutely privileged, under the doctrine applied in the case last cited. But when the case finally reached the supreme court of Canada, the action was held not to be maintainable on the ground that the doctrine as to qualified privilege protected the defendant. See II. h, *infra*. (The court expressed no opinion as to the higher degrees of immunity.)

But statements made to their superiors regarding public, or quasi public, servants are the subject of a merely qualified privilege. Proctor v. Webster, L. R. 16 Q. B. Div. 112 (sanitary inspector accused of taking bribes); Blake v. Pilford, 1 Moody & R. 198 (defendant complained to the secretary of the postoffice that a guard on a mail coach had been guilty of misbehavior to the defendant's wife); Vallery v. State, 42 Neb. 123, 60 N. W. 347 (charges against a teacher in a state school).

Words charging a servant with theft are not actionable, where they are spoken by his master merely for the purpose of sustaining in a court of justice a defense to the servant's claim for wages. But it is otherwise where they are spoken in a ca-

lumniatory manner, while the master is waiting about the court room, and not for the purpose of defense. Trotman v. Dunn, 4 Campb. 211.

For general discussion of the defense of absolute privilege, see Odgers, Libel & Slander, 4th ed. chap. 9; Townshend, Slander & Libel, 4th ed. §§ 217 et seq.

e. Qualified privilege.

Although the statement complained of may be defamatory in the sense explained in II., c, *supra*, the servant's action will fail if the statement is what is commonly described as a "privileged communication." The proper meaning of the phrase is merely this, that "the occasion on which the communication was made rebuts the inference prima facie arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact,—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made." Parke, B., in Wright v. Woodgate, 2 Cromp. M. & R. 573, Tyrw. & G. 12.

This definition was approved in Taylor v. Hawkins, 16 Q. B. 308; Jackson v. Hopperton, 16 C. B. N. S. 829; Jenoure v. Delmege [1891] A. C. 73.

For a similar definition, see Toogood v. Spyring, 1 Cromp. M. & R. 193; Somerville v. Hawkins, 10 C. B. 583; Gassett v. Gilbert, 6 Gray, 94.

In Gilpin v. Fowler, 9 Exch. 615, Erle, J., remarked that a more correct expression than "privileged communication" would be "a communication made on an occasion which rebutted the presumption of malice."

"A privileged communication is one made on a privileged occasion, and fairly warranted by it, and not proved to have been made maliciously. A privileged occasion is one which is held in point of law to rebut the legal implication of malice which would otherwise be made from the utterance of untrue defamatory language." Per Lindley, L. J., in Stuart v. Bell [1891] 2 Q. B. 341.

A communication is deemed to be of this nature "where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts." Blackburn, J., in Davies v. Snead, L. R. 5 Q. B. 608, Statement Adopted by Jessel, M. R., and Brett, L. J., in Waller v. Loch, L. R. 7 Q. B. Div. 619.

The cases constituting an exception to the general rule that the publication of all defamatory matter which is false in fact is malicious are those in which "the cause or occasion of the publication is such as to render it proper and necessary for common convenience and the general welfare of society that the party making it should be protected from liability. . . . A party cannot be held responsible for a statement or publication tending to disparage private character, if it is called for by the ordinary exigencies of social duty, or is necessary and proper to enable him to protect his own interest or that of another, provided it is made in good faith, and without a wilful design to defame." Gassett v. Gilbert, *supra*.

In the case of master and servant, the convenience of mankind requires that what is said in fair communication between man and man, upon the subject of character, should be privileged, if made bona fide and without malice. Lord Ellenborough, *arguendo*, in Hodgson v. Scarlett, 1 Barn. & Ald. 232.

The law does not allow a privilege merely for the benefit of the giver of the character. "It is of importance to the public that characters should be readily given. The servant who applies for the character, and the person who is to take him, are equally benefited. Indeed, there is no class to whom it is of so much importance that characters should be freely given as honest servants. It is for that object that the communications are protected." Gardner v. Slade, 13 Q. B. 796, per Wightman, J.

The situation thus predicated exists, wherever "a communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty." Harrison v. Bush, 5 El. & Bl. 344, per Lord Campbell, Ch. J.

Qualified privilege extends to all communications made bona fide upon any subject-matter in which the party has an interest and a duty to the person having a corresponding interest or duty. And the privilege embraces cases where the duty is only of a moral or social character. Bacon v. Michigan C. R. Co. 66 Mich. 166, 33 N. W. 181.

Similar phraseology is used in Hebner v. Great Northern R. Co. 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128.

In order that the occasion upon which a defamatory statement is made may be privileged, it is necessary that the person to whom such statement is made, as well as the person making it, should actually have an interest or duty in respect of the subject-matter of such statement. It is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has such an interest or duty. Hebditch v. MacIlwaine [1894] 2 Q. B. 54.

In Cowles v. Potts, 34 L. J. Q. B. N. S. 247, Blackburn, J., observed that the tendency in the more recent decisions had been to extend the limits of the moral duty or reasonable exigency which authorizes the publication of the defamatory matter.

An analysis of this statement shows that there are two relative situations in which a communication may be the subject of a qualified privilege, *viz.:*

(1) Where it is made by the defendant in the exercise of a duty to a person having an interest in the matter communicated. Pullman v. Hill [1891] 1 Q. B. 524, per Lopes, L. J.

See also Somerville v. Hawkins, 10 C. B. 583.

(2) Where the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has a corresponding interest. Hunt v. Great Northern R. Co. [1891] 2 Q. B. 189, per Lopes, L. J., adopting the language of Mr. Odgers in his treatise on Libel & Slander, 2d ed. p. 238.

A similar form of statement was used by the same judge in Pullman v. Hill, *supra*.

In most instances the qualified privilege accorded to a master in respect to communications affecting the character of his servant may be considered as falling more naturally under the first than under the second of these heads.

This aspect of the matter is illustrated by such statements as these: "It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so; and the person who receives the character has an interest in having it. Therefore, the occasion is privileged because the one person has a duty and the other has an interest." Pullman v. Hill, *supra*, per Lord Esher, M. R.

Communications of this sort are privileged on the ground of duty towards the servant, or of interest on the part of the master. Jervis, Ch. J., in Manby v. Witt, 18 C. B. 544.

But in some states of the evidence the conception of a mutuality of interest will more readily suggest itself as the rationale, —the exemption from liability; and, as a matter of fact all the cases which have been cited as authorities for both points of view relate to the characters of servants.

It is the province of the judge to determine whether the occasion on which the communication was made was privileged. Stuart v. Bell [1891] 2 Q. B. 341; Pullman v. Hill [1891] 1 Q. B. 524; Clark v. Molyneux, L. R. 3 Q. B. Div. 237; Hebditch v. MacIlwaine [1894] 2 Q. B. 54; Dewe v. Waterbury, 6 Can. S. C. 143; Tench v. Great Western R. Co. 33 U. C. Q. B. 8; Gassett v. Gilbert, 6 Gray, 94; Dale v. Harris, 109 Mass. 193; Fresh v. Cutter, 73 Md. 87, 10 L.R.A. 67, 25 Am. St. Rep. 575, 20 Atl. 774.

It is also his province to determine whether there was excess in the exercise of the privilege. Tench v. Great Western R. Co. *supra*.

f. Privilege in cases where the statement was made in compliance with a statutory duty.

A statement regarding a servant, made to the proper authority in compliance with a specific statutory duty, is prima facie privileged. No English or American authorities directly affirming this doctrine have been found. But its correctness is sufficiently manifest. It was so decided in Hill v. Thompson, 19 Sc. Sess. Cas. 4th series, 377 (entry in ship's log, made by captain, as required by the merchant shipping act of 1854, stated that an officer "wilfully and intentionally disobeyed" a certain order).

g. Privilege in cases where the statement was made in response to inquiries by third persons.

The reports furnish numerous illustrations of the doctrine that a statement affecting a servant's character is prima facie privileged if made in response to an inquiry from some person who has a legitimate interest in obtaining information on the subject. The decisions embodying this doctrine may be conveniently referred to the following categories:

(1) Inquiry addressed to a former master of the servant by a person who contemplates hiring him, or has already hired him. 4 Burr. 2424, per Lord Mansfield, *arguendo;* Lowry v. Aikenhead, an unreported case cited by Chambre, J., in Rogers v. Clifton, 3 Bos. & P. 587; Edmonson v. Stevenson, an unreported case cited in Buller, N. P. p. 8 (impertinence charged and immorality suggested); Dale v. Harris, 109 Mass. 193 (theft charged); Weatherston v. Hawkins, 1 T. R. 110; Child v. Affleck. 9 Barn. & C. 403 (charge of sexual immorality); Sims v. Kinder, 1 Car. & P. 279 (charge of theft); Blackburn v. Blackburn, 4 Bing. 395, 1 Moore & P. 33.

(2) Those in which the communication was made at the request of the servant's master, by a third person who did not contemplate hiring him. Cockayne v. Hodgkisson, 5 Car. & P. 543, per Parke, B. (letter written to B by A, his tenant, stating that A's gamekeeper had sold game); Kine v. Sewell, 3 Mees. & W. 297 (surveyor employed to measure a contractor's work voluntarily told contractor's employer that one of the contractor's servants had stolen some of the materials, and reported the charge in answer to an inquiry by the contractor).

(3) Request made for a character by the servant himself, when he is leaving the employment. Hebner v. Great Northern R. Co. 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128 ("service card" handed to dismissed railway servant in presence of clerks in superintendent's office).

(4) Inquiry made by a relative, or a friend, of the servant, or by any other third person, whose position with relation to the servant gives him an interest in obtaining correct information about the servant's character. Taylor v. Hawkins, 16 Q. B. 308, 15 Jur. 746, 20 L. J. Q. B. N. S. 313 (brother of servant told that he had been robbing his master).

See also Watson v. Burnet, 24 Dunlop. B. & M. 494, where the statement was made to the father and mother of the servant.

An action was held not to be maintainable where the defendant, upon being pressed by a friend of the plaintiff to give his reasons for refusing to sign a protest against removing the plaintiff from his position as trustee of a local charity, said that he would not keep a big rogue like the plaintiff in the trust; and, being further pressed, ex-

plained reasons for this opinion, *viz.*: That the plaintiff had left the parish under discreditable circumstances, and without settling with his creditors, including the defendant. Cowles v. Potts, 34 L. J. Q. B. N. S. 247.

Where the chairman of a society, at a meeting of its members, was asked questions as to the conduct of the manager of a local branch, and stated in reply what he had himself observed, the statement was held to be privileged. Stott v. Evans, 3 Times L. R. 693.

It has been held that, where a letter is written ostensibly to inquire into a servant's character, but in reality to entrap the master into a libelous answer, no action lies.

In Weatherston v. Hawkins, 1 T. R. 110, A., the plaintiff's brother-in-law, repeatedly called on the employer to inquire why he had dismissed the plaintiff, and at last the defendant wrote to A. stating his reasons specifically. The plaintiff issued a writ the same day the letter was written. It was held by Mansfield, Ch. J., and Buller, J., that no action lay on the letter, as the defendant was evidently entrapped into writing it.

See also King v. Waring, 5 Esp. 13, which is to the same effect.

h. Privilege in cases where the statement was made voluntarily.

There is some authority for the view that, where a master voluntarily and without being applied to, makes a statement prejudicial to the character of a servant, it will be incumbent on him to plead and prove the truth of the words. Buller, Nisi Prius, p. 8, note b, referring to Lowry v. Aikenhead, an unreported case in which Lord Mansfield said it was so settled, and that he had frequently ruled it so at nisi prius.

This case was cited as good law by Chambre, J., in Rogers v. Clifton, 3 Bos. & P. 587. But the other judges distinctly recognize the doctrine which, as in the cases cited in the following note, is sustained by the weight of authority. The actual point upon which the action turned was the existence of malice. See III., c, *infra*.

In Fraser on Master & Servant, p. 130, the rule of Scotch law is stated to be, that a master is not, in general, entitled, though what he says be true, to publish his servant's infamy voluntarily and without a request from an interested party. The decision cited is Christian v. Kennedy, 1 Murray, 427.

Such a theory implies that all voluntary statements are to be excluded from the class of those which are the subject of a prima facie privilege, and that the authors of such statements, not being entitled to rely on the presumption which is predicated in cases of privilege, occupy a less favorable position, in an evidential point of view, than those who make statements in response to inquiries. But, having regard to the general current of authority, it seems clear that the rule in this connection cannot be formulated more strongly against the master than this,—that, "if the master wantonly and capriciously volunteers to make a statement injurious to the servant, or makes such a statement out of malice, the statement is not privileged." This is the language used by Wightman, J., in defining the circumstances under which voluntary statements are actionable." See Gardner v. Slade, 13 Q. B. 796.

The decisions cited in this and the following subdivisions show that the doctrine upon which the courts have customarily proceeded is that the quality of a communication, as being prima facie privileged or not, depends simply upon the consideration whether it was made for the purpose of discharging a duty or protecting an interest, in the sense explained in II., d, *supra*, and not upon the consideration whether it was made voluntarily or in answer to an inquiry.

In Pattison v. Jones, 8 Barn. & C. 578, Bayley, J., remarked: "I do not mean to say that, in order to make libelous matter written by a master privileged, it is essential that the party who makes the communication should be put into action in consequence of a third party's putting questions to him. I am of opinion he may (when he thinks that another is about to take into his service one whom he knows ought not to be taken) set himself in motion, and do some act to induce that other to seek information from and put questions to him."

This doctrine is exemplified by numerous cases in which the actual employer of the plaintiff, or his agent, or some person having a direct financial or official interest in fitness of the plaintiff to discharge the duties of his position, was the defendant. The cases may be conveniently classified under the following heads, indicative of the relation between the defendant and the recipient of the information:

1. Statements made by the plaintiff's former master to a person who contemplates hiring, or has already hired, the plaintiff.

In Rogers v. Clifton, 3 Bos. & P. 587, it was laid down by Lord Alvanley, Ch. J., and Rooke, J., that a former master of a servant, whether asked to do so or not, is always warranted in communicating to a person who is about to hire the servant anything of a criminal nature which has come to his knowledge since the servant left his employment.

Statements made by a friend to the vicar of a parish with respect to the character of a curate who had been advertised as about to preach one of a course of sermons in the latter parish were held to be prima facie privileged. Clarke v. Molyneux, L. R. 3 Q. B. Div. 237.

The general rule formulated by the supreme court of Maryland is that a communication made by a man to his neighbor, who is about to employ a servant formerly in the employ of the speaker, to the effect that the servant

stole from the speaker, is privileged if made in good faith, without malice, in the honest belief of its truth, and under the conviction that the speaker is in duty bound to make it to his neighbor, although it is made voluntarily and not in response to any inquiry. Fresh v. Cutter, 73 Md. 87, 10 L.R.A. 67, 25 Am. St. Rep. 575, 20 Atl. 774.

The reasons for extending protection to such statements are especially strong, where a servant obtains a place upon the strength of a character given by his master in response to an inquiry, and the master afterwards discovers facts which induce him to believe that the character is undeserved. Under such circumstances the former master is morally bound to inform the new master of those facts, and the privilege "lasts as long as anything is discovered, before unknown to the master." See Gardner v. Slade, 13 Q. B. 796, 13 Jur. 826, 18 L. J. Q. B. N. S. 334 (former master intimated in a letter that servant had been dishonest, and thus induced further inquiry); Fowles v. Bowen, 30 N. Y. 20 (mercantile firm had given a general recommendation to a clerk).

2. Statements made by the plaintiff's master to other employees.

See Somerville v. Hawkins, 10 C. B. 583 (servant charged with theft in presence of two coservants); Manby v. Witt, 18 C. B. 544, 2 Jur. N. S. 1004, 25 L. J. C. P. N. S. 294 (master told each of two servants that the other had been robbing him); Innes v. Adamson, 17 Sc. Sess. Cas. 4th series, 11 (servant charged with neglect of duty, two other coservants being present); Newell v. Bennett, 3 Sc. L. T. 414 (immorality charged against three servants in presence of others).

Some of the decisions under this head illustrate the incidents and consequences of one variety of "blacklisting." See III., a, *infra*.

3. Statements made by the plaintiff's master to a person on whose recommendation the plaintiff had been hired.

See Child v. Affleck, 9 Barn. & C. 403 (female servant alleged to have been guilty of sexual immorality after leaving the defendant's employment); Dixon v. Parsons, 1 Fost. & F. 24 (letter to the effect that the servant's conduct had not justified the character given of him, that he had left a balance unaccounted for, and that he ought not to be recommended for morality or honesty); Farquhar v. Neish, 17 Sc. Sess. Cas. 4th series, 716 (mistress, immediately after dismissing a domestic servant for alleged drunkenness, wrote to the registry office through which she had been engaged, stating the reason for the dismissal, and declining to give anyone her character without mentioning her failing); Tremaine v. Parker, 12 L. T. 312 (captain of ship alleged to be a hard drinker).

4. Statements made by the plaintiff's master to a relative of the plaintiff.

See James v. Jolly, an unreported case, cited in Odgers, Libel & Slander, 4th ed. p. 256 (parents of servant told that he was a thief); Aberdein v. Macleay, 9 Times L. R. 539 (aunt of servant informed of various faults); Gorst v. Barr, 13 Ont. Rep. 644 (father of servant told that he was a thief); Livingston v. Bradford, 115 Mich. 140, 73 N. W. 135 (similar facts); Wells v. Lindop, 15 Ont. App. Rep. 695, Affirming 14 Ont. Rep. 275 (wife of servant told that he was a thief). (See also 13 Ont. Rep. 434.)

5. Statements made by the plaintiff's master to a person employed by him to investigate the plaintiff's conduct.

Instructions given to the employer's counsel to investigate certain questioned entries in the employer's books and make protest to the bookkeeper against them cannot serve as the foundation of a charge of defamation against the employer. Levy v. McCan, 44 La. Ann. 528, 10 So. 794.

When a charge of theft is being laid against a servant, the statements made to a police officer are privileged. Dale v. Harris, 109 Mass. 193.

6. Statements made by the plaintiff's former master to persons having commercial or financial dealings with the master.

The communication was held to be privileged where it consisted of a statement published by a baker in a newspaper, for the purpose of informing his customers that one of his drivers had left his employ, and taken upon himself the privilege of collecting bills. Hatch v. Lane, 105 Mass. 394.

So, also, where a circular, stating that an employee had been discharged, and giving the reasons therefor, was distributed by a newspaper company among persons from whom advertisements had been obtained in the past, or from whom they may be expected in the future, is privileged. Ratzel v. New York News Pub. Co. 67 App. Div. 598, 73 N. Y. Supp. 849, Reversing 35 Misc. 487, 71 N. Y. Supp. 1074.

In Gassett v. Gilbert, 6 Gray, 94, it was held to be the duty of the defendants, as directors of a society for promoting the medical education of women, to take all proper measures to see that the money raised by subscription, in aid of the institution, was collected and appropriated according to the intention of those from whom it was obtained; and that, if they believed that the plaintiff, after her authority as a collecting agent had ceased, was falsely representing herself as still authorized to collect subscriptions in behalf of the corporation, and was thereby wrongfully obtaining money from the public, they were justified in publishing a notice, couched in such language as was necessary and proper to put persons on their guard against her unauthorized representations, and to prevent her

from receiving money under the false pretense that it was collected for the use and benefit of the corporation.

7. Statements made by the plaintiff's master to a guarantor of the plaintiff's honesty.

See Dundas v. Livingston, 3 Sc. Sess. Cas. 5th series, 37 (charge of embezzlement).

8. Statements made by a director of the company of which the plaintiff is employee, to the directors of another company by which he is also employed.

See Harris v. Thompson, 13 C. B. 333 (charge that emplayee obtained the money of one company under false pretenses, and used it to pay his own debts).

9. Statements made by the governing body of a corporation to its shareholders with regard to the plaintiff, an employee of the corporation.

Where the president and directors of a company sent out to the shareholders a report stating the result of their investigations into the conduct of a mechanic employed as bridgebuilder, the communication was held to be privileged. Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. ed. 73.

This decision was approved in Lawless v. Anglo-Egyptian Cotton & Oil Co. L. R. 4 Q. B. 262, where the plaintiff was employed as manager of the factories of a joint-stock company, and the auditors of the company, in auditing the plaintiff's accounts, appended to their report the following statement: "The shareholders will observe that there is a charge of £1,306 for deficiency of stock, which the manager is responsible for. His accounts have been badly kept, and have been rendered to us very irregularly." It was resolved at the ordinary general meeting of the shareholders that this report should be printed with that of the directors, and sent to the shareholders. It was held that an action for libel could not be maintained by the manager. After referring to the above-mentioned American case, Mellor, J., said: "Independently of any authority, I am quite prepared to hold that a company, having a great number of shareholders, all interested in knowing how their officers conduct themselves, are justified in making a communication in a printed report, relating to the conduct of their officers, to all the shareholders, whether present or absent, if the communication be made without malice and bona fide."

10. Statements made by the shareholders of a company with regard to the conduct of a servant of the company.

See Broughton v. McGrew, 5 L.R.A. 406, 39 Fed. 672 (statements made at a stockholders' meeting); Haney v. Trost, 34 La. Ann. 1146, 44 Am. Rep. 1161 (wife of shareholder told him that a servant of a street car company was dishonest, and shareholder communicated the information to the foreman).

11. Statements made to the plaintiff's official superior by a person appointed by a higher authority to examine into the alleged misconduct of the plaintiff.

See Dewe v. Waterbury, 6 Can. S. C. 143, Reversing 19 N. B. 225 (chief postoffice inspector for Canada, while making inquiries into certain irregularities which had been discovered at a certain postoffice, told the assistant postmaster that he had charged one of his clerks with abstracting money from letters).

On the previous hearings of the case before the supreme court of New Brunswick (3 Pugsley, 670, 2 Pugsley & B. 6), the decision had turned upon the question whether the inspector had authority to make the inquiry.

12. Statements made by an official superior of the plaintiff to the governing body of an institution in which both were employed.

The communication was held to be privileged, where the principal of an institution for deaf mutes complained to the executive committee of the board of trustees of the institution that the plaintiff, a teacher therein, had mailed to the defendant's wife a printed paper recommending and advertising articles for the prevention of conception and for procuring abortions, and stating where the articles could be purchased. Hemmens v. Nelson, 138 N. Y. 517, 20 L.R.A. 440, 34 N. E. 342, Affirming 36 N. Y. S. R. 905, 13 N. Y. Supp. 175. Verdicts for the plaintiff, rendered on three previous trials of this case, had been set aside by the supreme court. See 24 Hun, 395, 36 Hun, 149, 13 N. Y. S. R. 211.

13. Statements made at a meeting of a public, or quasi public, corporation with regard to the plaintiff, an employee of the corporation.

Privilege was held to be a good defense under the following circumstances:

Where statements were made by a member of a board of poor law guardians, at a meeting of the board, with regard to a former employee of the board. Pittard v. Oliver [1891] 1 Q. B. 474.

Where a rate payer in a borough made an oral statement to a member of the watch committee of the borough, respecting the plaintiff in his capacity of superintendent of police. Bannister v. Kelty, 59 J. P. 793.

Where a rate payer, who was unable to attend a parish meeting called to investigate the parish constable's accounts, wrote a letter with regard to those accounts, and requested that it be read in the meeting. Spencer v. Amerton, 1 Moody & R. 470, Parke, B.

Where a parish officer was seeking reelection, and charges as to his previous conduct in the office were made against him at the parish meeting held for the purpose of nominating officers. George v. Goddard, 2 Fost. & F. 689.

Where the justices were about to swear in the plaintiff as a paid constable, and a parishioner came forward and stated that the plaintiff was not a proper person to be a constable. Kershaw v. Bailey, 1 Exch. 743. The fact that several other persons besides the justices were present was held not to destroy the privilege.

In one case the privilege of the occasion was held to be a good defense to an indictment for libel, laid against the wife of the servant's master, who had, at her husband's request, written to the servant a letter charging him with theft. Reg. v. Perry, 15 Cox, C. C. 169. The court laid it down, that the terms of a letter written under such circumstances ought not to be too nicely criticized.

But it is manifest that in this instance the fact that there was no publication to a third person would have been an effectual bar to a civil action in respect to the letter in question.

i. Same subject further discussed.

Other illustrations of the doctrine that the voluntary character of a communication concerning a servant's character does not take it out of the privileged class are to be found in the cases where the defamatory statement was made to the master, present or prospective, of the plaintiff, by a third person, who, for one reason or another, had a duty or interest in respect to the subject-matter of the communication.

Privilege has been successfully pleaded under the following circumstances:

Where a letter was written to the privy council, charging a sanitary inspector with corruption and misconduct in his office. Proctor v. Webster, L. R. 16 Q. B. Div. 112.

Where a petition addressed by a creditor of an officer in the Army to the Secretary of War, bona fide, and with a view of obtaining, through his interference, the payment of a debt due, contained a statement of facts which, though derogatory to the officer's character, the creditor believed to be true. Fairman v. Ives, 5 Barn. & Ald. 642.

Where a letter to the Postmaster General, or to the secretary of the general postoffice, complaining of misconduct in a postmaster, was written as a bona fide complaint to obtain redress for a grievance which the party really believed he had suffered. Woodward v. Lander, 6 Car. & P. 548, per Alderson, B.

Where the managing agent of an insurance society told the proprietor of a certain ship that, if the plaintiff was appointed to command her, the society would refuse to continue to insure her. Hamon v. Falle, L. R. 4 App. Cas. 247 (decided on demurrer).

Where a letter charging the manager of a quartz-crushing company with dishonesty in abstracting gold was written to a shareholder of that company by a person having an interest in a company which owned the mine which supplied the ore to the former company. Horne v. Milne, 7 Vict. L. R. (L) 296. (The "interest" which in this case was deemed sufficient to justify the communication consisted in the fact that the two concerns were virtually parts of the same undertaking.)

Where a letter was written to a board of guardians by their clerk, complaining that one of the under clerks in the office neglected his duty, and behaved in an offensive and insubordinate manner. Keight v. Hill, 43 J. P. 176.

Where a subscriber to a charity wrote to the managing committee a letter concerning the conduct of their secretary in the management of the funds of the charity, and a second letter in answer to an answer from the committee proposing an inquiry, and also made oral statements before the committee during the inquiry. Maitland v. Bramwell, 2 Fost. & F. 623.

Where a manual prepared by inhabitants of a school district, and sent to the local superintendent of schools, charged a teacher with immorality. McIntyre v. McBean, 13 U. C. Q. B. 534.

Where a communication, representing that A. was immoral and unfit to have the care of a district school, was made to a township superintendent by persons interested in a certain school within his jurisdiction, for the purpose of preventing the issue of a license to A. Wieman v. Mabee, 45 Mich. 484, 40 Am. Rep. 477, 8 N. W. 71.

Where a confidential letter was written to a friend who lived in the same city as plaintiff's employer (he being unknown to the writer), in which he mentioned that certain facts had created a suspicion in the neighborhood that the plaintiff had been guilty of dishonesty, and suggested that an investigation into the matter should be made. Hart v. Reed, 1 B. Mon. 166, 35 Am. Dec. 179.

Where a creditor wrote to the servant's employer, stating that the servant had slunk behind the statute of limitations to escape paying his debt. Hollenbeck v. Ristine, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355.

Where B, a tradesman, after having been dismissed from serving A, a customer, who stated as his reason that B charged for goods never delivered, and B afterwards wrote a letter to A vindicating himself, and imputing the dishonesty to a servant of A. Coward v. Wellington, 7 Car. & P. 531, per Littledale, J.

Where the defendant, a tradesman, having reason to suspect that A., a servant of M., who was a customer of the defendant, had, when sent to the defendant's premises by M., abstracted property belonging to the defendant, communicated to M. the reasons he had for believing that the plaintiff had taken such property. Amann v. Damm, 29 L. J. C. P. N. S. 313.

Where the defendant, the host of the

plaintiff's employer, told him privately that the plaintiff was suspected of having committed a theft at a hotel where the plaintiff's employer had been staying a few days before. Stuart v. Bell [1891] 2 Q. B. 341 (Lopes, L. J., dissenting, holding that the communication was not privileged).

Where the defendant wrote a confidential letter to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which the defendant was likewise interested. M'Dougall v. Claridge, 1 Campb. 267.

Where the defendant had spoken words to the plaintiff's employer which imputed that the plaintiff had made overtures to the defendant's clerk to commit a fraud upon the plaintiff's employer, and divide the proceeds between them. Caulfield v. Whitworth, 18 L. T. N. S. 527.

C. the mate of a ship, sent to B, a stranger, a letter charging A, the captain, with gross misconduct (constant drunkenness). B showed this letter to D, the owner, who dismissed A. It was held by Tindal, Ch. J., and Erle, J., that the showing of the letter by B to D was a privileged communication. It was held by Coltman and Creswell, JJ., that it was not privileged. Coxhead v. Richards, 2 C. B. 569. It was conceded by all the judges that the letter would have been privileged if it had been sent by the mate direct to the owner. In Amann v. Damm, 29 L. J. C. P. N. S. 314, Willes, J., said that he concurred in the opinion of Tindal, Ch. J., and Erle, J. Lindley, L. J., also approved of their conclusion in Stuart v. Bell [1891] 2 Q. B. 341.

In an action for libel, consisting of a publication in a newspaper of a report of an inspector of charities under the charitable trusts act, containing a letter, written some years before, reflecting on the plaintiff in his management of a college, it was held that, as the matter was one of public interest, the defendant was not liable, provided he published it fairly, from an honest desire to afford the public information. Cox v. Feeney, 4 Fost. & F. 13.

j. Circumstances under which statements are not privileged.

1. Making of statement to improper person.

The language in which the doctrine as to privileged communications is enunciated by the courts necessarily implies that it does not afford any protection in any case where, as between the publisher and the recipient of the information in question, there was no correspondence of duty or interest in respect to the subject-matter.

Privilege was held not to be a defense where a rector sent to his own parishioners and those of an adjoining parish a circular letter, warning them not to send their children to a national school which the plaintiff had opened in the parish against the rector's wishes, and in opposition to the rector's parish school. Gilpin v. Fowler, 9 Exch. 615.

Where a lieutenant in the Navy, who had been appointed by the government its agent on board a transport ship, wrote a letter to the secretary of Lloyd's Coffee House, imputing misconduct and incapacity to the master of the transport, the communication was held not to be privileged, as such a complaint should have been made to the government. Harwood v. Green, 3 Car. & P. 141, per Best, Ch. J., who held that the fact that others were in the habit of making similar complaints was neither a complete defense, nor admissible in mitigation of damages.

A circular letter sent out by a firm of merchants to everyone whose name was on its address book, and stating that the plaintiff was no longer in their employ, and advising their "friends and customers" to give him no recognition on their account, is not privileged. Warner v. Clark, 45 La. Ann. 863, 21 L.R.A. 502, 13 So. 203.

Words spoken by a subscriber to a charity in answer to inquiries by another subscriber, respecting the conduct of a medical man in his attendance upon the objects of the charity, are not, merely on account of those circumstances, a privileged communication. Martin v. Strong, 5 Ad. & El. 535. The decision was put upon the ground that the claim of privilege was too large, the subscriber to a charity not being entitled, as such, to enter into the discussion.

A was engaged to superintend the works of a railway company, and subsequently, at a general meeting of the proprietors, the engagement was not continued, but a former inspector was reinstated. A afterwards became a candidate for another situation. B wrote to C, introducing D as a candidate, and C having written to B, informing him that another person had succeeded in obtaining the appointment, B wrote an answer to C, reflecting on the conduct of A while in the situation of engineer to the railway company. There was a subsequent election, at which A was unsuccessful in consequence of this letter having been shown. It appeared that B and C were both shareholders in the railway company, and that B managed C's affairs in the railway. B had not been applied to for his opinion, and the letter containing the libel was written after the termination of one election, and before the other was in contemplation. It was held, in an action by A against B for the libel, that the letter was not a privileged communication. Brooks v. Blanshard, 1 Cromp. & M. 779. Lord Lyndhurst said: "The defendant was not applied to for any opinion, and the election was over. A communication is not privileged merely because it is confidential." Bayley, B., said: "The letter was written after one election was over and before the other was in contemplation." These brief statements might seem to indicate that the court treated the voluntary quality of the communication as the differentiating factor. But the true ra-

tio decidendi, as explained by Parke, B., in the subsequent case of Kine v. Sewell, 3 Mees. & W. 297, was that, "if the election was over, there could be no interest." The remark of Alderson, B., was to the same effect: "The question about which the subscribers had met had been determined one way or other before the words were spoken by the defendant, and the judge was of opinion that the defendant had no right to say anything about the matter."

In Jackson v. Mayne, 19 L. T. N. S. 399, the evidence adduced at the trial was that, in the police sheets issued and read to all the members of the metropolitan police force, the plaintiff, an inspector of hackney carriages, was stated to have been dismissed for having made out accounts for sums claimed to be due him, etc., founded on a misrepresentation of duties alleged to have been performed, etc. Keating, J., said he would hold for the present that it was not privileged. The jury could not agree and the point was not further discussed.

In a Canadian case it was considered that the course thus taken was proper. Tench v. Great Western R. Co. 33 U. C. Q. B. 8, per Hagarty, Ch. J.

In Pullman v. Hill [1891] 1 Q. B. 524, an employer had ordered his typewriter, a person having no interest in seeing or hearing the communication, to copy a letter containing libelous words, and then directed it in such a manner that it might possibly be opened by a clerk of the firm to which it was addressed. It was held that there had been two publications of the letter, neither of them privileged.

On the authority of this case, it has been held in Ontario that, where the manager of the defendant company handed to his stenographer, to be typewritten, a draft letter written in the interest of the company, but unconnected with its ordinary business, the publication to the stenographer took away the privilege as regards defamatory statements made in the letter. Puterbaugh v. Gold Medal Furniture Mfg. Co. 7 Ont. L. Rep. 582, Revising 5 Ont. L. Rep. 680.

But where a solicitor writing to his client on a privileged occasion gives the letter to his clerk to copy in the ordinary course of a solicitor's business, the publication is privileged. Boxsius v. Goblet Frères [1894] 1 Q. B. 842.

The transmission of libelous matter unnecessarily, by a postoffice telegram, which would have been privileged if sent in a sealed letter, avoids the privilege. Williamson v. Freer, L. R. 9 C. P. 393.

For other cases in which defense of privilege has been discussed with reference to the justifiability of making the statement to the person in question, see III., a, *infra*.

But a communication made to an official superior of an employee may sometimes be privileged, although it ought more properly to have been made to some other official.

As where a timekeeper, employed on behalf of a public department, wrote to the secretary of the department a letter charging the contractor with fraud in the measurement of the work. Scarll v. Dixon, 4 Fost. & F. 250.

And where defendant wrote to the inspector of constabulary, saying that he had been informed that the plaintiff, a government medical officer, had refused to attend a poor woman, who had died in consequence. Jenoure v. Delmege [1891] A. C. 73 (letter should have been addressed to the superintending military officer).

And where a letter written to the provincial secretary, and not, as in strictness it should have been, to the commissioner of Crown lands, complained of the conduct of a government land surveyor. Kerr v. Davison, 3 Nov. Sc. 354.

These three cases, however, are apparently in conflict with Blagg v. Sturt, 10 Q. B. 899, where it was held that a letter written to the home secretary, complaining of the conduct of the plaintiff, in his capacity as clerk to the borough magistrate of A., was not privileged "because the secretary of state has no direct authority in respect of the matter complained of, and was not a competent tribunal to receive the application." But in Harrison v. Bush, 5 El. & Bl. 344, 25 L. J. Q. B. N. S. 25, Lord Campbell expressed the opinion that this was not a proper criterion to determine whether the complaint is made to a competent tribunal; and remarked that it would certainly be strange if what might well be an excusable error on the part of the complainant should deprive him of the benefit of his privilege.

Nor is it deemed essential to the protection of a communication "that it should be made to some person interested in the inquiry, alone; and not in the presence of a third person. If made with honesty of purpose, to a party who has any interest in the inquiry, . . . the simple fact that there has been some casual bystander cannot alter the nature of the transaction." Toogood v. Spyring, 1 Cromp. M. & R. 181, 4 Tyrw. 582, per Parke, B. In that case, A, the tenant of a farm, required some repairs to be done to the farmhouse, and B, a master carpenter in the employ of the landlord, directed C, one of his assistants, to do the work. C did it, but in a negligent manner, and during the progress of it got drunk; and some circumstances occurred which induced A to believe that C had broken open his cellar door, and obtained access to his cider. A, two days afterwards, met C in the presence of D, a man working on the landlord's estate, and charged him with having broken his cellar door, and with having got drunk and spoiled the work. A afterwards told D, in the absence of C, that he was confident C had broken open the door. On the same day A complained to B that C had been negligent in his work, had got drunk, and he thought he had broken open his cellar. It was held that the complaint to B was a privileged communication, if made bona fide, and without any malicious intention to injure C, but that the reiteration of the statement to D, in the absence of C, was unauthorized and officious, and therefore not protected.

Words by which an employer accused an employee of dishonesty, in the course of an inquiry started by the employee for the purpose of clearing his character, were held to be privileged, although they were spoken in the hearing of a person to whom the employer had just sold his business. Ryan v. Newman, 3 New South Wales, L. R. 309.

At a meeting of a board of guardians, of which the plaintiff had been the clerk, the defendant, a member of the board, in the course of a discussion concerning the plaintiff's accounts, made certain defamatory statements concerning the plaintiff, without malice and bona fide believing that what he said was true. In accordance with the regular custom of the board, reporters were present at the meeting. It was held that the privilege which would have attached to the statements if made in the presence of guardians only was not taken away by the presence at the meeting of reporters or persons other than guardians. Pittard v. Oliver [1891] 1 Q. B. 474. It was conceded that, if the defendant had himself called in the reporters,—persons having no interest in the inquiry,—the privilege would have been destroyed. But, as he, as an individual, had had nothing to do with their introduction to the meeting, their presence at the time when he was called upon to do his duty made no difference.

This case may be contrasted with another, in which it was held, in an action against the proprietor of a newspaper, that the administration of the poor laws, both by the government department and by the local authorities, including the conduct of the medical officers, is a matter of public interest; but that the publication of a report of proceedings at a meeting of poor-law guardians, at which *ex parte* charges of misconduct against the medical officer of the union were made, is not privileged by the occasion. Purcell v. Sowler, L. R. 2 C. P. Div. 215. The court proceeded on the ground that the guardians were a body of limited jurisdiction whose proceedings it was not usual or essentially necessary to publish. There was no duty to report such *ex parte* proceedings.

"If a libel is uttered, on a privileged occasion, to a husband when his wife is present, her presence does not take away the privilege." Huddleston, B., *arguendo*, in Wennhak v. Morgan, L. R. 20 Q. B. Div. 635.

The mere fact that when a servant was accused by his master of theft certain casual bystanders, or some of his fellow servants, were present, will not deprive the words spoken of their privileged quality. Gildner v. Busse, 3 Ont. L. Rep. 561.

The mere fact that the attorney of a company is present at a shareholders' meeting by the request of the president does not deprive of its privileged quality a statement made by one of the shareholders with regard to the incompetency of an employee of the company. Broughton v. McGrew, 5 L.R.A. 406, 39 Fed. 672, per Woods, J.

"A master about to dismiss a servant may not call in a witness to hear what is said, without losing the privilege which his words would otherwise have on such an occasion." Taylor v. Hawkins, 16 Q. B. 308, 15 Jur. 746, 20 L. J. Q. B. N. S. 313, per Lord Campbell (servant was charged with embezzlement in the presence of a neighbor and friend of the employer).

The occasion was held to be prima facie privileged, where a master turned away a maid servant whom, upon his returning unexpectedly to his house, he found under circumstances which created a strong suspicion that she had been guilty of immoral conduct with another of his employees, and declared his reasons for the dismissal in the presence of two friends who happened to enter the house at the same time with him. Watson v. Burnet, 24 Dunlop, B. & M. 494. Where a maidservant in a hotel was accused by a guest, in the presence of her mistress and a fellow servant, of stealing an article belonging to him while she was cleaning his room, there was held to be no privilege. Reid v. Moore, 20 Sc. Sess. Cas. 4th series, 712. But, *quære* as to this decision.

2. Language going beyond the reasonable requirements of the occasion.

A communication which would have been privileged if it had been nothing more than a simple statement of facts may sometimes be actionable if it is couched in language of excessive violence.

In Fryer v. Kinnersley, 15 C. B. N. S. 422, 10 Jur. N. S. 441, 33 L. J. C. P. N. S. 96, 12 Week. Rep. 155, 9 L. T. N. S. 415, the defendant, on the recommendation of one E., hired F. in the capacity of a gardener. Being dissatisfied with him after some months, he gave him notice to leave his service, and called upon E. to recommend him another gardener in his place. Shortly afterwards the defendant wrote to E. a letter, complaining of F.'s conduct, in which letter, among other things, he said: "On Saturday I had another scene with F. in my garden. He was extremely violent; came towards me several times with an open clasp knife in his hand, and eyes starting from the sockets with rage,—a perfect raving madman. I was, fortunately, accompanied by my upper servant. He accused me of having opened a letter of his, etc. I think it right that you should be informed of F.'s violent conduct, as you might unwittingly recommend him without being aware of his temper and faults." In consequence of this letter, E. refused to employ F. in the society's gardens, as he before had done, and but for the letter would have done again. It was held that, assuming that the relation betwen the defendant and E. was such as to warrant a communication on the subject of F.'s conduct, the above letter was excluded from the privilege by reason of excess. It should be observed that on the trial the judge had left it to the jury to say whether the defendant was actuated by malicious motives, and malice had been negatived by the verdict. The decision of the

court of review was rendered in dealing with a motion for a nonsuit, made on the ground that the letter was privileged. As the element of express malice had been excluded from the case by the finding of the jury, it is clear that the conclusion that the defendant was liable necessarily implies that the doctrine applied was that which is stated in the text. But the case is sometimes referred to as one which embodies the doctrine that violent language is evidence of malice.

Plaintiff's daughter had been in defendant's service for some time, and, after she had left, defendant's wife went to where she was staying, at her sister's, and claimed some things as her property, as being taken by the girl. The girl and her sister went and told this to their father, the plaintiff; and the plaintiff, his wife, the girl, the sister, and the sister's husband, went together to defendant. Plaintiff said he came to inquire about the charge against his daughter. Defendant said she had been stealing all the time she had been at his house. Plaintiff then said that, if so, defendant should not have kept her in his service. Defendant then said that plaintiff was a thief, and that his family were all thieves, and that they were all tarred with the same stick. It was held that this was not a privileged communication, and that proof of express malice was not required to enable the plaintiff to recover. Miller v. Johnston, 23 U. C. C. P. 580. In the judgment of the court, it was remarked: "It would be, we think, going beyond all the authorities to hold the defendant protected on legal principles. He is represented as reiterating his charge against the plaintiff in a needlessly vehement and offensive manner; not calmly nor fairly stating an express charge in which he considered the plaintiff to be implicated or mixed up, but rather as making the charge against the daughter a ground for a general attack on the family." This circumstance is also competent evidence of malice. See II., 1, *infra*.

3. Statements made without a reasonable belief in their truth.

If the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable ground for his belief. Clark v. Molyneux, L. R. 3 Q. B. Div. 237.

"The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case bona fides is always to be presumed." Jenoure v. Delmege [1891] A. C. 73.

4. Repetition of statement.

In some instances a statement which was privileged when first made becomes actionable if it is made a second time.

In Blackburn v. Blackburn, 4 Bing. 395, 1 Moore & P. 33, Park, J., said: "Although the first communication might be privileged, yet the defendant had no right to reiterate the slander, or to continue vilifying the character or reputation of the plaintiff. If a person give a character of a servant, it is at first privileged; but if he afterwards say he will ruin such servant, it is not so." A verdict for the plaintiff was allowed to stand, although the jury had found that the defendant was not actuated by express malice.

See also Missouri P. R. Co. v. Behee, 2 Tex. Civ. App. 107, 21 S. W. 384, III., c, *infra*.

5. Information imparted solely for the benefit of the maker of the instrument.

In Over v. Schiffling, 102 Ind. 191, 26 N. E. 91, a letter charging the plaintiff with having obtained goods by fraudulent means, and requesting the employer to retain the price out of any money which he owed to the plaintiff, was held not to be a privileged communication, for the reason that the information it professed to contain was volunteered, and the purpose for which it was conveyed to the servant's employer was "solely for the benefit of the writer, and was not intended to benefit the employer by giving him, in good faith and for a just purpose, information necessary for his protection against a knavish servant."

k. Privilege avoided by proof of express malice.

Where the defamatory statement in question is one which does not belong to the class of those which are prima facie privileged, it is obviously immaterial whether express malice is proved or not. Accordingly, the mere fact that the jury have found that the defendant was not actuated by such malice in making a nonprivileged statement does not constitute a sufficient reason for setting aside a verdict in favor of the plaintiff. Blackburn v. Blackburn, *supra*.

But a servant cannot maintain an action for the damage caused by a privileged statement, unless he is able to prove affirmatively that it was maliciously made.

In Edmonson v. Stevenson, Buller, N. P. 8, Lord Mansfield laid down the rule which has been followed ever since, *viz.*, that, in an action for defamation in giving a character of a servant, "the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved."

"I take the law to be well settled, that, where a master is applied to for the character of a servant, the former is not called upon, in an action, to prove the truth of any aspersions thrown out by him against the latter, but that it lies upon the servant to prove the falsehood of the aspersions thrown out against him. In such case the master is justified, unless the servant prove

express malice in the act of the former." Chambre, J., in Rogers v. Clifton, 3 Bos. & P. 587.

That the onus of proving express malice lies in the servant is also laid down in the following cases: Fountain v. Boodle, 3 Q. B. 5, per Lord Denman, Ch. J.; Child v. Affleck, 9 Barn. & C. 403; Pattison v. Jones, 8 Barn. & C. 578; Taylor v. Hawkins, 16 Q. B. 308; Harris v. Thompson, 13 C. B. 333; Jackson v. Hopperton, 16 C. B. N. S. 829; Pullman v. Hill [1891] 1 Q. B. 524; Innes v. Adamson, 17 Sc. Sess. Cas. 4th series, 11; Wells v. Lindop, 15 Ont. App. Rep. 695; Dewe v. Waterbury, 6 Can. S. C. 143; Brown v. Norfolk & W. R. Co. 100 Va. 619, 60 L.R.A. 470, 42 S. E. 664.

The reason why a master who, when applied to, gives the character of a servant, is not bound to substantiate by proof what he says, has been thus stated by Lord Alvanley, Ch. J.: "If it were to be understood that, whenever a master gives a bad character to a servant who has quitted his service, he may be forced by the servant, in justification of his conduct as a master, to prove the particulars which he has stated respecting the servant, it would be impossible for any master so understanding the law (at least, with any regard to his own safety) to give any character but the most favorable to a servant, and consequently impossible for a servant, not entitled to the most favorable character, to obtain any new place." Rogers v. Clifton, 3 Bos. & P. 587.

The doctrine of the Scotch courts is that, where a servant seeks to recover damages for a statement, imputing misconduct to him, which has been made by his master, in discharge of a duty, to the proper authority, he must put in issue, not only that the statement was made maliciously, but also that it was made without probable cause. Hill v. Thompson, 19 Sc. Sess. Cas. 4th series, p. 377 (entry by captain in ship's log, in compliance with a provision in the merchant shipping act of 1854, charged an officer with wilful disobedience); Croucher v. Inglis, 16 Sc. Sess. Cas. 4th series, 774; (minister of parish in which the pursuer resided had, by letters written by him to the inspector of poor of another parish and to the board of supervision, represented the plaintiff as grossly unfit to have the charge of pauper children boarded with him by the parochial board of the second parish).

"It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the nonexistence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its nonexistence." Somerville v. Hawkins, 10 C. B. 583; S. P. Taylor v. Hawkins, 16 Q. B. 308, per Erle, J.; Harris v. Thompson, 13 C. B. 333.

The defendant cannot object to a charge which is substantially to the effect that, unless the jury are satisfied that the defendant availed himself of the occasion to make the statement maliciously, they should find for defendant. Wells v. Lindop, *supra*, referring to rule laid down by Bramwell, L. J., in Clark v. Molyneux, L. R. 3 Q. B. Div. 237.

Slight evidence of malice may be left to the jury. Fowles v. Bowen, 30 N. Y. 20.

In the absence of such evidence, "it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant. Otherwise there might be a question for the jury in every case where a master, however fairly, gives the character of a servant; and, if they conceived that there was malice lurking in the mind of the master, they might give a verdict for the plaintiff on the ground, merely, of the communication having taken place; and this would apply to all cases in which the occasion has been said to repel the presumption of malice." Taylor v. Hawkins, 16 Q. B. 308, per Lord Campbell, Ch. J. The same doctrine is laid down in Kelly v. Partington, 4 Barn. & Ad. 700, Caulfield v. Whitworth, 18 L. T. N. S. 527; Tench v. Great Western R. Co. 33 U. C. Q. B. 8.

If such evidence is forthcoming, "the question is to be left to the jury whether the defendant spoke the words with an honest belief that the imputation conveyed by them was true, or from motives of malice or ill-will." Jackson v. Hopperton, 16 C. B. N. S. 829, 2 Week. Rep. 913, 10 L. T. N. S. 529, per Erle, Ch. J. See also Kelly v. Partington, *supra;* Dixon v. Parsons, 1 Fost. & F. 24; Keight v. Hill, 43 J. P. 176; Hemmens v. Nelson, 138 N. Y. 517, 20 L.R.A. 440, 34 N. E. 342; Gassett v. Gilbert, 6 Gray, 94; Dale v. Harris, 109 Mass. 193; Hollenbeck v. Ristine, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355.

The existence of malice may be made out either from the language of the communication itself, or by such extrinsic evidence as may be afforded by the relation of the parties, the circumstances attending the publication, or the conduct and expressions of the defendant. Wright v. Woodgate, 2 Cromp. M. & R. 573, Tyrw. & G. 12, per Parke, B; Gassett v. Gilbert, *supra.*

In Indiana it is provided that the document which an employer is required by statute to furnish, showing the cause of the discharge of a servant, shall "never be used as the cause for an action for slander or libel" against the employer. Horner's Anno. Stat. § 5206r, 3. See I., b, *supra.*

l. Circumstances from which malice may be inferred.

In cases involving the right of a servant to recover damages for a statement prejudicial to his character, the existence of malice has been discussed with reference to the following circumstances:

(1) That the statement made by the defendant was untrue. Evidence which goes no further than to prove that the defamatory words were untrue is not sufficient to

warrant the inference of malice. Fountain v. Boodle, 3 Q. B. 5; Fowles v. Bowen, 30 N. Y. 20.

Such an inference, however, may be drawn where it is shown that the defendant knew that the words were untrue. Fountain v. Boodle, 3 Q. B. 5, 2 Gale & D. 455, per Lord Denman.

That malice is implied where the character given is false, to the knowledge of the defendant, is also the doctrine accepted in Scotland. Anderson v. Wishart, 1 Murray, 429.

When the statement is shown to have been a false one, it is incumbent on the defendant to answer the prima facie case of malice thus established by proving that the statement was made with an honest belief that it was true; and, if he fails to do so, a verdict in favor of the plaintiff is justifiable. Fountain v. Boodle, 3 Q. B. 5, per Patteson, J.; Wells v. Lindop, 14 Ont. Rep. 275.

It is primarily a question for the jury, whether the defendant honestly believed that what he stated was true, and whether he acted in what he considered the discharge of his duty. Scarll v. Dixon, 4 Fost. & F. 250.

In Gassett v. Gilbert, 6 Gray, 94, the court thus laid down the law: "The question of good faith on the part of the defendants, and their honest belief in the truth of the statements put forth by them, are matters of fact which are to be determined exclusively by the jury. Although it is not necessary for the defendants to prove the truth of the statements contained in the notice, in order to justify the publication, yet proof of their falsity is admissible on the part of the plaintiff to show that the defendants did not act on an honest belief in their truth."

(2) That the statement was made voluntarily, and not in response to an application from an interested party. It has already been pointed out that, according to the great preponderance of authority, this fact does not take a communication out of the prima facie privileged class. (II., h, *supra*.) But its competency as evidence of malice is also recognized.

In Rogers v. Clifton, 3 Bos. & P. 587, where the defendant had sought out a former employer of the plaintiff and told him that the plaintiff, after being dismissed, had refused to quit the house until he had received a month's wages, to which he conceived himself to be entitled, the court held that this single act of impertinence on the servant's part did not justify his officious interference. "I think," said Chambre, J., "the inducement to Sir Gervas Clifton to do all this was the quarrel which had taken place between himself and the plaintiff at parting. Considering, therefore, as I do, the quarrel as the real cause of the charge made against the plaintiff, and seeing so much officious interference on the part of the defendant, I am quite clear we ought not to grant a new trial."

A, having discharged his servant, and hearing that he was about to be engaged by B, wrote a letter to B, and informed him that he had discharged him for misconduct. B, in answer, desired further information. A then wrote a second letter to B, stating the grounds on which he had discharged the servant. In an action by the servant against A for a libel contained in this letter, it was held that, assuming the letter to be a privileged communication, it was properly left to the jury to consider whether the second letter was written by A bona fide, or with an intention to injure the servant. Pattison v. Jones, 8 Barn. & C. 578. Littledale, J., said: "Upon the question, whether a master who has written a libel in giving the character of a servant has acted bona fide or not, it may make a very material difference whether he volunteered to give the character, or had been called upon so to do. At all events, when he volunteers to give the character stronger evidence will be required that he acted bona fide than in the case where he has given the character after being required so to do."

The fact that the servant's former employer, when writing a letter about other matters to a person who had hired the servant on the strength of a recommendation given by the writer, alluded to the servant, and induced inquiries about him, is not evidence of malice. Gardner v. Slade, 13 Q. B. 796. Wightman, J., said: "It seems to me precisely the same thing as if the questions then put had been put to Mrs. Slade [the defendant's wife] when the first inquiry as to character was made. The answers would then have been privileged, unless malice had been shown; and I think that, spoken as they were, they afford no evidence of malice."

For a case in which malice was held not to be inferable, although the communication was voluntary, see Child v. Affleck, 9 Barn. & C. 403.

(3) That the defendant imparted to a third person information as to misconduct of which he believed the plaintiff to have been guilty after he had left his service. Such a communication was denied to be an "officious interference," betokening malice, where it had been made in response to an inquiry, and also voluntarily conveyed to parties from whom the defendant had received the servant with a good character. Child v. Affleck, 4 Mann. & R. 338, 9 Barn. & C. 403. "It has been contended," said Bayley, J., "that the letter should not have contained the statement of the alleged misconduct after the plaintiff left the defendant's service. But I think that Mrs. Affleck would have stopped short of her duty in withholding that information, and that she was not bound to disclose the names of the persons from whom she received it." With respect to the writing of the letter to the person from whom the servant had brought a character, the learned judge remarked that it was not a malicious act to make a communication which might have the effect of preventing the former character from being set up again as the true one.

(4) That the prejudicial statement made

by the defendant was inconsistent with a favorable one previously made by him. Macdonald v. M'Coll, 3 Sc. Sess. Cas. 5th series, 1082.

(5) That the communication was made to an improper person.

That a master had told each of two servants, in the absence of the other, that he was discharging them because both had been robbing him, was denied to be evidence of malice. Manby v. Witt, 18 C. B. 544. Jervis, Ch. J., remarked that the defendant was not only right in pursuing the course he did, but that he was bound, when he accused one of the plaintiffs of robbing him, to tell her with whom she was charged with having acted; and that, when he charged the other plaintiff with robbing him, he was bound to name his accomplice.

The mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted bona fide in making the charge, or been influenced by malicious motives. Toogood v. Spyring, 1 Cromp. M. & R. 181, per Parke, B.

(6) That a communication admitted to be privileged as regards the persons to whom it was addressed was transmitted in such a manner that other persons might read it.

In Sadgrove v. Hole [1901] 2 K. B. 1, it was held that, though the mere fact that a communication had been sent by postcard, instead of by a closed letter, would generally be evidence of malice, yet, in the present case, inasmuch as the communication would not be understood by the persons through whose hands it passed as referring to the plaintiff, there was no evidence of express malice to avoid the privilege.

See also Tench v. Great Western R. Co. 33 U. C. Q. B. 8, Reversing 32 U. C. Q. B. 452 (for facts, see III., a, *infra*).

(7) Or that it was transmitted to an unnecessarily large number of persons.

A baker published in a newspaper a statement to the effect that the plaintiff, one of his drivers, had "left my employ and taken upon himself the privilege of collecting my bills," etc. It was held that no exception lay to a ruling that the publication was privileged, if made in good faith, and if found by the jury to be a reasonable mode of giving the notice. Hatch v. Lane, 105 Mass. 394. The jury found this to be a reasonable mode of giving notice, thus negativing express malice.

But to give a similar publicity to the discharge of a cook or butler would be without justification. King v. Patterson, 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705.

In most instances, however, the question whether the publication was improper *quoad personam* has been treated as having a direct bearing upon the question whether the occasion was prima facie privileged. See II., j, 1, *supra*.

(8) That the defendant included in the document complained of statements or language not warranted by the occasion which led to its being published. Malice may be inferred where the terms of the document went beyond the limits of what was necessary and proper to accomplish the legitimate purpose of protecting the defendant and parties for whose information the document was published. Gassett v. Gilbert, 6 Gray, 94 (for facts, see II., h, 10, *supra*.)

In Taylor v. Hawkins, 16 Q. B. 308, 15 Jur. 746, 20 L. J. Q. B. N. S. 313, it was held that the defendant did not "go beyond what might be said by a person honestly wishing to tell the whole truth," where, in reply to the plaintiff's brother, who had inquired of the defendant why he had treated the plaintiff so, and was keeping him out of a situation, he said: "He has robbed me; and I believe for years past;" and added that he concluded so from the circumstances under which he had discharged the plaintiff.

See also Brown v. Norfolk & W. R. Co. 100 Va. 619, 60 L.R.A. 472, 42 S. E. 664, III., c, *infra*.

This element has also been treated as one which takes a statement altogether out of the privileged class. See II., j, 2, *supra*.

(9) That the defendant made a permanent record of the defamatory matter in such a manner as to render it constantly accessible to a large number of persons.

In Lawless v. Anglo-Egyptian Cotton & Oil Co. L. R. 4 Q. B. 262 (see II., h, 13, *supra*), it was intimated, *arguendo*, that there would have been independent evidence of malice for the consideration of the jury if the statements complained of (which had been inserted in a report made by the directors to the shareholders of the defendant company) had been entered in the books of the company to stand for an indefinite period as a record, that an accusation injurious to the character of the plaintiff as an employee had been brought against him.

(10) That the circumstance which constituted the subject-matter of the statement complained of had occurred a long time before it was made.

In a case where a letter, reflecting on the conduct of plaintiff in his management of a college, had been published in a newspaper, as part of the contents of a report of an inspector of charities, it was held that comments upon it were only material as evidence of malice. Cockburn, Ch. J., laid it down that the mere fact that the information was old did not show malice, in point of law, the jury being entitled to consider whether the bad system condemned in the letter had been perpetuated. Cox v. Feeney, 4 Fost. & F. 13.

(11) That the defendant reiterated the defamatory statement after he had admitted it to be untrue. See Missouri P. R. Co. v. Behee, 2 Tex. Civ. App. 107, 21 S. W. 384, the facts of which are given in III., c, *infra*.

This circumstance has also been viewed as one which takes a statement altogether out of the privileged class. See II., j, 4, *supra*.

(12) That the defendant refused to tell.

fully the reasons for which he was dismissed. Such a refusal may or may not be evidence of malice, according to circumstances.

In Manby v. Witt, 18 C. B. 544, where it was held that a master was justified in telling each of two servants whom he accused of theft that the other was regarded as his accomplice, it was remarked by Jervis, Ch. J., during the argument of counsel, that, if he had not done this, "he would have very imperfectly performed his duty, inasmuch as he would be suppressing the party's means of answering the charge; and so he might have laid himself open to an imputation of malice."

On the other hand, where the plaintiff had been dismissed for misconduct by the directors of one company and the communication in question had been made by one of those directors to the board of another company of which he was also a director, it was held that the defendant's refusal to go into the charges in the presence of the plaintiff and his attorney was consistent with bona fides, and therefore not evidence of malice which could properly be submitted to the jury. Harris v. Thompson, 13 C. B. 333. Jervis Ch. J., said: "He might fairly say that it was enough for him, as a director, to make a general charge, and that it was no part of his duty to furnish evidence." He had a right and a duty to put his codirectors in possession of the facts known to him; but he was not bound to produce strict proof of the charges on which the other company was acting in dismissing the plaintiff.

(13) That the defendant refused to grant reasonable facilities for investigating the truth of his assertion. As where he refused to point out an entry in a book, when that became the means of proving or disproving a charge which the defendant had made. Kelly v. Partington, 4 Barn. & Ad. 700.

(14) That the defamatory statement was couched in more violent and intemperate language than the occasion called for.

In Cowles v. Potts, 34 L. J. Q. B. N. S. 247, the jury negatived malice in a case where the defendant had declared that he would not keep a big rogue like the plaintiff in a certain trust, and that the plaintiff's roguery was so great that he was not fit to be near his employer's young son.

As to the effect of the same circumstance in avoiding the privilege altogether, see II., i., *supra*.

(15) That the statement was overcharged or exaggerated, or the facts distorted. Blake v. Pilford, 1 Moody & R. 198 (in charge to jury by Taunton, J.).

Where a master of a discharged servant, in answering a letter from her attorney, demanding the balance of her wages, stated that he had no doubt she had taken certain articles which had been missed from the house, the question of malice was held to be for the jury to decide. Laidlaw v. Gunn, 17 Sc. Sess. Cas. 4th series, 394.

(16) That the defendant, on an occasion subsequent to that upon which the statement complained of was made, used language which evinced an unfeeling recklessness as to the effect of that statement upon the ability of the plaintiff to earn an honest livelihood. As where the master, when requested to afford reasonable facilities for investigating the truth of his statement, remarked, "What is that to me?" when it was suggested that a female servant might have been driven to prostitution. Kelly v. Partington, *supra*.

(17) That the defendant employed an improper expedient for the detection of the crime with which he afterwards charged the plaintiff.

The mere fact that the cashier of a bank had marked coins for the purpose of detecting an unknown employee, who was committing thefts, is not evidence which is competent to prove that he was actuated by malice in subsequently accusing a boy of theft in the presence of his father and a bookkeeper. Livingston v. Bradford, 115 Mich. 140, 73 N. W. 135.

(18) That the defendant, having pleaded justification, introduced no evidence in support of the plea.

The only cases in which a jury is entitled to consider this circumstance as evidence of malice, in aggravation of damages, are those in which the communication was not privileged. Wilson v. Robinson, 7 Q. B. 68.

III. Blacklisting of servants.

a. Generally.

In several of the reported cases the remedial rights of servants who have suffered damage from the publication of their names in those circulars or notices which are now commonly known as "blacklists" have been determined with reference to the principles of the law of libel. But, as the subject has been dealt with from other standpoints also, and a peculiar interest attaches to it, as one of the characteristic incidents of the conditions created by the industrial developments of modern times, it will be of interest to the profession in bringing together all the decisions, English, Canadian, and American, in which its various judicial aspects have been discussed.

In its broadest sense, the expression "blacklist" may be said to denote a document by means of which A, either voluntarily, or, as is most frequently the case, in pursuance of a previous arrangement, communicates to B certain information about C which is likely to prevent B from entering into business relations with C. This description is comprehensive enough to cover the posting of workmen by labor organizations. But this aspect of "blacklisting" is more appropriately treated under the head of trade unions. The only species of "blacklist" with which we shall deal in this article is that which is issued by an employer of labor, with the object of rendering it more difficult for the persons mentioned in it to procure work. The cases relating to each of the two forms in which such a "blacklist" is

published are reviewed in the following subdivisions.

b. Notices exchanged between different employers in the same line of business.

It is to documents of this kind that the term "blacklists" is most commonly applied. In State ex rel. Scheffer v. Justus, 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759, the court observed: "Conceding that the word 'blacklist' . . . has no well-defined meaning in the law, either by statute or judicial expression, the general understanding of the term is that it has reference to the practice of one employer presenting to another the names of employees for the purpose of furnishing information concerning their standing as employees."

The cases in which their legal effect has been discussed may be conveniently arranged under four distinct heads, which have reference to the nature of the remedy sought by the servant.

1. Actions for libel.

Under the general principles of the law of libel, it is clear that, where a notice showing the unfitness of a discharged servant for the position he held is sent by his former employer to other employers in the same line of business, without malice and for the sole purpose of enabling them to avoid the employment of unsuitable persons, the publication must be deemed as privileged,—as being made bona fide upon a subject-matter in which the party communicating the information has an interest, or in reference to which he has a duty, to persons having a corresponding interest or duty.

In Wabash R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003, a declaration which alleged that the appellant railway company "blacklisted" the appellee, by informing another railway company that he was a "labor agitator," was held not to describe such a malicious interference with the appellee's business as would create a liability at common law. An analysis of the judgment of the court discloses the following grounds for its decision: (1) That there was no averment that a charge of this nature was calculated to injure the appellee, or that any odium attached to members of such orders, or to labor agitators; (2) that the charge was not libelous *per se*, as implying the use of unlawful or improper means to promote the interests of laboring men; (3) that no connection was shown between the alleged statement and the failure of the appellee to obtain employment, or his loss of any position; (4) that, for aught that appeared in the declaration, the statement made concerning the appellee was true, and, if it was true, it could not render the appellant liable; (5) that the information given to the second railway company was not volunteered by the appellant, but was given in answer to an inquiry.

The general phraseology used in the text to express the quality of a privileged communication is taken from the judgment of Lord Campbell in Harrison v. Bush, 5 El. & Bl. 344.

On the other hand, the privilege of the occasion will not protect an employer who inserts in a notice of this description a defamatory statement which he knows, or should know, to be false.

An action was held to be maintainable for sending the following printed circular to a number of employers following the same business as the plaintiff's master: "John Lally, an apprentice in my shop, not out of his time, quit work without cause on August 1. If he is working for you now, or applies for work, you will understand the situation. Article 11 of the by-laws covers the case." Lally v. Cantwell, 40 Mo. App. 44 (former appeal 30 Mo. App. 524 where it was held that the petition stated a good cause of action). The court said that the word "quit" implied "wrongfully quit," a false statement, as the plaintiff had not been legally bound as an apprentice, and could quit at any time.

2. Actions for conspiracy.

In the absence of proof that the agreement in pursuance of which the "blacklist" in question was sent out by his employer was entered into for a malicious purpose, the inclusion in it of a true statement, to the effect that a certain servant participated in a strike, does not furnish any ground for an action for conspiracy, although, as a result of the "blacklisting," he was unable to procure or retain work under other employers. Jenkinson v. Nield, 8 Times L. R. 540. The court held that the action came within the principle of Mogul S. S. Co. v. McGregor [1892] A. C. 51. There was no evidence, it was said, that the defendants were actuated by any other motive than self-interest. If that were so, and they were not desirous of injuring the plaintiff, their conduct was not actionable.

In Atkins v. W. A. Fletcher Co. 65 N. J. Eq. 658, 55 Atl. 1074, the members of a striking labor union attempted to procure an injunction for the purpose of preventing interference by the defendant with "picketing" by the members of the union. The bill alleged that the members of a certain trades association, including the defendant, have conspired together to prevent the employees discharged by defendant for striking from receiving employment by any of the members of the association. This allegation was declared to be based upon the erroneous idea that employers have not the right to combine freely to refuse employment to any kind or class of workmen precisely as employees have a right to combine freely to refuse to be employed by any employer who sees fit to employ workmen of whom they disapprove, or in any respect to conduct his business contrary to their views.

In Worthington v. Waring, 157 Mass. 421,

20 L.R.A. 342, 34 Am. St. Rep. 294, 32 N. E. 744, the petitioners, who had been employed as weavers in a mill owned by a corporation of which the defendants were the treasurer and superintendent, left their work after their demand for higher wages had been refused. The defendants then sent their names on a "blacklist" to the officers of other mills in the vicinity, informing them that petitioners had left on a strike. The petition alleged that the defendants and the officers of the other mills had thereupon conspired together not to employ the petitioners, with intent to compel them either to go without work in the vicinity, or to go back to work at their former place at such wages as that corporation should see fit to pay them. It was held: (1) That striking employees whose names are put by their employers on a "blacklist" which is sent to other employers in the same city, with whom a combination has been made by an agreement not to employ "blacklisted" employees of other employers, cannot unite in an action against the employers; but, if any right of action exists, it is in favor of each one separately; and (2) that equity will not sustain the "blacklisting" of striking employees in order to prevent their employment by other members of an employers' association; nor will it compel the former employers to reinstate them, or procure for them employment with other persons; but their remedy, if any, is in an action at law.

In Bradley v. Pierson, 148 Pa. 502, 24 Atl. 65, an action was brought by striking employees for damages resulting from their failure to obtain employment, in consequence of the distribution of "blacklist" circulars by their former employer. But, as it appeared that an association of which the employees were members approved of their action in quitting, and paid them wages while they were out of work, the court said that the plaintiffs could not recover on the facts, and that it was therefore useless to discuss the law of the case.

Compare the cases cited in I., a, *supra*, as to the liability of employers who agree not to hire servants who have not received "clearance cards."

The general principle embodied in Buffalo Lubricating Oil Co. v. Standard Oil Co. 106 N. Y. 669, 12 N. E. 825, Affirming 42 Hun, 153, that a libel, published in pursuance of a conspiracy to ruin the business of a rival, is actionable, may also be referred to in this connection.

3. Actions on the case.

The effect of several decisions seems to be that, even if a statement inserted in a certain "blacklist" was not libelous, and that agreement in pursuance of which it was circulated was not an unlawful conspiracy, a servant who has suffered injury from its publication is entitled to recover damages in a special action on the case, if it was false, and its falsehood was known, either actually or constructively, to the employer who procured its insertion.

In Blumenthal v. Shaw, 23 C. C. A. 590, 39 U. S. App. 490, 77 Fed. 954, the facts were as follows: Prior to the transfer of a business by M. to B. the defendant, a firm resident in another state, S., the plaintiff, a minor, and S.'s father entered into an agreement with M. whereby S. entered into the service of M. as an apprentice for a term of years. The parties regarded the agreement as though it were a valid statutory indenture of apprenticeship, although in fact it was not. When B. took over the business S. remained with them under the agreement. Subsequently S. was summarily discharged by P. the general foreman of the defendant. P. then sent out notices to other manufacturers in the trade in Wilmington, stating that S., an apprentice, had left without cause, and requesting that S. should not be employed. These notices were sent out in pursuance of an understanding among the manufacturers in the city that none of them should employ an apprentice belonging to another concern. It was shown that S. had thereafter been dismissed from two factories where he had been employed, because of these notices. It also appeared that S. had applied to P. for "discharge papers," and had been refused. S. brought a special action on the case against F. B. & Co. to recover damages for the injury which he had sustained from being prevented from obtaining employment, and from being dismissed from places where he had procured work. It was held: (1) That P., as the representative of absent principals who had invested him with a general agency, had implied authority to do those things in the course of the business which were appropriate and demanded by the occasion; (2) that the acts of P., resulting from his mistake in assuming that S. was bound as an apprentice during the remainder of his minority, were binding upon the defendant; (3) that the theory of the defendant that S.'s alleged grievance was the publication of a libel, or the utterance of slander by the defendant's agent, was untenable; and (4) that, as S. had been emancipated by his father, he was entitled, after he became of age, to maintain an action against the defendant to recover damages for their tortious act.

In Willis v. Muscogee Mfg. Co. 120 Ga. 597, 48 S. E. 177, it was laid down that, where several employers in a city make a rule that employees who leave without cause must give notice, and continue working during the period covered by the notice, and agree to report to each other all employees who leave without compliance therewith, and, except in special cases, not to employ men so reported, such agreement, although voluntary, and not enforceable, is not, in the absence of malice, an unlawful combination or conspiracy which would make such companies liable to men properly reported for a violation of the rule; but that an employer who wrongfully reports an employee, and thus damages him by preventing his getting work, is liable. The court took the position that "an employer has a right to select his employees according to what standard he

may choose, though such standard be arbitrary or unreasonable. An employer certainly has a right to refuse to employ anyone whom he knows to have left another employer in violation of a reasonable rule which both employers are seeking to enforce." Accordingly, "an agreement among a number of employers to report such violations, and thus assist each other in the selection of their employees, is not unlawful, though coupled with an agreement to employ no one so reported." (See headnote written by the court.) In the opinion we find the following remarks: "While the corporation which entered into the agreement above described had a right to do so, they owed a duty to their employees not to abuse that right. If one of them falsely reported an employee, to his injury, such employee may recover for the tort. The combination of the employers was a powerful machine for the accomplishment of lawful results, but it was capable of misuse to the injury of innocent employees. When a company so misuses it, such company must take the consequences. . . . If the employer who promulgated the regulation made a mistake in its construction, and applied it to a state of facts which did not come within it, the employee injured by such mistake has a right to recover. The employer cannot arbitrarily place an employee upon the blacklist, as having violated the regulation, when in point of fact the employee's conduct did not come within the terms of such regulation and he therefore had not violated it." As the plaintiff had introduced evidence from which the jury might properly find that the plaintiff had been discharged, or had left the service of the defendant, because the latter had insisted on a change in his contract of employment, and that the rule, therefore, did not apply to him, it was held to be error to grant a nonsuit.

In Hundley v. Louisville & N. R. Co. 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429, it was laid down that, where several railway companies have made an agreement that no person discharged for good cause by any of the parties to the agreement shall be employed by any of the others, it is an actionable wrong for one of those companies to enter upon its records a false statement as to its reasons for discharging an employee. It was held, however, that the declaration in this case was defective, as not containing any averment that the servant had sought, and been refused, employment in consequence of the wrongful act, the reason assigned being that an agreement of this character is not legally injurious to the servant unless it has actually been carried out to his damage.

4. Suits for an injunction.

One of the Federal courts of the United States has refused to grant an injunction to restrain a company from discharging its employees on the ground that they were members of a certain union, from placing their names on a "blacklist," from maintaining that "blacklist," and from permitting other employers to inspect it. Boyer v. Western U. Teleg. Co. 124 Fed. 246. After expressing its opinion that it was not unlawful to discharge the employees because they belonged to the union specified, the court proceeded thus: "Suppose a man should file a bill alleging that he belonged to the Honorable and Ancient Order of Free Masons, or to the Presbyterian Church, or to the Grand Army of the Republic; that his employer had discharged him solely on that account; that he had discharged others of his employees, and intended to discharge all of them for the same reason; that he kept a book which contained all the names of such discharged persons, and set opposite the name of each discharged person the fact that he had been discharged solely on the ground that he belonged to such organization; and that he had given such information to others, who refused to employ such persons on that account. Is it possible a court of equity could grant relief? If so, pray on what ground? And yet that is a perfectly parallel case to this as made by the bill."

c. Notices circulated among the coemployees of the persons to whom they relate.

Another kind of "black list" is that which employers who hire large numbers of servants circulate either among all their servants indiscriminately or among such superior employees as are invested with authority to engage and discharge subordinate servants. The right to publish such a document has so far been tested only in actions for libel, and it has uniformly been held that the privilege of the occasion is prima facie an effectual bar to a claim for damages based on this ground.

In Hunt v. Great Northern R. Co. [1891] 2 Q. B. 189, 60 L. J. Q. B. N. S. 498, 55 J. P. 648, it appeared that, after the plaintiff had been dismissed from the defendant railway company's service on a charge of gross neglect of duty, the railway company published his name in a printed monthly circular addressed to all its servants, stating the fact that plaintiff had been dismissed and the reason therefor. The communication was unanimously held to be a privileged one. "Can anyone," said Lord Esher, M. R., "doubt that a railway company, if they are of opinion that some of their servants have been doing things which, if they were done by their other servants, would seriously damage their business, have an interest in stating this to their servants? And how can it be said that the servants to whom that statement is made have no interest in hearing that certain things are being treated by the company as misconduct, and that, if any of them should be guilty of such misconduct, the consequence would be dismissal from the company's service? I cannot imagine a case in which the reciprocal interest could be more clear." It was argued that the plaintiff's name need not have been men-

tioned by the defendants, and that the privilege of the occasion was lost because his name was mentioned. This contention was rejected. "It might possibly be," said Lopes, L. J., "that the mentioning of his name could be suggested as evidence of malice on the part of the defendants,—not that I think the suggestion could be maintained for one moment. But, at any rate, it could only be used as evidence to show that the defendants had abused the occasion, not that the occasion did not exist."

In Hebner v. Great Northern R. Co. 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128, the record of the reasons for a railway servant's discharge was made in one of the books of the corporation, kept for its own information, and the only publication complained of occurred when the record was communicated by one of the clerks employed by defendant in the office of the telegraph superintendent to another clerk; both of these persons being interested and both acting strictly within the line of duty, as being engaged in procuring the information necessary to enable them to fill out the card which was to be delivered to him, the plaintiff. It was held that there was no undue public dissemination of the contents of the book; and that there was nothing in the evidence which indicated that care was not taken to confine the information to persons who were directly interested, and whose duty it was to know the reason for plaintiff's dismissal from defendant's service.

Where a notice to the effect that a railway servant has been discharged for insubordination is posted in various rooms set apart for his fellow servants, but sometimes visited without authority by members of the public, the communication is privileged. M'Donald v. Board of Works, 5 Austr. Jur. Rep. 34.

In Missouri P. R. Co. v. Richmond, 73 Tex. 568, 4 L.R.A. 280, 15 Am. St. Rep. 794, 11 S. W. 555, it was held that, in the absence of actual malice, an action for libel would not lie against a railway company for the circulation of a "blacklist" among the superior officials who employed men upon its own line. The court said: "Looking to the public interests involved in the safe operation of railways, as well as the interests of their owners, it seems to us that one having reasonable ground to believe that a person seeking important position in that service was incompetent, careless, or otherwise unfit would be under such obligation to communicate his knowledge or belief to all persons likely to employ such unsuitable person in that business as would make the publication privileged if made in good faith."

See also *infra*.

Whether the servant can recover in any given instance on the ground of express malice is a question to be determined with reference to considerations similar to those which are controlling in all actions for defamation.

In Tench v. Great Western R. Co. 33 U. C. Q. B. 8, Reversing 32 U. C. Q. B. 452, it was held by six out of nine judges that the evidence showed a reasonable mode of publication, and no excess, such as to take away the privilege or show malice. Draper, Ch. J., one of those who took this view, argued thus: "The station master's offices, or the booking offices in the cases pointed out, appear to me proper places for the notice to reach those to whom it was addressed; and the caution which McGrath was directed to give the employees in regard to these placards shows a careful intent to do no more than was necessary to convey the information to those who ought to receive it. McGrath swears he did what he was ordered, and no more. I think there was no evidence of express malice to be submitted to the jury." Spragge, C., one of the dissenting judges, expressed the opinion that, in the circulation of the paper in question, much more was done than was sufficient to answer all the legitimate purposes of the occasion: "It was posted up, and kept posted up in some places for weeks, and in others for months, in offices of the company called private, but to which others than servants of the company obtained access, and there saw and read it, and in some of those offices in a conspicuous place, where it could be seen and read from the wicket at which the public purchased their tickets." Richards, Ch. J., also considered that the putting up of this notice in the offices of the company in such places as they could be seen by others than employees, without its being shown there was any paramount necessity therefor, and pasting it in the books of certain officers of the company, was independent evidence of malice, to go to the jury.

In Bacon v. Michigan C. R. Co. 66 Mich. 166, 33 N. W. 181, the plaintiff, a carpenter employed by the defendant company, when he was leaving a train in a hurry upon its arrival at the place where he lived, picked up by mistake a coat which was not his, leaving his own behind, and carried it with his tools to the company's shop, where he threw it across a bench. A few days later he was discharged for no assigned cause. In a subsequent issue of a "discharged list," sent out at intervals to all the agents of the company who were authorized to hire employees, his name was inserted with a memorandum to the effect that he had been discharged for stealing. It was held that there was evidence which would have justified the jury in finding that defendant was actuated by malice in fact, and that it was error to take the case from them.

In a certain issue of a "discharge list," circulated among all the agents of a railway company who had charge of the employment of its servants, it was stated that the plaintiff had been discharged for incompetency. In spite of his having drawn attention of the defendant's train master to the mistake, and obtained a written statement that he had not been discharged on this ground, the list was again issued without any correction, the result being that he was discharged several times upon different lines of railway operated by the company. It was held that the reissuance of the list after

the train master had notice of the falsity of the statement with regard to the plaintiff was a circumstance which justified the inference of malice. Missouri P. R. Co. v. Behee, 2 Tex. Civ. App. 107, 21 S. W. 384. On a previous appeal of this case, 71 Tex. 424, 9 S. W. 449, the ground upon which the judgment of the lower court had been set aside was that certain evidence had been improperly excluded.

Where an order discharging an employee of a railway company was circulated among his fellow employees, with the statement that he had been dismissed for intimating that an officer of the company had used insulting language in speaking of another officer, and that such intimation was untrue, it was held that the language used was not so violent or disproportioned to the occasion as to raise an inference of malice. Brown v. Norfolk & W. R. Co. 100 Va. 619, 60 L.R.A. 472, 42 S. E. 664.

d. Statutes with regard to blacklisting.

The present writer has no hesitation in expressing the opinion that the broader considerations of public policy point very decidedly to the conclusion that "blacklisting" should everywhere be greatly restricted, if not entirely prohibited, by legislation, in so far as it is concerned with the exchange of circulars or notices between different employers. It would, of course, not be expedient to enact any statute which would deprive employers altogether of the privilege of communicating information regarding the character of an employee to a person who is interested in ascertaining the truth; and there may be some difficulty in framing provisions which will leave this privilege intact, and at the same time afford adequate protection to employees. But it seems preferable on the whole to circumscribe the employer's rights to some extent, than to leave unchecked and unregulated a practice so essentially repugnant to the free institutions of Anglo-Saxon civilization as that of "blacklisting." The inevitable effect of this practice, when developed on a large scale, must be the subjection of a constantly increasing number of employees to disabilities and restrictions scarcely less oppressive than those to which servants were formerly subjected in England by statutory provisions long since obsolete.

In 5 Eliz. chap. 4, § 10, it was enacted that a servant in any of the various occupations specified should be liable to imprisonment, if he departed from the city or parish in which he had been employed, without obtaining an official testimonial stating that he was licensed to depart from his master and at liberty to serve elsewhere.

It is manifest that, if the practice of "blacklisting" is permitted to go on unchecked, the employers of our own times will be able, by private compacts, to place large bodies of employees in a position analogous to that which would result from the operation of such a statute, and to which they are still subjected by the laws of some of the countries of continental Europe. A passport system of the kind has always been found to be productive of serious evils, even when it is worked by public officials, and it must be immeasurably more dangerous to leave in the hands of private parties so formidable an instrument of potential tyranny, capable of being used, and, as human nature is constituted, certain to be used, in many instances, as a means of gratifying personal animosity or class hatred.

These considerations go far to justify the drastic action already taken by those American legislatures which have enacted statutes of which the general purport is that any corporation or individual who "blacklists" an employee, with the intent of preventing him from obtaining employment from any other person, is guilty of a penal offense: Colorado: 1 Mills's Anno. Stat. chap. 15, p. 487; Georgia: Code 1895, § 1873; Indiana: Horner's Anno. Stat. 1901, §§ 5206p, 5206q, 2; Iowa: Code 1897, §§ 5027, 5028; Kansas: Gen. Stat. (Dassler) 1901, Laws 1897, §§ 2421–2423; Minnesota: Laws 1895, chap. 174; Missouri: Rev. Stat. 1899, § 2166; Montana: Political Code 1895, §§ 3390, 3391; Penal Code 1895, § 656; North Dakota: Rev. Code 1899, § 7042; Oklahoma: Laws 1897, p. 144; Virginia: Hurst's Code 1898, § 3845b (Acts 1891, 1892, p. 976); Wisconsin: Rev. Stat. 1898, § 4466b.

By the statutes of Georgia, Indiana, Montana, Virginia, Wisconsin, and Iowa, it is expressly provided that they shall not be construed as prohibiting the employer from furnishing, when requested by a discharged employee to do so, a truthful statement of the causes for his discharge.

One of these statutes, *viz.*, that of Minnesota, has been pronounced to be constitutional.

In State ex rel. Scheffer v. Justus, 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759, it was contended that the statute was class legislation, having application only to corporations or partnerships, as distinguished from individual employers. But the court held that it had reference to all employers, whether corporations, partnerships, or individuals; that employers, as distinguished from employees, did not constitute a class within the constitutional prohibition; and that the act, being applicable to all members of the class, was not invalid because limited to that class. It was urged, in the second place, that an employer of labor has the natural right, under the Constitution, state and Federal, to give such advice and information as he desires with respect to his employees, whether they have been discharged for cause or without cause, or whether they have voluntarily left the employment. The court replied to this argument as follows: "An employee who voluntarily leaves his employment is one who has the right to do so. He violates no contract obligations. Presumably, he is an employee in good standing, and leaves because it is to his advantage so to do; and, if he seeks employment elsewhere, he is entitled

to the presumption that his reputation as an employee has been unharmed by the fact of his leaving. The fact that such an employee voluntarily abandons his employment does not give the employer a right to prejudice his employment elsewhere. Under such circumstances, a communication designed to prevent such employment is presumably a reflection upon the standing of the employee. It is no answer to say that the employer may have cause for making such communication; that it may be to the advantage of the new employer, and for the mutual advantage of all such employers, to have notice of the character of the employee. If there is any valid reason for such communication, it would be available only as a matter of defense. The act does not attempt to interfere with the right of an employer to discharge an employee for cause or without cause. It does not seek to prohibit an employer from communicating to other employers the nature and character of his employees, when the facts would be for their interest. While such interference by an employer is not expressly characterized as malicious, that intent is necessarily implied. It is the purpose of this law to protect employees in the enjoyment of those natural rights and privileges guaranteed them by the Constitution, *viz.*, the right to sell their labor and acquire property thereby."

Another has been declared invalid, but merely for the technical reason that it was made applicable to a class of employees not embraced in the title. WABASH R. Co. v. YOUNG.

e. Defacement of written characters or licenses.

Where a certificate of character given to a servant by a former employer is couched in terms which show that it is intended to be used as a general testimonial on any future occasions when such a voucher may be required, the servant is entitled to recover substantial damages against a subsequent employer who maliciously defaces the document by writing on it a disparaging statement, although, by reason of its not having been published, that statement may not serve as the basis of an action for libel. Wennhak v. Morgan, L. R. 20 Q. B. Div. 635. Huddleston, B., said: "There is a material distinction between the letters ordinarily written in answer to an inquiry as to a servant's character,—which would probably be the property of the master proposing to engage the servant,—and a general testimonial of good character, which is, I should think, intended to be used as a voucher on future occasions. . . . There might well have been a question for the jury whether, under the circumstances, the handing over of the testimonial was a deposit, or a parting with the property so as to vest it in the defendants. If the jury found that it was merely a deposit, the illustration given in argument, of handing over a diploma on an application for a situation, would apply." It was also held that the trial judge had wrongly taken upon himself to decide the amount of damages.

This decision seems to be essentially inconsistent with the language used by Lord Abinger in Taylor v. Rowan, 7 Car. & P. 70, 1 Moody & R. 490. There A., before he entered the police force, sent a certificate of his good character, signed by the colonel of his regiment, to the commissioners of police. On his dismissal from that force, the certificate was returned to the plaintiff, inclosed in a letter signed by the defendant, the certificate being stamped with the words. "Dismissed the police service." It was held that for stamping these words trespass was not the proper form of action, the injury having been done to a chattel not in the possession of the plaintiff; and also that this was not evidence to go to the jury that it was done by the defendant, or by his order. In his charge to the jury, Lord Abinger said: "I should say that the only value of this certificate is to give prima facie evidence of the character of the plaintiff. And suppose a fact to occur afterwards which affected his character, I should say that any honest man who knew it, and made a remark of it on the certificate, would be doing no wrong. Suppose that a servant, who brought a written character, was taken into a service, and afterwards behaved ill. Now, if the master returned the servant the character, could it be considered that he did wrong if he wrote upon it that the person to whose character it related had afterwards been in his service, and was dismissed for ill behavior? I think that the commissioners of police act meritoriously in stating that men are dismissed from the police force." When this passage was quoted by counsel in the subsequent case of Rogers v. MacNamara, 14 C. B. 27 (see below), Jervis, Ch. J., remarked: "It would be morally right, perhaps, and yet actionable."

In Glynn v. Dillon, 8 Ir. C. L. Rep. Appx. LXXI., where the action was for the defacement of a written certificate of character by writing on it words which were susceptible of a construction injurious to the plaintiff, only a technical point of pleading was decided.

In cases where a statute by which it is enacted that a person engaged as an employee in a particular business shall take out a license provides that certain entries regarding him shall be indorsed upon his license when he leaves his employment, he is entitled to maintain an action if such an entry is made by an improper person or in an improper manner.

A declaration stated that the plaintiff had duly obtained a license to act as a conductor of metropolitan stage carriages, under 13 & 14 Vict. chap. 7; that the defendant, a proprietor of a metropolitan stage carriage, employed him to act as a conductor; that the plaintiff, on entering on such employment, delivered his license to the defendant, under the provisions of the act (6 & 7 Vict. chap. 86, § 8) to be retained by him while the plaintiff remained in his service; that the defendant wrongfully and

maliciously wrote in ink on the license, before he redelivered the same to the plaintiff on his quitting such service, the words, "discharged for being 1s. 4d. short. A. M.," to signify that the plaintiff had been dismissed as being dishonest; and that, by reason thereof, the license became defaced, damaged, and useless to the plaintiff, and he had been prevented from obtaining employment under it. It was held that the declaration disclosed a sufficient cause of action. Rogers v. Macnamara, *supra*. The defendant pleaded that the plaintiff, while in his employ as such conductor, received on his account the sum of 12s. 3d.; and that, in breach of his duty, and intending to defraud the defendant, the plaintiff accounted to him for 10s. 11d. only, and thereby defrauded him of 1s. 4d.; and that the defendant wrote on the license the words complained of to signify that the plaintiff had been dismissed for dishonesty, as it was lawful for him to do. It was held that the plea disclosed no justification for the act complained of. It is admitted," said Jervis, Ch. J., "that the plea can only be a good one if the declaration can be treated as containing a simple complaint of libel, to which the plea is pleaded as a justification. That, however, is not the essence of the plaintiff's complaint. The complaint is that, the plaintiff having an interest in the license, the defendant, whilst it remained in his possession pursuant to the provisions of the statute, by writing thereon defaced it, and rendered it of no value to the plaintiff. Now, unless the act charged can be said to be justified by some moral duty in the defendant,—which can hardly be seriously contended,—the action is clearly maintainable. The 24th section of the 6 & 7 Vict. chap. 86, entitles the master to retain possession of the license for twenty-four hours after the driver or conductor has ceased to be in his service, in order to enable him to make any complaint he may have to make against him. Under no circumstances can the employer be justified in taking upon himself to adjudicate on his own complaint, by writing on the license that which the act of Parliament authorizes the justice alone to indorse. I think the declaration is good, and the plea affords no answer." Williams, J., however, was of the opinion that the circumstances stated in the plea might have some effect on the amount of the damages to be awarded.

By 6 & 7 Vict. chap. 86, § 21, the proprietor of a hackney carriage is required to retain in his possession the license of every driver, etc., employed by him while such driver, etc., remains in his service. A declaration in case stated that the plaintiff obtained a driver's license under the act; that he was employed by the defendant, a proprietor of a hackney carriage, and, under the provisions of the act, delivered the license to him; and that, whilst the license remained in the defendant's possession, the latter "wrongfully and unjustly wrote . . . upon the said license certain words purporting to give, and being then intended by the defendant to give, a character of the plaintiff as an unfit and improper person to act as a driver of hackney carriage,—that is to say," etc.; by reason whereof the license became defaced and wholly useless to the plaintiff, and the plaintiff was thereby hindered and prevented from obtaining employment as a driver, etc. It was held, on motion in arrest of judgment, that the action was maintainable; that case was the proper form; and that the declaration was sufficient, as it was not necessary to aver that the act was done maliciously. Hurrell v. Ellis, 2 C. B. 295.

By § 8 of the same act, every proprietor of a hackney carriage employing the driver named in the license is to enter upon the license the days on which the driver entered and quitted his service respectively. The foreman of a cab proprietor, in making the entries required by the above section, inserted in the license one date of entering the proprietor's service and two dates of quitting it, and signed his name at the end of the entry. The effect of these entries was found to be to prejudice the driver with other cab proprietors, to the knowledge of the foreman who made the entries. It was held that such a defacement was a "matter of complaint" between a proprietor and a driver, within § 22 of the act, which a magistrate had jurisdiction to hear and determine, and in respect to which he might award such compensation as might seem proper. Norris v. Birch [1895] 1 Q. B. 639.

IV. Liability in other cases.

a. Liability for giving or procuring a false character.

1. Civil liability.

The effect of the authorities seems to be that, where A, by making statements, or by suppressing facts, regarding X, induces B to employ X as an agent, A is liable for such damages as B may sustain through the misconduct of X, although A has no intention of injuring B, or of benefiting himself. Foster v. Charles, 6 Bing. 396, 7 Bing. 105. Tindal, Ch. J., said: "The law will infer an improper motive if what the defendant says is false within his own knowledge and is the occasion of damage to the plaintiff." Bosanquet, J., said: "If a persons tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud in law."

In the later case of Wilkin v. Reed, 15 C. B. 192, the declaration in an action for giving a false character of one P., a clerk, alleged that the defendant fraudulently represented to the plaintiff that the reason why he had dismissed P. from his employ was the decrease in his business, and that the defendant recommended the plaintiff to try P., and knowingly suppressed and concealed from the plaintiff the fact that P. had been dismissed from his employ on account of dishonesty. The only points actually decided were that the plaintiff's evidence did not support the declaration, and that he was not

entitled to amend it under the common law procedure act of 1852. But Crowder, J., expressed a doubt whether the fact that an employer, when giving a character to his employee, abstains from stating that he had been guilty of dishonesty, constitutes a cause of action in favor of a person who takes the employee into his service on the strength of the character so given, and loses a certain sum of money by his misappropriations. This *dictum* seems to be inconsistent with the decision just cited.

In an anonymous case cited by Mr. Christian in a note to Blackstone's Commentaries, vol. 1, p. 432, a person had knowingly given a false character of a man to the plaintiff, who was thereby induced to take him into his service. The servant soon after robbed his master of property to a great amount, and was hung. It was held that the plaintiff was entitled to recover damages from the defendant to the extent of his loss.

In Fraser's Master & Servant it is stated that it has not yet been decided in Scotland that a person who sustains injury in consequence of the granting of a false character to a servant has an action of damages against the granter, but that in one case the point was taken for granted. Anderson v. Wishart, 1 Murray, 429.

2. Criminal liability.

A person who utters a forged testimonial as to his character, with intent to deceive, and thereby obtains a situation, is guilty of forgery at common law. Reg. v. Sharman, 6 Cox, C. C. 312, 23 L. J. Mag. Cas. N. S. 51; Queen v. Moah, 27 L. J. Mag. Cas. N. S. 204.

In England the giving or procuring of false characters has also been made the subject of an express statute. 32 Geo. III., chap. 56, amended in some unimportant particulars by 34 & 35 Vict. chap. 116, and 47 & 48 Vict. chap. 43.

b. Liability of recipient to giver of information regarding a servant.

Where a master informed a discharged servant that he had been discharged in consequence of the receipt of certain information communicated by a former master, and the former master was pronounced not liable in an action for defamation afterwards brought by the servant, it was held that he could not recover from the second master the extrajudicial expenses to which he claimed to have been put in connection with that action, although his letter in which the information regarding the servant had been imparted had been marked "private and confidential." Mushets v. Mackenzie, 1 Sc. Sess. Cas. 5th series, 756. The former master had used these words in his letter: "He went on strike, leaving us without giving sufficient notice. . . . It is unfair to us, if he is in your employment." Upon receiving this letter, B dismissed the workman, giving as a reason the breach of his contract with A, and ultimately communicated to him the contents of the letter. In an action for defamation, brought by the workman, A was found not to be liable, and was indemnified by the payment of the taxed costs. He then brought an action against B to recover the damages caused by the latter's breach of the contract of confidentiality, or, in the alternative, by the illegal violation of his proprietary rights in the letter, the sum claimed being the amount of the extrajudicial expenses to which he claimed to have been put, over and above the costs of the workman's action. All the judges held that A could not recover. Lord Macdonald put his decision on the ground that the claim was based upon the theory that extrajudicial expenses might be treated as damages owed to the plaintiff by a party who, by his action, had indirectly led to the action's being brought by a person who had no case against A. If there was no ground for the action, it could not be said that the proceedings of B had caused it to be raised. Lord Young was of opinion that, irrespective altogether of the claim being one for extrajudicial expenses, there was no violation of any legal right, and that a person receiving the character of a servant from a former employer of the servant is under no legal obligation not to disclose it to the servant. Lord Moncreiff, without deciding the general question thus raised by Lord Young, held that the answer of A to B's letter amounted to a suggestion that the workman should be dismissed, and that, as B could not be expected to do this without giving his reasons, the answer was deprived of any confidential quality which it might otherwise have possessed. C. B. L.

COLORADO SUPREME COURT.

ALEXANDER B. DAVIDSON, Appt.,
v.
WILLIAM FRASER.

(Two Cases.)

(— Colo. —, 84 Pac. 695.)

Appeal—record—form.

1. The appellate court is not precluded from considering exceptions which have been made a matter of record by the signature and seal of the trial judge because the record proper has been blended with the bill of exceptions and the whole treated as a bill of exceptions.

Mine—adverse claim—amendment.

2. An amendment of a complaint to establish an interest in a mining claim is not objectionable because limited to the ground

Case Note.—Duty and right of excluded co-owner to file adverse or protest against application for patent to a mining claim.—It was settled by the United States Supreme Court in Turner v. Sawyer, 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. Rep. 192, that one cotenant is not bound to adverse an application for a patent by another cotenant excluding him, and that his failure to do so

embraced in a conflict between two claims, whereas the original embraced the part which did not conflict, notwithstanding the averments are appropriate to support an adverse between hostile claims, whereas plaintiff relies on having been excluded from an interest in the premises as a cotenant.

Same.

3. An amendment of a complaint to establish an interest in a mining claim is not a departure because it designates the interest for the first time as that of a cotenant.

Same—adverse—cotenant.

4. The owner of an interest in a mining claim, who has been excluded by a co-owner from the application for patent, may adverse the application and maintain an action in support thereof.

(January 8, 1906.)

APPEAL by plaintiff from judgments of the District Court for Park County in defendant's favor in actions brought to enforce an interest in certain mining claims. Reversed.

Statement by Gabbert, Ch. J.:

The main question in each of these appeals being the same, they will be disposed of in one opinion. Appellee filed separate applications in his own name and right for patent on the A. Alexander and the East Saginaw lode mining claims. These applications were adversed by appellant, who brought suits in ejectment in support thereof. In each of these actions he set up in his complaint that he was a cotenant with defendant, and the owner of an undivided one-third interest in each claim; and further pleaded facts from which it appeared that the defendant had excluded him from his interest therein, and denied his rights as a cotenant. To each of these complaints a defense was interposed by way of motions or demurrers, to the effect that one claiming to be a cotenant in a mining claim upon which application for patent is made, from which he is excluded, is not entitled to file an adverse against such application, nor maintain an action in support thereof. These defenses were sus-

will not prevent him from maintaining a suit to have the patentee declared a trustee for his benefit; and the rule there laid down has been followed in a number of other cases. Stevens v. Grand Central Min. Co. 67 C. C. A. 284, 133 Fed. 28; Hunt v. Patchin, 13 Sawy. 304, 35 Fed. 816; Mills v. Hart, 24 Colo. 505, 65 Am. St. Rep. 241, 52 Pac. 680; Van Wagenen v. Carpenter, 27 Colo. 444, 61 Pac. 698; Brundy v. Mayfield, 15 Mont. 201, 38 Pac. 1067; Suessenbach v. First Nat. Bank, 5 Dak. 477, 41 N. W. 662; McCarthy v. Speed, 12 S. D. 7, 50 L.R.A. 190, 80 N. W. 135.

The Land Department formerly took the contrary view. See Re Grampian Lode, 1 Land Dec. 544; Re Lucy B. Hussey Lode, 5 Land Dec. 93; Re Monitor Lode, 18 Land Dec. 358. But these decisions were expressly overruled in Thomas v. Elling, 25 Land Dec. 495, upon the authority of Turner v. Sawyer, *supra*.

So, an adverse to an application for a patent by a relocator is not available to the original locator, who seeks to establish an equitable title in, and not against, the relocation. Doherty v. Morris, 11 Colo. 12, 16 Pac. 911.

The general rule as stated at the beginning of the note is recognized in 2 Lindley, Mines, § 728; but, upon the strength of an intimation in the concurring opinion of Judge Elliott in Tabor v. Sullivan, 12 Colo. 136, 145, 20 Pac. 437, Mr. Lindley says (2 Lindley, Mines, § 646, p. 1213) that a cotenant excluded from a patent application may adverse; and perhaps, under certain circumstances where the claim is held in open hostility and there is an emphatic and well-recognized repudiation of his title, brought to his notice, his asserted title may be jeopardized by failure to adverse. The case referred to was one in which the patentee had obtained a conveyance of the claim by all of the eight locators, and refused to recognize, and expressly repudiated, any rights under a previous deed to third persons of a portion of the claim, signed by five of the locators, the delivery of which was disputed. In the opinion referred to, Judge Elliott said: "If the applicant had previously known or recognized them (the persons claiming to be co-owners) as co-owners, and especially if there was an understanding with the applicant that he should secure the patent for the benefit of all, a court of equity would undoubtedly protect the interests of the co-owners against an assertion of exclusive ownership by the patentee; but, if these and other like circumstances calculated to inspire trust and confidence are altogether wanting, I see no reason why those claiming to be co-owners should passively suffer the patent to issue without asserting their rights."

But, while the exclusion of a cotenant from the application for a patent will not require him, or even entitle him, to file an adverse which will have the effect to suspend the proceedings in the Land Department to await the bringing of a suit to settle the matters in controversy, he may file a protest; and if he does the Land Department may, within its discretion, suspend proceedings upon the application to give the parties an opportunity to settle the dispute between them by a suit in the local courts.

Thus, a protest based upon alleged coownership is not such an adverse claim as requires the Land Department to await the bringing of a suit; but, if suit has been instituted in the local courts for the purpose of settling the question of joint ownership, the Land Department may await the result of

tained. Thereupon the plaintiff filed an amended complaint in the action which involved the East Saginaw lode. The latter amended the original in some particulars, which, however, it is not necessary to notice. The same defense was again interposed and sustained, and the action dismissed. Plaintiff also filed an amended complaint in the cause involving the A. Alexander lode. This pleading, in addition to the facts originally pleaded, based the right of ownership of the interest in the premises in controversy upon an executory contract and a conveyance which plaintiff sought to have reformed, from each of which, by mutual mistake of himself and his grantor, there had been omitted the interest in the premises which it was the intention of the parties to include in such contract and conveyance. The contract referred to and the deed mentioned had not been executed by the defendant, but by another party, who subsequently conveyed to the defendant the interest in the claim which the plaintiff contended belonged to him; it being alleged that the defendant took this interest with full knowledge of plaintiff's rights. The defendant moved to dismiss the amended complaint, for the reasons stated in the defense interposed to the original, and also upon the ground that the amended complaint stated a different cause of action from the original, and against a stranger to the suit. This motion was sustained.

Mr. George R. Elder for appellant.

Mr. Charles A. Wilkin, for appellee:

A tenant in common of a mining claim may not file an adverse claim in the land office against his cotenant seeking a patent for the ground in his own name.

Turner v. Sawyer, 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. Rep. 192.

Gabbert, Ch. J., delivered the opinion of the court:

It is contended on behalf of appellee that no exceptions to the rulings of the court on the motions have been properly preserved by bills of exceptions. What are termed bills of exceptions in these cases have been prepared in a form different from that usually followed. Instead of lodging in this court transcripts of the record proper, to-

that suit before giving further consideration to the protest. Thomas v. Elling, *supra*. The Land Department adhered to this position upon the review in Thomas v. Elling, 26 Land Dec. 220.

In Coleman v. Homestake Min. Co. 30 Land. Dec. 364, a protest having been filed by an alleged co-owner, which raised questions under a local statute of limitations and questions of fraud due to a claimed secret understanding as to the effect of a conveyance of undivided interests alleged to have been made without any consideration, the Land Department, in order to give the parties an opportunity to litigate and settle the matter by appropriate judicial proceedings, suspended further action in the matter by the Land Department for a period of ninety days, and directed that, in the event a suit should be instituted by either party, and prosecuted with reasonable diligence to a final determination, the suspension of proceedings in the Land Department should be continued until the controversy was finally determined in the courts.

In Re Golden & C. Lode Min. Claims, 31 Land Dec. 178, upon a protest filed by one co-owner after entry for patent by the other co-owner, the latter was required to elect whether the entry be canceled or amended by including the name of the co-owner who filed the protest.

It is apparent from the decisions of the Land Department that have first been cited, that the decision in DAVIDSON v. FRASER, upholding the jurisdiction of a court of equity over a suit by such a cotenant pending the application for a patent, is in harmony with the course of procedure adopted in the Land Department.

In Malaby v. Rice, 15 Colo. App. 364, 62 Pac. 228, where defendant, who had agreed with the plaintiff (a cotenant) to do all the assessment work, filed a pretended notice of forfeiture against the plaintiff for failure to contribute to the assessment work, with the intent to defraud the latter, and thereafter, claiming to be the sole owner of the claim, made application for a patent, and procured a receiver's receipt for the purchase price of the claim, it was held that the plaintiff could maintain a suit in a court of equity to have the defendant adjudged a trustee for him of an undivided portion of the claim, notwithstanding that the application for the patent was still pending before the Land Department. The defendant contended that the Land Department alone had jurisdiction of the controversy, and that a court of equity should not, if at all, assume jurisdiction until a patent for the claim had been issued by that department, basing the contention upon the rule of the General Land Office to the effect that "one holding a present joint interest in a mineral location in an application for a patent, who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issue of patent as applied for." The court, however, said that such rule had no application to the present controversy; and that, if such a protest had been made and received by the Land Department, it would not have assumed judicial functions and undertaken to decide the controverted point, but would have referred the parties to the court for redress.

gether with bills of exceptions, the two have been blended in one; that is to say, the record proper, together with those matters which can only be brought to the attention of this court by a bill of exceptions, have been prepared and treated as bills of exceptions. The record as thus made up is certified and attested by the trial judge, and also by the clerk. From this it appears that the plaintiff did except to the rulings of the court under consideration; so that over the signature and seal of the trial judge the exceptions taken to the rulings of the trial court have been made a matter of record.

The two mining claims conflict, and counsel for appellee objects to the amended complaint filed in the case involving the East Saginaw, for the reason that the original only embraced the parts of the claim which did not conflict with the A. Alexander, whereas, by the amended complaint, the ground in controversy is limited to the conflict between the two claims. The complaint is inartificial in this: That it makes averments which would be appropriate in support of an adverse between hostile locations, instead of limiting it to a statement of the case upon which the plaintiff relies to maintain his action, namely, that he had been ousted and excluded from his interest in the premises in controversy by a co-owner. Notwithstanding these inconsistencies, we do not think the pleading is objectionable upon the ground urged.

The next question to consider is whether or not the plaintiff, by his amended complaint filed in the cause involving the A. Alexander lode, departed from the cause of action originally pleaded. A cause of action is the fact, or combination of facts, which gives rise to a right of action. The cause of action, as originally pleaded by the plaintiff, consisted of two ultimate facts: (1) His exclusion by the defendant from his interest in the premises; and (2) his interest therein. By his amended complaint there was no change with respect to either of these two facts. He thereby pleaded his exclusion by the defendant, and his interest which he claimed in the premises. With respect to the latter, the facts pleaded were somewhat different, but they were directed to the same ultimate fact presented by his original complaint, namely, his interest as a cotenant. The amended complaint did not change the cause of action originally pleaded, because, according to each pleading, it was identical as against the defendant.

The vital question is whether or not an owner of an interest in a mining claim, who has been excluded by his co-owner from an application for patent, may adverse or protest such application and maintain an action in support thereof. So far as advised, this precise point has not been ruled upon by a court of review. Mr. Morrison, in his work on Mining Rights, 10th ed. 413, and Mr. Lindley, in his work on Mines, 2d ed. vol. 2, § 728, each express views to the effect that, where a co-owner applies for a patent in his own name, to the exclusion of his cotenant, the latter may institute proceedings in the land office and maintain an action in support thereof. The personal views of these learned authors on the subject of mining law are entitled to great weight. Sections 2325, 2326 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, pp. 1429, 1430) only apply to adverse claims arising out of independent conflicting locations of the same ground, and not to controversies between co-owners claiming under the same location. Turner v. Sawyer, 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. Rep. 192; Stevens v. Grand Central Min. Co. 67 C. C. A. 284, 133 Fed. 28; 4 Current Law, 656; Thomas v. Elling, 25 Land Dec. 495. There is no statute prescribing the steps which shall be taken by an owner of an interest in a mining claim from which he has been excluded by his co-owner in an application for patent. Rule 58 of the Land Department provides, in substance, that the claimant of a present interest in a mineral location, who is excluded from the application for patent thereon, may protest against the issuance of a patent, and such protestant will be deemed a party in interest entitled to appeal. Under this rule, and prior to its promulgation, it is now, and was, the practice of the Land Department, when an owner of an interest in a mining claim, who has been excluded from the application for patent thereon by a co-owner, filed his protest, to direct that a suit be brought in support of such protest, and await the result of such action before issuing patent. Coleman v. Homestake Min. Co. 30 Land Dec. 364; Thomas v. Elling, 26 Land Dec. 220. While the department is not required to await the bringing of a suit in support of such protest, because there is no provision in the statute therefor, and no obligation upon either party to invoke the jurisdiction of a court to determine their rights in such circumstances, nevertheless, the department has adopted the practice indicated, for the reason that it is its duty, before issuing patent, to determine who is entitled thereto, and that it is desirable, as well as expedient, to permit the parties to proceedings initiated in the land office by protest to have their rights finally determined in a court of the vicinage where witnesses can be more readily produced than before the Land Department, and then accept the judgment of such court as determinative of the

rights of the parties. This is certainly a wise policy, and there is no legal objection to its recognition by the courts. An owner who has been excluded by his co-owner from an application for patent may maintain an action against the patentee to establish and enforce a trust in the patented claim. Having this right, there can certainly be no valid objection against the maintenance of an action during the pendency for patent, the purpose of which is to have his rights determined before patent issues. In fact, this course ought to be encouraged, especially when the Land Department will await the result of such an action before issuing patent, if the excluded owner initiates the necessary proceedings in the land office through which the application for patent is made.

There may be instances wherein it might be necessary for the excluded co-owner to follow this course, rather than await the issuance of patent before bringing suit, because of the dangers which might arise of losing his rights by laches, the statute of limitations, or the intervention of the rights of innocent third parties. Section 275 of our Code of Civil Procedure permits an action for the possession of an interest in realty to be brought by a tenant in common against his cotenant, where the latter actually ousted the former, or did some act or acts amounting to a denial of his right as a cotenant. By virtue of this provision, the plaintiff could maintain an action against the defendant independent of the fact that he had filed a protest against the issuance of patent to the premises from which he has been excluded. The action of the defendant in excluding the plaintiff by applying for a patent in his own name amounts to a denial of the rights of the plaintiff; and such action cannot be pleaded as a bar to a suit instituted by the plaintiff to establish his rights. The wrong committed by the defendant cannot abate an action instituted by the plaintiff, the purpose of which is to right that wrong, and establish his rights in the premises in controversy, and which may result, when the judgment in such action is exhibited to the Land Department, in the issuance of a patent to the plaintiff and defendant instead of the latter, which, for the purposes of the motions interposed below, he admits he is not entitled to.

The judgment of the District Court in each case is reversed, and the causes remanded for further proceedings not inconsistent with this opinion.

Goddard and Bailey, JJ., concur.

Petition for rehearing denied.

4 L.R.A.(N.S.)

INDIANA SUPREME COURT.

WILLIAM H. McINTYRE, Appt.,
v.
SUSAN ORNER.
(— Ind. —, 76 N. E. 750.)

Automobile—duty of driver.

1. One driving an automobile on a public highway is bound to take notice that it is likely to startle horses when driven toward them at a rapid rate.

Same.

2. The driver of an automobile is bound to take notice of its effect upon horses which it is approaching on a highway, and, if they exhibit signs of fright, to slow up, stop the machine, or do whatever is reasonably required to relieve the persons in the carriage of their perilous situation.

Negligence—occupant of carriage.

3. A passenger in a carriage drawn by horses will not be presumed to be guilty of contributory negligence by failing to jump

Case Note.—Duty and liability of person operating automobile on public street or highway.—Both the common-law and the statutory duty and liability of the operator of an automobile upon the public street or highway are covered in a subject note in 1 L.R.A.(N.S.) 223 et seq. The following decisions bearing on the subject have been rendered since the preparation of that note:

In Hannigan v. Wright (Del.) 63 Atl. 234, the court instructed the jury, in an action for personal injuries to a pedestrian who was struck by an automobile, that, while automobiles are comparatively new in use, and novel in construction, operation, and movement, there is nothing new or exceptional in the principles of law that apply to their use upon the public highway; that the owner of an automobile has the same right as the owner of other vehicles to use the highways or streets of a city, and, like them, he must exercise reasonable care and caution for the safety of others.

Owners of automobiles have the same rights in the streets and highways of the state that the drivers of horses have. But the right of either class is not to use the means of locomotion without regard to the rights of others having occasion to travel the highway. Wright v. Crane (Mich.) 106 N. W. 71.

The degree of care required in the use and operation of a machine or vehicle upon the streets of a city depends not only upon the condition of the streets, but also upon the dangerous character of the machine or vehicle, and its liability to do injury to others lawfully upon such streets. The more dangerous its character and the greater its liability to do injury to others, the greater degree of care and caution required in its use and operation. In determining, therefore, the degree of care that the operator of an automobile should have used the jury must take into consideration its speed, size, appearance, manner of movement, the amount

therefrom when discovering that the horses are frightened by an approaching automobile.

Instructions—as to effect of facts.

4. If the controlling facts in a case are fully stated, and of such a character as to exclude all reasonable and possible modifying inferences from the other circumstances of the case, the court may inform the jury whether or not they are sufficient in law to entitle plaintiff to recover.

Automobile—excuse for driver's negligence.

5. The necessity of constant observation of the road to avoid holes and guide his machine in safety does not justify the driver of an automobile in driving the machine at more than 15 miles an hour to within 15 or 20 feet of a team of horses which are badly frightened at its approach.

Same—assumption of safety—justification.

6. That the driver of an automobile successfully passed a team of horses on a highway when overtaking them from the rear does not justify his assuming that he can do so when meeting them, if, when 200 feet away, he sees that they are making violent efforts to break away.

Instruction—conduct of person in sudden peril.

7. Instructing the jury that one put in sudden peril by another's negligence is not guilty of contributory negligence if he acts as a prudent person "might" act under the circumstances is not erroneous if used in connection with language requiring that he act "naturally" and in a manner "expected of ordinarily cautious persons."

Interrogatories—comment by counsel.

8. It is not error to permit opposing counsel to read, and comment to the jury upon, interrogatories which the court has intimated that it intends to submit to them.

(January 30, 1906.)

APPEAL by defendant from a judgment of the Circuit Court for Whitley County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **James E. Rose, Thomas R. Marshall, William F. McNagny,** and **P. H. Clugston,** for appellant:

Persons making use of horses as a means of travel or traffic by the highways have no rights therein superior to those who make use of them by other permissible modes.

Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522; Holland v. Bartch, 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83.

If the driver of a horse knows that the horse is liable to become frightened and run away, and, with such knowledge, drives him in the region of danger, he does so at his own risk.

Oates v. Metropolitan Street R. Co. 168 Mo. 535, 58 L.R.A. 447, 68 S. W. 906.

Both horses and automobiles being rightfully on the highway, ordinary care is re-

of noise it makes, and anything else that indicates unusual or peculiar dangers. Hannigan v. Wright, *supra*.

One operating an automobile upon the public streets of a city is bound to use ordinary care in its operation, to move it at a reasonable rate of speed, and to cause it to slow up, or stop, if need be, where danger is imminent, and can, by the exercise of reasonable care, be seen or known in time to avoid accident. Greater caution is required at street crossings and in the thronged streets of a city than in the less-obstructed streets in the open or suburban parts. Ibid.

Whether it is the exercise of due care toward a person approaching in a vehicle from the opposite direction to run an automobile in the dark without a headlight is a question for the jury. Wright v. Crane, *supra*.

In Gifford v. Jennings, 190 Mass. 54, 76 N. E. 233, it was held that the findings of the jury that the operator of an automobile which came up behind the plaintiff's vehicle was guilty of negligence in not sounding his horn before attempting to go by, and that such negligence was the cause of the breaking of the plaintiff's leg, were supported by evidence sufficient to establish the facts that the horse was not given to shying, kicking, or running; that he was not ordinarily frightened by automobiles; and that on the day of the accident three automobiles, the drivers of which sounded horns, had passed him going in the same direction without frightening him; that the horse did not start until the defendant's automobile was within 10 feet of the nigh hind wheel, undertaking to pass where there was not room; that the plaintiff did not hear the approach of the automobile; and that he was driving at the rate of 4 miles an hour in a market wagon with a load of 1,500 pounds, and had the reins "up good in" his hands "tight;" and that as the automobile passed the horse kicked and broke the plaintiff's leg.

The testimony of a person who was seated in a vehicle at the time an automobile approached it from the opposite direction, that the automobile made no noise when approaching, and that when running at a high rate of speed it makes but little noise, and that when running at low speed it makes much more noise, is incompetent on the question of the speed of the automobile at the time of the accident. Wright v. Crane, *supra*.

The acts of the chauffeur in operating an automobile within the authority of his employment are the acts of a servant for which his employer is responsible. Hannigan v. Wright, *supra*.

An automobile coming up behind a vehicle drawn by horses is "approaching it," within the Massachusetts statute requiring the driver of an automobile approaching any vehicle drawn by a horse to operate, man-

quired from persons in charge of each of them.

Riley v. Farnum, 62 N. H. 42.

If the statement of facts in the complaint shows the plaintiff guilty of such negligence, the complaint is insufficient.

Rich v. Evansville & T. H. R. Co. 31 Ind. App. 10, 66 N. E. 1028; Lafayette v. Fitch, 32 Ind. App. 134, 69 N. E. 414.

One who knows that a horse is afraid of automobiles, and yet deliberately rides behind the horse toward the automobile without exercising any care for her own safety, is guilty of contributory negligence.

Louisville & N. R. Co. v. Schmidt, 81 Ind. 264; Morgan v. Central R. Co. 77 Ga. 788; Flagg v. Chicago, D. & C. G. T. Junction R. Co. 96 Mich. 30, 21 L.R.A. 835, 55 N. W. 444; Moore v. Kansas City & I. Rapid Transit R. Co. 126 Mo. 265, 29 S. W. 9; Cornell v. Detroit Electric R. Co. 82 Mich. 495, 46 N. W. 791.

Injuries arising from mere fright of horses by a vehicle do not render the owner of the vehicle liable.

Holland v. Bartch, *supra;* Thompson v. Dodge, 58 Minn. 555, 28 L.R.A. 608, 49 Am. St. Rep. 533, 60 N. W. 545; Nason v. West, 31 Misc. 583, 65 N. Y. Supp. 651.

Messrs. **Charles F. Holler, Andrew A. Adams,** and **Luke H. Wrigley,** for appellee:

If appellant knew, or could have known by the exercise of ordinary care, that the machine in his possession and under his control had so far excited appellee's horse as to render him dangerous and unmanageable, it was his duty to have stopped his automobile, and to have taken such other steps for appellee's safety as prudence might suggest.

Shinkle v. McCullough, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196; Thies v. Thomas, 77 N. Y. Supp. 276; Mason v. West, 61 App. Div. 40, 70 N. Y. Supp. 478; Indianapolis Street R. Co. v. Tenner, 32 Ind. App. 311, 67 N. E. 1044; Moran v. Leslie, 33 Ind. App. 80, 70 N. E. 162; Evans v. Adams Exp. Co. 122 Ind. 362, 7 L.R.A. 678, 23 N. E. 1039; Citizens' Street R. Co. v. Damm, 25 Ind. App. 511, 58 N. E. 564; Indianapolis Street R. Co. v. Darnell, 32 Ind. App. 687, 68 N. E. 609; Citizens' Street R. Co. v. Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778; Elwood Electric Street R. Co. v. Ross, 26 Ind. App. 258, 58 N. E. 535; 18 Am. & Eng. Enc. Law, 2d ed. pp. 577, 578; 15 Am. & Eng. Enc. Law, 2d ed. p. 505; Meek v. Barton, 123 Iowa, 601, 99 N. W. 177; Bennett v. Lovell, 12 R. I. 166, 34 Am. Rep. 628; Mertz v. Detroit Electric R. Co. 125 Mich. 11, 83 N. W. 1036; Anderson v. Minneapolis Street R. Co. 42 Minn. 490, 18 Am. St. Rep. 525, 44 N. W. 518; Central R. Co. v. Knowles, 191 Ill. 241, 60 N. E. 829; Crosswell, Electricity, § 143; Wright v. Mulvaney, 78 Wis. 89, 9 L.R.A. 807, 23

age, and control such automobile in such manner as to exercise every reasonable precaution to prevent the frightening of the horse, and to insure the safety and protection of any person riding or driving the same. Gifford v. Jennings, *supra.*

By the terms of the Illinois statute, it is provided that, whenever it shall appear that any horse driven or ridden upon the street or highway is "about to become frightened" by the approach of an automobile, it shall be the duty of the person driving or conducting the automobile to cause the same to come to a full stop until the horse shall have passed. It was held in Ward v. Meredith, 220 Ill. 66, 77 N. E. 119, that an instruction was not erroneous because it informed the jury that it was the duty of the operator of the automobile to stop if the horse drawing the buggy in which the plaintiff was riding "became frightened, or showed that it was about to become frightened," by the approach of the automobile. It was contended by counsel for the defendant that the statutory requirement was to stop the automobile only where a horse is "about to become frightened," and not where it has already become frightened. The court, however, said that the criticism was entirely too refined.

When a horse becomes frightened, or shows that it is about to become frightened, by the approach of an automobile, the person operating it has no discretion as to what he shall do, but is bound by the express language of the statute just referred to immediately to stop it. Ward v. Meredith, *supra.* The hypothesis upon which this decision was based excluded the contingency of a horse becoming suddenly frightened as an automobile is about to pass, thereby causing an emergency in which the automobile driver may determine the best means of avoiding the injury.

An instruction substantially in the language of the Illinois statute, providing that in any action brought to recover damages caused by running an automobile at a greater rate of speed than 15 miles per hour the plaintiff shall be deemed to have made out a prima facie case by showing the fact of such injury, and that the person driving the automobile was, at the time of the injury, running the same at a speed in excess of 15 miles per hour, except that the phrase, "either by himself or his agent," is inserted immediately after the phrase, "person driving such automobile,"—is not erroneous either upon the theory that it ignores the question whether injuries sustained were occasioned by the running of the automobile at excessive speed, or because of the interpolation of the phrase referred to. Ward v. Meredith, *supra.*

Am. St. Rep. 393, 46 N. W. 1045; People's Ice Co. v. The Excelsior, 44 Mich. 229, 38 Am. Rep. 246, 6 N. W. 636.

One who does an act under an impulse, or upon a belief created by a sudden danger attributable to another's negligence, is not to be regarded as guilty of contributory fault, even though the act would be regarded as negligent if done under circumstances not indicating such peril.

Indiana R. Co. v. Maurer, 160 Ind. 25, 66 N. E. 156; Clarke v. Pennsylvania Co. 132 Ind. 199, 17 L.R.A. 811, 31 N. E. 808; Pennsylvania Co. v. McCaffrey, 139 Ind. 430, 29 L.R.A. 104, 38 N. W. 67.

The appellant, in operating upon the highway a novel wheeled conveyance of uncommon appearance and noise, owed to the plaintiff and other travelers the duty carefully to control and drive the same along so as to avoid causing needless injury.

Indiana Springs Co. v. Brown (Ind.) 1 L.R.A.(N.S.) 238, 74 N. E. 615.

Hadley, J., delivered the opinion of the court:

Appellee successfully prosecuted this action against appellant to recover damages for injuries claimed to have been received by appellant's negligence in driving an automobile on the public highway. The action is based upon the following facts disclosed by the jury in answers to interrogatories: The plaintiff, being fifty-four years of age and a resident of South Bend, about 3 o'clock P. M. of November 1, 1902, left the city of Auburn with the body of her deceased son to drive across the county to the town of Waterloo, there to take a train for home. The plaintiff and her son occupied the rear seat, and Mr. Ling and Mr. Mayfield, friends of her deceased son, occupied the front seat, of a carriage, which, with team to draw it, had been procured at a livery stable for the purpose, but without the knowledge and approval of the plaintiff. One of the horses was to some extent afraid of automobiles and the other was not. Ling, accustomed to driving and managing horses, drove the team without approval, but without any expressed objection from the plaintiff. The road from Auburn to Waterloo runs in a northeasterly direction. On the journey the hearse preceded the carriage containing the plaintiff. Later in the same afternoon appellant, with three other gentlemen, left Auburn by the same road for Waterloo in a gasoline automobile belonging to appellant. The machine was two seated, could speed 20 miles an hour, and exploded its gasoline in a chamber which to some extent deadened the sound. Appellant drove and managed the machine. On the journey it was necessary for appellant to look ahead to avoid holes and obstructions in the road; but on the occasion of the plaintiff's accident appellant was operating his machine in an unusual and extraordinary manner by going at a high rate of speed when meeting teams. On the way to Waterloo appellant drove his automobile past the carriage in which the plaintiff was riding, greatly frightened the horses, and caused them to crowd to the side of the road. Both appellee and appellant saw the fright of the horses. Appellant proceeded with his party to Waterloo, remained but a short time, and entered upon his return to Auburn. A short distance from the former town he met the funeral party. The hearse was 500 feet ahead of the carriage. A short distance before meeting the hearse, appellant drove his automobile to one side of the road and was about to stop when the driver of the hearse signaled him to come on. Appellant proceeded, and, having passed the hearse, he speeded his automobile towards the carriage at more than 15 miles an hour, the machine puffing and making a great noise, and, when it approached within 200 feet of the carriage, the horses, in apparent fright, began crowding to one side, and, when within 15 or 20 feet of the plaintiff, whirled back into the road, and, in turning the carriage, cramped and broke a fore wheel, tipping the vehicle, and causing the plaintiff to be thrown out and injured. The driver held the lines firmly and taut, and an ordinarily cautious man could not have driven the team past the automobile, because it was approaching at a high rate of speed. The driver did not request, nor signal, appellant to stop the machine; but, when the horses whirled around, appellant threw off the power and applied the brake, and stopped the automobile when within 15 or 20 feet of the plaintiff. The team manifested fright when the automobile was 200 feet away, seeing which, an ordinarily prudent man would have anticipated that the further forward movement of the machine would be likely to cause injury to the occupants of the carriage. If appellant had run his machine at less speed, it would have made less noise; and he operated it in a careless manner, because he speeded it too fast and too close to the team.

There are two paragraphs of complaint, both proceeding upon the theory that the plaintiff was injured by the negligence of appellant in continuing to run his automobile on the highway at an excessive speed, and failing to stop, or slow up, when, as alleged in one paragraph, "he saw from the frightened condition of plaintiff's horses that to proceed further would result in injury to the plaintiff," and, in the other, by

the exercise of reasonable care he might have seen that fact. As relating to the question of negligence the complaint charges "that, as said defendant approached said carriage with his said automobile, and when he was yet more than 300 feet distant therefrom, the horses attached to said carriage, drawing the plaintiff and her said companions, became badly frightened at the approach of said automobile, the loud noise made by the propulsion thereof, and the operation of its said motor, the high and dangerous rate of speed—more than 15 miles an hour—at which the same was approaching them, and the size and appearance of said vehicle, and plunged, reared, shied, and exhibited all of the evidences of fear usually manifested by horses when greatly frightened; . . . and said defendant, well knowing said frightened condition of said horses, well knowing, also, that his said automobile, the approach thereof at said high and dangerous rate of speed, and the noise made thereby, were the cause of such fright; and well knowing that the nearer approach of his said automobile at said speed and under the circumstances aforesaid would greatly increase the fright of said horses,—without exercising or using any care whatever, carelessly, recklessly, and negligently propelled his said automobile at said high and dangerous rate of speed up to and until the same was within less than 15 feet of said horses before the same was stopped or the speed thereof checked, . . . causing said horses to whirl around in said highway and run away to the south along the same, breaking one of the wheels of said carriage to which they were attached, and throwing the plaintiff with great violence out of said carriage upon the hard ground; whereby," etc. Is this a sufficient averment of negligence?

The employment of the automobile on the public highways, as a means of transportation, has been recognized in this state as a lawful use of the road (Acts 1905, chap. 123, p. 202; Indiana Springs Co. v. Brown, [Ind.] 1 L.R.A.(N.S.) 238, 74 N. E. 615); and if it results in causing injury to one traveling by another mode, the autoist cannot be held liable for the injury, unless it is made to appear that he used the machine at a time, or in a manner, or under circumstances, inconsistent with a proper regard for the rights of others. There is nothing dangerous in the use of an automobile when managed by an intelligent and prudent driver. Its guidance, its speed, and its noise are all subject to quick and easy regulation, and under the control of a competent and considerate manager it is as harmless, or may soon become as harmless, on the road, as other vehicles in common use. It is the manner of driving an automobile on the highway, too often indulged in by thoughtless pleasure seekers and for the exploitation of a machine, that constitutes a menace to public safety. While it is the law that automobiles, subject to statutory restrictions, have equal right with other vehicles to occupy the highways, it must be borne in mind that this equality of right imposes the reciprocal duty of managing one's vehicle, whatever its character, with care and caution to avoid causing injury to others with equal right. As we said in Indiana Springs Co. v. Brown, *supra:* "Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury, as well as inflicting injury upon the other." Within these principles, it was incumbent upon appellant to take notice, because common knowledge that motor carriages are, as yet, usually strange objects to horses, and likely to startle them when driven up in front at a rapid rate. We assume, therefore, that he knew, when he met the plaintiff's carriage on his return to Auburn, especially after the fright he observed in the horses as he passed them on the way to Waterloo, that his car, operated in the manner and at the speed described, was highly calculated to frighten the horses, and liable to cause them to injure the occupants of the carriage. With such knowledge, it was appellant's duty to keep a lookout ahead, and, as he approached the carriage, note the effect of his onward movement upon the horses; and when he saw, or could have seen by the exercise of reasonable caution, that the horses were under excitement, forcibly crowding off the road, and manifesting unmistakable fright, ordinary care required him to slow up, stop his machine, or do whatever was reasonably required to relieve the persons in the carriage of their perilous situation. In Shinkle v. McCullough (1903) 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196, it is said: "If . . . appellant knew, or could have known by the exercise of ordinary care, that the machine . . . under his control had so far excited appellee's horse as to render him dangerous and unmanageable, it was his duty to have stopped his automobile and taken such other steps for appellee's safety as ordinary prudence might suggest." See also to same effect, Christy v. Elliott, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 74 N. E. 1035. This, it is alleged, appellant did not do, but, on the contrary, upon seeing the plaintiff's team rearing and plunging with fright, when 300 feet away, knowingly drove his machine into their faces at more than 15 miles an hour, without stopping or checking his speed, until within 15 or 20 feet of the

plaintiff. As a charge of negligence, this is far within the limits of the rule.

Appellant insists that the complaint shows upon its face that appellee was guilty of contributory negligence. The claim springs from the averments "that the plaintiff was traveling with three other persons in a two-seated covered carriage, drawn by a team of gentle, well-broken horses, which were in charge of, and driven by, a competent and careful driver, who sat upon the front seat of said carriage while the plaintiff and her son occupied the rear seat," and "on the road to Waterloo appellant, in his automobile, rapidly and with great noise passed the carriage in which the plaintiff was riding, whereby the horses attached to said carriage became greatly frightened, and reared, plunged, and became almost unmanageable." It is argued that, since it is shown that appellee occupied the carriage when appellant drove his automobile by it on the road to Waterloo, we must presume, because not denied, that she, as well as appellant, beheld the fright and conduct of the horses; and when appellant was about to meet the carriage on his return from Waterloo, and saw, as alleged, the horses plunging and crowding when the automobile was 300 feet distant, we must also presume that appellee in the carriage saw the automobile coming as far as appellant in the automobile saw the frightened horses plunging, and, so seeing and knowing the increasing peril, it was negligence on her part to remain in the carriage and make no effort to reach a place of safety or have the horses secured. The specific allegations of the complaint are not sufficient to overcome the presumption of noncontributory negligence created by the statute. Greenawaldt v. Lake Shore & M. S. R. Co. (Ind. Sup. last term, April 7, 1905) 74 N. E. 1081. If we could presume that the plaintiff saw the automobile coming when 300 feet away, and the team was at the time rearing and plunging, we could not presume that her failure to jump out of the carriage was negligence. It might have been far more dangerous under the circumstances to attempt to alight than to remain seated in the carriage. We think the second paragraph of the complaint is good, and that the demurrer thereto was properly overruled.

Complaint is made of the giving and refusing of certain instructions. In the third instruction given, the court, after directing the jury that, if they found from the evidence the existence of certain enumerated facts relating to the conduct of appellant in the operation of his automobile at the time of the plaintiff's accident, continued: "If the facts established by the evidence are as above stated, then you should find for the plaintiff, unless you should also find it established by a fair preponderance of the evidence that there was contributory negligence on the part of, or imputable to, the plaintiff, which precludes a recovery by her."

It is objected, first, that the instruction is erroneous, because the court had no right to declare that any state of facts—if the question of negligence was to go to the jury—constituted negligence; that the most the court could have properly done was to set out a group of facts and authorize the jury to construe them under the law, with all the other facts and circumstances in evidence, in determining the question of negligence. We think the rule here contended for by appellant is too narrow. There are frequent cases, no doubt, where certain facts in evidence may be selected which, if standing alone, would constitute negligence, but under which, when considered with other facts and circumstances in evidence of a modifying character, the question of negligence becomes equivocal. In such cases it would be clearly error for the court to enumerate only the former class of facts, and direct the jury, if they found them proved, they should find the existence of negligence; and equally erroneous if the unstated facts would even tend to render the question of negligence doubtful, or such as equally prudent persons would characterize differently. But the controlling facts of a case may be of a character and so fully stated as to exclude all reasonable and possible modifying inference, and in such cases we see no impropriety in the court informing the jury whether or not such facts, if established, are sufficient in law. In so doing there is no invasion of the province of the jury. The facts are for the jury, and the law for the court. If, under the rules of the law, a given class of facts, embodying all the controlling facts in evidence and the reasonable inferences arising therefrom, constitute negligence, or due care, it is proper for the trial judge to tell the jury so for their guidance in returning their verdict. His primary duty on the bench is to see that the law is properly applied to the facts, and in principle he is doing the same thing whenever he is called upon to consider the correctness of a general verdict in the light of the special facts upon which it is founded as disclosed by answers to interrogatories. The general rule is thus stated in Shoner v. Pennsylvania Co. 130 Ind., at page 177, 28 N. E., at page 618: "In cases involving questions of negligence, the rule is now settled that, where the facts are undisputed [or found by a jury to exist] and the inferences which may be drawn from them are not equivocal and can lead to

but one conclusion, the court will adjudge, as matter of law, that there is, or is not, negligence." To same effect, see Mann v. Belt R. & Stock Yard Co. 128 Ind. 139, 141, 26 N. E. 819; Huntington County v. Bonebrake, 146 Ind. 311, 316, 45 N. E. 470; Oleson v. Lake Shore & M. S. R. Co. 143 Ind. 405, 32 L.R.A. 149, 42 N. E. 736.

It is not claimed by appellant that the facts summed up in the instruction were insufficient of themselves to constitute negligence; but he claims that the hypothesis should have embraced an additional fact shown by the evidence which tended to excuse him for not heeding the fright of appellee's horses and stopping his automobile sooner, namely, that he, as manager of the auto, did not have time and opportunity to look, because it was necessary for him to keep his eyes and attention fixed on the track of the road to enable him to guide the machine safely by, avoiding chuck holes and other obstacles. We are unwilling to admit that the omitted fact would have furnished appellant with a shadow of justification for continuing to speed his machine at more than 15 miles an hour to within 15 or 20 feet of the carriage, and until the horses had whirled around, thrown the plaintiff out, and taken flight back into the road. With the knowledge that the horses to the plaintiff's carriage were nervous, and that he would soon meet them, it would be a strange rule of law that would permit him to wilfully put his automobile into a high rate of speed, and relieve him from the duty of looking ahead and of the consequences of seeing the frightened team, because the speed of his car required his uninterrupted attention to the road. When, at the distance of 200 feet, he saw the team trying to break away with fright, it was appellant's duty under the law to stop, or check up, and stop or lessen the noise of his motors, as it was shown he could easily have done within a few feet and within a few seconds. Because he did not do it under the circumstances shown and summed up by the court, but one conclusion can be drawn from his conduct.

On this point it is also suggested that a further fact should have been included in the hypothesis, to wit, that, as the team was successfully controlled when appellant passed on the way to Waterloo, he had a right to believe he could pass them on his return without injury to the occupants of the carriage. Whatever warrant appellant might have had from this incident for such belief, it was completely nullified when, upon his return, approaching the horses and 200 feet distant, he beheld the animals enter into violent efforts to break away. When it became evident to him that his further progress would increase the peril of those in the carriage, his duty was to stop, or at least to check up, without reference to whether the occupants of the carriage were guilty of negligence.

A further objection is made to this instruction because it defines what will constitute negligence, and does not define what will constitute contributory negligence. Appellant has not the slightest ground for complaint on this point. In instruction No. 1, given upon the court's own motion, after enumerating the opportunities and acts of the plaintiff touching her relation to the driver, her knowledge of the habits of the team, her chance to see the automobile coming, her want of effort to seek a place of safety or to request appellant to stop, and other matters illustrative of her conduct, precisely as was done in the behalf of the plaintiff in the instruction under consideration, concluded as follows: "Then I charge you, as a matter of law, that the plaintiff was guilty of such negligence contributing to her own injury as prevents a recovery in this action: and your verdict should be for the defendant."

Our conclusion is that there was no error in the giving of the third instruction requested by appellee.

The sixth instruction given upon the request of appellee is also assailed. It is to the effect: It is claimed by the defendant that the plaintiff, when the team attached to the carriage in which she was riding turned around in the highway and just before she was injured, stood up in the carriage and jumped, or tried to jump, out of the same; that by so doing she was guilty of negligence which contributed proximately toward producing the injuries of which she complains; that if she had remained seated in the carriage she would not have been injured; and that she is therefore precluded from recovering in this case. Even though the jury may find from the evidence that the plaintiff, when the team turned around and just before she was injured, if she was, did stand up in the carriage, or did endeavor to get out of the same, and that no injury would have occurred to her if she had remained seated, still "if you further find from the evidence that the plaintiff was in a situation of sudden peril, which was brought about by the defendant's negligence, that in standing up in the carriage and in trying to get out of the same she acted under a sudden fright and impulse created by such peril, that in so doing she acted naturally, and as ordinarily prudent persons might act when in like situation and under the influence of like fright and like impulses," then it will be a question of fact for the jury to determine from the evi-

dence whether or not she was guilty of contributory negligence in so standing up in said carriage and in trying to get out of the same. The words quoted furnish the grounds for the criticism. It is insisted that it was erroneous to direct the jury that, if the plaintiff acted as ordinary prudent persons might act in a like situation and under the influence of like fright and impulse, the jury was at liberty to determine whether or not she was guilty of contributory negligence. The argument being that prudent men often act imprudently, and that the real test of prudence is what prudent men usually do, the statement that, if plaintiff acted as an ordinarily prudent person might act under like circumstances, etc., was an inaccurate statement of the rule. It may also be stated with equal logic that, when a prudent person acts imprudently, he is not a prudent person. To say the most, the distinction is refined, and not likely to mislead the jury, when modified and explained by the context, to wit, that, if the jury found that the plaintiff was in a situation of sudden peril, which was brought about by the defendant's negligence, and she acted under a sudden fright and impulse created by such peril, and in so doing acted naturally,—that is, in a manner expected of ordinarily cautious persons, and as ordinarily prudent persons might act, that is, might be expected to act, or would act, or would likely act. The rule quite applicable to the facts in this case was stated by this court in Clarke v. Pennsylvania Co. 132 Ind. at page 200, 17 L.R.A. at page 812, 31 N. E. at page 808, as follows: "One who does an act under an impulse or upon a belief created by a sudden danger attributable to another's negligence is not to be regarded as guilty of contributory fault, even though the act would be regarded as a negligent one if performed under circumstances not indicating sudden peril." See also Indiana R. Co. v. Maurer, 160 Ind. 25, 66 N. E. 156; Pennsylvania Co. v. McCaffrey, 139 Ind. 430, 29 L.R.A. 104, 38 N. E. 67. We are of the opinion that the instruction was not prejudicial to appellant.

Some complaint is made of the giving and refusing of a number of other instructions. We have carefully read and considered them all in the light of the evidence and accepted rules of the law, and find in them no substantial error, and, in view of the final conclusion we have reached in the case, see no important end to be subserved by a prolongation of this opinion.

The court, having indicated his intention to submit to the jury 140 interrogatories requested by appellant, permitted appellee's counsel, over appellant's objection, to read and comment upon the same to the jury. This was not error. Chestnut v. Southern Indiana R. Co. 157 Ind. 516, 62 N. E. 32; Southern Indiana R. Co. v. Fine, 163 Ind. 617, 72 N. E. 589.

We find no available error.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ROBERT G. HARRIS
v.
NORTH AMERICAN INSURANCE COMPANY.

(190 Mass. 361, 77 N. E. 493.)

Insurance—building in process of construction.

1. A building in process of construction is not within the meaning of an instruction by an insurance company to its agent not to insure unoccupied buildings.

Same—authority of agent.

2. One dealing with a local insurance agent is required to take notice that by the terms of his employment his authority does not include power orally to change the clause of a policy relating to vacancy of insured buildings.

Same—waiver of vacancy.

3. The terms of an insurance policy rendering it void in case of vacancy of a building cannot be changed by implied waiver in

Case Note.—Building in process of erection as vacant.—When a building may be considered vacant or unoccupied, within the meaning of the condition in a contract of insurance forfeiting the policy in case the premises become vacant by the removal of the owner or occupant, has frequently been the subject for consideration by the courts. But the question as to the applicability of this condition to a building in process of erection has not often arisen.

The policy involved in Burnham v. Royal Ins. Co. 75 Mo. App. 394, contained a provision that the contract of insurance should be void if the premises should be or become vacant for more than ten days after the issuance of the policy; but the provision was modified by a written slip attached to the face of the policy granting thirty days to complete construction and occupy the insured building as a dwelling. The court held that the failure to complete and occupy the premises within thirty days was a violation of the provision.

In Alkan v. New Hampshire Ins. Co. 53 Wis. 136, 10 N. W. 91, the insurance policy covered distillery buildings, and contained a provision forfeiting the policy if the premises should become vacant or unoccupied, and a clause stating "carpenter's risk granted during the term of this policy; and it is understood and agreed, that this policy of insurance is issued upon the express condition that the property insured shall not be

the issuance of a policy on a building known to be unoccupied, since the provision refers to a possible future, and not a present, use of the property.

Same—insurance of vacant property.

4. An insurance agent having no power expressly to waive the provisions of a policy rendering it void in case the premises become vacant cannot surrender the contractual right of his employer by issuing a policy on vacant property.

Same—removal of mechanics.

5. The removal from a building in process of construction of mechanics who have been in possession under a permit from the insurance company does not create a forfeiture under a clause of the policy making it void in case the premises become vacant by the removal of the owner or occupant, since the permit for their presence refers to the clause relating to increase of risk, and is not a waiver of the provision against vacancy.

Same—parol evidence to contradict policy.

6. Parol evidence is admissible to show that, when a policy of insurance was issued on a building, it was in process of erection, and, therefore, could not be occupied, within the meaning of a clause making the policy void if the premises became vacant by removal of the occupant; since such evidence does not contradict the terms of the policy.

Same—dwelling house.

7. One applying for insurance on a "dwelling house" which he states is in process of erection complies with his undertaking if, when occupied, the building is used for that purpose.

Same—vacancy.

8. A provision in an insurance policy rendering it void in case the premises become vacant by the removal of the owner or occupant has no application to a policy issued on a building in process of erection, which, because not fully fitted for occupancy, is never occupied prior to the fire.

Evidence—representations as to occupancy of insured buildings.

9. Evidence as to the laying by the town of pipes to supply with water a house insured when in process of erection is admissible in an action on the policy, in support of testimony by the owner as to representations made by him that the property would not be occupied until after the water was in.

Insurance—arbitration—waiver.

10. Noncompliance with a condition in an insurance policy as to arbitration is waived by the insurer by failure to raise the question in an action on the policy, so that refusal to direct a verdict in its favor is not error, although the provision had not been waived or complied with prior to the trial.

(February 28, 1906.)

operated as a distillery during the term of this insurance, it being intended by this policy to cover carpenter's risk only." In construing the policy, the court held that it was not forfeited because the building became vacant after the completion of the carpenter work, for the reason that the policy prohibited the use of the premises, which presumably were available for no other use, and so compelled the assured to let the buildings remain vacant and idle or forfeit his insurance. With the latter provision in the policy, the court said the insurers cannot be heard to allege forfeiture of the contract because the premises were unoccupied.

In Bear v. Atlanta Home Ins. Co. 34 Misc 613, 70 N. Y. Supp. 581, the court held that the issuance of a policy covering a frame dwelling and attachments thereto, occupied as a dwelling and road-house hotel, with knowledge on the part of the agent that the building was in process of erection, and that it would not be occupied until completed, constituted a waiver of the vacancy clause; and the insurer was liable for the amount of the policy, where the building was destroyed by fire before completion.

So, in Queen Ins. Co. v. Kline, 17 Ky. L. Rep. 619, 32 S. W. 214, vacancy of a dwelling house was held not to avoid the policy, where the agent of the insurer issued the policy knowing that the building was vacant and would necessarily remain so for some time because of incompletion.

And vacancy was held to be no defense in German Ins. Co. v. Penrod, 35 Neb. 273, 53 N. W. 74, where the agent filled out an application for insurance on a building which he knew to be unfinished, and stated therein that the house was in course of erection, and that it was designed to be rented when completed; the house having been burned before it was finished.

Knowledge by an insurance agent that buildings had not been finished and were vacant constitutes a waiver of the vacancy clause, notwithstanding that the agent did not place the risk with any company represented by him, but with a company represented by another agent, between whom and the insured there was no communication with reference to the insurance. Alkan v. New Hampshire Ins. Co. *supra*. The decision is upon the ground that, by virtue of a local statute, the first-mentioned agent must be deemed the agent of the insurance company in respect of the insurance in question.

But knowledge on the part of the agents of the insurance company at the time the policy is issued, that the building insured is not quite completed and is vacant, was held, in Royal Ins. Co. v. Lubelsky, 86 Ala. 530, 5 So. 768, not to operate as a waiver or that the building was insured as vacant, where the policy states that the building, when completed, was to be occupied as a private dwelling house; as that phrase must be taken to represent the mutual expectation of the contracting parties that the house was to be so occupied either by the owner or a tenant, and is scarcely explicit enough to constitute a promissory or executory warrant.

REPORT by the Superior Court for Essex County for the opinion of the Supreme Judicial Court after verdict in plaintiff's favor in an action brought to recover the amount alleged to be due on certain policies of fire insurance. Verdict to stand.

The facts are stated in the opinion.

Messrs. John M. Raymond and Edward C. Battis, for plaintiff:

Occupancy means actual use as a dwelling house.

Keith v. Quincy Mut. F. Ins. Co. 10 Allen, 230; Ashworth v. Builders' Mut. F. Ins. Co. 112 Mass. 422, 17 Am. Rep. 117; Whitney v. Black River Ins. Co. 9 Hun, 37; Herrman v. Adriatic F. Ins. Co. 85 N. Y. 163, 39 Am. Rep. 644; 1 May, Ins. 4th ed. § 249; Jordan v. State Ins. Co. 64 Iowa, 216, 19 N. W. 917; Cumberland Valley Mut. Protection Co. v. Douglas, 58 Pa. 419, 98 Am. Dec. 298; Browning v. Home Ins. Co. 71 N. Y. 508, 27 Am. Rep. 86; Johnson v. Norwalk F. Ins. Co. 175 Mass. 531, 56 N. E. 569.

The mechanics' permits did not vary the terms of the policies with reference to the vacancy or nonoccupancy of the premises.

Cummins v. Agricultural Ins. Co. 67 N. Y. 263, 23 Am. Rep. 111.

The agent of the company was fully authorized to issue the policies and to accept the risks offered; and he received the premiums, insured the house knowing the same was unoccupied, and his knowledge was that of the defendant; and the company thereby became bound by his acts, and it is estopped to deny the legal existence of the contract.

Bennett v. Agricultural Ins. Co. 106 N. Y. 243, 12 N. E. 609; Aurora F. & M. Ins. Co. v. Kranich, 36 Mich. 289; Williams v. Niagara F. Ins. Co. 50 Iowa, 561; Haight v. Continental Ins. Co. 92 N. Y. 51.

The plaintiff was making all reasonable efforts to get into his house and occupy it, and there was no increase of risk by his nonoccupancy, as there was no material change in the condition of the premises from the time of the issuance of the policies down to the time of the fire.

Gamwell v. Merchants' & F. Mut. F. Ins. Co. 12 Cush. 169; Smith v. Mechanics' & T. F. Ins. Co. 32 N. Y. 399.

Mr. Bancroft G. Davis for defendant.

Braley, J., delivered the opinion of the court:

Upon their face the policies, which are in the standard form required by Rev. Laws, chap. 118, § 60, purport to set forth the full provisions of the contract. The defendant endeavors to avoid payment of the loss which has accrued by showing that the building insured either became vacant for more than thirty days before the fire, by the removal of the owner without its written or printed assent, or was left under such conditions as materially to increase the risk. Although completed as a structure, the building, when burned, never had been occupied as a residence, and at the date of insurance was in process of erection. The local agent of the company by whom the policies were issued was informed by the plaintiff of these general conditions, and that it was his purpose not to occupy the house as a home until a time which was subsequent to the fire; but this knowledge was not otherwise communicated to the defendant.

In the list of prohibited risks which it furnished to its agents "unoccupied buildings" were included; but the exception to a refusal to rule that the agent was thus prohibited from insuring the plaintiff's building calls for no comment, as a new building in process of construction cannot be so classified. But the plaintiff, in dealing with a local agent who was authorized to issue policies and collect premiums, was required to take notice that by their terms the scope of his authority did not include the power orally to change the clause of the contracts relating to vacancy. Harrison v. City F. Ins. Co. 9 Allen, 231, 85 Am. Dec. 751; Kyte v. Commercial Union Assur. Co. 144 Mass. 43, 46, 10 N. E. 518; Harnden v. Milwaukee Mechanics' Ins. Co. 164 Mass. 382, 386, 49 Am. St. Rep. 467, 41 N. E. 658. Any modification or alteration of this nature could be made only with the written or printed assent of the insurer. Worcester Bank v. Hartford F. Ins. Co. 11 Cush. 265, 59 Am. Dec. 145; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133. Neither could they thus be changed if put upon the ground of waiver arising impliedly from the actual situation of the premises at the time the policies were issued, communicated to him by the plaintiff, but of which the agent independently might have been found to have had knowledge; for this provision referred to a possible future, and not a present, use of the property. Batchelder v. Queen Ins. Co. 135 Mass. 449. As the agent had no authority to assure the plaintiff that the defendant would not insist upon a strict compliance, he could not, under the doctrine of waiver invoked by the plaintiff, either by assent in words or by conduct, alter or surrender this contractual right of his principal, if it is found to have any application in the present case. Stone v. Howard Ins. Co. 153 Mass. 475, 480, 481, 11 L.R.A. 771, 27 N. E. 6, and cases there cited; Metropolitan Coal Co. v. Boutell Transp. & Towing Co. 185 Mass. 391, 397, 70 N. E. 421. Having been, however, regularly issued, duly

accepted, and the premiums paid, the contracts of insurance became binding upon the company, and the remaining questions are whether there has been a breach of this particular condition, or an unauthorized increase of risk, either of which would be sufficient to avoid them.

The defendant contends that, treating the physical presence of the mechanics under the permits as a sufficient compliance to satisfy the requirement as to occupancy, yet, after they left, as the house remained empty and unfurnished for more than thirty days before the fire, the issuance of the permits should be held to have the same modifying effect upon the contracts as the words "permission to remain vacant thirty days without prejudice," found in the policy construed in Newmarket Sav. Bank v. Royal Ins. Co. 150 Mass. 374, 23 N. E. 210. But the qualifying phrase there used had reference to, and was directly connected with, the condition relating to vacancy, and upon combining the two they were held in effect to constitute an agreement to insure the property as unoccupied for a period of thirty days, after the expiration of which it was to be treated as being within the clause relating to unoccupancy. The permission given the plaintiff here was "for mechanics to work in and about the insured premises thirty days from date," and evidently was designed to prevent a forfeiture, which otherwise might arise under the provision as to increase of risk set forth in the body of the policies, where it is said that if, without the printed or written consent of the company, "the situation or circumstances affecting the risk . . . shall be so altered as to cause an increase of said risk," they shall become void. Luce v. Dorchester Mut. F. Ins. Co. 105 Mass. 297, 301, 7 Am. Rep. 522.

The burden was on the defendant strictly to prove an avoidance of its liability, by showing that the acts of the plaintiff in connection with the insured property amounted to a removal from the house, and produced a forfeiture. Ferguson v. Union Mut. L. Ins. Co. 187 Mass. 14, 72 N. E. 358; Hitchcock v. North Western Ins. Co. 26 N. Y. 68; Orrell v. Hampden F. Ins. Co. 13 Gray, 431, 434; Butternut Mfg. Co. v. Manufacturers' Mut. F. Ins. Co. 78 Wis. 202, 47 N. W. 366. No doubt there is a sound practical distinction recognized in the community between a house that becomes merely unoccupied for a longer or shorter period, though fitted and furnished as a domicil, and one that becomes vacant by the removal of the furniture and departure of the owner. Herrman v. Adriatic F. Ins. Co. 85 N. Y. 163, 39 Am. Rep. 644. The words, "become vacant by the removal of the owner or occupant," on which the defendant so strongly relies, have received judicial construction by this court in Johnson v. Norwalk F. Ins. Co. 175 Mass. 529, 531, 56 N. E. 569, where it is held that, in accordance with this common understanding, "they refer to a permanent removal and entire abandonment of the house." But the house is not described either as occupied or unoccupied, and, there being no warranty or presumption of either present or future occupation, parol evidence that it was in process of erection, and hence could not be inhabited in the sense of being a residence until completion, did not contradict the written instrument, and was admissible. Westfield Cigar Co. v. Insurance Co. of N. A. 165 Mass. 541, 545, 43 N. E. 504. See Blood v. Howard F. Ins. Co. 12 Cush. 472; King Brick Mfg. Co. v. Phœnix Ins. Co. 164 Mass. 291, 294, 41 N. E. 277; Mead v. Phenix Ins. Co. 158 Mass. 124, 125, 32 N. E. 945.

The burden was on the plaintiff to prove that the building burned was a dwelling house, and it was open to the defendant to show that it was something else, and hence uninsured. Thomas v. Commercial Union Assur. Co. 162 Mass. 29, 34, 44 Am. St. Rep. 323, 37 N. E. 672. If it then had appeared that the defendant intended to insure one kind of a building, which the plaintiff had described, and the building burned was not of that class, there would have been no meeting of the minds of the parties, and therefore no contract. Goddard v. Monitor Mut. F. Ins. Co. 108 Mass. 56, 11 Am. Rep. 307. In describing the designated premises as a dwelling house, when taken in connection with his representations, which, because they are material, under Rev. Laws, chap. 118, § 21, are incorporated, though not expressed, in the policies all that the plaintiff undertook to perform was that, when occupied, the building should be used for this purpose. Ring v. Phœnix Assur. Co. 145 Mass. 426, 429, 14 N. E. 525; Cumberland Valley Mut. Protection Co. v. Douglas, 58 Pa. 419, 98 Am. Dec. 298. It could have been found by the jury that it was not inaccurate to describe the house as within the class commonly designated as dwelling houses equally when in process of erection as well as when finished, and that there was no misunderstanding concerning the identity of the subject-matter, even if a more technically accurate description would have been "a dwelling house now in process of erection, which, upon completion and when ready for occupancy, will be occupied by the insured." See Royal Ins. Co. v. Lubelsky, 86 Ala. 530, 5 So. 768.

While not conceded by the defendant, no satisfactory reason has been advanced whereby, in the ordinary course of human

affairs, it can be said that the plaintiff has removed from a residence he never had furnished or inhabited, although legally in his possession and subject to his direct supervision, being built on his homestead lot. Indeed, it would be a contradiction of terms, if not absurd, to say that the house ever became vacant by the bodily removal of the "owner or occupant." Recognizing the practical difficulty of sustaining such an argument, the defendant insists that, as matter of law, the premises became vacant within the meaning of the policies, and relies upon Wainer v. Milford Mut. F. Ins. Co. 153 Mass. 335, 338, 11 L.R.A. 598, 26 N. E. 877, as sustaining the proposition that in contemplation of the parties removal and subsequent vacancy must be held to have begun at the expiration of the permits. In that case, although the policy was dated January 23, 1889, the dwelling house was not occupied between that date and April 1, 1889, and it was said that "if the policy was in force from its date it was therefore rendered void." But it was not necessary to decide this question, as the decision turned upon the inquiry as to when the policy took effect, and it was held that it did not become effective by delivery until March 12, 1889. As the fire was on May 12, 1889, it would follow that the house had not been vacant for more than thirty days. This position, moreover, if anything more was meant than to say that the policy was avoided by an increase of risk caused by the vacancy, is not supported by the cases to which reference is there made. Lyman v. State Mut. F. Ins. Co. 14 Allen, 329, 334, turns upon the issue whether the act of the plaintiff had increased the risk under a policy which apparently did not contain any clause as to vacancy. While Kyte v. Commercial Union Assur. Co. 144 Mass. 43, 46, 10 N. E. 518, was also decided under a policy which provided that it should be void if without the company's assent the risk was increased, and the remaining authority of Hinckley v. Germania F. Ins. Co. 140 Mass. 38, 54 Am. Rep. 445, 1 N. E. 737, rests upon the effect of the act of the assured in keeping a bowling alley and pool table in avoiding a policy for the same reason. This decision, therefore, cannot be considered as decisive of the case now before us.

It having been found that when the policies were issued the agent understood that the insured had not occupied and could not occupy the dwelling house then being built, in the sense of living in it as a home for himself and family, until finally ready for occupancy, the clause relating to unoccupancy of the insured premises, as no change appears to have taken place, must be construed in connection with these conditions under which the parties entered into their contracts. Germania F. Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489. Even after substantial completion, and while waiting for the necessary addition of some form of service by which water could be supplied, it cannot be said that, never having been inhabited by him, the house had become vacant because the owner removed therefrom, for such a subsequent condition, upon the facts here found, manifestly becomes inapplicable. Ring v. Phœnix Assur. Co. *ubi supra;* Newmarket Sav. Bank v. Royal Ins. Co. 150 Mass. 374, 376, 23 N. E. 210, and cases there cited; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 60, 4 Am. Rep. 582; Alexander v. Germania F. Ins. Co. 66 N. Y. 464, 23 Am. Rep. 76; Philadelphia Tool Co. v. British American Assur. Co. 132 Pa. 236, 19 Am. St. Rep. 596, 19 Atl. 77; Woodruff v. Imperial F. Ins. Co. 83 N. Y. 133. There is a further provision that any increase of the risk by the act and with the consent of the plaintiff avoids them. But the question whether allowing the house to remain vacant after the mechanics left increased the hazard of its taking fire was an issue of fact, under the circumstances shown by the evidence offered by the plaintiff of his supervision and care, and which was admissible for this purpose, although the defendant finally did not ask to go to the jury on this branch of its defense. Allen v. Massasoit Ins. Co. 99 Mass. 160; Luce v. Dorchester Mut. F. Ins. Co. *ubi supra;* Powers v. Guardian F. & L. Ins. Co. 136 Mass. 108, 110, 49 Am. Rep. 20.

A portion of the evidence, to the admission of which the defendant excepted, related to the laying in the street, by the town, of a water pipe with which the house was to be connected, and for which the plaintiff's application to the water board was pending at the date of the fire. This was accompanied by further proof that at the time the insurance was effected under the first policy the agent was informed that the plaintiff's purpose was not to occupy the house until arrangements had been made for supplying it with water, and also that he knew this service could not be provided until a date subsequent to its destruction. It is now urged that the defendant was prejudiced by the admission of this, as well as other testimony that the plaintiff dug trenches on his land for the pipes, and that the pipe in the street could not be laid unless the town at its annual meeting voted an appropriation; but the evidence cannot be said to have been wholly irrelevant, as

it had some tendency to support the plaintiff's narrative of his original statements to the agent when obtaining the insurance, and to show that they were not an afterthought.

By the sixth request the defendant in substance asked for a ruling that upon all the evidence the action could not be maintained, and, this having been refused, it now further contends, that, compliance with the precedent condition of submitting the amount of loss to arbitration not having been shown, nor its waiver pleaded, the suit is prematurely brought. Lamson Consol. Store Service Co. v. Prudential F. Ins. Co. 171 Mass. 433, 50 N. E. 943. There is, however, not the slightest suggestion in the record that in any form this question was raised, or even alluded to, at the trial; and the parties evidently proceeded upon other and distinct issues which are presented by the report. If the defendant had considered the declaration insufficient for want of proper averments as to this clause in the policies, it might have demurred. Lamson Consol. Store Service Co. v. Prudential F. Ins. Co. *ubi supra*. Instead of doing so it filed an answer containing a general denial, with other specific defenses to which reference already has been made; so that, after proof of the making of the contracts and the loss of the insured property by fire, the case was tried on two questions,—whether the premises had become vacant within the meaning of the policies, or the risk had been increased. It plainly appears that the defendant did not, either by a direct request for a specific ruling, or by any form of pleading, explicitly raise the question which it now endeavors to present; and the ruling requested must have been understood by the presiding judge as relating solely to the issues presented and the evidence which had been introduced, and not as including a defense which was not only undisclosed, but which might have been definitely pleaded. If either course had been adopted, the plaintiff undoubtedly would have been afforded an opportunity to amend; but in going to trial upon pleadings which in terms did not raise this question, and by the course pursued up to the time when the case was submitted to the jury, the defendant must be deemed to have waived its right to set up this defense. Edwards v. Carr, 13 Gray, 234, 238; Goodnow v. Hill, 125 Mass. 587; Tilden v. Greenwood, 149 Mass. 567, 22 N. E. 45; Lyon v. Prouty, 154 Mass. 488, 28 N. E. 908; Fairman v. Boston & A. R. Co. 169 Mass. 170, 47 N. E. 613; Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726.

By the terms of the report the order must be: Verdict to stand.

4 L.R.A.(N.S.)

KENTUCKY COURT OF APPEALS.

HENRIETTA MILES, Appt.,
v.
MATTIE L. TRACEY et al.

(— Ky. —, 89 S. W. 1128.)

Landlord's liability for defective wall.

The foundations and walls of a building the different floors of which are leased to different tenants cannot be regarded as within the possession of the landlord, within the rule that he is liable for injuries to the tenants through defects in portions of the building remaining within his control.

(January 3, 1906.)

Case Note.—Liability of landlord for injuries from defective condition of foundation, walls, chimneys, or roof of a building, the different floors of which are let to different tenants.—In a note to Siggins v. McGill, 3 L.R.A.(N.S.) 316, the landlord's responsibility for the condition of portions of the leased property remaining under his control is considered, and numerous cases are cited illustrating the general rule that a landlord is liable for an injury resulting from the unsafe conditions of the portions over which he has reserved control. The cases there cited involve more particularly stairways and passageways which are used in common by the various tenants of the building. The application of the general rule to walls, chimneys, and roof is discussed in the following cases:

In Eagle v. Swayze, 2 Daly, 140, where a tenant rented part of a dwelling house the residue of which was occupied by other tenants, it was held that, in the absence of an express agreement on the part of the tenant to do so, it was the duty of the landlord to repair an injury to the building, such as the falling of a chimney; and, if the landlord negligently suffered one of the chimneys to remain in so defective a state that it tumbled down, causing loss and injury to the tenant, he would be answerable to the tenant for the consequences.

In Toole v. Beckett, 67 Me. 544, 24 Am. Rep. 54, it was held that, where the tenant had no care or control of the roof, and no right to intermeddle with it, and the landlord retained such control and care, the latter, by implication, undertook so to exercise his control as to inflict no injury upon his tenant, and would be responsible for injury caused to the tenant's property by a defective condition of the roof.

And in Rauth v. Davenport, 60 Hun, 70, 14 N. Y. Supp. 69, where the plaintiff leased the lower floor of a building, and the second floor was leased by another tenant, and water leaking through the roof damaged the goods of the plaintiff, and plaintiff left the building and then brought suit for damages on account of the injury suffered by his goods, it was held that the roof of the building was under the entire control of the landlord, and was no part of the premises

APPEAL by plaintiff from a judgment of the Common Pleas Branch of the Circuit Court for Jefferson County, First Division, in defendants' favor in an action brought for injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Beckley & Scott** for appellant.

Mr. Huston Quin, for appellees:

Apart from fraud, the landlord is under no obligation to keep the demised premises in repair; there being no implied covenant that premises are in a fit condition.

Battres v. Heiss, 2 Ky. L. Rep. 308; Coke v. Gutkese, 80 Ky. 598, 44 Am. Rep. 499; Franklin v. Tracy, 117 Ky. 267, 63 L.R.A. 649, 77 S. W. 1113; Lane v. Cox [1897] 1 Q. B. 415; Keates v. Cadogan, 10 C. B. 591; Doyle v. Union P. R. Co. 147 U. S. 413, 37 L. ed. 223, 13 Sup. Ct. Rep. 333; Davidson v. Fischer, 11 Colo. 583, 7 Am. St. Rep. 267, 19 Pac. 652; Land v. Fitzgerald, 68 N. J. L. 28, 52 Atl. 229; Harpel v. Fall, 63 Minn. 520, 65 N. W. 913; Dowling v. Nuebling, 97 Wis. 350, 72 N. W. 871; Jones v. Millsaps, 71 Miss. 10, 23 L.R.A. 155, 14 So. 440; Whitmore v. Orono Pulp & Paper Co. 91 Me. 297, 40 L.R.A. 377, 64 Am. St. Rep. 229, 39 Atl. 1032; Kuhn v. Sol. Heavenrich Co. 115 Wis. 447, 60 L.R.A. 585, 91 N. W. 994; Ward v. Fagin, 101 Mo. 669, 10 L.R.A. 147, 20 Am. St. Rep. 650, 14 S. W. 738; Lucas v. Coulter, 104 Ind. 81, 3 N. E. 622; Krueger v. Ferrant, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158; 1 Thomp. Neg. §§ 1129, 1130; Taylor, Land. & T. § 382; 18 Am. & Eng. Enc. Law, pp. 215, 216.

O'Rear, J., delivered the opinion of the court:

Appellees, landlords, owned a two-story building, the lower story of which was let to tenants and the upper story to appellant. The building fell because structurally in-

leased to the plaintiff or to the tenant of the story above, and there was imposed upon the landlord the obligation of maintaining the roof in a reasonably safe condition, not only for the plaintiff alone, but for the other occupants of the building.

To the same effect is Glickauf v. Maurer, 75 Ill. 289, 20 Am. Rep. 238, where a workman, in repairing a skylight, left it uncovered, and the goods of a tenant were injured.

But in Krueger v. Ferrant, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158, the court said that, where several apartments are leased by the owner of the premises to different tenants under a common roof, those parts of the premises, including the roof, not expressly included in the leases, would be deemed to remain in the possession and control of the landlord; but that, in the absence of any express agreement upon his part to make repairs, the landlord would not be liable for damages to the tenant's property caused by a leaky roof.

In Ward v. Fagan, 28 Mo. App. 116, where the main wall of a tenement house occupied by various tenants fell and injured the property of plaintiff, one of the tenants, it was held that the plaintiff might recover where the injury complained of was owing to the defective condition of the parts of the structure of which he had no possession or control, but which were in the exclusive possession of the landlord. But the case was removed to the supreme court, which reversed the judgment of the lower court, and held that, aside from an express covenant to that effect, a landlord is not bound to keep the leased premises in repair, nor is he responsible in damages to his tenant for injuries to the tenant resulting to the latter from the nonrepair of the leased premises; and that it is immaterial whether the tenant be the lessee of the entire premises or only a part thereof. 101 Mo. 669, 10 L.R.A. 147, 20 Am. St. Rep. 650, 14 S. W. 738.

In Bold v. O'Brien, 12 Daly, 160, where the wall of a building occupied by several tenants fell in and injured the property of plaintiff, it was held that the landlord was liable for the injury. But this decision was based upon the fact that the landlord knew of the defect in the wall, and had promised to repair it, and that, relying upon this promise, the tenant remained in the building.

Where the roof of the building is used by the tenants, for the purpose of drying clothes, the cases generally hold that the landlord is liable for any injuries to the tenant due to its defective condition.

Thus, in Alperin v. Earle, 55 Hun, 211, 8 N. Y. Supp. 51, it was held that the general rule that the landlord was responsible for the injuries to his tenants resulting from the dangerous condition of those parts of the building which he reserved for the common use and over which he retained control would govern where a tenant, while hanging out clothes upon a roof used in common by the tenants for that purpose, was injured through the defective condition of the roof.

And in Karlson v. Healy, 38 App. Div. 486, 56 N. Y. Supp. 361, it was held that, where the tenants of a tenement building were obliged to use the roof of the building for the purpose of drying clothes, and so used it with knowledge of the landlord, and the landlord had knowledge of the defective condition of the roof, he would be held liable for injuries to a tenant, received while so hanging out clothes, and which were due to the defective condition of the roof.

In Rouillon v. Wilson, 29 App. Div. 307, 51 N. Y. Supp. 430, it was held that, where a landlord had had pointed out to him the dangerous condition of a portion of the platform upon the roof of a tenement building used by the tenants to dry clothes, such notice was sufficient to impose upon the owner the duty of inspecting the entire platform.

secure, and damaged appellant's furniture. She sues the landlords to recover for the damages. In Franklin v. Tracy, 117 Ky. 267, 63 L.R.A. 649, 77 S. W. 1113, it was held that there was no implied warranty by the landlord that the tenement was fit or safe; that the tenant leases, as one buys, such property, with the duty to look and take notice for himself of its condition. In this case, to avoid the effect of the opinion above cited, it is admitted, and, to conform presumably to the response to the petition for rehearing in that case (117 Ky. 275, 63 L.R.A. 652, 78 S. W. 1112), appellant here amended her petition in this case, and alleged that she was tenant of the upper story alone, that defendants had let the lower story to other tenants, and that appellees had retained and reserved control and possession of the walls and foundation of the building. The desire was to bring the allegations of this pleading up to the rule, as stated by some textwriters and courts, that, where the landlord lets portions of a tenement to different tenants, reserving a common entry, hallway, or stairway, which is not let to any of them, but is reserved for the use of all, he is liable for injuries occurring in such reserved portion by reason of its defective condition.

This case falls short of the doctrine relied on. Although it is stated that the landlords retained possession and control of the walls and foundation, the pleading shows the fact to be that the possession of the entire premises had been parted with. While, if the landlord had reserved, for example, a stairway for the common use of all of his tenants, it could not be said that any of them had exclusive control of it, or that all together had. It was then his duty to keep it in repair, not by reason of any implied covenant to that effect, but, as those using it were his licensees, he owed them the duty to keep the pass way in reasonably safe and fit condition for their use. But here there could have been in fact no reservation of possession or control. The technical averment is an ideality, and inconsistent with the essential conditions resulting from the facts alleged in the petition. It then is reduced to a legal conclusion, and does not help an otherwise defective pleading. There was no allegation that the defective condition of the building was known to the landlords, or that the defect was concealed or warranted against by them.

The judgment of the Circuit Court sustaining a demurrer to the petition as amended is affirmed.

4 L.R.A. (N.S.)

VERMONT SUPREME COURT.

STATE OF VERMONT
v.
JAMES DUNCAN et al.

(78 Vt. 364, 63 Atl. 225.)

Witness—self-crimination.

1. To render available the constitutional protection against being compelled to give incriminating evidence against one's self, to one summoned before the grand jury when not under arrest or suspected of crime, the privilege must be claimed, and it is not sufficient that the evidence is given involuntarily,—at least where the conditions and circumstances of the case are not such as to speak for the witness, and of themselves show compulsion.

Same—failure to instruct witness.

2. Failure to instruct a witness summoned before a grand jury as to his rights in regard to self-crimination will not nullify an indictment against him founded in part upon his own testimony.

Conspiracy to prevent business.

3. To prevent persons from engaging in a lawful business is unlawful at common law, and conspiracy to accomplish it may be rendered unlawful by statute.

(February 2, 1906.)

Case Note.—Necessity of claiming constitutional protection against being compelled to give incriminating evidence.—It is well settled that evidence which a person has voluntarily given as a witness in any case, proceeding, or investigation may be used in any subsequent prosecution or proceeding against him. 1 Bishop, New Crim. Proc. 4th ed. § 1255, and cases cited. Generally, cases thus holding do not discuss the question whether a witness must claim his privilege of refusing to answer incriminating questions in order to render his testimony incompetent, it apparently being generally taken for granted that he must. But there are some cases which expressly hold that, if he fails to claim the privilege, he must be deemed to have intended to waive it, and his answers must be regarded as voluntary,—at least where he was not under arrest, or charged with the crime at the time of giving the testimony.

The best discussion of the question of the necessity of setting up this privilege is contained in the cases of People v. Lauder, 82 Mich. 109, 46 N. W. 956, and State v. Comer, 157 Ind. 611, 62 N. E. 452, which are set out at some length in the opinion in STATE v. DUNCAN. In these cases the contention that the witness's constitutional right to refrain from giving incriminating testimony had been violated was set up in abatement of the indictment. Another case in which a motion to quash the indictment was made on the ground that the defendant had been examined before the grand jury touching the offense therein charged is People v. King, 28

EXCEPTIONS by defendants to rulings of the Caledonia County Court sustaining an indictment against them for conspiracy. Affirmed.

The facts are stated in the opinion.

Messrs. Senter & Senter, Taylor & Dutton, M. G. Morse, and H. B. Howe, for defendants:

It is fatal to the indictments that the defendants were called to testify in the particular matter from which they resulted, without being informed or knowing that their own conduct was the subject under investigation.

United States v. Edgerton, 80 Fed. 374; Boyd v. United States, 116 U. S. 617, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Boone v. People, 148 Ill. 440, 36 N. E. 99; Entick v. Carrington, 19 How. St. Tr. 1029; Cullen v. Com. 24 Gratt. 624; Temple v. Com. 75 Va. 892; State v. Froiseth, 16 Minn. 297, Gil. 260; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; People v. Singer, 5 N. Y. Crim. Rep. 1; People v. Haines, 6 N. Y. Crim. Rep. 100; People v. Moore, 65 How. Pr. 186; State v. Horton, 63 N. C. 595; State v. Clifford, 86 Iowa, 550, 41 Am. St. Rep. 518, 53 N. W. 299; Corley v. State, 50 Ark. 305, 7 S. W. 255; People v. Sellick, 4 N. Y. Crim. Rep. 329; People v. Sharp, 107 N. Y. 436, 1 Am. St. Rep. 851, 14 N. E. 319; People v. Lauder, 82 Mich. 109, 46 N. W. 956; Rapalje, Crim. Proc. § 77; Thompson & M. Juries, § 643.

Cal. 265, where the motion was denied on the ground that there was no rule of law which made it illegal for defendant to testify if he felt inclined to do so, or which made the voluntary statements of the defendant before the grand jury a ground for setting aside the indictment; but in this case the duty of the defendant to claim his privilege is not discussed.

So, statements made before the grand jury while they were investigating a crime and before anyone was charged therewith may be given in evidence on the subsequent prosecution for the crime of the person making them, where he might have refused to answer the questions on the ground that they would incriminate him, and failed to do so. State v. Broughton, 29 N. C. (7 Ired. L.) 96, 45 Am. Dec. 507; Jenkins v. State, 35 Fla. 737, 48 Am. St. Rep. 267, 18 So. 182; Gardner v. State (Tex. Crim. App.) 28 S. W. 470.

Where, in proceedings as to the validity of an election, a witness, after being informed that he need not testify to any fact tending to convict him of crime, testified that he voted at the election in a certain precinct, and that his ballot was received by the inspectors, he cannot refuse, upon cross-examination, to answer questions as to his qualification as a voter on the ground that the answers would tend to incriminate him. Ex parte Senior, 37 Fla. 1, 32 L.R.A. 133, 19 So. 652.

And a deposition made in insolvency proceedings, by one who was subsequently indicted on the charge of obtaining goods by false representations that he had a large cash capital and owed nothing, is admissible in evidence to show the falsity of such representations, where the witness might have objected to answering on the ground that his answers would criminate him, and failed to do so. People v. Wieger, 100 Cal. 352, 34 Pac. 826.

And a statement by a person, made without objection, upon his examination before a commissioner in bankruptcy, before any criminal charges were made against him, is admissible in evidence against him on his subsequent trial on the charge of uttering a forged letter. Reg. v. Sloggett, 7 Cox, C. C. 144. In this case the question of the necessity of setting up one's privilege against answering criminating questions was discussed in the briefs, and the court, in its opinion, said that the witness might have objected to the questions put to him, and, since he did not, his statement must be regarded as voluntary.

Answers to questions propounded to a bankrupt by commissioners in bankruptcy, to which he might have demurred on the ground that they would subject him to penalties, but which he answered without objections, are admissible in evidence against him in a subsequent action to recover a penalty for having concealed property. Smith v. Beadnell, 1 Campb. 33. The court said that he might have protected himself, but, having unguardedly answered the questions put to him, his answers might be employed against him for all purposes to which they were legally applicable.

So, a bankrupt who, when testifying before a referee, does not invoke his constitutional right to refuse to testify as to matters tending to incriminate him, waives his privilege; and any admissions made by him in such proceeding before the referee may properly be made a matter of cross-examination, if pertinent, in a subsequent criminal proceeding against him. State v. Burrell, 27 Mont. 282, 70 Pac. 982.

In Queen v. Coote (1873) L. R. 4 P. C. 599, the deposition of the defendant, indicted for arson, before a board of fire commissioners empowered by statute to investigate the origin of fires, was held admissible, although made on oath by him as a witness whose attendance might have been compelled, and without caution that his statement might be given in evidence against him, where he made no objection to answering on the ground that his answers would incriminate him. The court held that, even though the witness had been ignorant of the law enabling him to decline to answer criminating questions, the evidence would nevertheless be admissible; but, as a matter of fact, it appeared that the witness was acquainted with the law, since he did exercise his priv-

A party testifying under oath before a grand jury is not a voluntary witness.

State v. Clifford, *supra;* People v. McMahon, 15 N. Y. 385; People v. Mondon, 103 N. Y. 211, 57 Am. Rep. 709, 8 N. E. 496.

An indictment for conspiracy shall state, with as much certainty as the nature of the case will permit, the facts which constitute the crime intended to be charged.

State v. Keach, 40 Vt. 113; Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; Lambert v. People, 9 Cow. 578.

It is not every combination to do unlawful acts to the prejudice of another by a concerted action which is punishable as conspiracy.

King v. Turner, 13 East, 228; Com. v. Hunt, *supra.*

The facts constituting the offense must be set out with particularity, unless the offense is one having in law a well-known definition.

State v. Crowley, 41 Wis. 271, 22 Am. Rep. 719; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 480, 12 N. E. 865, 17 N. E. 898.

If the agreement or combination be to do an act or to effect an object not criminal in itself, by unlawful means, then a general charge of conspiracy to effect the object is not sufficient.

State v. Keach, *supra;* State v. Stewart, 59 Vt. 292, 59 Am. Rep. 710, 9 Atl. 559; State v. Hewett, 31 Me. 398; State v. Roberts, 34 Me. 320; Lambert v. People, *supra;* Com. v. Eastman, 1 Cush. 225, 48 Am. Dec. 596; Com. v. Shedd, 7 Cush. 514; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; State v. Parker, 43 N. H. 88; Cole v. People, 84 Ill. 219; People v. Barkelow, 37 Mich. 456; State v. Jones, 13 Iowa, 269; State v. Potter, 28 Iowa, 557; People ex rel. Lawrence v. Brady, 56 N. Y. 182.

Messrs. **Frank D. Thompson, W. W. Miles,** and **David E. Porter,** for the State:

The defendants' constitutional right against self-crimination was not violated.

A person cannot be regarded as charged with a crime or offense until some formal complaint, indictment, or information has been filed against him.

United States v. Kimball, 117 Fed. 156; United States v. Brown, 1 Sawy. 531, Fed. Cas. No. 14,671; United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134.

The privilege of a witness to refuse to testify to self-incriminating facts is personal. He alone is entitled to invoke its protection, and, if he desires, he may waive it.

3 Wigmore, Ev. §§ 2268–2276; Chamber-

ilege of refusing to answer some questions put to him.

The fact that the witness may be ignorant of his privilege, and that he is not advised of it, seems generally not to be considered important, since it is said everyone must be deemed to know the law.

Nevertheless, it was held, in United States v. Bell (C. C. W. D. Tenn.) 81 Fed. 830, that it is the duty of all officers, when about to examine one who might be incriminated by his testimony, to warn him of his privilege; and therefore, where an ignorant negro was summoned before a pension examiner and examined without any warning of his right to remain silent, and he there gave false testimony on which a charge of perjury was based, it was held that his testimony before the examiner could not be used in evidence against him on the charge of perjury. The court said that, while it might be conceded that the right to remain silent is a personal privilege that may be waived, and it is the duty of the witness himself to claim his privilege when it is in danger, nevertheless, in order to show a waiver of such privilege, it must appear that the waiver was knowingly and understandingly made.

It is also well settled by the weight of authority that the voluntary testimony of a person at a coroner's inquest is admissible on his subsequent trial for homicide; and, if the person is not under arrest or charged with the crime at the time the testimony is given, it is generally held that he is to be treated as any other witness, and need not be informed of his right to refuse to testify in case his answers might incriminate him; and that, if he fails to claim his privilege, his testimony is deemed voluntary. The rule seems to be otherwise where the person is under arrest, charged with the crime, at the time he gives his testimony. See note, as to admissibility, on trial for murder, of testimony of accused at coroner's inquest, in 70 L.R.A. 33.

The question whether or not it is necessary for a person to claim his privilege in order to be entitled to the benefit of the exemption conferred by a statute which provides that a witness may be compelled to answer, but that his evidence shall not be used against him, has also been considered in some cases. Thus, it is held, in Reg. v. Hendershott, 26 Ont. Rep. 678, that the deposition of a witness before a coroner's court cannot be used against him when he is subsequently charged with murder, under the Canada evidence act (1893), providing that no person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, but that no evidence so given shall be used in evidence against him in any criminal proceeding thereafter instituted against him, other than a prosecution for perjury in giving such evidence, notwithstanding the fact that a witness failed to claim his privilege at the time of making the deposition. The court said that there was no doubt that, before the passage of the act, it was the duty of a person examined

lain v. Willson, 12 Vt. 491, 36 Am. Dec. 356; People v. Lauder, 82 Mich. 109, 46 N. W. 956; State v. Comer, 157 Ind. 611, 62 N. E. 452; Evans v. O'Connor, 174 Mass. 287, 75 Am. St. Rep. 339, 54 N. E. 557.

As a matter of right, he is not entitled to be informed by the court, or by anyone else, as to his privilege.

3 Wigmore, Ev. §§ 2269, 2270; State v. Comer, *supra;* Bolen v. People, 184 Ill. 338, 56 N. E. 408; Com. v. Shaw, 4 Cush. 594, 50 Am. Dec. 813; Com. v. Howe, 13 Gray, 26; Paxton v. Douglas, 16 Ves. Jr. 239.

Nor does it make any difference that the witness does not know of his rights.

State v. Comer and People v. Lauder, *supra.*

If a person, in response to a subpœna, appeared before the grand jury and voluntarily testified to self-incriminating matters, the validity of an indictment against him cannot be impeached by the circumstance that he has been compelled to appear and testify before the grand jury.

Thompson & M. Juries, § 643; 17 Am. & Eng. Enc. Law, p. 1288; People v. Lauder; State v. Comer; United States v. Kimball; and United States v. Brown,—*supra;* People v. King, 28 Cal. 265; State v. Donelon, 45 La. Ann. 744, 12 So. 922.

If the object sought to be effected is unlawful in itself, the means to be used need not be alleged.

State v. Noyes, 25 Vt. 415; State v. Keach, 40 Vt. 113; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; State v. Dyer, 67 Vt. 690, 32 Atl. 814.

If the defendants had prevented, hindered, and deterred the several persons from further engaging and continuing in the business of manufacturing granite, that act would have been criminal.

King v. Eccles, 3 Dougl. K. B. 337.

It logically follows that a conspiracy to do this thing would be equally so.

State v. Stewart, *supra.*

Rowell, Ch. J., delivered the opinion of the court:

This is an indictment against ten for conspiracy to "prevent, hinder, and deter" the several persons therein named, "by violence, threats, and intimidation, from further engaging and continuing in the business of manufacturing granite." Five of the prisoners were summoned before the grand jury and gave self-criminating evidence under oath, and they severally plead that in abatement. The other five jointly plead that in abatement, although they themselves were not called before the grand jury. The pleas are demurred to; but only Mc-

to claim his privilege if he wished the benefits of it, referring to Queen v. Coote, *supra.*

This case, however, was overruled in Reg. v. Williams, 28 Ont. Rep. 583, where it was held that evidence of the accused, given before a coroner, was admissible against him on his trial, unless he claimed his privilege at the time. The court in this case relied upon the case of Reg. v. Madden, 14 Can. Law Times, 505, 30 Can. L. J. 765, where, on a trial for conspiracy to defraud, the evidence of a statement made by a defendant on cross-examination under oath in a prosecution before a magistrate, in which the defendant was the complainant and gave evidence on his own behalf, was held to be admissible against him, notwithstanding the statute, where he failed to assert his privilege when testifying before the magistrate.

But, in Queen v. Hammond, 29 Ont. Rep. 211, the Williams Case was criticized, and the court refused to follow it, and approved the rule laid down in the Hendershott Case. The court in this case referred to the fact that, before the statute, if a witness elected to waive his privilege by answering without claiming it, he was deemed to have answered voluntarily, and the evidence could afterwards be read against him, but said that in fact and in law a witness under oath, answering questions pursuant to the statute, does not speak voluntarily, but is under legal compulsion throughout; that therefore surely the doctrine of compulsion propounded in the older authorities, and adopted in Reg. v. Williams, was without pertinence or significance.

So, it is held that a person who appears before a senate committee appointed to investigate certain charges of fraud and bribery, in obedience to a subpœna, and is sworn and examined as a witness, cannot be deemed a willing or consenting witness, and does not waive, by failing to assert it, his privilege, under N. Y. Penal Code, § 79, making any person offending against the sections thereof which relate to bribery a competent witness against another person so offending, and providing that he may be compelled to testify upon any trial, hearing, proceeding, or investigation, but declaring that the testimony so given shall not be used in any prosecution or proceeding against such witness; and that he shall not thereafter be liable to indictment, prosecution, or punishment for that bribery. People v. Sharp, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319.

And statements of a person on his examination in proceedings supplementary to execution pursuant to N. Y. Code Proc. § 292, which provides that no person shall be excused from answering any question on the ground that it would tend to convict him of a fraud, but that his answer shall not be used in evidence against him in any criminal proceeding or prosecution, cannot be admitted in evidence on his subsequent prosecution for obtaining goods by false pretenses, although he failed to claim his privilege. Barber v. People, 17 Hun, 366.

Naughton's several plea need be considered, as the others are essentially like it. That plea alleged that while said indictment and the charges of conspiracy therein contained were pending before the grand jury, and while the grand jury was investigating and inquiring into said charges and considering whether it would find said indictment, the prisoner appeared before the grand jury in obedience to a subpœna duly served upon him; that he did not then know that said indictment and charges were being investigated; that he was not permitted to have counsel, and was not advised in the premises; that he was sworn by the foreman of the grand jury to testify upon the subject-matter of said charges, and was required and compelled to make oath as a witness, and then and there under oath was required and compelled to give testimony touching said indictment and charges, and was fully interrogated as to them, and questioned as to each and every detail, fact, and circumstance of the same, and was then and there obliged and compelled to make, and then and there did make, answer thereto on his oath; that he was not then and there informed by the grand jury, the state's attorney, nor anyone else, and did not know that his own conduct and acts in reference to said charges were then and there in question and under consideration by the grand jury; that he was not informed, and did not know, that he was then and there charged with any crime, and was not then and there warned nor advised of his right and privilege to refuse to give evidence against himself, and was wholly ignorant and uninformed of his rights in that respect, and did then and there involuntarily and upon his oath answer all questions asked him concerning said charges, and was compelled to testify, and did testify, to facts that were material and necessary to establish the truth of said charges against him and the other respondents; that his said testimony was considered and acted upon by the grand jury in finding and presenting said indictment; and that he was summoned before the grand jury as aforesaid for the purpose of obtaining evidence from him upon which to find said indictment against him and the other respondents.

It is objected that, as the matter complained of does not go to the qualification of the grand jury, but only to the propriety of its proceedings, it cannot be taken advantage of by plea in abatement, but only, if at all, by suggestion to the court. But we pass over that question, and consider the plea on its merits. Our Constitution declares that no one can be compelled to give criminating evidence against himself. Such is the common law. *Nemo tenetur seipsum accusare.* It is objected that the plea is bad, because it does not show that the prisoner was compelled to give criminating evidence against himself. This immunity is a personal privilege, and may be waived, and is waived if not seasonably asserted, and the testimony regarded as voluntary. Chamberlain v. Willson, 12 Vt. 491, 36 Am. Dec. 356. The plea does not show that the prisoner asserted his privilege. It alleges that he involuntarily testified. But that is subjective, signifying only his mental state, and means no more than unwillingly and reluctantly, and does not imply a disclosure of that mental state by objecting to answer nor otherwise; and until such disclosure was made in some way there could have been no compulsion. True, the plea alleges compulsion; but that is only a conclusion, and is not warranted by the facts alleged.

In People v. Lauder, 82 Mich. 109, 46 N. W. 956, the prisoner, who was indicted for bribery, pleaded in abatement that he appeared before the grand jury in obedience to a subpœna, and being ignorant of the fact that charges of bribery against him were being inquired into, and without counsel or being advised in the premises, he was required and compelled to, and did, give his testimony, and was fully interrogated as to said charges, and testified to facts material and necessary to prove their truth and to sustain the indictment, and that upon his testimony and that of other witnesses the indictment was found. The court said that being subpœnaed and appearing before the grand jury was not a violation of the prisoner's constitutional rights, nor being sworn before that body, nor testifying upon any matter that did not criminate him, for the law compelled him to do all that under pains and penalties; but that it did not compel him to criminate himself; and that in all cases where a personal privilege exists for a witness to testify or not, and he testifies without objection, he will be deemed to have done so voluntarily. The court went on to say that the prisoner did not say in his plea that he claimed his privilege, or refused to answer any question; that he averred that he was required and compelled to, and did, make answer to the questions put to him; but that that was a conclusion from the facts, whereas the rules of pleading in abatement required him to set forth the facts, and not his conclusions. It is objected that that case is by a divided court, and stands alone; and Boone v. People, 148 Ill. 440, 36 N. E. 99, is much relied upon as holding a different doctrine. It is true that the Michigan case is by a divided court, but it does not stand alone, nor is

the Illinois case opposed to it; for there, at the time of his examination before the grand jury, the prisoner was in custody in jail, charged with the very crime about which he was examined and for which he was indicted, and therefore he stood as a party, and not as a mere witness, and the court specially noted that distinction. But in the Michigan case the prisoner was not in custody, charged with the offense, at the time he was examined, and therein lies a marked and fundamental difference between the cases.

State v. Comer, 157 Ind. 611, 62 N. E. 452, is practically like the Michigan case. There the prisoner was indicted for selling his vote in violation of the statute. He pleaded in abatement that, for the purpose of obtaining evidence and securing an indictment against him, the grand jury caused him to be summoned before them to answer such questions as might be propounded to him; that he appeared, and was sworn, and while under oath was interrogated by the grand jury, and by them then and there compelled, forced, and caused involuntarily to testify to matters and facts concerning said crime; that he was not then and there informed by anyone, and did not know, that he had the legal right to refuse to testify or give to the grand jury any evidence concerning his supposed connection with or commission of said crime, whereof the grand jury suspected him guilty; that, if he had had such information and knowledge, he would not have testified about such facts, nor given the grand jury any evidence in relation thereto; and that the indictment was returned upon the testimony so given by him. The court said that being summoned and appearing before the grand jury and being sworn was not a violation of the prisoner's constitutional rights, and while before the grand jury he could be compelled to testify to any matter that would not criminate him, but could not be compelled to testify to any matter that would criminate him, and could claim his privilege or not, as he chose; but, if he gave criminating evidence voluntarily, his constitutional rights were not thereby violated, for it is a general rule that when a personal privilege exists for a witness to testify or not as he chooses, and he testifies without objection, he will be deemed to have done so voluntarily; that the allegation of the plea that the grand jury compelled and forced the prisoner involuntarily to testify to facts criminating himself was a mere conclusion, whereas facts, and not conclusions, should have been alleged; that the grand jury could not have compelled him, but only the court, and that the plea did not show compulsion; that as to the allegation that the prisoner was not informed, and did not know, of his right to refuse to testify, the statute did not require the grand jury to give him such information; that everybody is presumed to know the law, and that the grand jury had a right to act upon the presumption that the prisoner knew his rights in the premises; that he was not in custody nor under bonds to answer to a charge of selling his vote, and no such charge was pending against him.

The line is definitely drawn in New York between cases in which the testimony of a witness can be used against him and those in which it cannot be. Thus, when a witness is called and sworn before a coroner's jury before it has been ascertained that a crime has been committed, or before anyone has been arrested charged with the crime, the testimony of that witness, should he afterwards be charged with the crime, may be used against him on his trial; and the mere fact that at the time of his examination he was aware that a crime was suspected, and that he was suspected of being the criminal, will not prevent his being regarded as a mere witness whose testimony may be given in evidence against him, unless he claimed his privilege. But if, on the other hand, at the time of his examination, it appears that a crime has been committed, and that he is in custody as the supposed criminal, he is not regarded as a mere witness, but as a party accused, called before a tribunal vested with power temporarily to investigate the question of his guilt; and he is to be treated the same as though brought before a committing magistrate; and, if his examination is not taken in conformity with the statute, which requires his testimony to be taken without oath and on advice of privilege, it cannot be used against him. This is a judicial examination; that, an extrajudicial. People v. Mondon, 103 N. Y. 211, 57 Am. Rep. 709, 8 N. E. 496, is an example of the latter class, and Hendrickson v. People, 10 N. Y. 13, 61 Am. Dec. 721, of the former class, to which the case at bar belongs. There the prisoner's wife died suddenly in the morning, and in the evening of the same day a coroner's inquest was held, and the prisoner was called and sworn as a witness. At that time it did not appear that a crime had been committed, nor that the prisoner had been charged with any crime, nor even suspected, except as far as the nature of some of the questions asked him might indicate such suspicion. On his subsequent trial on an indictment for the murder of his wife, the statements made by him at the coroner's inquest were held admissible, on the ground that he was not examined as a party charged with a crime, but simply as a witness, and had testified without objection. The court said that it is only

in judicial examinations, namely, in the case provided for by statute, when a prisoner is brought before a magistrate charged with crime, that the preliminaries required by statute are to be observed, and the examination taken without oath and on advice of privilege; that all other examinations are extrajudicial; that one is the examination of a witness, the other of a party; that in all cases, as well before coroners' inquests as on the trial of issues in court, when the witness is not under arrest, nor before the tribunal, charged with crime, he stands on the same footing as any other witness; that he may refuse to answer, and that his answers are to be deemed to be voluntary unless he is compelled to answer after having refused to do so, in which case only will they be deemed to be compulsory and be excluded.

The same thing was held in Reg. v. Coote, 12 Cox, C. C. 557, which went up from the court of Queen's bench for the province of Quebec on a case reserved. There certain officers called "fire marshals" were appointed under a statute, with power to inquire into the origin of fires in Montreal and Quebec, and for that purpose to compel the attendance of witnesses and examine them on oath, and to commit to prison any witness refusing to answer without just cause. On an inquiry held in pursuance of that statute as to the origin of a fire in a warehouse occupied by the prisoner, he was examined on oath as a witness. At the time of such examination there was no charge against the prisoner, nor anyone else, and he was not cautioned that his evidence might be used against him. Subsequently the prisoner was tried for arson of said warehouse, and his depositions made at said inquest were admitted in evidence against him, and properly so, it was held. After reviewing the cases, their lordships gave it as their opinion that the depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consist of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer; that the exception depends upon the principle, *nemo tenetur seipsum accusare*, but does not apply to answers given without objection, which are to be deemed to be voluntary. To the objection that the prisoner should have been cautioned as prisoners accused before magistrates are required to be by statute, their lordships said that the statute applied only to accused persons, and not to a mere witness, as the prisoner was. In Reg. v. Sloggett, Dears, C. C. 656, the court said that the test is, not whether the witness could discriminate between matters to which he was bound to testify and those to which he was not, but whether he might have objected; that if he might have, and did not, he voluntarily submits to testify.

It is unnecessary to inquire whether the conditions and circumstances of a case may not be such as to speak for the witness, and of themselves constitute compulsion, for the plea does not present a state of facts calling for such inquiry. But the privilege is an option of refusal, not a prohibition of inquiry. Hence, when an ordinary witness is on the stand, and a self-criminating act relevant to the issue is desired to be shown by him, the question may be asked, and then it is for the witness to say whether he will answer it or claim his privilege, for it cannot be known beforehand which he will do. 3 Wigmore, Ev. § 2268; Rapalje, Witnesses, § 265; Short v. State, 4 Harr. (Del) 568. A witness must obey a subpœna, and be sworn. Then he may claim his privilege. Eckstein's Petition, 148 Pa. 509, 24 Atl. 63; United States v. Kimball, 117 Fed. 156, 163; Boyle v. Wiseman, 10 Exch. 647.

Some of the cases already referred to relate to the question of notifying the ordinary witness of his privilege, and warning him of possible consequences; and such used to be the English practice. Mr. Erskine once said that he conceived it to be of all things the most idle to recognize the privilege as a principle of law, and not at the same time warn the witness that his answer might criminate him. But in Lord Eldon's time the practice had come to be otherwise, he said, and he would not suppress an interrogatory in chancery allowed by the master, but let it be put, assuming that the witness would claim his privilege if he wanted to. Paxton v. Douglas, 16 Ves. Jr. 242. Parke, B., said in Atty. Gen. v. Radloff, 10 Exch. 87, that he thought the witness ought to make the objection himself, though he understood that in Lord Cardigan's Case Lord Denman interposed to prevent a witness from answering a question having a tendency to elicit self-criminating evidence. It seems clear, upon the authorities, that the old practice has disappeared in England, as far, at least, as any general rule is concerned. But in this country, Mr. Wigmore says, both the rule and the trial custom vary in different jurisdictions; that no doubt a capable and an impartial judge will give the warning when need appears; but that there is no reason for letting a wholesome custom degenerate into a technical rule. 3 Wigmore, Ev. § 2269. In this state the law does not require the warning, though ordinarily it is given, either by counsel or by the court on its own motion or at the suggestion of counsel. But the privilege is the witness's and he alone must claim it. Chamberlain v. Willson, 12 Vt. 491, 36 Am. Dec.

356. In Massachusetts it is within the discretion of the court, and the usual practice, to advise a witness that he is not bound to criminate himself, when it appears necessary to protect his rights. Mayo v. Mayo, 119 Mass. 292. So in Janvrin v. Scammon, 29 N. H. 280, 290, it is held that, as the privilege is personal to the witness, it is for him to say in the first place whether he will answer, but that the court will frequently interpose and inform him of his privilege, when it sees that his answer might tend to criminate him. This seems to be the general practice in this country, but in some of the states it is otherwise. Thus, in Virginia it is held that as a general rule the witness should be warned of his privilege before he can be held to have waived it by answering. Cullen v. Com. 24 Gratt. 624.

Thus it appears that the allegations of the plea that the prisoner did not know what was going on before the grand jury, and was not advised of his privilege, are immaterial; for it is not shown that at the time he testified before that body it had been ascertained that a crime had been committed, nor that he was in custody, charged with the crime, nor even suspected of it, and therefore he stood as an ordinary witness, and not at all as a party. Nor is the allegation that he was "wholly ignorant" of his rights in respect of his privilege material, for he is to be treated just as if he knew them, for ignorance of the law excuses no one. Coote's Case, above referred to, is in point here. There the chief justice of the court below suggested that Coote might have been ignorant of the law enabling him to decline to answer criminating questions, and that, if he had been acquainted with it, he might have withheld some of the answers he gave. Their lordships said that, as matter of fact, it would appear that he was acquainted with so much of the law; but whether he was or not, it was obvious that to institute an inquiry in each case as to the extent of the prisoner's knowledge of the law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion; and their lordships saw no reason to introduce, with reference to this subject, an exception to the rule, recognized as essential to the administration of the criminal law. *Ignorantia legis non excusat.* The plea, therefore, is held bad, and the other pleas must fall with it.

The indictment is demurred to, for that it does not charge the offense with the requisite certainty. It is claimed that, although it is in this respect almost identical in language with the indictments in State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559, and State v. Dyer, 67 Vt. 690, 32 Atl. 814, which were held good, yet that those cases are not authority for holding this indictment good, because there the conspiracy related to the preventing, hindering, deterring of workmen from accepting, undertaking, and prosecuting the work of stone cutting, which was made criminal by statute. But the statute is directed more to the means of accomplishing the object of the conspiracy than to the conspiracy itself; and it was held in both of those cases that the indictment charged a conspiracy to do an act unlawful at common law by means unlawful by statute. Tested by those cases, to which we refer for the law of the subject, it is clear that this indictment charges a conspiracy to do an act unlawful at common law, and therefore is good, without more.

Judgment affirmed, and cause remanded.

WISCONSIN SUPREME COURT.

CHARLES L. JACOBSON, Appt.,
v.
WILLIAM O. BENTZLER, Respt.

(— Wis. —, 107 N. W. 7.)

Sunday—illegal contract.

1. A transaction consisting of a lending of money, represented by a check, on real-estate security, which takes place on Sunday, is not relieved from the operation of the Sunday law by the fact that the check is not collected, or the deed acknowledged, recorded, and transmitted to the lender until a subsequent day.

Same—illegal loan.

2. A loan of money on Sunday is void, and not subject to ratification on a subsequent day.

Illegal contract—failure to assert.

3. The omission to assert in the pleadings the invalidity of a contract because contrary to the Sunday law does not preclude the raising of the objection at a later time in an action to enforce it.

(March 20, 1906.)

Case Note.—Validity of contract partially made on Sunday and perfected on a secular day.—The following contracts partially completed on Sunday, but perfected on a business day, were held to be valid, and not within the operation of the Sunday law:

A contract of sale, executed on a week day, the terms of which were agreed upon on Sunday,—Moseley v. Vanhooser, 6 Lea, 286, 40 Am. Rep. 37; a contract for personal services, consummated on a secular day pursuant to a request in a letter written and delivered on Sunday,—Tuckerman v. Hinkley, 9 Allen, 452; a contract entered into pursuant to an offer made on Sunday to pay

APPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County in defendant's favor in an action brought to compel repayment of an alleged loan. Affirmed.

Statement by Siebecker, J.:

Plaintiff alleges that he loaned and advanced defendant the sum of $1,000, and that defendant agreed to repay the sum on demand. He claims that demand has been made, and that no part of the sum has been paid. Defendant denies that a loan was ever made, and alleges that he conveyed certain real estate to the plaintiff in consideration of the $1,000. He further alleges that the deed was executed and delivered upon an express agreement in writing that upon repayment of the sum, and provided he had paid the taxes levied on the property, he might demand a reconveyance, but that in case of failure to pay such taxes then the contract was to be null and void. He alleges that he has not paid the taxes, and that the right to demand a reconveyance no longer exists; and he asserts that plaintiff has not offered to reconvey. The evidence on the trial shows that all of the transactions involved took place on Sunday, including the delivery of the check for $1,000, the signing and delivery of the written agreement, and the delivery of the deed. The only act not positively shown to have taken place on Sunday refers to the acknowledgment and the recording of the deed, and this is left in uncertainty by the statements of the plaintiff. At the conclusion of plaintiff's evidence, defendant's motion

workmen, but not accepted until the following day,—McDonald v. Fernald, 68 N. H. 171, 38 Atl. 729; Stackpole v. Symonds, 23 N. H. 229; an agreement growing out of a proposition for a certain use of a horse, made on Sunday, but accepted on a business day,—Dickinson v. Richmond, 97 Mass. 45; an agreement for the payment of damages, perfected on a week day, the terms of settlement of the claim being agreed upon on Sunday,—Taylor v. Young, 61 Wis. 314, 21 N. W. 408; a fire insurance policy, the terms of which and property to be covered being talked over on Sunday, but no company, rate, or date fixed for the commencement of the risk being mentioned; and which was written, delivered, and became operative on the following Monday,—Wooliver v. Boylston Ins. Co. 104 Mich. 132, 62 N. W. 149; a deed of trust and notes drawn up and handed to the debtor for signature on a secular day and signed by him and his wife on Sunday and dated on that day, but delivered to the beneficiary on a secular day without the latter's knowledge that the instruments were signed on Sunday,—Duggan v. Champlin, 75 Miss. 441, 23 So. 179; a mortgage agreed to and consummated on a business day, but talked over on Sunday,—McKinnis v. Estes, 81 Iowa, 749, 46 N. W. 987; an agreement by the purchaser of a mortgaged chattel to pay the amount of the mortgage to the mortgagee in consideration of the latter's promise to surrender the note and mortgage to the mortgagor, made wholly on Monday, although such sale was broached on Sunday when the purchaser bought the mortgagor's interest,—Provenchee v. Piper, 68 N. H. 31, 36 Atl. 552; an agreement for the purchase of partnership lands, made on Sunday subject to the subsequent approval of the absent copartner, who refused to confirm the sale, not so far illegal as to prevent recovery of a payment made on a business day,—Merrill v. Downs, 41 N. H. 72; a bond signed on Sunday, but dated and delivered on a business day,—Hall v. Parker, 37 Mich. 590, 26 Am. Rep. 540; Beitenman's Appeal, 4 L.R.A. (N.S.) 55 Pa. 183; State v. Young, 23 Minn. 551; Gibbs & S. Mfg. Co. v. Brucker, 111 U. S. 597, 28 L. ed. 534, 4 Sup. Ct. Rep. 572; a bond signed by one surety on Saturday and by a second surety on Sunday, but not delivered until the following day,—Com. v. Kendig, 2 Pa. St. 448; a contract of guaranty talked over on Sunday, but reduced to writing, signed, and delivered on a week day,—Tyler v. Waddingham, 58 Conn. 375, 8 L.R.A. 657, 20 Atl. 335; a contract of guaranty dated and signed on Sunday, without the knowledge of the obligee, but delivered on a secular day, on which day a letter accepting the guaranty was written and sent to the guarantor,—Diamond Glass Co. v. Gould (N. J.) 61 Atl. 12; an official bond signed and delivered by the surety to the principal on Sunday, and delivered by the latter to the proper officer on a business day,—Evansville v. Morris, 87 Ind. 269, 44 Am. Rep. 763; Prather v. Harlan, 6 Bush, 185; a note dated and signed by the maker on Sunday, but delivered on a business day,—Hofer v. McClung, 24 Ky. L. Rep. 355, 68 S. W. 438; Lovejoy v. Whipple, 18 Vt. 379, 46 Am. Dec. 157; Goss v. Whitney, 24 Vt. 187; Dohoney v. Dohoney, 7 Bush, 217; King v. Fleming, 72 Ill. 21, 22 Am. Rep. 131; Hilton v. Houghton, 35 Me. 143; Bell v. Mahin, 69 Iowa, 408, 29 N. W. 331; a note signed by the maker and two sureties on Sunday and dated as of another day, but signed by a third surety and delivered on a secular day,—Barger v. Farnham, 130 Mich. 487, 90 N. W. 281; a note for borrowed money, executed on Sunday, a part of the loan being paid in cash on that day and a check given for the balance, which was collected on a business day,—Campbell v. Young, 9 Bush, 240.

But the contract was held to be invalid in Cook v. Forker, 193 Pa. 461, 74 Am. St. Rep. 699. 44 Atl. 560, it appearing that the note was indorsed and discounted on Sunday, and that a check, given on that day for the proceeds, was dated as of the following day, and indorsed by the payee on Sunday, but cashed on a secular day.

for a nonsuit was granted by the court. A motion for a new trial was denied, and judgment for costs was rendered for defendant. This is an appeal from such judgment.

Mr. J. A. Eggen, for appellant:

The deed, having been both made and delivered on a week day, made all previous transactions valid, no matter on what date they took place.

McKinnis v. Estes, 81 Iowa, 749, 46 N. W. 987; DeForth v. Wisconsin & M. R. Co. 52 Wis. 320, 38 Am. Rep. 737, 9 N. W. 17.

One cannot assent to the thing done, seek benefits from it, and, in case of disappointment, deny the validity of the act assented to.

Bigelow, Estoppel, 5th ed. 687.

One can neither plead, nor offer in evidence, a document without admitting its validity and legal effects.

Campbell v. Crone, 10 Neb. 571, 7 N. W. 334; Hulbert v. Hammond, 41 Mich. 343, 1 N. W. 1040; Jarstadt v. Morgan, 48 Wis. 245, 4 N. W. 27; Oshkosh v. State, 59 Wis. 425, 18 N. W. 324.

Messrs. McElroy, Eschweiler, & Wetzler, for respondent:

An action cannot be based upon a contract or agreement made and entered into on Sunday.

Sherry v. Madler, 123 Wis. 621, 101 N. W. 1095; Pearson v. Kelly, 122 Wis. 660, 100 N. W. 1064; Howe v. Ballard, 113 Wis. 375, 89 N. W. 136; Ainsworth v. Williams, 111 Wis. 17, 86 N. W. 551; Williams v. Lane, 87 Wis. 152, 58 N. W. 77; Cohn v. Heimbauch, 86 Wis. 176, 56 N. W. 638; Smith v. Chicago, M. & St. P. R. Co. 83 Wis. 271, 50 N. W. 497, 53 N. W. 550; Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787; DeForth v. Wisconsin & M. R. Co. 52 Wis. 320, 38 Am. Rep. 737, 9 N. W. 17; Troewert v. Decker, 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26; Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605; Hill v. Sherwood, 3 Wis. 343.

The loaning of money on Sunday is such business within the meaning of the statute.

Howe v. Ballard and Troewert v. Decker, *supra*.

That such defense need not be pleaded, see.—

Pearson v. Kelly, *supra;* Wight v. Rindskopf, 43 Wis. 344.

The giving of a check on a bank is payment.

Mehlberg v. Tisher, 24 Wis. 607; Schierl v. Baumel, 75 Wis. 69, 43 N. W. 724.

Mr. Christian Doerfler also for respondent.

Siebecker, J., delivered the opinion of the court:

The evidence of the plaintiff shows that the transactions on which relief is sought took place between the parties on Sunday. It is undisputed that plaintiff on this day delivered to and that defendant received from him a check for $1,000; that the written agreement expressing the conditions of the loan were executed and delivered on Sunday; and that the deed, which had been signed by the grantor, was handed to plaintiff on the same day. The only part of the transaction which occurred thereafter was that the defendant had the deed acknowledged and left for record, with directions to the register of deeds to mail it to the plaintiff. The time of payment of the check and the acknowledgment and recording of the deed are relied on as showing that the alleged loan was not made on Sunday: Firstly, upon the ground that the alleged loan to defendant was not made until the check had been paid at the bank; and, secondly, it is claimed that the loan was not made until the deed was acknowledged, recorded, and transmitted by mail to plaintiff, and that these acts were essential to the delivery of the deed, and were necessary steps to give legal efficacy to the transaction. As to the first point, it seems clear that acceptance of a check on a bank is in the nature of a conditional payment, which becomes complete when accepted and when the amount due on it is actually paid; and that such payment relates back to the time of its delivery. 22 Am. & Eng. Enc. Law, p. 569; Dan. Neg. Inst. § 1623. Under the circumstances shown, the fact that defendant received the money on the check after Sunday does not relieve the transaction from the operation of the Sunday law. The same is true with respect to the acknowledgment, the recording, and the transmission of the deed. These were mere incidents to the transaction, which constituted the making of the loan. The alleged obligation for the repayment of the money loaned arises out of what took place on Sunday.

Plaintiff is not relieved from difficulty by the claim that the acts done after Sunday were in the nature of a ratification of that which preceded, for it has been held that the loaning of money on Sunday is within the meaning of the statute prohibiting the doing of business on the first day of the week. This makes the contract void and not susceptible of ratification. Troewert v. Decker, 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26; Brown v. Gates, 120 Wis. 349, 97 N. W. 221, 98 N. W. 205 and cases cited; Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787; Sherry v. Madler, 123 Wis. 621, 101 N. W. 1095. The fact that defendant, in his answer, did not assert the invalidity of the contract upon the grounds now advanced does not preclude him from insisting that the agreement cannot be enforced. Upon the ground of public

policy, all the parties to such an agreement are deemed equally guilty, and are denied the usual remedies of the law for its enforcement. Pearson v. Kelly, 122 Wis. 660, 100 N. W. 1064.

The judgment dismissing the action was properly awarded.

Judgment affirmed.

WASHINGTON SUPREME COURT.

W. HENDRYX et al., Appts.,
v.
PEOPLE'S UNITED CHURCH OF SPOKANE et al., Respts.

(— Wash. —, 84 Pac. 1123.)

Religious society—expulsion of member—equitable relief.

Equity will aid a member of a church expelled for the fraudulent purpose of devoting the church property to purposes entirely foreign to that of the church organization, to preserve the trust property, notwithstanding the rules of the organization permit the expulsion of members without formal trial.

(March 17, 1906.)

APPEAL by complainants from a judgment of the Superior Court for Spokane County dismissing a suit to cancel a deed purporting to transfer property alleged to belong to the defendant church. Reversed.

The facts are stated in the opinion.

Mr. L. H. Prather, for appellants:

A church corporation cannot expel a member of the church arbitrarily without accusation, charge, notice, or trial.

Sayre v. Louisville Union Benev. Asso. 1 Duv. 143, 85 Am. Dec. 613; People ex rel. McIlhany v. Chicago Live Stock Exchange, 170 Ill. 556, 39 L.R.A. 373, 62 Am. St. Rep. 404, 48 N. E. 1062; Com. v. St. Patrick Benev. Soc. 2 Binn. 441, 4 Am. Dec. 453; Palmetto Lodge No. 5, I. O. O. F. v. Hubbell, 2 Strobh. L. 457, 49 Am. Dec. 604; 3 Clark & M. Priv. Corp. §§ 637 et seq.; Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363.

The action of one faction in declaring, without notice, hearing, or evidence, the members of the other faction withdrawn or suspended, will, in a civil action involving property rights, be considered as of no effect.

West Koshkonong Congregation v. Ottesen, 80 Wis. 62, 49 N. W. 24; Hoffman, Ecclesiastical Law, pp. 276, 277; St. Luke's

Case Note.—Review by civil courts of expulsion of member of a religious society.—It is to be observed, in the first place, that the only basis for the interference by a civil court in an ecclesiastical controversy is that some property or civil right is involved. White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends, 89 Ind. 136, and other cases cited in note to 49 L.R.A. 384. It is apparent, therefore, that, unless there is some civil or property right involved so as to confer jurisdiction upon the civil court, the question as to the effect of a decision of the ecclesiastical tribunal cannot legitimately arise. The distinction is clearly drawn in the statement of the court in Watson v. Garvin, 54 Mo. 355, that the true ground why civil courts do not interfere with the decrees of ecclesiastical courts where no property rights are involved is not because such decrees are final and conclusive, but because the courts have no jurisdiction whatever in such matters, and cannot take cognizance of them at all, whether they have been adjudicated or not by those tribunals.

When the action or proceeding before the civil court presents a property or civil right, then it may be necessary for that court, in order to determine such civil or property right, to pass upon the effect of a decision of the ecclesiastical tribunal. The following statement from the opinion in Harmon v. Dreher, Speers, Eq. 87, as to the respective functions of the ecclesiastical and civil courts where property or civil rights are involved has often been quoted with approval: Where a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the civil right and nothing more, taking the ecclesiastical decisions out of which the civil right has arisen as it finds them, and accepting those decisions as matters adjudicated by another jurisdiction. The civil courts act upon the theory that the ecclesiastical tribunals are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrine and discipline of the respective denominations to which they belong. Among other cases in which this statement is quoted with approval are Watson v. Jones, 13 Wall. 679, 20 L. ed. 666, and Lamb v. Cain, 129 Ind. 486, 14 L.R.A. 518, 29 N. E. 13.

The principle embodied in the foregoing statement has a clear and undoubted application, so far as the merits of the decision are concerned, to the expulsion of a member by a religious society; and therefore the decision by which such expulsion is accomplished is not reviewable on the merits by the civil courts, even where a property or civil right depends upon it. Hatfield v. De Long, 156 Ind. 207, 51 L.R.A. 751, 83 Am. St. Rep. 194, 59 N. E. 483; Shannon v. Frost, 3 B. Mon. 253; Igleheart v. Rowe, 20 Ky. L. Rep. 821, 47 S. W. 575; Grosvenor v. United Society of Believers, 118 Mass. 78.

There is, however, a decided difference of opinion upon the question whether a civil court may inquire into the regularity and fairness of the procedure of the ecclesiastical tribunal by which a member is expelled, when a civil or property right is involved.

Church v. Mathews, 4 Desaus. Eq. 578, 6 Am. Dec. 619; State ex rel. Waring v. Georgia Medical Soc. 38 Ga. 608, 95 Am. Dec. 408.

Messrs. Graves & Graves and W. H. Plummer, for respondents:

The courts cannot inquire as to the motives which actuated the expulsion of a church member.

Shannon v. Frost, 3 B. Mon. 253; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Nance v. Busby, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874; Bouldin v. Alexander, 16 Wall. 131, 21 L. ed. 69; Hundley v. Collins, 131 Ala. 234, 90 Am. St. Rep. 33, 32 So. 575; Sale v. First Regular Baptist Church, 62 Iowa, 26, 49 Am. Rep. 136, 17 N.W. 143; Igleheart v. Rowe, 20 Ky. L. Rep. 821, 47 S. W. 575; Grosvenor v. United Society of Believers, 118 Mass. 78; Krecker v. Shirey, 163 Pa. 534, 29 L.R.A. 476, 30 Atl. 440; Trinity M. E. Church v. Harris, 73 Conn. 216, 50 L.R.A. 636, 47 Atl. 119; O'Donovan v. Chatard, 97 Ind. 425, 49 Am. Rep. 462; Fitzgerald v. Robinson, 112 Mass. 379; Pounder v. Ashe, 44 Neb. 672, 63 N. W. 48; Powers v. Budy, 45 Neb. 208, 63 N. W. 476; Herman v. Plummer, 20 Wash. 363, 55 Pac. 315.

Dunbar, J., delivered the opinion of the court:

This is an action to cancel a certain deed, purporting to have been made by the People's United Church of Spokane, Washington, to the defendant Thomas Hye, for an accounting with the defendant David N. McInturff, and for the appointment of a receiver for all the property of said church. The substance of the complaint, after alleging that the People's United Church of Spokane, Washington, is a religious corporation, organized for the purpose of maintaining the worship of Almighty God, charitable purposes, and support of the widows of deceased members of said church, the business affairs of which are managed by a board of trustees, and that the church was the owner and in possession of certain real estate and personal property, is to the effect that, about five years ago, the said McInturff, the pastor of said church, and his wife, the defendant Eugenie L. McInturff, conceived the intent of getting possession of all of said property for their own use and benefit, and of selling and trading it off for other property outside of the state of Washington, with fraudulent intent to convert the same to their own use and benefit; and for that pur-

Upon the one side, it is held that the expulsion of a member by a religious tribunal is conclusive upon the civil courts, even though the action was taken without giving notice to the accused or affording him an opportunity to be heard. Shannon v. Frost, *supra;* Nance v. Busby, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874.

Upon the other side, it has been held that an expulsion of a member without notice or opportunity to be heard is not conclusive upon the civil courts when a property or civil right is involved. Gray v. Christian Society, 137 Mass. 329, 50 Am. Rep. 310; Canadian Religious Asso. v. Parmenter, 180 Mass. 415, 62 N. E. 740; Johes v. State, 28 Neb. 495, 7 L.R.A. 328, 44 N. W. 658; West Koshkonong Congregation v. Ottesen, 80 Wis. 62, 49 N. W. 24.

So, it has been held that inquiry may be made by the civil court as to whether or not the resolution of expulsion was the act of the church, or of persons who were not of the church, and, consequently, could not excommunicate others. Bouldin v. Alexander, 15 Wall. 139, 21 L. ed. 71.

So, the inquiry whether or not a church tribunal that undertakes to decide as to the expulsion of a member has been organized in conformity with the constitution of the church is not ecclesiastical within the jurisdiction of the ecclesiastical tribunals, but is within the jurisdiction of the civil courts, although the decision of such ecclesiastical tribunal, if it were properly constituted, would be conclusive on the civil courts. Hatfield v. De Long, *supra.*

It was held in Boncaum v. Murphy (Neb.) 104 N. W. 180 (reversing upon rehearing the former decision reported in 98 N. W. 1030), that the civil courts will not review the process or proceedings of church tribunals for the purpose of deciding whether they are regular or within their ecclesiastical jurisdiction; nor will they attempt to decide upon the membership or spiritual status of persons belonging, or claiming to belong, to religious societies. This, however, appears to have been a case in which there was no civil or property right involved which would give the court jurisdiction to interfere in the matter at all, the court remarking that "the sole issue tendered by the petition is as to the spiritual or ecclesiastical status of the defendant as determined by the 'laws, canons, statutes, discipline, rules, regulations, and customs of the Roman Catholic Church.'" The fact that the only issue involved in the case was the defendant's status in the society, and that no property or civil rights were involved, is also emphasized in other portions of the opinion. This case, therefore, does not appear to be an authority against the right of the civil court to pass upon the jurisdiction or the regularity of the proceedings of the ecclesiastical jurisdiction where property or civil rights of which the civil court can take jurisdiction are dependent upon the decision of the ecclesiastical tribunal.

The general subject of the conclusiveness of the decisions of ecclesiastical tribunals is treated in a note in 49 L.R.A. 384 et seq.

pose they then began, and continuously thereafter pursued, a course of false and fraudulent conduct in their treatment of the members of said church and its board of trustees and its property, by which the said McInturff used his office of pastor and spiritual adviser of said board and members to induce them to allow him to manage the business affairs of said church and its property, representing to them that he could heal them of disease and make them miserable or happy as he wished, and that he would do everything for the benefit of the church; that by such means he gained the confidence of said members and board to such an extent that many of the members and trustees did whatever he requested them to do, and, if any one of them showed opposition to his wishes, he peremptorily called pretended meetings of the church and of the board of trustees and, by said influence, had them expelled, without accusation, charge, notice, or trial, and had others of his choice and who were willing to do his bidding, put in as members of the church and board of trustees in their places; that on the 8th day of February, 1905, the defendants, pretending to act as trustees of said church, but in fact acting under the procurement and instigation of said McInturff in aid of his said fraudulent intent, made, executed, and delivered to said defendant Thomas Hye a deed to all of said church's real estate and a bill of sale of all of said church's personal property in the state of Idaho, for the purpose of there establishing a community colony, which was entirely outside of the purposes of said church corporation, and for the use and benefit of said McInturff; that the said deed was not the deed of said church, and that the said pretended trustees who signed said deed were not at that time trustees of said church and had no authority from said church to execute said deed; that the defendant Thomas Hye at all times had notice of all the facts hereinbefore set forth; that the said disposition of said church property would destroy said church and leave it no means of support or maintenance; that said McInturff during said times, had, by his said influence, got possession of large sums of money for which he has failed and refused to account; that the plaintiffs were at all times members of said church, and brought this action on behalf of themselves and all other members of said church. The answer was, in effect, a denial of the allegations of the complaint. At the beginning of the trial, the defendants moved the court to take up and determine, before entering into the trial of any other issue of fact, the question whether or not plaintiffs were members of said church at the time of bringing said action, to which plaintiffs objected because there was no plea in abatement. The court overruled said objection, to which ruling the plaintiffs excepted, and thereupon the court took up and tried the question of plaintiffs' membership, deciding that they were not members of the church at the time of the commencement of the action, and that they therefore had no interest in the church property and were not competent to bring the action, and the cause was dismissed. The records of the church were introduced by the respondents, showing that the appellants at a certain time had been expelled. It was the contention of the appellants, and they so testified, that they had not been expelled; that they had had no notice of any trial; that the alleged expulsion was fraudulent and illegal from its inception. From the judgment of dismissal the appeal is taken.

With the view we take of the merits of the case, it is not necessary to discuss the question of pleadings, raised by the appellants in their first assignment of error, *viz.*, that, there not having been any plea in abatement, the question of the membership of the appellants was not put in issue. It is the contention of the appellants that a church corporation cannot expel a member of the church arbitrarily, without charges, notice, or trial, as being opposed to the objects of the corporation and opposed to public policy. In this case the manual introduced in evidence permitted the expulsion of a member without formal trial, but provided that he should be restored to membership on his repentance; and it is contended by the appellants that the two provisions taken together necessarily imply the commission of some offense as the cause of expulsion, else no repentance would be required for restoration. Cases are cited to show that property given or set apart to a church or religious association, for its use and enjoyment and the promulgation of its adopted faith and teachings, is, by said church or association, held in trust for that purpose, and any members of the church or association less than the whole may not divert it therefrom; that the action of one faction in the church in declaring, without notice, hearing, or evidence, the members of the other faction withdrawn or suspended, will, in a civil action involving property rights, be considered as of no effect. It is contended by the respondents that this organization having adopted a creed and made a provision for church government, one of the provisions being that it had power to expel members of the local church with or without formal trial, its action was final; and that, inasmuch as in this country the church and state are divorced, the state shall no more be permitted to interfere with the affairs of the

church than will the church be permitted to interfere with the affairs of the state; that the courts will protect the civil rights, but never when in order to do so it is necessary to review, revise, or set aside the action of an ecclesiastical tribunal dealing with matters of church doctrine or discipline; that the court will only go so far as to inquire whether it is a church, and whether the tribunal which has acted is the one endowed with power in the premises by the church; that, these questions settled in the affirmative, the courts cannot inquire as to the motives which actuated that tribunal in its action, nor whether it proceeded with the usual legal formalities or with those prescribed by the laws of the church; that the mere fact of action is conclusive, and that a party who has been expelled from a church organization could not be heard to say in a court of justice that such expulsion was illegal; but that, the question of expulsion having been by the rules of the society relegated to the ecclesiastical body, its decision in that respect was final and not reviewable. Many cases are cited to sustain this broad ground, all of which we have examined, and we have also examined many others not cited in the briefs, the question being an important and interesting one. But the three principal cases, the ones upon which all or most of the other decisions hinge, are the cases of Shannon v. Frost, 3 B. Mon. 253; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666, and Nance v. Busby, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874.

Shannon v. Frost, *supra*, was where two discordant and dislocated parties of a Baptist church in Frankfort, Kentucky, were litigating their respective claims to the house of public worship erected by the church on ground conveyed years before. In this case, both factions were attempting to use the church, and to deprive the other faction of its use, and the court held that the rights of the parties must depend on the terms and legal effect of the conveyance to the church, on the acts of that church for governing and preserving itself as a distinct Christian society, and on the common law of the land; and that the state court, having no ecclesiastical jurisdiction, could not revise or question ordinary acts of church discipline or excision; saying: "Our only judicial power in the case arises from the conflicting claims of the parties to the church property, and the use of it. And these we must decide, as we do all other civil controversies brought to this tribunal for ultimate decision. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church. We must take the facts of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church; for, whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this court." And it was held that, inasmuch as the conveyance was to the use of the Baptist Church, only those who were members of the church at the time of the commencement of the action were interested in the property as a *cestui que trust*. The court further said, in relation to this question: "Having once associated themselves with many others, as an organized band of professing Christians, they thereby voluntarily subjected themselves to the disciplinary, and even expulsive, power of that body. The voice of the majority has prevailed against them. They have, by that fiat, ceased to be members of that association, and with the loss of their membership they have lost all the privileges and legal rights to which, as members, they were ever entitled. Their only remedy now is, therefore, . . . in a consciousness of their own moral rectitude, and in the consolations of that religious faith and those Christian graces which, under all temporal trials, will ever sustain the faithful Christian and adorn the pathway of his earthly pilgrimage."

Watson v. Jones, decided by the Supreme Court of the United States, Justice Miller speaking for the court, virtually laid down the same rule. In that case the controversy arose in the Presbyterian Church, over the question of slavery, and it was held that in cases where the right of property in a civil court is dependent on the question of doctrine, discipline, ecclesiastical law, rule, or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its application to the case before it. In this case, as in the ones preceding, the church became divided, each faction claiming that it constituted the true presbytery and true synod, each faction claiming that the other had departed from the true teachings of the church and the articles of faith subscribed to. The court stated that the issues showed that it was a separation of the original church members and officers into two distinct bodies, with distinct members and officers, each claiming to be the true Walnut Street Presbyterian Church, and denied the right of the other to any such claim. In that case the rule was laid down that, where property had been dedicated to advance certain religious doctrines, it was the duty of the civil courts to see that the property so dedicated was not diverted from the trust which was thus attached to its use;

and that, so long as there were persons qualified within the meaning of the dedication, and who were also willing to teach the doctrines or principles prescribed in the act of dedication, the courts would prevent the diversion of property or fund to other and different uses; that a person who built and dedicated a house to the sole and exclusive use of those who believe in the doctrine of the Holy Trinity has a right to expect that the law will prevent that property from being used as a means of support and dissemination of the Unitarian doctrine and as a place of Unitarian worship. While there are many things said in this case which tend to support the doctrine claimed by the respondents, the announcement just made it seems to us clearly supports the appellants' contention in this case. According to the allegations of the complaint, which must be taken as true in this case, the property which was collected and necessarily dedicated by the organization of the church for the purposes expressed in the manual of the church is to be diverted for purposes which are entirely foreign to the objects of the organization. It is conceded by the court in this case that the doctrine of the English courts is that the civil courts would take jurisdiction to determine even ecclesiastical questions; but the court, upon the theory of the divorcement of church and state in this country, took the other view; saying: "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and as binding on them, in their application to the case before them."

Nance v. Busby, *supra*, a Tennessee case, was a case arising out of dissensions in the Primitive Baptist Church in that state, each faction claiming to be the true church and observing the proper ordinances, the plaintiffs alleging that the defendants had abandoned the celebration of the Lord's Supper; that they had ceased to observe the ordinance of the washing of feet; and alleging various other delinquencies; and it was held there that the court would be bound by the final determination of the ecclesiastical tribunal to which the questions were submitted. In passing upon this question, however, the court said, in speaking of its refusal to take jurisdiction of the question of whether the excommunications complained of were illegal: "A different question would be presented if it appeared that before such sentence of excommunication the majority had abandoned the faith and practice of the original beneficiaries, and that they had been cut off for adherence to the old ways by such majority, as a mere scheme to better enable them to misapply the property. Such a charge was intimated in the bill. But the verdict of the jury sets at rest every suggestion of heresy or departure from the 'faith and order' of the original organism antecedent to the acts of expulsion complained of." So that it will readily be seen that the court in that case, under the allegations of the complaint in this case, would have held that the question of the expulsion of the members was a question which the court would take jurisdiction of.

But, conceding the general rule to be as announced by these cases, yet, if beneath all there was a fraudulent scheme to expel these members for the purpose of wrongfully obtaining control of the property of the organization and diverting it from its original channel, the law will not permit the fraud to be consummated. For, notwithstanding the fact that appellants joined an organization which provided that they might be summarily expelled upon entering the organization, there was an implied obligation or contract that the members would be fairly treated, and that good faith would be maintained between them. Church organizations are largely based upon faith,—primarily, faith in God and His teachings; secondarily, faith in and reliance upon each other. They are organizations which peculiarly call for this reliance. It is the very basis of their existence. It is recommended as a virtue and commanded as a duty, and the constant exercise of faith, charity, and forbearance necessarily makes members of such organizations easy victims for the wily schemer who is willing to don the livery of heaven to more effectively serve the devil; and they should not be held to too close a knowledge of the arbitrary rules of the society in relation to the manner of their admission or expulsion, questions ordinarily entirely unthought of and neglected by them in the consideration of the more important subject which moves and induces them at the time of their admission to the church. It is true that in this country there is what is termed a separation of church and state. The state maintains no church, and absolute individual liberty is granted to every man to worship God according to the dictates of his own conscience, or not to worship Him at all. But it does not follow from this that church

property is placed beyond the pale of protection by the law; or that the law will not compel the trustees of such property to honestly and faithfully carry out the duties of their trust in relation to this kind of property, as well as any other kind. It may be conceded that the courts will not assume to decide purely ecclesiastical questions and substitute their views for the views of ecclesiastical authorities or judicatories, for, as said by Judge Miller in Watson v. Jones, *supra:* "Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches) has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collection of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies, as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so."

But in this case, unlike the one under discussion by the learned judge, there is no ecclesiastical question involved. It is not a question where a schism has arisen in a church, where there is any contention over articles of faith, or the construction of creeds or the construction of the Bible, or any of those burning questions which so frequently shake churches to their center,—questions which are theological and, therefore, ecclesiastical, and must of necessity be determined by ecclesiastical authority; but the bald question here is, Can a man or set of men, or a majority of the church organization, by chicanery, deceit, and fraud, divert the property of a church organization to a purpose entirely foreign to the purposes of the organization, for their own selfish benefit, whether by the expulsion of members or in any other fraudulent manner? Neither the law nor public policy will sustain such a rule. Fraud vitiates all transactions, and, if members are expelled for a fraudulent purpose to carry out a fraudulent scheme, the expulsion is a void act, and of no force or effect whatever. Equity will compel fair dealing, disregarding all forms and subterfuges, and looking only to the substance of things.

In this case we think the court erred in denying the right of the appellants to be heard on the questions raised in the complaint. The cause will be reversed, and remanded with instructions to proceed with the trial of the cause.

Mount, Ch. J., and **Hadley**, **Fullerton**, **Crow**, and **Root**, JJ., concur.

CALIFORNIA SUPREME COURT.

LEONORA DUFFY, Respt.,
v.
SARAH J. YORDI, Appt.

(— Cal. —, 84 Pac. 838.)

Parent—action for support.

An aged parent who is being supported by one child with no threat of the withdrawal of the support cannot maintain an action against another child for support, under a statute making it the duty of a child to support its parent who is unable to maintain himself.

(April 5, 1906.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in plaintiff's favor in an action brought to enforce defendant's statutory duty of support. Reversed.

The facts are stated in the opinion.

Mr. **John O'Gara**, for appellant:

At common law, children were under no legal obligation to support their indigent parents.

Tiffany, Personal & Dom. Rel. p. 291; Schouler, Dom. Rel. §§ 244, 245.

There is no authority for the court to make a judgment requiring the defendant to undertake future support.

Case Note.—Right of parent to sue child for support.—It is a well-recognized doctrine that at common law a child is under no obligation to provide care and support for a parent. Edwards v. Davis, 16 Johns. 281; Herendeen v. DeWitt, 49 Hun, 53, 1 N. Y. Supp. 467; Lebanon v. Griffin, 45 N. H. 558; Stone v. Stone, 32 Conn. 142; Dawson v. Dawson, 12 Iowa, 512.

The liability of a child, if of sufficient ability, to support his parents who are infirm, destitute, or aged, is wholly the creature of statute, and therefore the statutory remedy is the only one to be resorted to by a destitute parent in case a child neglects to furnish support. A careful search has failed to reveal any case similar to DUFFY v. YORDI, involving the right of a parent to sue a child for support, in which the action was based on the duty created by statute. Proceedings under such statutes to compel a child to maintain a destitute parent are usually instituted by the poormaster or some other town officer. Cases in which a child is under contract to support a parent should not be confused with cases like DUFFY v. YORDI.

McCook County v. Kammoss, 7 S. D. 558, 31 L.R.A. 461, 58 Am. St. Rep. 854, 64 N. W. 1123; Shelton v. Springett, 11 C. B. 452.

Plaintiff, being already supplied with all the necessaries by one of her children, and the withdrawal of such support not being threatened, cannot claim support from defendant.

22 Am. & Eng. Enc. Law, 2d ed. p. 1017; State ex rel. Griffith v. Osawkee, 14 Kan. 422, 19 Am. Rep. 99.

Mr. Joseph Rothschild for respondent.

McFarland, J., delivered the opinion of the court:

The plaintiff, a widow, is the mother of the defendant, also a widow; and the purpose of this action is to obtain a judgment that defendant pay to plaintiff for her permanent support the amount of $100 per month, and also $100 to be paid forthwith for plaintiff's immediate use. It is averred in the complaint that plaintiff is seventy-seven years old, is without any means of subsistence, and by reason of her age and physical condition is unable to maintain herself by work; that defendant has ability to support her, and that $100 a month is a reasonable sum to be allowed her for her maintenance. In the answer of the defendant the material averments of the complaint are denied, and it is averred that plaintiff has other children able to support her, and that, when defendant was about six years old plaintiff abandoned her, and gave her to her aunt, Bridget Duffy, and her husband, and agreed that her aunt should rear and support her, and that defendant's obligations as a child should be due to her said aunt; and that since then plaintiff would have nothing more to do with defendant, and defendant was reared and supported by her aunt, and that defendant now supports her said aunt. The court found that plaintiff was destitute and unable to maintain herself by work; that defendant is able to support her; that plaintiff did not abandon defendant as alleged in the answer; that $60 a month is a reasonable amount for plaintiff's maintenance, and that $20 a month is a reasonable proportion thereof to be paid plaintiff by defendant. Judgment was rendered in favor of plaintiff against defendant for $143.30 for her support from the commencement of the action until the date of the judgment, and that thereafter defendant pay to plaintiff $20 on the 15th of each month until further order of the court. From this judgment defendant appeals.

Appellant contends that the material findings of the court are not supported by the evidence, but, under our views of the case, this contention need not be discussed. While some writers speak of the "natural obligation" of a child to support a parent, it is clear that at common law there was no legal obligation on the part of the child to do so; that such obligation depends entirely upon statutory provisions; and that the procedure provided by statute for the enforcement of the obligation must be pursued. In Schouler's Domestic Relations, § 265, it is said that the following is "a well-settled rule at the common law; namely: That there is no legal obligation resting upon a child to support a parent; that, while the parent is bound to supply necessaries to an infant child, an adult child, in the absence of positive statute, or a legal contract on his own part, is not bound to supply necessaries to his aged parent." In Edwards v. Davis, 16 Johns. 281, it is said: "The duty of a child of sufficient ability to maintain its poor and destitute parents, being an imperfect one, not enforced at the common law, and the statute having prescribed the manner in which it is to be enforced and the extent of the penalty, the statute remedy is the only one to be resorted to." In England and in many of the American states there are statutes declaring this obligation, and providing how it shall be enforced,—who may institute proceedings for that purpose, the court which shall have jurisdiction, etc. The main purpose of the statutes seems to be to protect the public from the burden of supporting poor people who have children able to support them. Our statutory provisions on the subject are very meager, and are all contained in § 206 of the Civil Code, which is as follows: "It is the duty of the father, the mother, and the children of any poor person, who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding." Counsel discusses somewhat elaborately the meaning and effect of this section,—what rights it gives, who may bring an action under it, what court has jurisdiction, whether there is not a fatal absence of any procedure, etc. The only case in point, under a statute similar to ours, that has been cited, is McCook County v. Kammoss, 7 S. D. 558, 31 L.R.A. 461, 58 Am. St. Rep. 854, 64 N. W. 1123. In that case the county, having supported an indigent father, brought suit against his children to recover for the amount which the county had already expended for such support, and also to recover for his future support; and the court held that the county could recover for the amount already expended, but that under the statute there was no procedure for enforcing future support. We have referred to these questions because they are interest-

ing, and because they should be thoroughly considered in any future cases which may arise under said § 206. But it is not necessary to pass upon them definitely here, or to determine whether McCook County v. Kammoss was properly decided, because we think that the case at bar does not give the plaintiff a right to recover under any reasonable construction of the section, and that defendant's motion for a nonsuit should have been granted. The plaintiff has three children other than defendant,—Mrs. Perkins, Mrs. Germaine, who lives in Seattle, and a son who has not been heard from in several years. Mrs. Perkins testified as follows: "My mother is living with me, and I am supporting my mother. I have supported my mother. This sister in Seattle sends $5 or $10 or $15, once a month for the last two years. Otherwise, my mother has been entirely supported and cared for and protected by me." It is apparent therefore that plaintiff, being supported by her other children, and there being no threat of a withdrawal of such support, is in no condition to demand support from defendant. She is demanding from defendant what she is already receiving from another. For instance, what is the judgment of $143.43 for? Evidently not for her support, but for an amount of money independent of and in addition to the support which she had already received. It may be that her other children, having supported her, may maintain an action against defendant for her proportionate contributive share of such support; but that question is not here presented. A mother being supported by one child cannot maintain an action against another child for another support. For this reason the judgment in the case at bar cannot be sustained.

The judgment appealed from is reversed.

We concur: Henshaw, J.; Lorigan, J.

ILLINOIS SUPREME COURT.

ILLINOIS STEEL COMPANY, Appt.,
v.
ANDREW ZIEMKOWSKI.

(220 Ill. 324, 77 N. E. 190.)

Jury—question of fellow service.

1. The court cannot take from the jury an action by a servant to recover from his employer for injuries due to the act of another servant, unless the evidence proves conclusively that the relation of fellow service existed between the two employees.

Fellow service—what constitutes.

2. To render an employee in a steel mill, who is engaged in cleaning stoppers of the "vessels," a fellow servant of a blower whose duties are to supervise the blowing of the molten metal, so that the master will not be liable for injury to him from the latter's negligence, it must appear either that they were directly co-operating with each other in the same line of employment, or that their duties were such as to bring them into habitual association with each other, so that they might exercise a mutual influence on each other promotive of proper caution.

Master—vice principal.

3. One charged with the duty in a steel mill of giving warning to the employees when a heat was to be blown, that they might reach a place of safety, is a vice principal of the master, for whose negligence with respect to that duty the master will be liable.

Same—assumption of risk.

4. An employee in a steel mill, assigned to duty near "vessels" filled with molten metal, does not assume the risk of neglect to give warning of blowing a heat, which will cause the metal to fly and render the working place unsafe.

Same—fellow service—duty of jury.

5. In an action to hold a master liable for injury to one servant by the act of another, the duty of the jury is to determine whether or not they were fellow servants, not the extent to which the conditions which would make them such specifically existed.

(February 21, 1906.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Knapp, Haynie, & Campbell** and **William Beye**, for appellant:

The blower and plaintiff were fellow servants.

Honner v. Illinois C. R. Co. 15 Ill. 550; Illinois C. R. Co. v. Cox, 21 Ill. 23, 71 Am. Dec. 298; Chicago & A. R. Co. v. Keefe, 47 Ill. 108; Chicago & A. R. Co. v. Murphy, 53 Ill. 336, 5 Am. Rep. 48; Columbus, C. & I. C. R. Co. v. Troesch, 68 Ill. 545, 18 Am. Rep.

Case Note.—A servant charged with the duty to warn other servants of danger as a vice principal.—Where the failure to give employees warning of peril of the merely transitory class, against which they have no adequate means of guarding themselves, is the fault of one who, by virtue of his rank as a general or departmental manager, is to be deemed a vice principal, the master is liable for a resulting injury caused by the failure to give warning. 1 Labatt, Mast. & S. p. 1703.

578; St. Louis & S. E. R. Co. v. Britz, 72 Ill. 256; Illinois C. R. Co. v. Keen, 72 Ill. 512; Toledo, W. & W. R. Co. v. Durkin, 76 Ill. 395; Chicago & A. R. Co. v. Rush, 84 Ill. 570; Valtez v. Ohio & M. R. Co. 85 Ill. 500; Chicago & N. W. R. Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Chicago & E. I. R. Co. v. Driscoll, 176 Ill. 330, 52 N. E. 921; Abend v. Terre Haute & I. R. Co. 111 Ill. 202, 53 Am. Rep. 616; Illinois Steel Co. v. Coffey, 205 Ill. 206, 68 N. E. 751; Chicago City R. Co. v. Leach, 208 Ill. 198, 100 Am. St. Rep. 216, 70 N. E. 222; Chicago & A. R. Co. v. Bell, 209 Ill. 25, 70 N. E. 754; Chicago & E. I. R. Co. v. White, 209 Ill. 124, 70 N. E. 588; Wells v. O'Hare, 209 Ill. 627, 70 N. E. 1056.

In voluntarily taking a place in which to do his work where there was great danger of injury to the plaintiff if the signal of turning the vessel was not given, plaintiff assumed the risk of injury.

Illinois Steel Co. v. McNulty, 105 Ill. App. 594; Stobba v. Fitzsimmons & C. Co. 58 Ill. App. 427; Wabash R. Co. v. Propst, 92 Ill. App. 485; Penwell v. Harvey, 78 Ill. App. 278; Abend v. Terre Haute & I. R. Co. *supra*.

The giving of warning in each and every instance when the vessel was turned down was not a nondelegable duty.

Chicago & A. R. Co. v. Bell, 209 Ill. 29, 70 N. E. 754; Hermann v. Port Blakely Mill Co. 71 Fed. 853; Ocean S. S. Co. v. Cheeney, 86 Ga. 278, 12 S. E. 351; Donnelly v. San Francisco Bridge Co. 117 Cal. 417, 49 Pac. 559; Portance v. Lehigh Valley Coal Co. 101 Wis. 574, 70 Am. St. Rep. 932, 77 N. W. 875; Donovan v. Ferris, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519; Gallagher v. McMullin, 25 App. Div. 571, 49 N. Y. Supp. 734; Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603; Long v. Coronado R. Co. 96 Cal. 269, 31 Pac. 170; New Pittsburgh Coal & Coke Co. v. Peterson, 14 Ind. App. 634, 43 N. E. 270; Cole Bros. v. Wood, 11 Ind. App. 37, 36 N. E. 1074; Byrnes v. Brooklyn Heights R. Co. 36 App. Div. 355, 55 N. Y. Supp. 269; Texas & P. R. Co. v. Campbell (Tex. Civ. App.) 39 S. W. 1104; Luebke v. Chicago, M. & St. P. R. Co. 63 Wis. 91, 53 Am. Rep. 266, 23 N. W. 136; Lundquist v. Duluth Street R. Co. 65 Minn. 387, 67 N. W. 1006.

Mr. Francis J. Woolley, with **Mr. F. W. Jaros**, for appellee:

Plaintiff and the steel blower were not fellow servants.

Belleville Stone Co. v. Mooney, 60 N. J. L. 323, 38 Atl. 835, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764; Sword v. Cameron, 1 Dunlop, B. & M. 493; Felice v. New York C. & H. R. R. Co. 14 App. Div. 345, 43 N. Y. Supp. 922; Snyder v. Cleveland, C. C. & St. L. R. Co. 60 Ohio St. 487, 54 N. E. 475; Lake

But, in the absence of any such superiority of rank, or of some special consideration bringing the facts within the domain of some duty which is conceded to be nondelegable, so that the question depends solely on the failure of one servant to give warning to others, the trend of the decisions is to the effect that such failure is not chargeable to the master.

Some cases of this kind are found in the case note to 1 L.R.A.(N.S.) 669. Others to the same effect are collected in Labatt, Mast. & S. p. 1741.

In conflict with these are some of the cases which are cited in ILLINOIS STEEL CO. v. ZIEMKOWSKI in support of the decision that the duty to give warning cannot be delegated.

The case of Belleville Stone Co. v. Mooney, cited on this point, was affirmed in 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764, where the court strongly stated its conclusion as follows: "The danger of blasting was one frequently recurring, and its occurrence could always be foreseen, not by the workmen scattered about the quarry, but by any person charged with the duty of watching for it. If the danger was not foreseen and proper warning given, the quarry became an unsafe place for the workmen; but it was made reasonably safe if such warning was given. It seems clearly to follow that on him whose duty it was to take care that the place should be kept safe was cast the duty of giving timely warning. We conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be exercised in giving warning of an expected blast."

In agreement with this decision is also that of McLean v. Blue Point Gravel Min. Co. 51 Cal. 255, where the negligence of the foreman of a mine in failing to give warning of the firing of a blast was held to be that of a vice principal.

On the other hand, two other cases, almost identical in their facts, have held the contrary.

In Donovan v. Ferris, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519, the failure of a foreman in a stone quarry, who had full charge of the blasting, to give warning to the workmen when the blast was to be fired, was held to be the negligence of a fellow servant only, although it was the rule and custom to give such warnings.

In Gallagher v. McMullin, 25 App. Div. 571, 49 N. Y. Supp. 734, it was also held that the failure of a workman who prepared and set off a blast to give such warning in the interior of a bridge caisson was deemed that of a fellow servant.

It is proper to point out that the other authorities cited by the court in the ZIEMKOWSKI CASE, in addition to that of Belleville Stone Co. v. Mooney, above quoted, are none of them strictly in point on the question whether a servant charged with the

Shore & M. S. R. Co. v. Feller, 21 Ohio C. C. 605; Orman v. Salvo, 54 C. C. A. 265, 117 Fed. 233; Rogers v. Cleveland, C. C. & St. L. R. Co. 211 Ill. 126, 103 Am. St. Rep. 185, 71 N. E. 850, 109 Ill. App. 494; Chicago & G. T. R. Co. v. Spurney, 197 Ill. 471, 64 N. E. 302; Street's Western Stable Car Line v. Bonander, 196 Ill. 15, 63 N. E. 688.

Plaintiff and the steel blower were servants of a different grade.

North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186; Wenona Coal Co. v. Holmquist, 152 Ill. 581, 38 N. E. 946.

They were not directly co-operating in the particular business in hand.

Chicago & A. R. Co. v. Swan, 176 Ill. 424, 52 N. E. 916; Duffy v. Kivilin, 195 Ill. 630, 63 N. E. 503; Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371; Illinois Third Vein Coal Co. v. Cioni, 215 Ill. 583, 74 N. E. 751.

Wilkin, J., delivered the opinion of the court:

This is an appeal from a judgment of the appellate court affirming a judgment of the superior court of Cook county in an action on the case by appellee against appellant for a personal injury. The case was tried in the superior court on a second additional count, filed April 9, 1902, and the first and second additional counts, filed December 19, 1902. The second additional count, filed April 9, 1902, alleged, in substance, that the defendant was engaged in the manufacture of various articles of steel, iron, and metals, and had in its plant certain ladles or vessels, with appliances attached thereto, and used by it in said manufacture, and operated various appliances filled with molten metal, slag, or other substances at a dangerously high temperature; that plaintiff was in defendant's employ, engaged in the work assigned to him at or near said ladles, receptacles, or vessels so filled; that it was defendant's duty not to operate said vessels, etc., so filled, without giving plaintiff timely notice or warning of danger then known to defendant, and not known to plaintiff; that defendant disregarded said duty, and so carelessly and negligently operated and managed said vessels, filled as aforesaid, that by said negligent conduct of defendant, and while plaintiff was engaged in defendant's business and in the exercise of due care, said molten metal was violently forced up and spattered and spilled in and around the place where plaintiff was working, and to, upon, and against the left eye of plaintiff, by means whereof said eye was destroyed and plaintiff's other eye was seriously injured, etc. In the first additional count, filed December 19, 1902, it is averred, in substance, after stating the defendant's business, that it used a large receptacle, called a "vessel," in manufactur-

duty to warn other servants of danger is a vice principal.

The case of Rogers v. Cleveland, C. C. & St. L. R. Co. 211 Ill. 126, 103 Am. St. Rep. 185, 71 N. E. 850, was a case in which, indeed, it was declared that a fellow servant intrusted with the duty of giving warning to trainmen of an unexpected obstruction on the track was a vice principal in respect to that duty. But in this case the railroad company had received information of the danger, and thus it was a case in which the master himself had knowledge, and the duty to give the warning. It therefore comes within the class of cases relating to the attempt of the master to delegate his own duty, and in that respect is distinguishable from cases relating to the duty of a fellow servant to give a warning of a danger which comes to his knowledge in the exercise of his duties as a fellow servant merely.

The case of Felice v. New York C. & H. R. R. Co. 14 App. Div. 345, 43 N. Y. Supp. 922, related to the duty of the master to provide for warning workmen in a railroad tunnel of the approach of trains. As to this duty of the master, the court said that it was a duty which could not be delegated where warning was needed of peril from doing other work different from that in which the servant was engaged. There was no question of the fellow servant's negligence in the case; nor was there any question of the negligence of a fellow servant in the other cited case of Snyder v. Cleveland, C. C. & St. L. R. Co. 60 Ohio St. 487, 54 N. E. 475. In the latter case a station agent was killed by a train while loading a car, but it was not shown that he was a fellow servant of those by whose negligence he was killed.

It is said in Labatt, Mast. & S. p. 452, that the adoption of a system of notifying servants of the approach of a certain kind of transitory or sporadic danger constitutes a specific and additional reason for holding the master liable for the failure to give the warning, if the servants have relied upon receiving it. But this doctrine seems to be stated with respect to the negligence of the employer himself or a vice principal, and not with reference to the negligence of a fellow servant.

It is obvious that the cases on this question are perplexing. While those that relate to the failure to give warning of the firing of a blast seem to be about equally divided, the majority of the cases on the more general question of the failure of a fellow servant to give warning of transitory or sporadic dangers to other servants while they are at work seem to deny that his duty to give such warning makes him necessarily a vice principal. For numerous cases justifying this conclusion, see note to 54 L.R.A. 120, also 2 Labatt, Mast. & S. pp. 1741 et seq.

ing and reducing iron and steel, and that in such use such vessel contained a large amount of iron, steel, slag, etc., in a semi-liquid or molten state, at a high temperature, and that at a certain time in the operation of the same particles of iron, steel, and slag, etc., so heated, were apt to and in the ordinary course of business would be thrown and would fly and spatter from said vessel a great distance, to wit, 50 feet, thus endangering the lives and limbs of persons working at or near the same and within said distance, and that at another stage in the operation of such vessel this would not occur; that plaintiff was in defendant's employ, engaged in his work and exercising due care; that it was defendant's duty to warn plaintiff when, in the ordinary course of business, that stage of operation of said vessel was to be reached when said heated particles would be thrown, etc.; that the defendant did not so warn the plaintiff, by reason whereof plaintiff was not aware that said stage of operation was reached, and the said heated particles were hurled and flew from said vessel against plaintiff and into his eye, destroying the same, etc. The second additional count, filed December 19, 1902, contains substantially the same averments as the first filed at said date, and, in addition, the following averments, in substance: That it was defendant's custom to give warning that the stage of operation was about to be reached when said heated particles were about to be thrown, and that a whistle was then blown; that plaintiff knew and relied on said custom for his protection; that it was defendant's duty to so warn plaintiff and to blow said whistle, but defendant, contrary to said custom, did not warn plaintiff or blow said whistle, by reason whereof said substances were hurled, thrown, and struck against plaintiff and into his eye. To these several counts the general issue was pleaded, and the trial by jury resulted in a judgment in favor of the plaintiff for $7,500 and costs. The defendant entered timely and proper motions to instruct the jury to find it not guilty; but the motions were overruled and exceptions duly taken.

The material facts in the case are as follows: The plaintiff below was, at the time of his injury, employed in the steel mill of the defendant near Chicago, and worked in a large brick building in which Bessemer steel was manufactured. In the building there were three large egg-shaped vessels, some 20 feet in length and 10 feet in diameter, swung on pivots at points between their ends, so that they could be turned from an upright to a horizontal position, so as to receive molten metal poured into them. In each of these vessels were 18 pipes, or tuyeres, constructed with small holes at the bottom, so that a blast of air could be forced into the pipes, as was necessary in order to convert the metal into steel. When the air was thus forced in, large quantities or particles of the molten metal and sparks were thrown out in every direction, making it dangerous for employees working near the vessels. This blowing is termed, in the process of making steel, "blowing a heat," and at the time of the accident from 120 to 125 heats were blown every twelve hours, but at no particular time. The blowing of each heat was controlled by a man named Howe, called the "steel blower." He occupied a position on a stage or platform a considerable distance from the vessels. It was his duty to blow a whistle located on the platform or stage before each heat was blown, so as to warn the workmen engaged about the vessels and give them an opportunity to get away and escape the danger from the sparks. At the time of the accident to the plaintiff a heat was turned on while he was near one of the vessels, without the whistle being sounded or any warning whatever given him. The sparks striking him on the back, he suddenly turned around, when a spark or particle of the molten metal struck him in the left eye, completely destroying the sight and otherwise injuring him. Howe, the blower, testified: "The mill work, you may say, practically revolved around the blower; everything that went out really depended and revolved about me." In fact, it is admitted by counsel for the appellant that the steel blower, from his stage, controlled the vessels in which the steel was blown. The plaintiff was not under his immediate control. His business or employment was to clean certain stoppers which were used in the vessels, and to take care of them by placing them in piles for future use, or, in case they needed repair, carry them to the blacksmith shop. He had worked in the building for a number of years, at different employments. For about ten years his work was to pour the molten metal from ladles into the vessels, but at the end of that time he left the employment of the company, and did not return for several years, when, as already stated, he was employed in cleaning stoppers, etc., which he continued to do until he was injured. At the time he was injured he was some 30 or 40 feet from the blower's stage. At the very time of the accident he was in the act of carrying a stopper rod with the help of another employee. These stoppers were rods of iron weighing from 85 to 125 pounds. He testified that at the time he was stooping down cleaning the stopper and kept hammering with a sledge and chisel, and the

first he knew sparks hit him on the neck and head, and he turned and a spark hit him in the eye and on the nose. There is no conflict in the evidence as to the respective duties of the blower and plaintiff. The duties of the former were to superintend and direct the men engaged in the Bessemer process of converting iron into steel, and to give notice, by sounding the whistle, when a blast or heat was about to be blown; while the plaintiff's duty was strictly confined to cleaning and taking care of the stoppers after they had been used. An extended statement of the facts precedes the opinion of the appellate court; but we deem the foregoing sufficient for this decision.

One of the contentions of counsel for appellant is that the court erred in refusing to give the peremptory instruction to find for the defendant, because the blower, who negligently failed to give the signal, and the plaintiff, were at the time of the accident fellow servants. The question in this state whether servants in the employ of the same master are fellow servants within the rule which exempts the master from liability for the injury of one through the negligence of another is a question of fact; and it is only where the facts are conceded, or where there is no dispute whatever as to the facts, and they show beyond question that the relation of fellow servants exists, that, on a motion to take the case from the jury, that question will become a question of law. Chicago & E. I. R. Co. v. Driscoll, 176 Ill. 330, 52 N. E. 921. In this case the evidence falls far short of proving conclusively that the relation existed between the employee through whose negligence the injury resulted and plaintiff. The rule as to fellow servants in this state was first definitely stated in Chicago & N. W. R. Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168, and has been followed in later cases. In North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186, Justice Scholfield (on page 64 of 114 Ill., and page 188 of 29 N. E.), referring to those cases, said: "That ruling requires that the servants of the same master, to be coemployees so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business,—*i. e.*, the same line of employment,—or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. The idea is that the relations between the servants must be such that each, as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent act of the other or protect himself against its consequences; and, of course, where there is no right or no opportunity of supervision, or where there is no independent will and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of his immediate superior, the doctrine can have no application." In the case of Chicago & E. I. R. Co. v. Kneirim, 152 Ill. 458, 43 Am. St. Rep. 259, 39 N. E. 324, we said (page 466, of 152 Ill., page 265, of 43 Am. St. Rep., and page 326, of 39 N. E.): "The rule in this state is that where one servant is injured by the negligence of another servant, where they are directly co-operating with each other in a particular business in the same line of employment, or their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not liable." These cases, and those cited in them, state the doctrine of fellow servants in this state as it has been held by this court in a long line of decisions. To make the blower and plaintiff fellow servants within the first branch of the rule, they must have been directly co-operating with each other in a particular business in the same line of employment. It is not sufficient that they were employed by the same master. In order to bring them within the rule, they must be directly co-operating in a particular business, as distinguished from indirectly co-operating or co-operating in a general business or employment of the master. Chicago & E. I. R. Co. v. White, 209 Ill. 124, 70 N. E. 588; Chicago City R. Co. v. Leach, 208 Ill. 198, 100 Am. St. Rep. 216, 70 N. E. 222. In order to be fellow servants under the second branch of the rule, their duties must have been such as to bring them into habitual association with each other so that they might exercise a mutual influence upon each other promotive of proper caution. Chicago & N. W. R. Co. v. Moranda, *supra*. It cannot be said, under the evidence, that Howe and plaintiff were fellow servants under either branch of the Illinois rule.

It is further insisted that appellee voluntarily took the position assigned him by the appellant, and, as he fully knew the surroundings, he assumed the risk of his employment, and for that reason cannot recover. He did not know that the man whose duty it was to give the signal would not perform that duty. We are also of the opinion that Howe, the steel blower, as to the plaintiff, occupied the relation of a vice principal, and not that of a fellow servant. It will be conceded that it was the duty of the defendant to provide the plaintiff a safe

place in which to work, and to use reasonable care to maintain the safety of that place. That was a continuing duty imposed upon the company which could not be delegated. In Belleville Stone Co. v. Mooney, 60 N. J. L. 323, 38 Atl. 835, the plaintiff was employed by the defendant in a quarry, and worked at a derrick, under a superintendent named Barr. Under Barr was a subboss named Perkins, whose duty it was to light the explosives used in blasting, after previously giving a signal to the other men in the quarry. The men continued to work up to the time they received the signal, and then ran to a place of safety. Perkins fired a blast without giving the plaintiff sufficient warning, and he was struck by a piece of flying rock. One of the defenses introduced to the action for damages for the injury thus received was that Perkins was a fellow servant of the plaintiff. The court said: "Under these circumstances, the rule of law held the defendant to the exercise of reasonable care that there should be a space of time reasonably long enough for the workmen to reach a place of safety. This was the defendant's duty in the actual conduct of the work going on then and there in that quarry, and this was his duty under the system by which the work was being conducted, and it was a duty the neglect of which would be imputable to the defendant. . . . Perkins, in giving the signal of warning, was in the performance of the duty of the defendant. To him, through the directions of Barr, was delegated the performance of the duty of the master. In an ordinary sense he was a mere foreman and a coservant; but, under the direction of his master, he was performing that master's duty, and the neglect was imputable to the master. . . . As a part of these, rested the duty on the master to exercise reasonable care to give a reasonably sufficient time for the plaintiff to reach a place of safety, as a part of the duty to provide a reasonably safe place for the plaintiff to work in, and to exercise reasonable care to maintain it as a reasonably safe place. If that duty was cast upon an employee the defendant was chargeable with the employee's fault."

In Felice v. New York C. & H. R. R. Co. 14 App. Div. 345, 43 N. Y. Supp. 922, plaintiff's intestate was killed, while employed as a laborer by the defendant upon its railway tracks in a tunnel, by one of its engines. The court said: "It is the duty of the master to use reasonable care to provide for the servant, so far as the work at which he is engaged will permit, a reasonably safe and proper place in which to do his work, and to that end, if the place may become dangerous by reason of perils arising from the doing of other work pertaining to the master's business different from that in which the particular servant is engaged, to give him such warning of the additional dangers as will enable him, in the exercise of reasonable care, to avoid them or to guard himself against them. . . . Whatever means are employed, it is the duty of the master to employ them. And that duty cannot be delegated to any other person. . . . It remains the duty of the master, and the person appointed to perform it is the *alter ego* of the master, for whose negligence the master is liable. Bushby v. New York, L. E. & W. R. Co. 107 N. Y. 374, 1 Am. St. Rep. 844, 14 N. E. 407. . . . As to the performance of that kind of duty, the person intrusted with it, if anybody is so intrusted, is not a coservant of another employee, but he is for that purpose the master, and his act and his neglect is the act and neglect of the master himself." To the same effect is Snyder v. Cleveland, C. C. & St. L. R. Co. 60 Ohio St. 487, 54 N. E. 475. In harmony with the doctrine of the foregoing case is Rogers v. Cleveland, C. C. & St. L. R. Co. 211 Ill. 126, 103 Am. St. Rep. 185, 71 N. E. 850, and cases there cited. It is not claimed that the plaintiff was working in a place not designated by the defendant. His duties were such that they could have been performed in a room safe at all times. If the defendant chose to have him work in a place which became dangerous at irregular periods, and gave him no warning of the approach of danger, it must be held liable for a breach of that duty, which it could not delegate so as to relieve it of responsibility.

It is next insisted that the sixteenth instruction, given on behalf of appellee, was erroneous, for the reason that it directed the jury to determine from the evidence to what extent and in what manner, if at all, appellee and the blower co-operated or associated in their work, and to what extent, if at all, they were able to influence each other as to caution. It was not the duty of the jury to ascertain to what extent these conditions specifically existed; but it was its duty to ascertain, from all the evidence, whether or not the appellee and the blower were fellow servants. The instruction as given did not accurately state the law, but we are unable to see how it could have misled the jury to the prejudice of appellant. The first part of the instruction correctly states the rule of law, as did the seventeenth, given on behalf of the appellant. From an examination of the two instructions, together with all the others given, we

think the jury were fully informed as to the rights of the appellant.

The judgment will accordingly be affirmed.

Petition for rehearing denied April 5, 1906.

ILLINOIS SUPREME COURT.

AMERICA THEATER COMPANY, Appt.,
v.
SIEGEL, COOPER, & COMPANY.

(221 Ill. 145, 77 N. E. 588.)

Sale—retention by vendee—action for price.

1. One who receives and retains property bought under a contract cannot defeat an action for the price by showing that it did not exactly correspond with the requirements of the contract.

Contract—breach—loss of rent—damages.

2. A lessor cannot make the loss of rent a ground for special damages for failing to comply with a contract to supply furnishings for the leasehold within a specified time without showing a valid contract exempting the lessee from liability for the rent during the period of delay.

(April 17, 1906.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in plaintiff's favor in an action brought to recover the purchase price of theater chairs. Affirmed.

The facts are stated in the opinion.

Mr. D. F. Matchett, for appellant:

The contract was not complied with.

Holmes v. Stummel, 24 Ill. 370; Walker v. Brown, 28 Ill. 378, 81 Am. Dec. 287; Phelps v. Hubbard, 59 Ill. 79; Brand v. Hen-

Case Note.—Right of buyer to retain goods and defeat action for price on discovering that goods do not comply with requirements of contract.—The cases in which the foregoing question arises may be considered as falling into two classes, according to the circumstances involved. The first class consists of cases where the sale is of specific property, the nonconformity of which to the requirements of the contract may be regarded as a fraud perpetrated upon the purchaser, who may therefore avoid liability by rescinding the contract. Where the sale is not of specific property, the nonconformity of the goods to the contract requirements cannot be regarded as fraud, but may be viewed as a nonperformance of the contract according to its conditions. But whether the defense interposed is fraud or breach of warranty, express or implied, the cases are agreed that a return, or an offer to return, is a condition precedent to the right to set up such defense, unless special circumstances exist, such as a declaration of the seller that he will not receive the goods back, the worthlessness of the property, or its consumption in the course of ascertaining whether it conformed to contract requirements.

It is said of this defense in Dalton v. Bunn, 137 Ala. 175, 34 So. 841, an action for the value of goods sold: "That a party may not purchase and retain the goods of another, and when sued for their value, set up a breach of contract in the sale and purchase to defeat payment, is a proposition of law too well settled to call for discussion or citation of authorities. To permit such would be in disregard of the plainest principles of common justice. The purchaser may, however, where there is a special contract of sale, and the contract has been breached by the seller, to the injury and damage of the purchaser, set up the contract and its breach and the damages sustained resulting as a proximate consequence of such breach, by way of recoupment to the claim for the value of the goods."

In Barkalow v. Pfeiffer, 38 Ind. 214, it is held that the fact that the work done and materials furnished did not exactly conform to the terms of the contract to furnish a tombstone was no defense to an action for the agreed price, although it might entitle the defendant to a deduction.

And in Mackey v. Swartz, 60 Iowa, 710, 15 N. W. 576, it was held that a defendant who has not offered to return a safe cannot refuse to pay for it because it is not ornamented as specified in the order.

In Neaffie v. Hart, 4 Lans. 4, it is held that defects in a boiler which the purchaser continues to use cannot be set up as a defense to an action on the purchase-money note.

In Youngs v. Kent, 2 Sweeny, 248, it is held that noncorrespondence of goods delivered to the sample cannot be pleaded in bar to an action for the agreed price, where the purchaser has never offered to return the goods.

Payment for lumber of a size smaller than the order called for cannot be avoided where the purchaser had sawed it up before discovering that it was too small. Bogue v. Newcomb, 1 Thomp. & C. 251.

In Allison v. Noble, 1 Litt. (Ky.) 279, 13 Am. Dec. 230, the fact that cotton was of an inferior quality to that which the defendant had agreed to purchase was not available as a defense in an action of assumpsit for the price, where the cotton was of some value and had been used by the purchaser.

Falsity of representations made in respect to specific property cannot be set up as a bar to recovery of the purchase price, where the purchaser has not offered to return the property. Ford v. Oliphant (Tex. Civ. App.) 32 S. W. 437; Harris v. Daly, 121 Ga. 511, 49 S. E. 609; Hancock v. Tucker, 8 Fla. 430; Lukens v. Aiken, 174 Pa. 152, 34 Atl. 575; Cowen v. Harrington, 5 Idaho, 329, 48 Pac.

derson, 107 Ill. 141; Morris v. Wibaux, 159 Ill. 627, 43 N. E. 837; Benjamin, Sales, § 600.

The court erred in excluding the evidence offered by appellant.

2 Sutherland, Damages, § 662; Frazer v. Smith, 60 Ill. 145; Underwood v. Wolf, 131 Ill. 425, 19 Am. St. Rep. 40, 23 N. E. 598; Lapp v. Illinois Watch Co. 104 Ill. App. 255.

Messrs. Binswanger & Jackson, for appellee:

The act of appellant in accepting the chairs as delivered without protest or objection as to kind or character after an opportunity for inspection was a waiver of any departure from the terms of the contract.

Barker v. Turnbull, 51 Ill. App. 226; Titley v. Enterprise Stone Co. 127 Ill. 457, 20 N. E. 71.

The damage claimed here—refusal of the tenant to pay rent—is not such as would be within the contemplation of the parties; and it is not shown that such tenant, who had a written lease, had any right to refuse to pay rent, nor that appellant's attention was ever directed to this element of possible damage in any manner.

Olmstead v. Burke, 25 Ill. 86; Devlin v. New York, 63 N. Y. 8; Masterton v. Brooklyn, 7 Hill, 61, 42 Am. Dec. 38.

Scott, J., delivered the opinion of the court:

Siegel, Cooper, & Company, the appellee, brought suit in assumpsit in the superior court of Cook county against America Theater Company, the appellant, to recover the amount claimed to be due for 597 opera chairs which had been sold and delivered to appellant in pursuance of a written order which reads as follows:

Chicago, March 24, 1903.

Siegel, Cooper, & Co.,
Chicago, Ill.

Gentlemen:—

Please deliver to the America Theater Co., 77 E. 31st St., about 600 opera chairs, K. D. flat, same as sample shown me by Mr. Rowles and Mr. Macfarlane. Backs to be upholstered in red plush, same quality as sample submitted by Mr. Macfarlane.

1059. See also Thompson v. Chambers, 13 Pa. Super. Ct. 213, and Rice v. Gilbreath, 119 Ala. 424, 24 So. 421, which hold that one seeking to recover the consideration paid for property purchased, on the ground of false representations, cannot also retain the property.

An injunction will not issue against the enforcement of a judgment rendered on a purchase-money note because of a breach of warranty of soundness of slaves purchased, where the purchaser does not offer to surrender them. Garland v. Bowling, Hempst. 710, Fed. Cas. No. 5,242.

The payment of the entire purchase money cannot be avoided on the ground of fraud or breach of warranty, where the machinery purchased has not been returned on discovery of its defects, and it is of any intrinsic value, whether adapted to the particular use for which it was purchased or not. Young v. Arntze, 86 Ala. 116, 5 So. 253.

Although machinery, purchased for $600, in its present condition is worthless, a purchaser may not keep it without paying for it, where an expenditure of $50 would put it in good condition. Trippe v. McLain, 87 Ga. 536, 13 S. E. 523.

Cases in which the nonconformity of the goods to the contract requirements is held not to relieve the purchaser who has retained them from liability for the full amount of the purchase price, although such nonconformity is relied on as a partial, rather than an entire, defense, may also be referred to as bearing upon the question in hand. Among such cases are Smith v. Estey Organ Co. 100 Ga. 628, 28 S. E. 392, where the purchaser of an ebony wood piano received, instead, one finished to resemble ebony; Barker v. Turnbull, 51 Ill. App. 226, where railroad ties delivered were of inferior quality; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210, where the purchaser received lumber of inferior quality; Logan v. Berkshire Apartment House, 3 Misc. 296, 22 N. Y. Supp. 776, where the purchaser retained a hot-water tank with knowledge of its defects; National Keg & Box Co. v. Baker, 21 Misc. 35, 46 N. Y. Supp. 885, where the purchaser used boxes of inferior quality; Turl v. Knabe, 26 Misc. 770, 56 N. Y. Supp. 1017, where the purchaser continued to use a leaky tank; E. T. Burrowes Co. v. Rapid Safety Filter Co. 97 N. Y. Supp. 1048, where window screens delivered were inferior in workmanship and materials; Florida Athletic Club v. Hope Lumber Co. 18 Tex. Civ. App. 161, 44 S. W. 10, where the purchaser used lumber inferior to contract requirements; Cole v. Champlain Transp. Co. 26 Vt. 87, where the purchaser used fire wood of inferior quality; Wolf v. Dietzsch, 75 Ill. 205, where the purchaser resold part of a quantity of wine delivered, which was of a quality inferior to that purchased; Houston v. Clark, 62 Ill. App. 174, where the purchaser resold lumber of inferior quality; Richardson v. Levi, 69 Hun, 432, 22 N. Y. Supp. 352, where the purchaser resold bananas which did not conform to the contract requirement that they should be good and merchantable.

But, as above stated, a purchaser is not obliged, as a condition precedent to defending an action on the ground of nonconformity of the goods delivered to the requirements of the contract, to tender back the goods received, where it appears that such tender would be fruitless. Enterprise Soap

Back and seat to be in mahogany finish and the iron frames in black, for which we agree to pay you $2.87 each. It is understood and agreed that the chairs are to be delivered in any number as quickly as possible, and the order must be filled complete inside of three weeks from this date. (Strikes excepted.) Terms regular.

America Theater Co.,
By G. H. Boyd, Prest.

Witness: J. A. Macfarlane.

The declaration consisted of the common counts only. Appellant filed the general issue, with an affidavit of merits as to $700 of appellee's demand. At the close of all the evidence the court instructed the jury to return a verdict for $1,713.39 in favor of appellee, and, after overruling motions for a new trial and in arrest of judgment, entered judgment upon the verdict of the jury. The appellate court for the first district has affirmed the judgment of the superior court, and the record is brought by appellant to this court for review.

It is first urged that appellee failed to prove that the chairs delivered complied with the description contained in the contract, in that it was not shown that the chairs were of the same quality and description as the sample exhibited to the president of appellant by the agent of appellee. The evidence offered by appellee showed that the chairs which were delivered were "K. D." opera chairs, with iron frames and upholstered backs, and that appellant received and retained them and had them set up in its opera house for use. With this proof in the record, it was not necessary for appellee to prove that the chairs exactly corresponded with the sample or with the description contained in the contract. The law does not permit a person to receive goods under a contract, appropriate them to his own use, and then defeat an action for the purchase price on the ground that the goods were not of the exact quality or description called for by the contract. His remedy, in the absence of a warranty, is to refuse to accept the goods when delivered, or to return them within a reasonable time after the departure from the terms of the contract is discovered.

Works v. Sayers, 55 Mo. App. 15; Bailey v. Manley, 77 Vt. 157, 59 Atl. 200; Milliken v. Skillings, 89 Me. 180, 36 Atl. 77.

A specific tender is not required where the vendor has refused to accept an offer to return. Ohio Thresher & Engine Co. v. Hensel, 9 Ind. App. 328, 36 N. E. 716.

And in Strauss v. National Parlor Furniture Co. 76 Miss. 343, 24 So. 703, it is held that a purchaser who rejects goods as not conforming to contract need not actually return, or offer to return, them,—especially where the distance is great and the freight charges large.

A purchaser need not return, or offer to return, property purchased, in order to defeat the entire claim to the purchase price, where he can show that it was entirely worthless for any purpose whatever. Kerr v. Haymaker, 20 Mo. App. 350; McCormick Harvesting Mach. Co. v. Brady, 67 Mo. App. 292; Heimann v. Hatcher Mercantile Co. 106 Mo. App. 438, 80 S. W. 729; Hallwood Cash Register Co. v. Berry, 35 Tex. Civ. App. 554, 80 S. W. 857; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105.

Where bank bills for which a promissory note was given are not returned, no failure of consideration may be found in an action upon the note, unless the defendant proves such bank bills to have been worthless. Johnson v. Barney, 1 Iowa, 531.

A total failure of consideration cannot be pleaded where the article sold has some value and is not returned. Armstrong v. Johnson Tobacco Co. 41 Mo. App. 254.

Where a mare sold is represented as sound, but is not so in fact, the purchaser will be held liable for the purchase price, unless he returns the mare or shows her to be worthless. Burton v. Stewart, 3 Wend. 236, 20 Am. Dec. 692.

Where a device has no other use than for the purpose for which it was intended, its worthlessness for such purpose may be set up as a defense to an action for the purchase price, although the purchaser has never returned it. Compton v. Parsons, 76 Mo. 455.

A purchaser of a pony with the option of return at the end of six months if not satisfied may plead dissatisfaction as a defense to an action on the purchase-money note, although the pony has not been returned, where such pony choked to death without his fault the night after the purchase. Lyons v. Stills, 97 Tenn. 514, 37 S. W. 280.

So, also, guaranteed oats need not be returned as a condition precedent to the maintenance of an action to recover back the consideration, where they are shown to have been worthless. Seley v. Parker (Tex. Civ. App.) 45 S. W. 1026.

The exception, hereinbefore referred to, to the rule under discussion, which exists where the property has been consumed in proving its nonconformity to the contract, is supported by the cases of Shaw v. Smith, 45 Kan. 334, 11 L.R.A. 681, 25 Pac. 886, which holds the purchaser not liable for the price of seed which did not germinate, and Pacific Guano Co. v. Mullen, 66 Ala. 582, which holds that a purchaser may show the worthlessness of fertilizer which he has discovered by using it, as a defense to an action on a purchase-money note.

Wolf v. Dietzsch, 75 Ill. 205; Titley v. Enterprise Stone Co. 127 Ill. 457, 20 N. E. 71.

The evidence for appellant showed that some of the chairs were not delivered until after the time specified by the contract for delivery had expired, and appellant, as it now says, sought to recoup damages on the theory that these chairs, of the description designated in the order, were purchased for a special purpose and for delivery at a particular time and place, to enable appellant to comply with its contract made with the tenants to whom the opera house was rented; that the delay in the delivery of the chairs occasioned special or exceptional damages, consequent upon appellant's inability to carry out the contract with its tenants; that prior to the time the order was signed appellee was fully advised of the purpose for which the chairs were purchased, and of the damages that would ensue if they were not delivered within the time specified in the order, and that such damages were therefore within the contemplation of the parties and recoverable in this suit. Counsel for appellant asked several questions which he says were calculated to elicit answers which would disclose this situation, but which, we think, were not sufficiently definite, and, upon objection being sustained to each of those questions, he said: "I want to show at the time this contract was made with Siegel, Cooper, & Co. an arrangement had been made with these lessees by which, in consideration of their signing a lease, these chairs here sued for must be put in, and that they were not to pay rent until these chairs were put in. For that reason this contract was made providing that the chairs must be delivered within three weeks. By their failure, as their own testimony shows, to deliver within three weeks of the time the chairs were sold, Elliott & Sutherland refused to pay rent, and these people were out something like $500, and for that reason we want to show what condition the premises were in without the chairs."

If such an arrangement as is mentioned in this offer was included in the lease, that instrument, which was in writing, should have been offered in evidence. If the arrangement was not in the lease, then, to be binding, it must at least have been embodied in a contract made upon a valid consideration, by which the lease was modified. The lease was not offered, and no offer was made to prove any such contract so modifying the lease. An "arrangement" may or may not be an enforceable contract. It was not made to appear to the superior court that appellant sought to establish the existence of a valid contract with the tenants, the terms of which appellant was unable to comply with on account of the failure of appellee to deliver all of the chairs within the three weeks. The proffered evidence was therefore properly excluded.

No further reasons are suggested for disturbing the judgment of the Appellate Court. That judgment will accordingly be affirmed.

MINNESOTA SUPREME COURT.

GEORGE C. HOWE, Appt.,
v.
MARY O. COATES et al., Respts.

(— Minn. —, 107 N. W. 397.)

Contract—to sell real estate.

1. A contract for the sale of real estate construed, and held to call for a marketable record title.

Same—marketable title.

2. A marketable title means a title free from reasonable doubt.

Same—defect in record.

3. A purchaser will not be compelled to take a title when there is a defect in the record title which can be cured only by resorting to parol evidence.

Same—reasonable doubt.

4. A title open to reasonable doubt is not marketable, and the court cannot make it so by passing upon an objection dedend-

Headnotes by ELLIOTT, J.

Case Note.—Vendor and purchaser; what is a marketable title.—The authorities on the general question of what is a marketable title are so fully reviewed in the opinion in HOWE v. COATES that any further discussion of the cases therein cited, by way of annotation, seems unnecessary. The following note will, therefore, be largely of a supplemental character, adding a few decisions whose statement of general principles seems of value, together with some illustrative cases.

In Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739, it is said: "As a general rule a title which is open to judicial doubt is not marketable; but what may be regarded as such doubt is not easily defined, depending much upon the discretion of the court. But in no case will a purchaser be compelled to accept and pay for a title which he can only acquire in possession by litigation and judicial decision, nor where it is evident that his possession must be defended in like manner."

In Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 105, it is said: "By marketable title is meant one reasonably free from such doubts as would affect the market value of the estate; one which a prudent man with knowledge of all the facts and their legal bearing would be willing to accept."

In Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527, it is said:

ing upon a disputed question of fact, or a doubtful question of law, in the absence of the party in whom the outstanding right or claim is vested.

Same—defect—value of land.

5. A title to real estate is not marketable when so defective as to affect the value of the land or interfere with its sale.

(March 9, 1906.)

APPEAL by plaintiff from an order of the District Court for Stearns County denying a motion for new trial after verdict in defendants' favor in an action brought to recover an advanced payment on a contract to purchase real estate. Reversed.

The facts are stated in the opinion.

Messrs. **Washburn, Bailey, & Mitchell** and **Stewart & Brower**, for appellant:

One of the tests of whether a title is good is, Would it pass the examination of the average examining counsel not given to captious objections?

Eggers v. Busch, 154 Ill. 604, 39 N. E. 619; Harrass v. Edwards, 94 Wis. 459, 69 N. W. 69; Miller v. Bronson, 26 R. I. 62, 58 Atl. 257; Walker v. Gillman, 127 Mich. 269, 86 N. W. 830; Ford v. Wright, 114 Mich. 122, 72 N. W. 197; Kane v. Rippey, 22 Or. 296, 23 Pac. 180; Smith v. Taylor, 82 Cal. 533, 23 Pac. 217.

The contract could only be satisfied by a title merchantable and marketable in fact and merchantable and marketable of record.

"A doubt as to the title may be raised upon a question of law, or upon a question of fact, or upon both law and fact. It is impossible to state any precise and definite rule by which to determine when a doubt raised upon a question of law is to be deemed reasonable. Without going so far as some of the English cases, which appear to hold that in a case where the doubt exists as to the construction of an act of Parliament, or of a deed or will, the court will resolve the doubt, and thus remove it, so that it shall not stand in the way of enforcing specific performance, we can at least say that the doubt suggested must raise a question of law that is fairly debatable,—one upon which the judicial mind would hesitate before deciding it. If it depend on the construction of an act of the legislature, or of a written instrument, and the construction is readily arrived at by the application of the well-known rules of interpretation, it ought not to be regarded as making the title doubtful. . . . When the doubt as to the title is raised upon a matter of fact, the question whether it is reasonable or not will not depend solely on the actual existence or nonexistence of the fact as it may appear after a trial of it. If it need a trial to ascertain it, and especially if its character be such, or if the evidence to show it be such, that it may be decided either way, or if the evidence be not readily accessible to the vendee so that he can establish the fact at any time when called upon, it would certainly affect the marketable value of the title. On the other hand, if there is no doubt as to how the fact is, and it may be readily and easily shown at any time, the title is not rendered doubtful by depending upon it."

In Vought v. Williams, 46 Hun, 638, 12 N. Y. S. R. 733, it is said: "A marketable title . . . must be free from judicial doubt or uncertainty as to matter of facts, and one in which the possession can be acquired and retained without litigation or judicial decision. That, if a reasonable doubt exists in reference to any facts upon which the title depends, or such a doubt exists that a court of law would not feel called upon to instruct a jury to find that the fact existed, or where the title depends upon a matter of fact such as is not capable of satisfactory proof, a title is not marketable."

And in Shriver v. Shriver, 86 N. Y. 575, it is said: "A title may be doubtful, which is to say, unmarketable, because of the uncertainty of some matter of fact appearing in the course of the deduction of it. And if, after the vendor has produced all the proofs that he can, a rational doubt still remains, a title is not marketable. It seems that a rational doubt may be said to exist when a court of law would not feel called upon to instruct a jury to find that the fact existed, on the existence of which the vendor's title depends."

In Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483, the court, after remarking that the title may be held marketable although dependent on the proofs of facts, and that the quantum of evidence necessary to render such a title marketable must necessarily rest upon the peculiar circumstances of each case, says: "The authorities, I think, establish the rule as a safe one, that a title dependent on a fact must be regarded as marketable when (1) the fact is so conclusively proved in the suit for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law; and (2) where there is no reasonable ground for apprehending that the same fact cannot be, in like manner, proved, if necessary, at any time thereafter for the protection of the purchaser."

A title by adverse possession is a marketable one. Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355.

But where the vendor only shows uninterrupted occupancy for thirty years without negativing the existence of persons who might still be entitled to attack his title, it will be regarded as unmarketable. Fuhr v. Cronin, 82 App. Div. 210, 81 N. Y. Supp. 536.

Where the vendor of certain premises, the buildings on which encroach on adjoining property from ½ inch to 3 inches, does not show that such encroachment is not material and will not affect the value of the

George v. Conhaim, 38 Minn. 338, 37 N. W. 791; Horn v. Butler, 39 Minn. 515, 40 N. W. 833; Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056; Fairchild v. Marshall, 42 Minn. 14, 43 N. W. 563; Gregory v. Christian, 42 Minn. 304, 18 Am. St. Rep. 507, 44 N. W. 202; Richmond v. Koenig, 43 Minn. 480, 45 N. W. 1093; Ladd v. Weiskopf, 62 Minn. 29, 69 L.R.A. 785, 64 N. W. 99; Duluth Loan & Land Co. v. Klovdahl, 55 Minn. 341, 56 N. W. 1119; Austin v. Barnum, 52 Minn. 136, 53 N. W. 1132; Long v. Miller, 46 Minn. 13, 48 N. W. 409; Joslyn v. Schwend, 85 Minn. 130, 88 N. W. 410.

An agreement to give title good of record is only fulfilled by one that is in fact good of record.

Noyes v. Johnson, 139 Mass. 436, 31 N. E. 767; Zunker v. Kuehn, 113 Wis. 421, 88 N. W. 605; Page v. Greeley, 75 Ill. 400; Todd v. Union Dime Sav. Inst. 128 N. Y. 636, 28 N. E. 504; Swayne v. Lyon, 67 Pa. 436; Dobbs v. Norcross, 24 N. J. Eq. 327; Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483; Herman v. Somers, 158 Pa. 424, 38 Am. St. Rep.

property, or that the right to continue the buildings has been acquired by adverse possession, his title is not marketable. Stevenson v. Fox, 40 App. Div. 354, 57 N. Y. Supp. 1094.

A 2-inch encroachment upon adjoining property by the wall of a building in process of construction upon the premises contracted to be sold, there being no one in existence who can execute a release or agreement to permit the wall to remain, will render the title unmarketable. Snow v. Monk, 81 App. Div. 206, 80 N. Y. Supp. 719.

Where a portion of the piers of a stone building beyond the inner surface of longitudinal channels cut therein encroaches upon a city street, but within the stoop and area line, the title is not thereby rendered unmarketable, where it appears that the building has been erected for five years without objection on the part of the city, and that the portion encroaching does not bear any part of the weight of the building. Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. Supp. 371.

The title to land is not unmarketable on the ground that a highway across it has never been legally closed when there has been an evident and notorious abandonment of the road, and private rights have grown up in respect to it, whereby the public are estopped to assert their easement. Baldwin v. Trimble, 85 Md. 396, 36 L.R.A. 489, 37 Atl. 176.

A tax deed, which a statute provides shall vest in the grantee an absolute estate in fee simple, in the absence of any known defect in the tax deed or proceedings will constitute a marketable title. Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

A tax title is marketable where all proceedings appear to have been regular and the description of the property was sufficient to give notice to the owner had he made search. Reeves v. Alter, 9 Sadler (Pa.) 412, 22 W. N. C. 34, 12 Atl. 551.

The fact that judgments against a prior owner of the property remain uncanceled of record does not render the title unmarketable where such judgment debtor has been discharged in bankruptcy by a decree which remains unrevoked. Grosso v. Marx, 45 Misc. 500, 92 N. Y. Supp. 773.

The fact that subsequent to the record of the deed of a purchaser in good faith there appears from his grantor a deed of previous date upon the record will not render the title of such purchaser unmarketable. Jay v. Wilson, 91 Hun, 391, 36 N. Y. Supp. 186.

The title of a person claiming through foreclosure of a mechanic's lien after the death of the person by whom such lien was incurred is marketable, although the heirs were not made parties to the proceedings to foreclose, where it is not shown that they could have interposed any defense. Reece v. Haymaker, 164 Pa. 575, 30 Atl. 404.

A "good and marketable" title cannot be given where the vendor holds subject to a condition against the erection of any mill, factory, brewery, or distillery on the land. Batley v. Foerderer, 162 Pa. 460, 29 Atl. 868.

An outstanding oil lease of which the purchaser was ignorant at the time of the sale renders a title unmarketable. Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 105.

An outstanding right of dower, even though inchoate, renders a title unmarketable. Cooper v. Cooper, 56 N. J. Eq. 48, 38 Atl. 198.

The title taken by a mortgage trustee who purchased the property on foreclosure is not marketable, such sale being presumptively voidable at the instance of the beneficiaries. Priessenger v. Sharp, 27 Jones & S. 315, 14 N. Y. Supp. 372.

A title made by a conveyance executed during the life of the devisee for life, from a child having a vested estate under the provisions of § 10 of the descent act, being subject to be devested in the event of the death of such child leaving issue during the life of the devisee for life, is not a marketable title. Lamprey v. Whitehead, 64 N. J. Eq. 408, 54 Atl. 803.

The presumption of death of one who left home for causes unknown, and has not been seen or heard of by his family or friends for upwards of twenty-four years, and who when last seen was about twenty-three years old, unmarried, dissipated, in feeble health, and in destitute condition, is not sufficiently strong to make marketable a title to real estate which depends on his death unmarried and without issue. Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195.

851, 27 Atl. 1050; Mitchner v. Holmes, 117 Mo. 185, 22 S. W. 1070; Hunting v. Damon, 160 Mass. 441, 35 N. E. 1064; Paulmier v. Howland, 49 N. J. Eq. 364, 24 Atl. 268; Street v. French, 147 Ill. 342, 35 N. E. 814; Turner v. McDonald, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Harding v. Olson, 177 Ill. 298, 52 N. E. 482; Sturtevant v. Jaques, 14 Allen, 523; Clouse's Appeal, 192 Pa. 108, 43 Atl. 413; Irving v. Campbell, 121 N. Y. 353, 8 L.R.A. 620, 24 N. E. 821; Griffith v. Maxfield, 63 Ark. 548, 39 S. W. 852.

A court of equity will not now compel a purchaser to accept a title which is so doubtful that it may expose him to litigation, though the court may believe it to be good.

Speakman v. Forepaugh, 44 Pa. 363; Close v. Stuyvesant, 132 Ill. 607, 3 L.R.A. 161, 24 N. E. 868; Sharp Street Station v. Rother, 83 Md. 280, 34 Atl. 843; Daniell v. Shaw, 166 Mass. 582, 44 N. E. 991; McPherson v. Schade, 149 N. Y. 16, 43 N. E. 527; Frazier v. Boggs, 37 Fla. 307, 20 So. 245; Vought v. Williams, 120 N. Y. 257, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195; Irving v. Campbell, 121 N. Y. 353, 8 L.R.A. 620, 24 N. E. 821; Early v. Douglass, 110 Ky. 813, 62 S. W. 860; Spencer v. Sandusky, 46 W. Va. 582, 33 S. E. 221; Fahy v. Cavanagh, 59 N. J. Eq. 278, 44 Atl. 154; Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851; Bruce v. Wolfe, 102 Mo. App. 384, 76 S. W. 723; Ruess v. Ewen, 165 N. Y. 633, 59 N. E. 1130, Affirming 34 App. Div. 484, 54 N. Y. Supp. 357; Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195; Brooklyn Park v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905; Jordan v. Poillon, 77 N. Y. 518; Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527; Greenblatt v. Hermann, 144 N. Y. 13, 33 N. E. 966.

Messrs. **Calhoun & Bennett, Taylor & Jenks, and Reynolds & Roeser,** for respondents:

Where a title is of record, and the court can say as a matter of law that it is good, the title is sufficient and marketable.

Mathews v. Lightner, 85 Minn. 333, 89 Am. St. Rep. 558, 88 N. W. 992; Ladd v. Weiskopf, 62 Minn. 29, 69 L.R.A. 785, 64 N. W. 99; Fairchild v. Marshall, 42 Minn. 14, 43 N. W. 563; Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527; Richmond v. Koenig, 43 Minn. 480, 45 N. W. 1093; Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056; Womack v. Coleman, 89 Minn. 17, 93 N. W. 663; Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. 966; Meyer v. Madreperla, 68 N. J. L. 258, 96 Am. St. Rep. 536, 53 Atl. 477.

The opinion of counsel does not make a title unmerchantable.

Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640; Moser v. Cochrane, 107 N. Y. 35, 13 N. E. 442; Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195; Moot v. Business Men's Invest. Asso. 157 N. Y. 201, 45 L.R.A. 666, 52 N. E. 1; Atkinson v. Taylor, 34 Mo. App. 442; Dalzell v. Crawford, 1 Clark (Pa.) 155.

Elliott, J., delivered the opinion of the court:

This is an appeal from an order denying the plaintiff's motion for a new trial. There is little, if any, controversy over the material facts. It appears that upon March 12, 1902, the appellant, the plaintiff below, and the respondents, entered into a written contract, whereby, in consideration of the sum of $50,000 in hand paid, and in consideration of the covenants and agreements therein contained, the vendors granted, bargained, and sold to the vendee (the appellant herein), his heirs, and assigns the exclusive right, privilege, and option to purchase certain lands in Itasca county, Minnesota, known as the "Arcturus Mine," at any time on or before July 12, 1902, for the sum of $750,000. The appellant paid $50,000, which, under the contract, was to apply upon the purchase price if he elected to consummate the sale. The grantors covenanted that they were the owners in fee simple of the premises, free from all encumbrances, and that they had good right and authority to sell and convey the same. Among other provisions, the contract contained the following:

"It is further agreed that the said parties of the first part shall furnish an abstract of the title to said premises to the said party of the second part, as soon as the same can reasonably be obtained, with all tax and judgment certificates necessary to cover any liens that may be upon the said premises, and at all events to furnish the said abstract within the next fifteen days; and that thereupon the said party of the second part shall cause the same to be examined, and, in case he shall find the title to said property, or the record title thereof, defective, unmerchantable, or encumbered, he shall, within a reasonable time and as near as may be within fifteen days from the date of the delivery of such abstract, notify the said parties of the first part, by notification of said Daniel H. Freeman, mailed to him at St. Cloud, Minnesota, of such defects, and the said parties of the first shall thereupon proceed to correct and cure such defects as speedily as possible, and at all events shall have such corrections complete on or before

June 15th, 1902; in case the title to said premises shall be defective, and the said parties of the first part shall fail to perfect the same within the time above specified, and they are notified thereof, then this agreement, at the option of the said party of the second part, shall cease and determine altogether, and the moneys hereinbefore provided to be paid shall be refunded, in which case there shall be no claim for damages by either party; but the parties hereto may agree upon a further reasonable time for the correction of such title. In case a difference arises between the counsel for the said party of the second part, who may be employed to examine the title to said premises, and the counsel for the said parties of the first part, with respect to any alleged defect in the title or in the record of the title to said premises, as to whether the same is a substantial defect requiring correction within the spirit and terms of this agreement, or as to whether such defects as may have been discovered in the examination of such title shall have been substantially and sufficiently cured, then and in such event the matters of difference shall be submitted to Hon. D. B. Searle and Hon. Homer B. Dibell, two of the judges of the district court of the state of Minnesota, who shall determine the same, failing to agree in which, they may call in a third judge of the said district court within said state, and the decision of the majority shall prevail and be conclusive and binding upon the parties hereto."

It will thus be seen that the respondents agreed to furnish an abstract of title to the property, with all taxes and judgment certificates, within fifteen days after the contract was signed, and the grantee was to have the same examined, and, if he found the title or the record title to be defective, unmerchantable, or encumbered, he should, within a reasonable time, as near as may be within fifteen days from the day of the delivery of the abstract, notify the respondents of such defects, and respondents should proceed to correct and cure such defects as speedily as possible, and in all events have such corrections completed on or before June 15, 1902. It was provided that, " in case the title to said premises shall be defective, and the said parties of the first part shall fail to perfect the same within the time above specified, and they are notified thereof, then this agreement, at the option of the said party of the second part, shall cease and determine altogether, and the moneys heretofore provided to be paid shall be refunded; and in which case there shall be no claim for damages by either party." It is further agreed between the parties "that time is of the essence of this agreement in respect to all matters and things herein by the respective parties hereto agreed to be done and performed." In case a difference shall arise between the counsel of the respective parties with respect to any alleged defect in the title, or in the record title, as to whether the same is a substantial defect, requiring correction within the spirit and terms of the agreement, or as to whether such defects had been sufficiently cured, then the matters of difference shall be submitted to two distinct judges of the state, named in the agreement, who shall determine the same, "failing to agree in which they may call in a third judge of the said district court of the said state, and the decision of the majority shall prevail and be conclusive and binding upon the parties hereto." Within a few days after the contract was signed, the respondents delivered an incomplete abstract of title which had been used in some prior transaction, and requested appellant's attorney to have it brought down to date. The abstract as brought down and completed by the register of deeds at the instance of appellant's attorney disclosed the matters which give rise to the controversy respecting the title and the record title to the property. The alleged defects, so far as of present importance grew out of the existence of two previous leases which have been referred to as the Foley and Snider leases.

(a) It appeared from the abstract that while Josiah E. Hayward, the ancestor of the respondents, owned the lands in question, he on March 19, 1892, his wife joining, executed and delivered to Timothy Foley and Daniel H. Freeman a mining lease for the greater portion of the land. This lease ran for a period of fifty years from its date. It provided for the payment of a nominal rental until the lapse of a period of five years after a railroad should have been completed to within 1 mile of the property, and thereafter there should be paid a royalty upon the iron ore mined and removed from the premises. This lease further granted an option for and throughout the full period of the lease to the lessees, their heirs, or assigns to purchase the premises for $100,000. The instrument was recorded in Itasca county. The abstract also showed an assignment recorded in the same county of a four-sevenths interest therein to Josiah E. Hayward, Henry C. Waite, Datus E. Meyers, and Frank E. Searle, and an assignment from these assignees and the original lessees of the entire lease and contract to the Foley Mining Company. No wives joined with any of these assignors in making the assignment. It is admitted that the assignors were all married men at the time of the making of such assignment and their wives were then living. There was nothing upon

the abstract or records to show that the rights and interests of these married women, whatever they were, had been acquired or extinguished or surrendered. There was nothing on the abstract or record to show any surrender or termination of the estate or rights of the Foley Mining Company, except what purported to be a certified copy of a judgment in an action to determine adverse claims brought by the female respondents herein, as plaintiffs, wherein the Foley Mining Company was the sole defendant. The copy of the judgment was recorded February 13, 1899, but the certificate of comparison of the certified copy so recorded was dated February 20, 1899, and the copy of the judgment bore date February 25, 1899. The files in the clerk's office showed that this judgment was not entered in any form in the clerk's office until twelve days after the record of the certified copy in the office of the register of deeds, and that no judgment was ever entered in the judgment book in said action unless a judgment in an action entitled Mary O. Coates, Clara H. Freeman, Flora H. Holden, and John O. McClure v. Foley Mining Company was such judgment.

(b) The abstract also showed that on November 29, 1895, the respondents entered into an agreement with one Margaret E. Snider, which was recorded February 17, 1896, whereby, for a valuable consideration, therein acknowledged, respondents sold and agreed to convey to the said Margaret E. Snider, on or before the 1st day of January, 1900, the greater portion of the land covered by the contract between the appellant and respondents. This agreement provided that said Snider, her heirs, or assigns should, not later than January 1, 1896, commence explorations on the premises for the discovery of iron ore, and prosecute the same with reasonable diligence until either $10,000 should have been expended or 400 tons of iron ore be discovered in the said premises, or until $10,000 should have been paid on the contract. The agreement provided for deferred payments to be made at different intervals, aggregating $90,000, and for a credit on the purchase price for all iron ore taken out at the rate of 25 cents per ton; and provided that in the event of default the first parties to the contract might terminate the same by serving notice in writing upon the holder of the contract, first giving sixty days within which to comply with its terms. On March 9, 1897, the respondents caused a notice or declaration to be recorded in the office of the register of deeds claiming a default in the contract in the payment of said sum of $10,000. But there also appeared of record a new and modified agreement in writing entered into between the Arcturus Iron Company and the respondents on or about May 13, 1897, reciting the former agreements and alleged default, by which last agreement, for valuable considerations, therein acknowledged, the alleged forfeiture and dissolution were withdrawn and canceled, and the time for the making of the various payments extended, one or more parcels of the premises released and additional payments agreed to be made. It also provided that the same might be terminated by serving notice as provided by chapter 223, p. 431, Laws 1897. This latter contract appeared of record, and was entered on the abstract, and was encountered by the appellant in making an examination of the title. There was nothing of record to show any release of this contract or the rights or estate granted thereunder, and the only thing which appeared, or has ever been made to appear, respecting the termination of this contract, or the extinguishment of the rights or estate therein granted, is the record on February 13, 1899, of a notice without date in the office of said register of deeds which recites certain alleged defaults in the making of said payments required by the contract, and specified that the contract should be canceled and determined December 20, 1897, unless the conditions and agreements as to which default had been made should have been complied with on or before that date. Accompanying this notice was proof that it had been published.

The title was examined by Mr. Washburn, as attorney for the appellant, and, while engaged in his investigations, he was informed by interested parties that they still claimed rights under the Snider contract. On March 5 and 24, and April 5, 1902, he sent letters to Mr. Taylor, the attorney for the respondents, calling his attention to the alleged defects in the record title, and insisting that they were material and should be cured. In the latter part of May Mr. Taylor informed Mr. Washburn that "we have concluded to arbitrate." Thereupon, on May 26, 1902, appellant sent to respondents a communication which contained the following language: "We must insist upon the substantial character of the objections raised and assuredly cannot waive them, and we are extremely anxious, as the time is now growing short, to have the matter determined, and this communication is sent to you for the purpose of bringing to a speedy hearing the reference of these questions before the district judges mentioned in the contract as arbitrators. The objections raised to the title and to the record title, the character and the validity of which are to be determined by such arbitrators, are: (a) Whether the interest and estate in said property under a mining lease executed by Hayward and wife to Timothy Foley and Daniel H.

Freeman in 1892 have been extinguished, and whether the same has been done so as to clear the record title to the premises thereof and of all persons who may claim thereunder, including Foley Mining Company and the wives of Josiah E. Hayward, Henry C. Waite, Datus E. Meyers, and Frank E. Searle. (b) Whether the interest and rights of the Arcturus Iron Company under a certain contract of sale made by you to Margaret E. Snider November 29, '95, and assigned by said Snider to Arcturus Iron Company, have been determined and extinguished and sufficiently determined and extinguished of record to remove the cloud thereof from the title. . . . As your counsel has advised my counsel that you desire to arbitrate the validity of these objections, I respectfully ask that you at once arrange for a hearing before the arbitrators at the earliest possible time."

After some further correspondence the parties met at St. Paul June 14, 1902, and submitted their respective claims to Judge Searle and Judge Dibell, the arbitrators named in the contract. No claim was made on the part of the respondents that they had cured any alleged defects in the title or the record title, but they stood on the claim that they were not such defects as they were required to cure under the contract; that is, they were not substantial defects. The arbitrators were unable to agree, and each prepared and submitted an opinion supporting his views; the last, that of Judge Dibell, being dated July 1, 1902. From this time on plaintiff made earnest efforts to have a third judge selected and a final determination made. The trial court has found that "the plaintiff and his attorney, by letters, telegrams, and oral requests, used their utmost efforts in endeavoring to obtain a decision of a board of arbitrators as to defendants' title to the land in controversy; but that neither of the judges named as arbitrators in the contract are in fault or in any way responsible for the failure to call in a third arbitrator, or for the failure to have the determination of the question of title arrived at." The evidence amply supports the conclusion that the appellant used every effort to secure the selection of the third arbitrator; and, waiving the question of the location of the fault, we are satisfied that the appellant was clearly justified in refusing to longer urge the arbitration or rely upon the respondents' right thereto and in seeking to have the question of his rights determined by the courts. On July 17, 1902, the appellant served notice upon the respondents that, as they had failed to comply with the contract in regard to furnishing a perfect title and a perfect record title, he elected to terminate the contract, and tendered a proper release of his interest in the lands, and demanded the return of the money which he had paid. An action to recover the $50,000 which had been paid to the respondents was then brought, and resulted in a decision in favor of the defendants therein. The court found, among other things, "that on the 12th day of July, 1902, the defendants, Mary O. Coates, Clara H. Freeman, John O. McClure, and Eliza H. Holden, were, ever since have been, and now are, the owners in fee simple of the land described in the contract, . . . and had during all said time a good record title thereto; and that their title to said land and the record title thereto was not defective, unmerchantable, or encumbered." The entire case is involved in the correctness of this finding.

1. We are not able to accept the respondents' theory for the construction of this contract. It calls for a title of record, merchantable and unencumbered. The vendors agreed to furnish such a title by June 12, 1902, and the language, as well as the entire structure, framework, and import of the contract shows that the parties intended to make time of the essence of the contract. The respondents' contention rests upon the assumption that the title was such as they were required to furnish. Assuming this important fact, it is argued that the appellant was required to make his election to purchase the property before the 12th day of July, 1902. The contract requires a written notice of the intention to elect to exercise the right to consummate the purchase, and provides that, "in case the said party of the second part shall elect not to exercise the right and option herein granted to purchase the said premises and not to consummate the purchase thereof, then and in that event, the said sum of $50,000, the payment of which is hereby acknowledged, shall be forfeited to the said parties of the first part as liquidated damages, as being a reasonable consideration for this agreement. In case the said party of the second part shall fail to give a notice of his election hereinbefore provided, the same shall be deemed to be an election not to consummate such purchase."

The contract must be read as a whole, giving due force and effect to all its provisions. This provision for the forfeiture of the $50,000 must rest upon the condition that the vendee has refused, without cause, to consummate the contract. It was, of course, never intended that the money should be forfeited in the event that the vendor failed to furnish a title such as called for by the contract. If the vendor tendered a marketable record title before June 12, 1902, the vendee was required to complete the contract or lose the money he had paid.

If the title was not tendered by that date, he had the right to cancel the contract and recover the amount he had paid. The respondents elected to stand upon their title as it was, and under those conditions they were not entitled to a notice giving them further time. Had the arbitration been determined in favor of the appellant, he would have been entitled to recover his payment; but, if it had been determined in favor of the respondents, the appellant must have carried the contract to completion according to its terms or forfeited the $50,000 which he had paid. The rights of the parties, so far as they depended upon the conditions of the title, were fixed upon June 12, 1902, and all future proceedings, whether before arbitrators or courts, were for the purpose of determining their rights as of that date. The notice given on June 17, 1902, was all that the respondents were entitled to receive under the circumstances and conditions then existing. We confess our inability to grasp the force of the respondents' contention that the appellant is claiming a forfeiture. Nor does the suggestion that he is insisting upon his pound of flesh seem appropriate.

2. As we construe this contract, it calls for an abstract which shows a good title of record in the vendors and which discloses sufficient of record to defeat the claim of any adverse claimant. George v. Conhaim, 38 Minn. 338, 37 N. W. 791. It requires respondents to furnish an abstract of title within fifteen days; and thereafter the vendee must cause the same to be examined, and, "in case he shall find the title of said property, or the record title thereof, defective, unmerchantable, or encumbered," he shall notify the vendors of the defects. A somewhat similar requirement was considered in Horn v. Butler, 39 Minn. 515, 40 N. W. 833. The contract there provided: "Abstract of title to be furnished without delay. . . . In case the title shall be ascertained to be unmarketable to such an extent as to warrant the purchaser in refusing the same and shall so refuse the same upon that ground," earnest money shall be returned. The abstract failed to show a good title in the vendor, and the court said: "In determining the marketability of defendant's title to the property described in the contract,—in ascertaining the validity of his alleged title, —plaintiffs were justified in relying solely upon the abstract furnished by him for their guidance. If it did not disclose his ownership,—the marketable character of his title,—they were not obliged to examine further or elsewhere. Their refusal to proceed was warranted. It may be the fact that defendant's title was, or could be made, complete; but no provision was made in the contract for the perfecting thereof, should it be found defective. The marketable character of the title depended upon the record, and this would or should be shown by the abstract." Lessenich v. Sellers, 119 Iowa, 314, 93 N. W. 348; Kane v. Rippey, 22 Or. 296, 23 Pac. 180. A contract "to convey unto the second party by warranty deed with an abstract showing a good title" refers to the record title which might be epitomized on the abstract. Such a contract calls for a good title on the abstract, or at least of record. Fagan v. Hook (Iowa) 105 N. W. 155; Spooner v. Cross, 127 Iowa, 259, 102 N. W. 1119; Martin v. Roberts, 127 Iowa, 218, 102 N. W. 1126. In Brown v. Widen (Iowa) 103 N. W. 158, the court said: "The contract called for an abstract showing good title, and nothing less than this would satisfy the condition, no matter what the vendor's real title might be." See Boas v. Farrington, 85 Cal. 535, 24 Pac. 787; Noyes v. Johnson, 139 Mass. 436, 31 N. E. 767; Zunker v. Kuehn, 113 Wis. 421, 88 N. W. 605; Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527; Howe v. Hutchinson, 105 Ill. 501; Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851; Bruce v. Wolfe, 102 Mo. App. 384, 76 S. W. 723. This contract calls for a title good in fact and for an abstract showing a good title of record, but it was evidently not contemplated that the vendee should rely entirely upon the abstract. It was not so construed by the parties. An admittedly incomplete abstract was delivered to the vendee's attorney and accepted by him with the understanding that he would have it brought down to date and made to show the whole record title of the vendors. It was the record title, and not the abstract, upon which the vendee was entitled to rely.

3. A purchaser under such a contract is not required to resort to evidence *dehors* the record. It is not sufficient that the title is good in fact; that is, capable of being made good by the production of affidavits or other oral testimony. It must be good of record. So, even a good title may be unmarketable. Block v. Ryan, 4 App. D. C. 283; Speakman v. Forepaugh, 44 Pa. 363; Close v. Stuyvesant, 132 Ill. 607, 3 L.R.A. 161, 24 N. E. 868. As far as the principle is concerned, it seems to be immaterial whether the contract authorizes the vendee to rely upon the abstract or the record. In either case he cannot be required to resort to oral evidence. In Fagan v. Hook, *supra*, the court said: "The title may be good; but one to whom an abstract showing a good title has been promised as a condition precedent is not bound to accept any evidence thereof, except that contained in the abstract. The vendee in such a case is not required to accept or rely on parol evidence of title or information *dehors* the record, or

the word of the vendor." It was therefore held that the purchaser was not obliged to accept the title which was bad of record, although capable of being made good by evidence showing adverse possession for the statutory period of time. Carolan v. Yoran, 104 App. Div. 488, 93 N. Y. Supp. 935; Fagan v. Hook and Noyes v. Johnson, *supra;* Page v. Greeley, 75 Ill. 400; Gwin v. Calegaris; Bruce v. Wolfe; and Zunker v. Kuehn,—*supra*. A title is not marketable where it "depends necessarily upon matter *in pais* which is in itself a doubtful fact and never can be determined or established except by bringing every party into court,—certainly others besides the immediate party to the suit for specific performance." Rutherford Land & Improv. Co. v. Sanntrock (N. J. Eq.) 44 Atl. 938; Ruess v. Ewen, 34 App. Div. 484, 54 N. Y. Supp. 357. Affirmed in 165 N. Y. 633, 59 N. E. 1130; Smith v. Death, 5 Madd. 371, 21 Revised Rep. 314. This rule was applied in Austin v. Barnum, 52 Minn. 136, 53 N. W. 1132. The record there disclosed an unsatisfied mortgage, and its date showed that it might have been, and inferentially was, barred by the statute of limitations, but, as this might depend upon matters which did not appear of record, the title was held to be unmarketable. The action was to recover the money which had been paid under the contract; and the court said: "Because of the mortgage which of record was unsatisfied and undischarged the title was defective, and respondent's right of action accrued. The time for payment of the debt may have been extended by agreement of the parties, or partial payments may have been made, operating to prevent the running of the statute of limitations against the mortgage security; thus keeping it still alive." Where the vendor is required to furnish a title good in fact and in law, without reference to the record, he may, of course, rest upon the bar of the statute of limitations, provided it clearly appears that the entry of the real owner is barred. Pratt v. Eby, 67 Pa. 396. The application of this rule disposes of the respondents' contentions, unless their record title was clearly marketable and unencumbered. We are not called upon to determine the validity of any claim which may be made by the Arcturus Mining Company or its successors under the Snider contract. It is certainly not clear beyond any reasonable doubt that the rights which were created by that contract were terminated by the giving of the notice provided by chapter 223, p. 431, Gen. Laws, 1897. If the company was in default when the notice was given, it had a legal right to remove the default within the time limited by the notice. Whether it was in fact in default, and, if so, whether such default was removed, does not appear of record, and would necessarily have to be established by oral evidence.

4. The question whether this title was such as was called for by the contract cannot be determined by an examination of the record alone. In Ladd v. Weiskopf, 62 Minn. 29, 69 L.R.A. 785, 64 N. W. 99, and Mathews v. Lightner, 85 Minn. 333, 89 Am. St. Rep. 558, 88 N. W. 992, it was held that a title is not unmarketable when no question of fact is involved, but only one of law arising exclusively upon the construction of a record muniment of title and all the parties in interest are before the court, so that its decision will be a final determination of the matter. But, even if the present case involved only a question of law arising upon the construction of the record, it could not be controlled by this rule because all the parties in interest are not before the court. If this court should hold, for instance, that the claims of the Arcturus Mining Company were cut out by the service of the notice of default, it would not bind that company or its successors in interest. The claimants would be entitled to their day in court, and upon a full hearing a different conclusion might be reached. A vendee will not be required to accept a title on the court's assurance that it is good and marketable, and assume the risk of contesting the question in another action wherein the issues of law and fact may be differently determined by the same or some other court. Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056; Heller v. Cohen, 15 Misc. 378, 36 N. Y. Supp. 668; Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905; Brokaw v. Duffy, 165 N. Y. 391, 59 N. E. 196.

5. The distinction which once prevailed as to marketable titles between courts of law and equity no longer exists. An action at law by the vendee to recover back purchase money paid must now be based upon the grounds which would justify a court of equity in refusing to compel him to accept the title. Ladd v. Weiskopf, *supra:* Moore v. Williams, 115 N. Y. 586, 5 L.R.A. 654, 12 Am. St. Rep. 844, 22 N. E. 233; Brokaw v. Duffy, *supra*. In Sugden on Vendors (chap. 10, § 3) it is said: "A court of equity is anxious to protect a purchaser and give to him reasonable security for his title, not compelling him to take a title without knowing whether it is good or bad. The inclination of the court is in favor of the vendee, and a vendor claiming to be exempted from the general rule is required clearly to establish a case of exception. To enable equity to enforce the specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free even from suspicion; for it would be an extraordinary proceeding

for a court of equity to compel a purchaser to take an estate which it cannot warrant to him. It has, therefore, become a settled and invariable rule that a purchaser shall not be compelled to accept a doubtful title; and the court will not have regard to its own opinion only, but will take into account what the opinion of other competent persons may be." But the standard set by Cæsar for his wife is a little higher than the law requires for a title. Street v. French, 147 Ill. 342, 35 N. E. 814. In Vreeland v. Blauvelt, 23 N. J. Eq. 483, Vice Chancellor Dodd said: "A court of equity will not compel a purchaser to take a doubtful title. If there is such an uncertainty about the title as to affect its marketable value, even though a court might consider it good, still the contract may not be specifically enforced. But there must be some debatable grounds on which the doubt may be justified." A marketable title means a title free from reasonable doubt,—what Lord Eldon, in Stapylton v. Scott, 16 Ves. Jr. 272, called a rational doubt. Austin v. Barnum, 52 Minn. 136, 53 N. W. 1132; Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527; Richmond v. Koenig, 43 Minn. 480, 45 N. W. 1093; Fleming v. Burnham, *supra;* Kilpatrick v. Barron, 125 N. Y. 751, 26 N. E. 925; Holmes v. Woods, 168 Pa. 530, 32 Atl. 54; Morrison v. Waggy, 43 W. Va. 405, 27 S. E. 314; Downey v. Seib, 102 App. Div. 317, 92 N. Y. Supp. 431; Muller v. Palmer, 144 Cal. 305, 77 Pac. 954; Jeffries v. Jeffries, 117 Mass. 184; Collard v. Sampson, 1 Eq. Rep. 262; Wilde v. Fort, 4 Taunt. 334, 13 Revised Rep. 616. It means a title which would insure to the vendee the peaceable enjoyment of the property. Barnard v. Brown, 112 Mich. 452, 70 N. W. 1038, 67 Am. St. Rep. 432. "Every title is doubtful which invites or exposes the party holding it to litigation. If there be color of outstanding title which may prove substantial, though there is not enough evidence to enable the chancellor to say so, a purchaser will not be held to take it and encounter the hazard of litigation." Herman v. Somers, 158 Pa. 424, 38 Am. St. Rep. 851, 27 Atl. 1050; Corbett v. McGregor (Tex. Civ. App.) 84 S. W. 278; Frazier v. Boggs, 37 Fla. 307, 20 So. 245; Sharp Street Station v. Rother, 83 Md. 289, 34 Atl. 843; Daniell v. Shaw, 166 Mass. 582, 44 N. E. 991. But the doubt must be such as affects the value of the land and will interfere with its sale. Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195; Schenck v. Wicks, 23 Utah, 576, 65 Pac. 732. A marketable title "means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing to accept and ought to accept." Todd v. Union Dime Sav. Inst. 128 N. Y. 636, 28 N. E. 504; Hunting v. Damon, 160 Mass. 445, 35 N. E. 1064; Paulmier v. Howland, 49 N. J. Eq. 364, 24 Atl. 268. "A purchaser ought not to be compelled to take property, the possession of which he may be obliged to defend by litigation. He should have a title which will enable him to hold his land free from probable claim by another, and one that, if he wishes to sell, would be reasonably free from any doubt which would interfere with its market value." McPherson v. Schade, 149 N. Y. 16, 43 N. E. 527; Turner v. McDonald, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262; Clouse's Appeal, 192 Pa. 108, 43 Atl. 413; Harding v. Olson, 177 Ill. 298, 52 N. E. 482; Heller v. Cohen, 154 N. Y. 299–306, 48 N. E. 527; Irving v. Campbell, 121 N. Y. 353, 8 L.R.A. 620, 24 N. E. 821; Griffith v. Maxfield, 63 Ark. 548, 39 S. W. 852. The purchaser "must get such a title as he can force down upon a repurchaser from him." Magennis v. Fallon, 2 Molloy, 578. A purchaser "should not be left upon receiving a deed to the uncertainty of a doubtful title or the hazard of a contest with other parties which may seriously affect the value of the property if he desires to sell the same." Jordan v. Poillon, 77 N. Y. 518–521. "It has often been held that a title is not marketable when it exposes the party holding it to litigation." Swayne v. Lyon, 67 Pa. 436. "The title tendered need not in fact be bad in order to relieve him from his purchase; but it must either be defective in fact or so clouded by apparent defects, either in the record or by proof outside of the record, that prudent men, knowing the facts, would hesitate to take it." Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. 966. In Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056, this court said: "The purchaser is entitled to a marketable title,—one clearly shown to be good. It must, therefore, be free from reasonable doubt. . . . It is not necessary that the title be shown to be bad, nor is it enough, even, that the court may on the whole consider it good, if there be doubt or uncertainty about it sufficient to form the basis of litigation; for, if there be a doubt, it cannot be thrown upon the purchaser to contest that doubt. . . . It cannot be said that there is no question or doubt about the title tendered by the plaintiff: and the marketable value of the land will naturally be affected by the doubt and uncertainty resting upon the title. . . . The devisees, including infant heirs, are not parties, and

would not be bound by the judgment of the court in this case. A purchaser might, we think, well hesitate to accept such a title, and a court of equity will not compel its acceptance, and cast upon him the risk of litigation and the embarrassment of a questionable title."

Numerous elements necessarily enter into the question of what constitutes a marketable title. In this case the plaintiff's counsel, acting in good faith, guided by ample professional knowledge and with an evident desire to see the transaction consummated, declined to accept the title on behalf of his client. The two arbitrators selected by the parties for their judicial standing, knowledge, and experience were unable to agree upon the questions of law involved. It cannot fairly be said that a title which is thus viewed by able lawyers who have no conceivable motive for reaching a biased opinion is marketable. No reasonably prudent man would accept such a title in the ordinary course of business, especially in a transaction of the magnitude and importance of this, in which the vendee is required to pay three quarters of a million dollars for the property. The opinion of counsel that a title is bad or unmerchantable may or may not in itself be sufficient to create a doubt which would justify the vendee in refusing to accept it. There are authorities to the effect that it is not sufficient (see Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640); but the adverse opinion of counsel is certainly a material fact, and its importance and value in a particular case must depend upon the counsel and the circumstances under which he is acting. See Ladd v. Weiskopf, 62 Minn. 29, 69 L.R.A. 785, 64 N. W. 99. In Walker v. Gillman, 127 Mich. 269, 86 N. W. 830, the court approved the claim that, "if the rejection of the title was based upon the good-faith opinion of the counsel, and if any of the questions involved were doubtful questions of law, defendant was justified in refusing to perform the contract." In Miller v. Bronson, 26 R. I. 62, 58 Atl. 257, it was held that a title to real estate is not a marketable title where a loan company declines to take a mortgage on the property because its counsel will not certify the title. There is ample authority to support this general proposition, although we are not called upon, in this case, to accept it in its entirety. See Moore v. Williams, 115 N. Y. 586, 5 L.R.A. 654, 12 Am. St. Rep. 844, 22 N. E. 233; Kane v. Rippey, 22 Or. 296, 23 Pac. 180; Harrass v. Edwards, 94 Wis. 459, 69 N. W. 69; Vought v. Williams, 46 Hun, 639; Herman v. Somers, 158 Pa. 424, 38 Am. St. Rep. 851, 27 Atl. 1050; McCroskey v. Ladd (Cal.) 28 Pac. 216; Ford v. Wright, 114 Mich. 122, 72 N. W. 197.

Without determining whether the respondents had a title to the land in question which was good in fact, we are satisfied that the record did not disclose a title which was marketable, "merchantable," and unencumbered. There was a serious and reasonable doubt as to whether the interests of the Foley Mining Company, the Arcturus Mining Company, and the inchoate interests of the wives of the assignees of the Hayward contract had been determined and extinguished. These questions were fairly debatable, and cast such a doubt upon the title of the vendors as to render it unmarketable. Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527; Fairchild v. Marshall, 42 Minn. 14, 43 N. W. 563; Richmond v. Koenig, 43 Minn. 480, 45 N. W. 1093. Under the evidence as disclosed by this record, no prudent business man could be expected to accept the title, and no court should require him to do so. The risk of litigation and embarrassment of title should not be cast upon the purchaser.

The order appealed from is **reversed, and a new trial granted.**

Petition for rehearing denied.

TENNESSEE SUPREME COURT.

LUKE SMITH, by Next Friend, Appt.,
v.
DAYTON COAL & IRON COMPANY, Limited.

(— Tenn. —, 92 S. W. 62.)

Statute—adoption—judicial construction.

1. The rule that the judicial construction which has been given to a statute adopted from another state is deemed to be a part of it will not prevail if such construction would contravene the well-established policy prevailing on the subject in the adopting state.

Master—liability for act of statutory servant.

2. Compliance with a statute requiring the employment of a competent mine boss does not absolve the mine owner from liability for injuries caused by failure to perform his common-law duties with respect to the safety of the mine, although the statute specifically charges the mine boss with the performance of the duty the neglect of which causes injury to an employee.

(April 19, 1906.)

Note.—The cases bearing upon the question of the liability of a master for the negligence of a mine boss whom he is required by statute to employ are discussed in a note in 3 L.R.A.(N.S.) 1105.

APPEAL by plaintiff from a judgment of the Circuit Court for Rhea County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. **A. P. Haggard** and **Sam H. Ford** for appellant.

Messrs. **Burkett, Miller, Mansfield, & Swafford** for appellee.

McAlister, J., delivered the opinion of the court:

Luke Smith, a minor, brought this suit by his next friend against the Dayton Coal & Iron Company to recover damages for personal injuries sustained while working in defendant's mines.

The declaration embraces three counts, and complains (1) of the negligence of the mine boss in failing to properly inspect the mine; (2) for breach of duty on the part of defendant in failing to furnish plaintiff a safe place to work; (3) the failure of defendant to warn plaintiff of the danger.

A demurrer was interposed to the first and second counts of the declaration, assigning for cause that defendant was not liable for any breach of duty on the part of its mine boss; it not being averred that it had failed to exercise due care and caution in employing him.

The circuit court, Hon. M. D. Smallman presiding, sustained this ground of demurrer, holding that, if defendant company employed a careful and competent inside overseer or mine boss, as required by chap. 170, § 8, p. 238, Acts 1881, and that by reason of the negligence, inattention, or carelessness of such boss the plaintiff was injured, he could not recover on account of such injury.

The third count of the declaration alleged a breach of duty on the part of the defendant in failing to employ a certified mine foreman, as required by chapter 37, p. 51, Acts 1901.

The demurrer to this count of the declaration assigned as cause that the act in question did not take effect until after the accident, and hence compliance with said act was not required.

This ground of demurrer was also sustained by the circuit judge.

A plea of not guilty was also interposed to the three counts of the declaration. There was a trial on this plea, wherein the plaintiff and defendant each presented their evidence as though there had been no judgment on the demurrer. At the conclusion of the evidence the trial judge instructed the jury as follows:

"A demurrer to the declaration was interposed by the defendant and acted on by my predecessor, and I am of the opinion that it reaches all the facts in the evidence, if any there be, which would warrant a recovery; and, being bound by the action of my predecessor on the demurrer, I am of the opinion there are no questions of fact to submit to the jury, and it will be your duty to find a verdict in behalf of the defendant."

This was accordingly done, whereupon plaintiff appealed and has assigned errors.

An examination of the record reveals that the only actionable negligence claimed on the trial was the failure of the mine boss to perform the duties required of him by the statute, and hence the only question presented for our determination is whether the trial judge was correct in his ruling that, as between the coal company and the mine boss, the principle of *respondeat superior* would not apply for injuries sustained by an employee in consequence of the negligence of the mine boss. This was the question presented by the demurrer and which was resolved in favor of the contention of the defendant company. The proper solution of this question depends upon a proper construction of chapter 170, p. 234, Acts 1881, entitled: "An Act to Provide for the Ventilation of Coal Mines and Collieries for the Protection of Human Life."

Section 8, p. 238, of that act provides as follows: "That to better secure the ventilation of every coal mine and colliery, and to provide for the life and safety of the men employed therein, otherwise and in every respect, the owner or agent, as the case may be, in charge of every coal mine and colliery, shall employ a competent and practical inside overseer to be called 'mining boss,' who shall keep a careful watch over the ventilating apparatus, over the airways, traveling ways, pumps and sumps, and the timbering, and see, as the miners advance in their excavations, that all loose coal, slate, or rock overhead is carefully secured against falling; . . . and all things connected with and pertaining to the safety of the men at work in the mines."

It should be remarked that no complaint is made that the company breached its duty in employing an unskilled and incompetent mine boss. The contention on behalf of plaintiff is that the circuit judge was in error in holding that the defendant company, having in the first instance employed a competent mining boss, was not afterwards liable for any negligence or breach of duty on the part of said boss. The action of the circuit judge seems to have been based on the construction of our mining statute, which is a transcript of the Pennsylvania act, and which had been construed

by the Pennsylvania courts prior to its adoption in this state in 1881.

As already seen, the duties of the inside mining boss are specifically defined by the act of 1881, and the company is required to employ him in obedience to the mandates of the statute. The question presented is whether, in the performance of his statutory duties, the mining boss acts as a vice principal, or whether he is a mere fellow servant, as already stated. It is argued that our act of 1881 is a literal copy of chapter 1, Pa. Acts 1870 (P. L. 3), and that at the time our statute was enacted the Pennsylvania statute had undergone a uniform construction by the supreme court of that state. It was held by the Pennsylvania court that the duties imposed by § 8 were duties of the mine boss, whom the operator was by law compelled to employ, and, if the mine boss failed to discharge his duties, he was personally liable in damages and also to criminal prosecution. It is admitted that, under the 1st section, the company would be liable in damages for a breach of its statutory duty in failing to employ a competent and practical mining boss; but it is insisted that, the company having discharged its duty and employed a competent and practical mining boss, it is not liable in damages for his failure to perform the duties which the statute has enjoined upon him.

In the case of Lehigh Valley Coal Co. v. Jones, 86 Pa. 441, it was said: "Nor do we think the liability of the company for the act of its mining boss is changed by the fact that he is appointed pursuant to a statute, where it has a general superintendent over him who has power to direct and control him. We discover no sound reason for any distinction. In either case the company must appoint a competent and suitable person and provide suitable and safe machinery. He [the boss] is to 'carefully watch' and 'to see' for the purpose of protecting from danger all the men at work in the mines, says the statute."

The act was again construed by the supreme court of Pennsylvania in 1879, in the case of Delaware & H. Canal Co. v. Carroll, 89 Pa. 374. In that case it was said as follows: "It is too plain for argument that, if the defendants have not violated said act, they are not responsible. In what respect have they transgressed its provisions? They employed a mining boss as required by the act, and there is no allegation that he was not a competent and a practical man. No attempt was made to show that the defendants were guilty of negligence in employing a mining boss, that they employed an incompetent man knowing him to be so, or employed him without knowledge of his capacity or fitness and without making such inquiry as to his qualifications as a man of ordinary prudence would do. The defendants, having placed a mining boss in charge of the works, are not in default. . . . The negligence of the mining boss, if it exists, might make him liable to the plaintiffs. It certainly cannot render the defendants liable under this act of assembly."

In Waddell v. Simoson, 112 Pa. 573, 574, 4 Atl. 725, 726, it is said: "Moreover, as the defendants had complied strictly with the 8th section of the act of March 3, 1870, in providing a practical and skilful inside overseer or mining boss, and, as they had thus fulfilled the duty imposed upon them by the general assembly, it is not for this or any other court to charge them with an additional obligation. . . . 'It is too plain for argument that if the defendants have not violated said act, they are not responsible.'"

In Reese v. Biddle, 112 Pa. 79, 80, 3 Atl. 813, 814, it is said: "It was plain error to instruct the jury that the defendants below were responsible for the negligence of their mine boss. There was no evidence that he was not competent to perform his duties, and hence no negligence can be imputed to defendants for employing him."

See also Haley v. Keim, 151 Pa. 117, 25 Atl. 98; Lineoski v. Susquehanna Coal Co., 157 Pa. 153, 27 Atl. 577.

The supreme court of West Virginia, in Williams v. Thacker Coal & Coke Co. 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107, in construing a similar provision in a statute of that state, which was a copy of the Pennsylvania statute, used this language: "The operator is left no choice—no discretion—in the matter. Although he may himself be a practical miner, possessed of all the qualifications of a mine boss, yet, under the statute, he is compelled to employ such person. . . . The legislature . . . so far interferes with the private business of the capitalist . . . as to require him to take into his employment a person whose experience in the business and sound judgment equip him for such management and oversight of the conduct of the mine as to reduce the dangers thereof to a minimum. . . . The duty of the operator or agent is to employ a competent mine boss according to the provisions of the statute, and when he has done so he has discharged his duty to his employees in relation to those duties which the statute prescribes shall be performed by such mine boss; and the operator or agent is not liable for injuries arising from the negligence of the mine boss, who is not a vice principal, as his duties are not delegated to him by his employer, but are pre-

scribed by statute; and he is a fellow servant, as, in case of an injury to other employees through his negligence, the master is not responsible."

It may be stated as a general rule that, when a statute of another state is adopted, the judicial construction and interpretation of that statute in the state of its origin is also imported and written in the statute by the adopting state. This rule, however, is subject to the important qualification that the judicial construction of said statute by the state of its origin does not contravene the well-established policy prevailing on said subject in the adopting state. As said by Endlich on Interpretation of Statutes, p. 518: "But, as applied to transcribed statutes this rule is undoubtedly subject to important qualifications. Whilst admitting that the construction put upon such statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it, its binding force has been wholly denied, and it has been asserted that a statute of the kind in question stands upon the same footing, and is subject to the same rules of interpretation, as any other legislative enactment. And it is manifest that the imported construction should prevail in so far as it is in harmony with the spirit and policy of the general legislation of the home state, and should not, if the language of the act is fairly susceptible of another interpretation, be permitted to antagonize other laws in force in the latter, or to conflict with its settled practice."

In Jamison v. Burton, 43 Iowa, 285, it was said: "The limitation that the construction by another state of a statute of that state enacted here will be followed only when consistent with the spirit and policy of our laws is eminently proper. For otherwise we could not avail ourselves of the legislative wisdom of other states without introducing along with it incongruous and inharmonious judicial construction."

In Cole v. People, 84 Ill. 218, it was said: "It can hardly be said the legislature, in adopting the statute of another state, intended, also, to adopt a construction in direct antagonism with our laws and in conflict with the practice that has prevailed under them through a long series of years. At most it is but a presumption, and may be repelled when such construction is found to be inconsistent with the spirit and policy of our laws." McCutcheon v. People, 69 Ill. 601.

We think these authorities announce the true rule, and we proceed to inquire whether the imported construction of the transcribed statute contravenes the spirit and policy of our laws. At common law a master who is engaged in the business of mining is bound to use reasonable care to make the place of work reasonably safe. He must therefore use reasonable care to ventilate the mine in order to prevent the accumulation of poisonous and explosive gases. He must also shore up and timber the shafts and galleries, and take such other precautions as may be reasonably necessary to prevent the fall of rock, earth, etc. 20 Am. & Eng. Enc. Law, p. 58; Union P. R. Co. v. Jarvi, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65; Gowen v. Bush, 22 C. C. A. 196, 40 U. S. App. 349, 76 Fed. 349.

It is assumed by counsel that this court, in Heald v. Wallace, 109 Tenn. 346, 71 S. W. 80, decided that the doctrine of a safe place to work did not apply to mining operations. In that case it appeared that at the time of the accident deceased was engaged in driving the neck of a room, and, under the rules and custom of the company, it was the duty of the miner to make the necessary tests of his room neck; and, if he discovered it was not safe, he was charged with the duty of sending for the timberman, etc. It was said in that case that, according to the testimony of plaintiff's witnesses, the duty of inspecting the changing top of a room neck is the same as in any other part of the room. This court held that the doctrine of a safe place to work does not apply to such places as are constantly shifting and being transformed as the direct result of the employees' labor. When he engages in a work of making a place that is known to be dangerous safe, or in a work that necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place, and the increased hazard of the place made dangerous by the work, are the ordinary and known dangers; citing Finalyson v. Utica Min. & Mill Co. 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 510.

But we did not hold that the company was under no obligation to make its permanent places of work reasonably safe for its employees. We had already held in Knoxville Iron Co. v. Pace, 101 Tenn. 484, 48 S. W. 232, that it is the duty of the master to keep his premises used in the prosecution of his business in a reasonably safe condition, and, if he fails to do so, he is liable to the servant for all injuries resulting to him from such defects; and that this rule applied to a mining corporation. It was also held in that case that the company was liable for failure of the mine boss to examine every morning the mines, not on-

ly for noxious and explosive gases, but for mine dust or other explosive substances that may endanger the life or health of the miners, and remove every such thing, etc., as required by § 8 of the act of 1881. But in that case one of the counts of the declaration proceeded upon the idea that the company had been negligent in the employment of the mining boss, and that the latter was incompetent to perform his duties; and there was proof tending to establish this allegation.

It must be admitted, in view of the authorities, that the duties devolved by the statute on the mining boss were not different from those that the company was obliged to perform at common law, and which the company would not have been authorized to delegate and thereby escape liability for the nonperformance of those duties. What, then, is the effect of the statute requiring the company to employ an inside overseer or mine boss and devolving upon him the duties which, at common law, belong to the company? As already seen, the Pennsylvania and West Virginia courts, in construing this statute, have held that the effect thereof was to shift the responsibility for the negligent performance of these duties upon the mining boss, since the company was compelled to employ him and his duties were specifically defined by the statute.

To the same effect is Colorado Coal & I. Co. v. Lamb, 6 Colo. App. 255, 40 Pac. 251.

Mr. Thompson, in his work on Negligence (vol. 4, cl. 4206), in combating the doctrine of the Pennsylvania and West Virginia courts, used the following language: "Employment of a mine boss or mine foreman: When it is recalled that the duty of exercising care, to the end that the mine shall be a reasonably safe place within which his employees are to work, is an absolute and unassignable duty, it quite readily follows that the owner of a mine does not, by employing a so-called 'mining boss,' or 'mine boss,' or 'mine foreman,' who is competent and fit for his duties, release himself from the obligation of taking those precautions which are necessary for the reasonable safety of his miners, nor from the necessity of taking the precautions prescribed by the statute law, although the statute law requires him to employ a mine boss. The effect of such a statute is to prescribe the duties owing by the master; and the fact that the mine boss is required to be employed to perform those duties does not release the master from the obligation of performing them or of seeing that they are performed. . . . Contrary to the above, we find an untenable and regrettable decision to the effect that a mine owner discharges his full duty to his miners when he complies with a statute requiring him to employ a properly qualified person to discharge the duties prescribed therein as to the care and inspection of the mine, and is not liable for accidents traceable to the carelessness or negligence of such person, who is a fellow servant with the other miners. Reasoning on similar lines, another court holds that the employment of a competent mine boss, as required by statute, discharges the full duty prescribed by the statute, and that the employer is not liable for the negligence of the mine boss in the performance of those duties which the statute prescribes shall be performed by him. He is not a vice principal, and his duties are not delegated to him by his employer, but are prescribed by statute."

On the latter proposition, Mr. Thompson cites Pennsylvania and West Virginia cases. The only authority cited by him for his text in opposition to the rulings in Pennsylvania and West Virginia is the case of Linton Coal & Min. Co. v. Persons, 11 Ind. App. 264, 39 N. E. 214.

In that case the court held that the duties prescribed relating to the safety of the mine are the positive duties of the master, and that the statute was intended, not to lessen his duties, but to increase them to the extent of requiring him to employ a competent mining boss to give special attention to the condition of the mine.

In Gowen v. Bush, *supra*, it was held that an employee, who was charged with the duty of inspecting the mine to see that it was free from gas, was not, while thus engaged, a fellow servant of the miners; and this for the obvious reason that the inspector was in the performance of a duty that devolved upon the principal, and the inspector was *pro hac vice* a vice principal.

In this state the doctrine has always prevailed that it is the duty of the master to provide a reasonably safe permanent place of work for his employees, and that this duty cannot be delegated, so as to exonerate the master from liability for a breach of his duty. In Pennsylvania it appears that a different rule has prevailed. In Philadelphia & R. R. Co. v. Hughes, 119 Pa. 314, 13 Atl. 289, it was said: "If however, the company employed competent and skilful persons for the purpose of inspection, and afforded them reasonable opportunities and facilities for the work under proper instructions, the company will not ordinarily be liable for the negligent performance of the work of their employees, to a fellow employee, unless the company knew, or by ordinary diligence ought to

have known, of the defective manner in which the inspection was conducted." The court then held that a brakeman and a car inspector were fellow servants in the same business and that the former assumed the risk of the negligence of the latter in common service.

In this state, however, it is uniformly held that a brakeman and a car inspector are not fellow servants, but in different and distinct departments of the company's service (Taylor v. Louisville & N. R. Co. 93 Tenn. 305, 27 S. W. 663), and that the company is liable for the negligence of the former whereby an injury is sustained by the latter. So that it is obvious that the rule with reference to a safe place to work and the fellow-servant doctrine is entirely different in this state from that which prevails in the state of Pennsylvania; hence the adjudications of that court, exempting a mining company from liability for the negligence of a mine boss employed in obedience to the mandates of the statute, which specifically defined his duties, were in entire accord with the general policy and legal system of that state regulating the relations of master and servant. We are of opinion, however, that the decisions of that state and of the other states which exempt mining corporations from liability for the negligent acts of the mining boss are not in consonance with our general system defining the duties of master and servant.

The act of 1881 is entitled "An Act to Provide for the Ventilation of Coal Mines and Collieries for the Protection of Human Life." But, under the construction of the act contended for, the company is relieved of all positive duty and responsibility in providing safeguards for the protection of human life, when it has appointed a competent and practical inside overseer or mining boss. Surely such a construction could never have been contemplated by the legislature, in view of the express object and purpose of the statute.

We are therefore of opinion that the judgment of the Circuit Court sustaining the demurrer was erroneous, and must be reversed, and the cause remanded for a new trial.

WEST VIRGINIA SUPREME COURT OF APPEALS.

VIRGINIA B. TROUGH
v.
RICHARD L. TROUGH, Appt.

(— W. Va. —, 53 S. E. 630.)

Bill for divorce—demurrer.

1. A bill for divorce has two grounds or matters for relief. It charges adultery calling for absolute divorce, and desertion calling for decree of separation. The bill does not name a *particeps* in the adultery, or give time, place, and circumstance. If the bill be bad therefor, a demurrer, being general, is properly overruled.

Same—contempt—striking defendant's evidence.

2. A court has no power to strike out and disregard depositions filed by a defendant in defense of a suit for divorce, for failure to pay money required of him to enable his wife to prosecute her suit and for temporary alimony, and pass final decree of divorce against him. Such decree is not due process of law.

Same—confessions.

3. Confessions of adultery, made in the country, cannot be given in evidence or considered in a suit for divorce for such offense.

(April 17, 1906.)

Headnotes by BRANNON, J.

Case Note.—power to punish disobedience to orders in case by striking pleadings.—The power which courts possess to punish disobedience to their orders by striking out or disregarding pleadings in a pending action is intended for the protection of the adverse party, whose substantial rights are, or may be, affected by the disobedience of such orders, as well as for the punishment of the disobedience itself. Frazer v. Lynch, 88 Cal. 621, 26 Pac. 344.

In the following cases it was held that this authority had been rightfully exercised: In Gross v. Clark, 87 N. Y. 272, the complaint was stricken out for noncompliance with an order requiring plaintiff to serve a bill of particulars; in Shelp v. Morrison, 13 Hun, 110, for the refusal of the plaintiff, in an action to foreclose a bond and mortgage, to produce the bond after being subpœnaed by the defendant for that purpose, and the refusal of the attorney for the plaintiff to produce it although he had it in his pocket at the trial; in Bonesteel v. Lynde, 8 How. Pr. 226, for the neglect of the plaintiff to produce a lease and inventory after being ordered to do so by the court; which papers he surreptitiously obtained for the purpose of preventing their use in evidence, after he knew that an order had been issued for their production and was about to be served on the party having them in charge; in Gaughe v. Laroche, 14 How. Pr. 451, it was held that the complaint may be stricken out as punishment for the failure of an adverse party to obey a summons to attend and testify; in Barney v. Barney, 6 D. C. 1, the answer to a bill filed for the purpose of having the court adjudge the defendant unfit to perform the office of guardian to his minor children was stricken from the files, and the complainant allowed to proceed as in case of default, for the failure of the defendant to comply with an order of the court requiring him to bring the children within the jurisdiction of the

APPEAL by defendant from a decree of the Circuit Court for Braxton County in favor of complainant in a suit for divorce. Reversed.

The facts are stated in the opinion.

Messrs. **Hall Brothers**, for appellant:

The adultery is not sufficiently alleged. Miller v. Miller, 92 Va. 196, 23 S. E. 232; Wood v. Wood, 2 Paige, 113; Marsh v. Marsh, 16 N. J. Eq. 391, 84 Am. Dec. 164; Hogg, Eq. Prin. 667; 14 Cyc. Law & Proc. pp. 665–667; 7 Enc. Pl. & Pr. pp. 71–76; Farr v. Farr, 34 Miss. 597, 69 Am. Dec. 406; Black v. Black, 27 N. J. Eq. 664, 26 N. J. Eq. 431; Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; Church v. Church, 3 Mass. 157; Shoemaker v. Shoemaker, 20 Mich. 222; Mills v. Mills, 18 N. J. Eq. 444; Scheffling v. Scheffling, 44 N. J. Eq. 438, 15 Atl. 577; Cardwell v. Cardwell, 12 Hun, 92; Gridley v. Gridley, 7 N. Y. Civ. Proc. Rep. 215; Denison v. Deni-

court; and in Haskell v. Sullivan, 31 Mo. 435, it was held that an answer may, on motion, be stricken out when the defendant, who has been subpœnaed to attend a suit on a note as a witness for the plaintiff, fails to appear.

The power conferred upon courts to strike out pleadings should be exercised with guarded discretion, and with a view to promote substantial justice in the case. Frazer v. Lynch, *supra*.

Such authority was held to have been abused in Hunter v. Blackman, 32 La. Ann. 403, in which the parish judge ordered the petition to be taken from the record and returned to the plaintiff on the latter's refusal to say whether he intended any disrespect to, or reflection, upon, the district judge by describing him in the petition as the "acting" judge; in Frazer v. Lynch, *supra*, in which the court struck out the defendant's answer in an action of ejectment on account of the neglect of the defendant, who was an illiterate person, to obey a *subpœna duces tecum* to produce a United States patent conveying land, where the defendant's counsel, before the issuance of the order, offered to admit everything that could be shown by the papers sought to be produced; in Glover v. American Casualty Ins. & Security Co. 130 Mo. 173, 32 S. W. 302, in which the court struck out a demurrer, and denied further right of defense, in an action for libel, for the failure of defendant to obey an order requiring it to produce a written contract for inspection, which failure the defendant explained on the ground that the contract was destroyed, merely on the supposition that such explanation was consistent with a wilful destruction after the service of the order; in Rice v. Ehele, 55 N. Y. 518, in which an answer was stricken out by an *ex parte* order for failure to produce certain books pursuant to the direction of the court; and in Ward v. Ward, 70 Vt. 430, 41 Atl. 435, in which the court denied the right of a father, who was the guardian of his minor children, to answer, by counsel, a petition by their mother to show cause why the children should not be given to her. In this case the petitionee, at once upon the service of the petition, left the state taking the children with him, but appeared by counsel in the proceedings. The court said that the petitionee's presence was not necessary for the purpose of requiring the petitioner to make full proof of her ability and fitness to care for the children, and his absence did not obstruct or embarrass the court, and for such absence he could not be adjudged in contempt; that he was not required to bring the children before the court, and their presence was not necessary for the full and complete determination of the issue presented by the petition.

Many of the cases involving the right of the court to punish noncompliance with an order for suit money and alimony are discussed by the court in TROUGH v. TROUGH. In addition to the cases there mentioned, the following authorities sustain the power of the court to strike out the defendant's answer for disobedience to such orders: Clark v. Clark, 13 Daly, 497; Quigley v. Quigley, 45 Hun, 23, 9 N. Y. S. R. 486; Knott v. Knott, 6 App. Div. 589, 39 N. Y. Supp. 804; Peel v. Peel, 50 Iowa, 521. In the last case the court said that such an order will only in extreme cases authorize striking the defendant's answer from the files, and should be granted only when other punishment cannot be inflicted or will not enforce obedience; since such a course would result in a decree of divorce without a full investigation into the merits of the controversy.

Such an order was enforced in Zimmerman v. Zimmerman, 7 Mont. 114, 14 Pac. 665, as the defendant was not to be found within the jurisdiction of the court, and punishment for contempt could not be otherwise inflicted.

But the right to strike out the defendant's answer was denied in McMakin v. McMakin, 68 Mo. App. 57, on the ground that the mere failure to pay money as temporary alimony was not a contempt which would justify striking out an answer.

Service of an order to pay counsel fees and temporary alimony on the defendant's counsel, and not on the defendant himself, was held in Larson v. Larson, 9 S. D. 1, 67 N. W. 842, not to authorize the court to strike out the defendant's answer and cross bill.

A statute providing that a party may be fined or imprisoned for a contempt for refusing to obey orders of the court was held, in Brisbane v. Brisbane, 34 Hun, 339, not to abrogate the power of the court to strike out the defense in an action for divorce for refusal of the defendant to obey its orders to pay alimony and counsel fees. The Brisbane Case was relied on in Mahoney v. Dwyer, 84 Hun, 348, 32 N. Y. Supp. 346, in which a similar decision was rendered.

son, 4 Wash. 705, 30 Pac. 1100; Miller v. Miller, 20 N. J. Eq. 216.

Failure of the husband to obey an order directing the payment of temporary alimony or counsel fees will not ordinarily justify a denial of his right to defend.

14 Cyc. Law & Proc. pp. 795, 796; Peel v. Peel, 50 Iowa, 521; 17 Century Dig. "Divorce," § 738, 1; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122; Gordon v. Gordon, 141 Ill. 160, 21 L.R.A. 387, 33 Am. St. Rep. 294, 30 N. E. 446; Johnson v. Superior Court, 63 Cal. 578; Baily v. Baily, 69 Iowa, 77, 28 N. W. 443; Cason v. Cason, 15 Ga. 405; McMakin v. McMakin, 68 Mo. App. 57; Allen v. Allen, 72 Iowa, 502, 34 N. W. 303; McCrea v. McCrea, 58 How. Pr. 220; Wass v. Wass, 41 W. Va. 126, 23 N. E. 537.

Evidence of admissions of defendant is not admissible.

Hampton v. Hampton, 87 Va. 148, 12 S. E. 340; Brainard v. Brainard, Wright (Ohio) 354; Bascom v. Bascom, Wright (Ohio) 632; McCulloch v. McCulloch, 8 Blackf. 60; 17 Century Dig. "Divorce," § 399a; Mathews v. Mathews, 41 Tex. 331.

Messrs. Hines & Kelly for appellee.

Brannon, J., delivered the opinion of the court:

This is a suit by Virginia B. Trough versus Richard L. Trough for a divorce. The bill contains a charge of adultery and also desertion, though the desertion is not for a period to call for an absolute divorce from the bond of matrimony. The special prayer of the bill is for absolute divorce, which was granted, and the defendant appealed.

Demurrer. There is much argumentation upon a demurrer to the bill, based on the claim that the bill does not name the woman with whom the defendant committed adultery, nor does it give time, place, and circumstance, and thus wants legal certainty. We do not say whether or no a bill for divorce for this offense should contain the name of the *particeps criminis* or other matter of alleged defect of the bill, because the demurrer is general, and there are two grounds of divorce contained in the bill, one calling for full divorce, *a vinculo matrimonii*, the other a partial divorce, divorce of separation, *a mensa et thoro*. The demurrer does not separate these two causes of suit. It does not aim at the charges of adultery, and, being general, it was properly overruled. We again say that where a bill contains two or more matters of suit, one good, one bad, the demurrer must be separate. This has always been law. Miller v. Hare, 43 W. Va. 647, 39 L.R.A. 491, 28 S. E. 722; Gay v. Skeen, 36 W. Va. 582, 15 S. E. 64. The bill contains a prayer for divorce absolute and for general relief, and a divorce of mere separation could be granted under the latter prayer. Vance Shoe Co. v. Haught, 41 W. Va. 276, 23 S. E. 553. Therefore, the demurrer was properly disregarded. Here a question arose in my mind. The decree being for absolute divorce for adultery, based thus on that part of the bill said to be defective, can that decree be sustained? While proper to overrule the demurrer, because some relief may be granted, would a decree standing on the bad part of the bill be good on appeal, in view of the rule put in several cases, that, where a bill contains some matter proper for relief, and some not good for relief, a general demurrer is not good, and should be overruled, as it should be aimed especially at the bad matter; but, where the court gives relief justifiable only on the bad matter, it is reversible error? Turner v. Stewart, 51 W. Va. 493, 41 S. E. 924. But that says bad "matter," meaning the very substance of the facts on which the bill predicates the relief sought, bad matter not calling for any relief by law, not mere defective statement of matter which does call for relief. In this case the bill charges adultery, the alleged defect being in not naming a *particeps* and giving time, place, and circumstance,—a mere defect of specification. That takes the case out of the rule just referred to. We find no error in disregarding the demurrer. It was not acted on expressly, likely owing to inadvertence; but we must regard it as overruled.

An order was made requiring the defendant to pay $50 for counsel fees and $15 per month for support of the plaintiff and two children, and, he failing to pay, the court decreed that "none of the depositions taken by defendant be read or considered on the hearing of this case," and granted a decree of absolute divorce, giving the plaintiff custody of the three children, commanding defendant to surrender to the plaintiff the custody and control of a daughter who was with her father, enjoining forever the defendant from interfering with the plaintiff in the care, custody, and control of the children, decreeing that the plaintiff hold a tract of land and personal property consisting of household goods, cows, hogs, chickens, and other property claimed by the plaintiff in her bill, and decreeing costs against defendant. The defendant filed an answer denying all the allegations of the charges involved in the divorce, claiming the land and personal property. The defendant

took numerous depositions. Had the court power to thus refuse the defendant the right of defense? For refusal of defense it was, since what avail the answer without proof under it? The case involved the dearest rights of the defendant, wife, marriage rights, children, property, personal character, rights of person and property. What had the payment of this money as temporary alimony to do with the merits of the controversy touching those all-important and inestimable rights? Nothing. This action of the court is based on the idea that the defendant, in failing to obey the order for payment, was in contempt; and that courts have power to punish contempt, and to enforce their orders,—necessarily so,—and that they can refuse to allow a plaintiff to prosecute a suit for such disobedience, or refuse a party attacked to defend. There is authority for this proposition. 14 Cyc. Law & Proc. p. 795, says that refusal of defense is rarely resorted to, but may be. 1 Enc. Pl. & Pr. p. 436, says a method to enforce payment, "frequently resorted to," is dismissing the plaintiff's bill, or refusing to proceed with the trial, or striking the answer of the defendant from the files and proceeding with the case *ex parte*. These statements are guarded and hesitating. The reason of the matter, the weight of authority, are decidedly against the power to refuse one a defense when attacked. The late work, Nelson on Divorce, in § 861, says: "An order for temporary alimony may be enforced by execution, sequestration, or by proceedings in contempt. But during the suit the court has the power to enforce its orders by declaring the husband in contempt and refusing to proceed with the cause until its order is complied with. In some instances the courts have dismissed his petition for a failure to comply with its orders. It is error to refuse a matter of right, such as a change of venue, until the temporary alimony is paid. It is doubtful if the court should refuse to enter a decree of divorce until the temporary alimony is paid. But in some instances this practice has been approved. In many instances the husband's answer has been stricken out for his disobedience of the orders of the court. But this is now considered against public policy for it prevents that full investigation into the merits of the controversy which is necessary to protect the interest of the state." The last expression of Nelson is borne out by Wass v. Wass, 41 W. Va. 126, 23 S. E. 537, holding that the state is an implied party to divorce suits, and the court must take care that divorces are not granted contrary to law and without good cause. Bishop on Marriage, Divorce, & Separation, § 1095, says: "Taking away privileges in the cause is sometimes employed for enforcing payment. For example, in justifying circumstances, the court may strike out the defendant's answer, or dismiss the plaintiff's complaint, or refuse to proceed with the trial, unless or until its alimony order is obeyed. Possibly some of the cases under these heads have gone too far. The interests of the public, while not prejudiced by what delays the cause or ends it without a trial, will not permit a hearing with the channels of evidence obstructed. Therefore public policy forbids that a husband's refusal to pay temporary alimony should deprive him of the right to defend the suit." This is so because all law says that public policy looks with aversion on divorces. This principle that the public interest is involved so far that it is deemed a quasi party is fully supported by a note in 30 Am. Dec. 545, and Bishop on Marriage, Divorce, and Separation, § 480. Now, you suppress a defense to a divorce suit, and dissolve a marriage on the application of one party, and refuse a defense, and you overturn this public policy. No more effective process to further this result can be conceived. For myself, though not involved in the case, I question the right to dismiss a plaintiff's suit for such contempt, under the nature and structure of our government in America, and especially under our Bill of Rights in our Constitution, art. 3, § 17: "The courts of this state shall be open, and every person, for an injury done to him, in his person, property, or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial, or delay." And does not this accord the right to defend when attacked "in person, property, or reputation?"

But let us, on this grave question, look at further authority. In Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841, is a long, learned opinion for a unanimous court reviewing the law under English and American cases for more than a century touching the power of courts to punish contempt of a party in failing to pay money under an order of court, arriving at the conclusion that a court cannot for this cause strike out an answer and take the bill for confessed; that it has not the power to summon a party to defend, and, having obtained jurisdiction over him, "refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt." The court held the decree void. In Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914, where an answer has been stricken out to a libel

of confiscation because the owner of the property was a confederate, the court referring to McVeigh v. United States, 11 Wall. 259, 20 L. ed. 80, referring to an order striking out an answer, said: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and, hence, could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact, and of the right administration of justice." The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be, in effect, to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, "Appear, and you shall be heard," and when he has appeared, saying, "Your appearance shall not be recognized, and you shall not be heard." In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.

The law is, and always has been, that wherever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. In Underwood v. McVeigh, 23 Gratt. 409, of a decree given after an answer was stricken out, the court said: "It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegation of fact, and upon the matter of law; and no sentence of any court is entitled to the least respect in any other court or elsewhere, when it has been pronounced *ex parte* and without opportunity of defense. An examination of both sides of the question, and deliberation between the claims and allegations of the contending parties, have been deemed essentially necessary to the proper administration of justice by all nations, and in every stage of social existence." In the four cases just cited the decrees were held void as not judicial sentences. The party had no day in court. It is not due process of law under state and Federal Constitution. It is condemnation without notice. The party's case has been put out of court. No matter the character of his defense, no matter that he be in contempt, lasting final decree against him, involving in this case his most important rights in life, cannot be entered. It is void for want of due process. It violates that definition of due process of law given by Daniel Webster approved without dissent everywhere. "By the law of the land is most clearly intended the general law, which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." Such action denies equal protection of the law. The law imposes no such heavy penalty for contempt. The right of defense is given to one man and denied to another for no cause involved in the merits. If there is any plain right as to judicial procedure, I assert that it is a right to defend where attacked in person, character, or property. We recognize in both opinions in Hebb v. County Court that while a court might refuse affirmative action, action in favor of one in contempt, it could not deny one attacked right to defend. 48 W. Va. 279, 37 S. E. 676, 49 W. Va. 733, 37 S. E. 676. This distinction between plaintiff and defendant will be found in the opinion in Hovey v. Elliott, *supra*. To support the particular position that a defense cannot be denied to one failing to pay temporary alimony because in contempt, I cite Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122, holding that an answer cannot be stricken out, but the contempt may be punished other-

wise; Gordon v. Gordon, 141 Ill. 160, 21 L.R.A. 387, 33 Am. St. Rep. 294, 30 N. E. 446; Johnson v. Superior Court, 63 Cal. 578, holding that one in such contempt cannot be denied process for witnesses; Baily v. Baily, 69 Iowa, 77, 28 N. W. 443, holding that it would be against public policy to deny a defense for such contempt; Cason v. Cason, 15 Ga. 405; McMakin v. McMakin, 68 Mo. App. 57, holding that contempt "does not authorize the striking of answer or refusal to admit evidence for him;" Allen v. Allen, 72 Iowa, 502, 34 N. W. 303, where the court said: "It will not do to hold that the marriage relation may be dissolved on the ground of defendant's inability to pay a sum awarded as alimony, or because of his recusancy;" Dwelly v. Dwelly, 46 Me. 377; Newhouse v. Newhouse 14 Or. 290, 12 Pac. 422. The Century Digest, vol. 17, § 738, will show few cases to sustain such action. Outside New York, scarcely any. Its leading case, Walker v. Walker, 82 N. Y. 260, seems hesitating, and rests on the old arbitrary practice of English chancery. But it is not sound English law, as the Supreme Court holds in Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841, and as shown in Gordon v. Gordon, 141 Ill. 163, 21 L.R.A. 387, 33 Am. St. Rep. 294, 30 N. E. 446, citing Haldane v. Eckford, L. R. 7 Eq. 425; where the English court said: "Although the contempt committed by the defendants had been of the most flagrant kind, yet, as what they asked was for the purpose of defending themselves, he had no jurisdiction to refuse the order." Other English cases are there cited. The Illinois court says the New York case is not looked upon with favor, or followed. Some cases cited to the reverse do not support that reverse. Casteel v. Casteel, 38 Ark. 477, holds that the plaintiff's suit may be dismissed for refusal to pay wife's counsel fees. Winter v. Superior Court, 70 Cal. 205, 11 Pac. 633, did not refuse defense, but refused to hear the case on the contemnor's motion, refused a favor asked by him. Waters v. Waters, 49 Mo. 385, only holds that a plaintiff's suit may be dismissed for failure to pay a wife money to carry on her defense. Clark v. Clark, 117 N. Y. 622, 22 N. E. 1127, does not touch the matter.

Another consideration not without force is that we have a statute prescribing how contempts shall be punished. It was passed in 1830 to restrain arbitrary action by courts. Code 1899, chap. 147. I think it contemplates only fine and imprisonment. It curbs or lessens the common-law power of courts. State v. Hansford, 43 W. Va. 773, 28 S. E. 791. Just as it was held to be the sole mode of punishment in Galland v. Galland, 44 Cal. 475, 13 Am. Rep. 167. But it is argued, in answer to the point just discussed, that the striking out of the evidence is immaterial, as, if all the evidence be considered, the same decree would have been made. How do we know what the circuit court would have thought? The evidence was voluminous and flatly contradictory in material respects,—contradictory as to the criminal conduct and as to desertion and other matters. Now, first, a decree without a hearing of both sides is not a judicial decision. The case has never been passed on by the circuit court. The party had a right to have the judgment of the circuit court on his evidence and cause before this court can consider the weight of the evidence. Had the decree on evidence on both sides been for the defendant, we could not reverse, unless this court would think it clearly wrong, because he would have the advantage of that decision, and occupy a different position from that which he now occupies. We cannot, in the first instance, be asked to pass on the evidence. This is an appeal court, and is not called on to act until the circuit court has done so. There must be a hearing of the whole case. There has not been. "The supreme court will not consider questions not yet acted on by the circuit court." Kesler v. Lapham, 46 W. Va. 294, 33 S. E. 289; Armstrong v. Grafton, 23 W. Va. 50. This case, as made up on both sides, has never been decided by the circuit court. But second, the decree is void under the high authorities above given. Can it be, with reason, said that, where the whole of a defendant's case has been struck out, consisting of a volume of material evidence, this court should perform the function of a court of original jurisdiction, treat the case as if heard on the whole evidence in the court below, and review it on the evidence on both sides? When it is just as though the party was not before the court, and was decreed against "without a day in court?" Shall we not rather say the case has not been heard, the decree is not binding on the defendant, and remand the case that it may be heard on the evidence? On that evidence we indicate no opinion.

Considerable evidence of admissions in the country by the defendant, of criminal conduct, was given, which is assailed as incompetent. Can these admissions be considered? As it is deemed by law in the interest of society that marriage should not be dissolved on insufficient grounds, and cannot be dissolved by consent of parties, the common law held such admissions not effectual to sustain a ground for divorce, certainly not alone. 30 Am. Dec. 544; Bishop, Marr.

Div. & Sep. §§ 707, 730. The lowest grade of evidence in weight. Nelson, Div. § 781. "While not alone sufficient to warrant a decree, it is admissible in connection with other evidence, unless a statute forbids." 14 Cyc. Law & Proc. p. 682. Does our statute law (Code 1899, chap. 64, § 8) ban such evidence wholly? We think so. The legislature intended to render it incompetent. "Such suit shall be instituted and conducted as other suits in equity, except that the bill shall not be taken for confessed, and whether the defendant answer or not, the cause shall be heard independently of the admissions of either party, in the pleadings or otherwise." Now, this prohibits the bill from being taken for true on default of the defendant to appear, thus making it different from other suits, and, in accordance with the rule in divorce cases, requires proof of the grounds of divorce. Next, it forbids a decree though the wrongful act be admitted solemnly in the answer. It must be proved. Now, if an admission or confession in an answer is of no avail, why shall we say that one made in the country is? Can a decree be had thus by indirection when it cannot by an answer of confession? Plain intent and policy would thus be violated. The letter of the law is that the case shall be decided "independently of the admissions of either party in the pleadings or otherwise." What does this broad word "otherwise" mean? We must give it some effect, as it is sedately added. After saying default, silence shall not avail, but proof must be made; after saying, with special reference to admissions in the answer, that they shall count nothing, this word is added to say that no admission in the country, outside the pleading, shall count. One case in Virginia on this statute seems to hold otherwise. Bailey v. Bailey, 21 Gratt. 43. I have never been able to see with certainty what it means. Does it mean to say that admissions in letters only are competent? Cralle v. Cralle, 79 Va. 182, only goes to the effect that admission may be used to defeat a divorce. Latham v. Latham, 30 Gratt. 307, only says that defendant is entitled to a denial in his answer,—that the act never designed to eliminate that pleading so far as to refuse the benefit of its denial. Hampton v. Hampton, 87 Va. 148, 12 S. E. 340, overrules Bailey v. Bailey, by holding, under the statute, that "evidence that defendant admitted the charge [of adultery] and a letter from her purporting to admit it, are inadmissible." If this is not the purpose of the plain statute, what is it? Sometimes it operates to defeat justice; but it has a policy which the law has always held as to the marriage state. If wrong, the remedy is with the legislature. Under another construction, a party may obtain a divorce by his or her admission, or greatly aid by it in doing so. It would open the door to collusion between the parties; it would enable one party more easily to divorce himself.

The decree of the 8th day of December, 1903, is reversed, and the case remanded for further proceedings.

WASHINGTON SUPREME COURT.

BENJAMIN BANK, Respt.,
v.
EARLE DOHERTY et al., Appts.

(— Wash. —, 84 Pac. 872.)

Usury—conflict of laws.

1. A contract valid by the laws of the state where it is made and to be performed is not rendered subject to the usury laws of another state by the fact that it is secured by mortgage on land there situated, and to whose courts it is necessary to resort to enforce the mortgage.

Appeal—exception—sufficiency.

2. Error in allowing interest on a note at a greater amount than is authorized by statute is sufficiently questioned under § 5055, 2 Ballinger's Anno. Codes & Statutes.

Case Note.—Enforcement of mortgage on real property valid according to the law of the place where made and payable, but usurious according to the *lex fori et rei sitæ*.—The decision in the foregoing case, applying the law of Montana where the note and mortgage were executed and payable, upon the subject of usury, notwithstanding that the land covered by the mortgage was in Washington, and that the suit to enforce the mortgage was brought in the latter state, involves two propositions, both of which are sustained by the great weight of authority: (1) That the law of a particular state with reference to usury does not govern a note or mortgage merely because the land covered by the mortgage is located in that state; (2) that usury laws are not so distinctive a part of the public policy of the forum that the courts will, on the ground of public policy, decline to enforce any contract which would be involved, tested by them, though valid according to its proper law.

As shown by a note in 55 L.R.A. 933, there is some slight authority for the position that the *lex rei sitæ* with respect to usury necessarily controls in an action to foreclose a mortgage on real property; but, as pointed out in that note, the great weight of authority is opposed to that view, and holds that a mortgage on real property is to be tested by the same law with respect to usury that applies to the personal obligation which it secures, and not necessarily, nor even generally, by the *lex rei sitæ*. See, among many other cases to that

by an exception "that the evidence is insufficient to support the finding, and that the same is contrary to the evidence."

Interest—after maturity—statute.

3. A statute regulating the rate of interest on contracts after maturity in the absence of express provision by the parties will control any presumption of law that the rate mentioned in the contract was intended to prevail until judgment should be entered on the contract.

Mortgage—satisfaction—priority.

4. One having actual notice that a mortgage on real estate which was levied on to pay the costs in a suit to foreclose it, and sold to a stranger, has not been regularly satisfied, who advances money to take it up upon its satisfaction by the purchaser and the execution of a new mortgage on the property, cannot claim priority over it in case the sale is subsequently set aside on a motion pending when the second mortgage was executed.

Same—lis pendens—priority.

5. One who advances money to take up a mortgage which was levied on and sold to a stranger for the payment of the costs in a suit to foreclose it is bound by constructive notice of the rights of the parties afforded by the *lis pendens* filed at the time the foreclosure suit was begun, so as to be precluded from claiming priority in case the sale is subsequently set aside.

(March 16, 1906.)

APPEAL by defendants, administrators of the estate of Mary T. Doherty, deceased, and John S. Dutton from a judgment of the Superior Court for King County foreclosing a mortgage on certain real estate and establishing its priority. Modified.

The facts are stated in the opinion.

Messrs. **Melville C. Brown, John W. Roberts, and Maurice D. Leehey**, for appellants Doherty and the administrator:

The note and mortgage are usurious.

Emery v. Burbank, 163 Mass. 327, 28 L.R.A. 57, 47 Am. St. Rep. 456, 39 N. E. 1026; Irving v. Ford, 183 Mass. 448, 65 L.R.A. 177, 97 Am. St. Rep. 447, 67 N. E. 366.

The *lex fori* governs as to the remedies for its enforcement, and the usury law of this

effect, De Wolf v. Johnson, 10 Wheat. 383, 6 L. ed. 347, and McIlwaine v. Ellington, 55 L.R.A. 933, 49 C. C. A. 446, 111 Fed. 578. It is to be noted in this connection, however, that the fact that a loan is secured by a mortgage on real property is sometimes of importance in determining the proper law governing the personal obligation, and therefore the mortgage itself; in other words, in ascertaining the real intention of the parties as to the governing law with respect to usury, or in testing their good faith in undertaking to subject their contract in this respect to the law of another state. Thus, in many cases involving the contracts of foreign building and loan associations, the fact that the loan was secured by a mortgage upon real property located in the state of the forum has been held, in connection with other circumstances, sufficient to show that the parties, in making the loan payable at the domicil of the association, and in some instances in expressly stipulating that it was made with reference to the law of the domicil, acted in bad faith and for the purpose of evading the local law. See Falls v. United States Sav. L. & Bldg. Co. 97 Ala. 417, 24 L.R.A. 174, 38 Am. St. Rep. 194, 13 So. 25; National Mut. Bldg. & L. Asso. v. Burch, 124 Mich. 57, 83 Am. St. Rep. 311, 82 N. W. 837; National Mut. Bldg. & L. Asso. v. Brahan, 80 Miss. 407, 57 L.R.A. 793, 31 So. 840, Affirmed in 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532; and many other cases cited at page 944 of the note already referred to.

The courts might conceivably take the view that the usury laws of the forum are so distinctive a part of its public policy that it is contrary to public policy to enforce any contract that would be usurious tested by them, notwithstanding that the contract is valid according to the law of another state, in which it was made and to be performed: in other words, according to its proper law. But, while the courts have frequently refused to enforce contracts valid by their proper law because their enforcement would be contrary to the public policy of the forum, evidenced by its laws with respect to certain other matters, the courts have rarely, or never, applied this principle with respect to usury laws. The authority for the proposition that a contract valid by its proper law may be enforced notwithstanding that it would be usurious and invalid tested by the law of the forum rests rather upon the necessary implication of the great number of cases in which such contracts have been enforced, rather than upon cases which expressly affirm the proposition, though there are not lacking cases of the latter kind. See Buckinghouse v. Gregg, 19 Ind. 401; Uhler v. Semple, 20 N. J. Eq. 288.

It is to be noted in this connection, however, that the application of principles by which the real situs of a contract is ascertained will often locate such situs at the forum, and then its law is applied, not because it is the *lex fori*, but because it is the law of the situs of the contract. So, as already pointed out, the court may hold, by reason of the location of mortgaged property in the state of the forum, or by reason of other circumstances, that the attempt of the parties to subject their contract to the law of another state was for the purpose of evading the law of the forum, the real situs of their contract.

The extent to which the courts of the forum will enforce or give effect to the usury laws of the situs of the contract presents another question not considered in this note.

state affects only the remedy, not the substance of such contracts.

Ridgway v. Davenport, 37 Wash. 134, 79 Pac. 606; La Selle v. Woolery, 14 Wash. 70, 32 L.R.A. 73, 53 Am. St. Rep. 855, 44 Pac. 115; Clark v. Eltinge, 38 Wash. 376, 107 Am. St. Rep. 757, 80 Pac. 556; Craig v. Butler, 9 Mich. 21; Thurston v. Prentiss, 1 Mich. 193; Sherman v. Gassett, 9 Ill. 521; Suffolk Bank v. Kidder, 12 Vt. 464, 36 Am. Dec. 354; Collins Iron Co. v. Burkam, 10 Mich. 283; Watriss v. Pierce, 32 N. H. 560; Wright v. Bartlett, 43 N. H. 548; Willis v. Cameron, 12 Abb. Pr. 245; Gale v. Eastman, 7 Met. 14; Story, Confl. L. § 572; Gibbs v. Howard, 2 N. H. 296; Falls v. United States Sav. L. & Bldg. Co. 97 Ala. 417, 24 L.R.A. 174, 38 Am. St. Rep. 194, 13 So. 25; Meares v. Finlayson, 55 S. C. 105, 32 S. E. 986; Carpenter v. Lewis, 60 S. C. 23, 38 S. E. 244; Turpin v. Povall, 8 Leigh, 93; Sime v. Norris, 8 Phila. 84.

The court erred in computing interest at the contract rate beyond the date of maturity, because the note does not provide for interest "after maturity" or "until paid."

Palmer v. Laberee, 23 Wash. 409, 63 Pac. 216; Holden v. Freedman's Sav. & T. Co. 100 U. S. 72, 25 L. ed. 567; Hazard v. Maxon, 1 Wash. Terr. 585.

No foreign law will be enforced in a sovereign state if to enforce it will contravene the express statute law.

May v. First Nat. Bank, 122 Ill. 551, 13 N. E. 806; Frank v. Bobbitt, 155 Mass. 112, 29 N. E. 209; Mackey v. Pettijohn, 6 Kan. App. 57, 49 Pac. 636; Bowles v. Field, 78 Fed. 742; Case v. Dodge, 18 R. I. 661, 29 Atl. 785; Despard v. Churchill, 53 N. Y. 192; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; Freeman's Appeal, 68 Conn. 533, 37 L.R.A. 452, 57 Am. St. Rep. 112, 37 Atl. 420; Armstrong v. Best, 112 N. C. 59, 25 L.R.A. 188, 34 Am. St. Rep. 473, 17 S. E. 14; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509; True v. Ranney, 21 N. H. 52, 53 Am. Dec. 164; Jackson v. Jackson, 82 Md. 17, 34 L.R.A. 773, 33 Atl. 317; Pennegar v. State, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; State v. Ross, 76 N. C. 242, 22 Am. Rep. 678; Edgerly v. Bush, 81 N. Y. 199; Woodward v. Brooks, 128 Ill. 222, 3 L.R.A. 702, 15 Am. St. Rep. 104, 20 N. E. 685; Ex parte Dickinson, 29 S. C. 453, 7 S. E. 593; Smith v. Union Bank, 5 Pet. 518, 8 L. ed. 212; Williams v. Kemper, H. & McD. Dry Goods Co. 4 Okla. 145, 43 Pac. 1148; Barnett v. Kinney, 147 U. S. 476, 37 L. ed. 247, 13 Sup. Ct. Rep. 403; Butler v. Wendell, 57 Mich. 62, 58 Am. Rep. 329, 23 N. W. 460; Kerr v. Dougherty, 79 N. Y. 327.

If the money was loaned to be employed on the land for which the mortgage was given, then the law of the place where the mortgaged property is situated must prevail.

Fitch v. Remer, 1 Biss. 337, Fed. Cas. No. 4,836; Chapman v. Robertson, 6 Paige, 627, 31 Am. Dec. 264; Goddard v. Sawyer, 9 Allen, 78; Pine v. Smith, 11 Gray, 38; Philadelphia Loan Co. v. Towner, 13 Conn. 249; Levy v. Levy, 78 Pa. 507, 21 Am. Rep. 35; Kilgore v. Dempsey, 25 Ohio St. 413, 18 Am. Rep. 306; Fisher v. Otis, 3 Chand. (Wis.) 87; Arnold v. Potter, 22 Iowa, 194.

Mr. Elmer E. Todd, for appellant Dutton:

At the time Dutton took the note and mortgage from the administrator the purchaser of the Bank note and mortgage at the sheriff's sale had executed a satisfaction of the same, and the record was clear.

Blight v. Tobin, 7 T. B. Mon. 612, 18 Am. Dec. 219; Cowles v. Hardin, 101 N. C. 388, 9 Am. St. Rep. 36, 7 S. E. 896; Reeves v. Kennedy, 43 Cal. 643.

The mortgage cannot be restored against one who has in good faith purchased the property after the cancelation, or who has advanced money upon it upon the faith of a clear record title.

Jones, Mortg. 5th ed. § 967; Heyder v. Excelsior Bldg. L. Asso. No. 2, 42 N. J. Eq. 403, 59 Am. Rep. 49, 8 Atl. 310; Charleston v. Ryan, 22 S. C. 339, 53 Am. Rep. 713; Robbins v. Todman, 28 Kan. 491; Richey v. Merritt, 108 Ind. 347, 9 N. E. 368.

The purpose of *lis pendens* was to give the world notice of the pendency of the action; and, where that action was finally terminated, there could be no notice of the pendency of said action, because the same had been finally terminated by a judgment of the supreme court, from which there could be no appeal.

Holbrook v. New Jersey Zinc Co. 57 N. Y. 616; Page v. Waring, 76 N. Y. 463; London & S. F. Bank v. Dexter H. & Co. 61 C. C. A. 515, 126 Fed. 593; Johnson v. Irwin, 16 Wash. 652, 48 Pac. 345; Abadie v. Lobero, 36 Cal. 390; 21 Am. & Eng. Enc. Law, p. 624.

Messrs. Harold Preston and James B. Murphy, for respondent:

The notice of *lis pendens* filed charged every person with notice of all subsequent proceedings had in the action, and this relates to proceedings subsequent to judgment.

Ballinger, Anno. Codes & Statutes (Wash.), § 4887; Furry Bros. v. Ferguson, 105 Iowa, 231, 74 N. W. 903; Myers v. Jones, 61 Kan. 191, 59 Pac. 275; McClung v. Hohl, 10 Kan. App. 93, 61 Pac. 507; Smith

v. Kimball, 36 Kan. 474, 13 Pac. 801; Olson v. Leibpke, 110 Iowa, 594, 80 Am. St. Rep. 327, 81 N. W. 801; Gilman v. Hamilton, 16 Ill. 225; Smith v. Brittenham, 109 Ill. 540; Castleman v. Combs, 7 T. B. Mon. 273; Miller v. Hall, 1 Bush, 229; Real Estate Sav. Inst. v. Collonious, 63 Mo. 290; Carr v. Cates, 96 Mo. 271, 9 S. W. 659; Hollister v. Mann, 40 Neb. 572, 58 N. W. 1126; Phelps v. Elliott, 35 Fed. 455; Newman v. Chapman, 2 Rand. (Va.) 96, 14 Am. Dec. 766; Stoddard v. Myers, 8 Ohio, 203; Stout v. Philippi Mfg. & Mercantile Co. 41 W. Va. 339, 56 Am. St. Rep. 874, 23 S. E. 571.

A reversal or vacation of the judgment will devest the title obtained under it notwithstanding the fact it may have been transferred to an innocent third party, and the parties to the litigation will be restored to the same position in which they were prior to the rendition of the judgment.

Singly v. Warren, 18 Wash. 434, 63 Am. St. Rep. 896, 51 Pac. 1066; Benney v. Clein, 15 Wash. 581, 46 Pac. 1037; Bryant v. Fairfield, 51 Me. 140; Adams v. Odom, 74 Tex. 206, 15 Am. St. Rep. 827, 12 S. W. 34; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459; Dunnington v. Elston, 101 Ind. 373; Smith & V. Co. v. Burns, 72 Miss. 966, 18 So. 483.

When a recorded mortgage is discharged by a person other than the mortgagee, the person paying the money and all subsequent purchasers are bound to inquire what authority he had to discharge him, and are chargeable with notice of such facts as, by proper inquiry, might have been ascertained.

1 Jones, Mortg. 4th ed. § 957; Swarthout v. Curtis, 5 N. Y. 301, 55 Am. Dec. 345; Stanley v. Valentine, 79 Ill. 544; Harris v. Cook, 28 N. J. Eq. 346; Foy v. Armstrong, 113 Iowa, 629, 85 N. W. 753.

Messrs. **Graves, Palmer, Brown, & Murphy**, also for respondent:

The fact that the indebtedness was secured by the mortgage upon real property in the state of Washington does not make it subject to the Washington laws relating to usury.

Odom v. New England Mortg. Secur. Co. 91 Ga. 505, 18 S. E. 131; Cotheal v. Blydenburgh, 5 N. J. Eq. 17; Chase v. Dow, 47 N. H. 405; Dolman v. Cook, 14 N. J. Eq. 56; Andrews v. Torrey, 14 N. J. Eq. 355; Lewis v. Headley, 36 Ill. 433, 87 Am. Dec. 227; Hickox v. Elliott, 10 Sawy. 415, 22 Fed. 13, 27 Fed. 839; Call v. Palmer, 116 U. S. 100, 29 L. ed. 560, 6 Sup. Ct. Rep. 301; Fitch v. Remer, 1 Biss. 337, Fed. Cas. No. 4,836; Black v. Reno, 59 Fed. 917; Broughton v. Bradley, 36 Ala. 691; Eastwood v. Kennedy, 44 Md. 572; Coghlan v. South Carolina R. Co. 142 U. S. 101, 35 L. ed. 951, 12 Sup. Ct. Rep. 153; Bigelow v. Burnham, 83 Iowa, 120, 32 Am. St. Rep. 294, 49 N. W. 104; Oregon & W. Trust Invest. Co. v. Rathburn, Fed. Cas. No. 10,554; Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597; La Selle v. Woolery, 14 Wash. 70, 32 L.R.A. 73, 53 Am. St. Rep. 855, 44 Pac. 115; Clark v. Eltinge, 38 Wash. 376, 107 Am. St. Rep. 757, 80 Pac. 556; De Wolf v. Johnson, 10 Wheat. 383, 6 L. ed. 347, 2 Rose's Notes, 426; United States Sav. & L. Co. v. Beckley, 62 L.R.A. 33, and note, 137 Ala. 119, 97 Am. St. Rep. 19, 33 So. 934.

There being no evidence to show a contrary intention, the law will presume that it was the intention of the parties that the money should bear the rate specified in the note, from its making until paid, or until such time as a judgment might be entered thereon.

Shaw v. Rigby, 84 Ind. 375, 43 Am. Rep. 96; Kellogg v. Lavender, 15 Neb. 256, 48 Am. Rep. 339, 18 N. W. 38; Overton v. Bolton, 9 Heisk. 762, 24 Am. Rep. 367; Kohler v. Smith, 2 Cal. 597, 56 Am. Dec. 369; Cox v. Smith, 1 Nev. 171, 90 Am. Dec. 476; McLane v. Abrams, 2 Nev. 199; Cecil v. Hicks, 29 Gratt. 1, 26 Am. Rep. 391; Union Inst. for Savings v. Boston, 129 Mass. 82, 37 Am. Rep. 305; Hamilton & R. Hydraulic Co. v. Chatfield, 38 Ohio St. 577; Findlay v. Hall, 12 Ohio St. 610; Pridgen v. Andrews, 7 Tex. 461; Thompson v. Pickel, 20 Iowa, 490; Hand v. Armstrong, 18 Iowa, 324; Etnyre v. McDaniel, 28 Ill. 201; Adams v. Way, 33 Conn. 431; Hubbard v. Callahan, 42 Conn. 524, 19 Am. Rep. 564; Spencer v. Maxfield, 16 Wis. 178; Pruyn v. Milwaukee, 18 Wis. 368; Jersey City v. O'Callaghan, 41 N. J. L. 349; Edward C. Jones Co. v. Guttenberg, 66 N. J. L. 667, 51 Atl. 277; Borders v. Barber, 81 Mo. 645; Jefferson County v. Lewis, 20 Fla. 980; Jefferson County v. Hawkins, 23 Fla. 223, 2 So. 365; Weems v. Ventress, 14 La. Ann. 267; Warner v. Juif, 38 Mich. 662; Meaders v. Gray, 60 Miss. 400, 45 Am. Rep. 414; Cromwell v. Sac County, 96 U. S. 57, 24 L. ed. 686; Ohio v. Frank, 103 U. S. 698, 26 L. ed. 531; Wadesboro Cotton Mills Co. v. Burns, 114 N. C. 353, 19 S. E. 238; Shipman v. Bailey, 20 W. Va. 140; Greenhaw v. Holmes (Ariz.) 68 Pac. 537; Kelley v. Phenix Nat. Bank, 17 App. Div. 496, 45 N. Y. Supp. 533.

Mount, Ch. J., delivered the opinion of the court:

This is an action to foreclose certain real-estate mortgages. On January 3, 1900, the respondent Benjamin Bank, a resi-

dent of Butte, Montana, loaned to Mary T. Doherty, a resident of the same place, $2,500 on her promissory note, as follows:

$2,500. Butte, Montana, January 3, 1900.

For value received, three years after date, I promise to pay to B. Bank, or order, the sum of $2,500 at his office in Butte, Montana, with interest at the rate of two per cent per month, payable monthly. The privilege hereby granted to the maker of this note to pay any amount not exceeding $200 per month thereon. Interest to be reduced according to such payments. Payment to be made on interest day.

[Signed] Mary T. Doherty.

At the same time and place, in order to secure the said note, the maker executed two mortgages, a chattel mortgage on certain personal property in Butte, and a real-estate mortgage on certain real estate in Seattle, this state. The property included in the chattel mortgage was afterwards sold, and the proceeds of the sale amounted to $96. A short time after the note and mortgages were made, the said Mary T. Doherty died testate in Montana. Her will was thereafter admitted to probate in King county in this state, and letters testamentary with the will annexed issued to appellant Maurice D. Leehey. Her minor son, the appellant Earle Doherty, a resident of California, was her sole devisee. On March 9, 1901, the respondent brought an action in the superior court of King county to foreclose his real-estate mortgage, and at that time filed a *lis pendens* in the office of the county auditor of King county. Subsequently a judgment of foreclosure was entered, and an appeal was taken therefrom to this court. We reversed the judgment, for the reason that the debt was not then due. Bank v. Doherty, 29 Wash. 233, 92 Am. St. Rep. 903, 69 Pac. 732. The appellants in that action, Earle Doherty and Mr. Leehey, administrator, were awarded costs therein against Mr. Bank, for the sum of $101.45. The original note and mortgage had been introduced in evidence by the plaintiffs in that case, as exhibits, and were transmitted here with the record, where they were held by the clerk of this court. After a remittitur in that case had gone down, the parties stipulated in writing that the exhibits might be returned to the clerk of the superior court, to be held by him subject to the demand of the party who introduced the same in evidence. After demand had been made upon Mr. Bank to pay the judgment for costs, as above stated, and he had neglected to do so, an execution was issued at the request of the appellants in that case, and the sheriff levied upon the original note and mortgage, and took the same from the possession of the clerk. The note and mortgage were advertised for sale, and, on December 1, 1902, were sold at sheriff's sale to C. L. Byron, defendant in this action, for $110.20, being the amount of the judgment and accrued costs. The sale was subsequently confirmed, and the note and mortgage were delivered to Mr. Byron. Neither Mr. Bank nor his attorneys had any actual notice of the seizure and sale of the note and mortgage. The note had been indorsed in blank by the payee some time before it was introduced in evidence in the first foreclosure action. After the sale to Mr. Byron, the words "pay to C. L. Byron or order" were written on the note above the respondent's signature. On December 16, 1902, the appellant Leehey, as administrator of the estate, petitioned the probate court for leave to place another mortgage upon the property described in respondent's mortgage, for the purpose of procuring money with which to pay the respondent's mortgage, then held by C. L. Byron under the said sheriff's sale.

On January 13, 1903, the respondent, Mr. Bank, and his attorneys, upon learning that the note and mortgage had been sold, filed a motion to set aside the sale in the original foreclosure action out of which the execution issued. After many continuances of the hearing and some amendments to the motion, the motion was finally heard, and on April 10, 1903, the superior court of King county made an order setting aside the sale. This order was subsequently affirmed, on appeal, by this court. Bank v. Doherty, 37 Wash. 32, 79 Pac. 486. In the meantime, on February 20, 1903, an order was entered in probate, authorizing the administrator to mortgage the property for the purpose of paying off respondent's note and mortgage while it was held by Mr. Byron. Soon after the sale of the note and mortgage to Mr. Byron, Mr. Leehey, the administrator of the estate of Mary Doherty, deceased, went to Butte, Montana, and there informed J. S. Dutton and Adolph Pincus, two creditors of the estate, that the note and mortgage executed to Mr. Bank were then held by Mr. Byron, and could be satisfied for $2,200: that the mortgaged property was worth at least $3,000; and requested Mr. Dutton and Mr. Pincus to advance $2,200 for the purpose of taking up respondent's note and mortgage, and promising that he, as administrator, would obtain leave of the probate court to execute a new mortgage on the property to secure them for the $2,200, and that by means of such mortgage he would permit them to acquire the title to the property and thus make themselves whole on the estate. Mr.

Pincus and Mr. Dutton agreed to this, and, while the motion to vacate the sale of the note and mortgage to Mr. Byron was pending, appellant Leehey, as administrator, executed a mortgage to Mr. Dutton for the sum of $2,200, and Mr. Byron thereupon acknowledged satisfaction of the respondent's note and mortgage and delivered the same to Mr. Dutton, who thereupon sent to Mr. Leehey a draft for the amount agreed upon, $1,100, being contributed by Mr. Dutton and $1,100 by Mr. Pincus. Mr. Leehey thereupon recorded the mortgage to Mr. Dutton.

After the sale of respondent's note and mortgage was set aside by the court, and after the same became due, respondent brought this action to foreclose his mortgage, and made all persons claiming any interest in the property parties to the foreclosure proceeding. The defendant Dutton filed a cross-complaint, setting up his mortgage, and praying that the same be also foreclosed, and that he be decreed to be a prior mortgagee. At the trial, the court found the facts in favor of the respondent Bank, and that the defendant Dutton took his mortgage with notice and knowledge of respondent's mortgage, and was therefore a subsequent mortgagee. The judgment of the lower court was in favor of the respondent Bank, for the full amount of the note, with interest at 2 per cent per month from its date to the date of the judgment; and his mortgage was decreed a first lien upon the property for the amount thereof. Appellant Dutton was also given judgment for the amount of the note and mortgage standing in his name; but the court found that he took his mortgage, with notice of the respondent's mortgage, and the lien was therefore declared subsequent to respondent's mortgage. The administrator Leehey and the legatee Doherty appeal from the judgment, claiming (1) that the note given to respondent Bank is usurious; (2) that it does not bear interest after maturity at the rate of 2 per cent per month, and (3) that respondent is not the owner thereof. Mr. Dutton appeals separately, claiming that the court erred in finding that his mortgage was subsequent to respondent's mortgage.

It is apparently conceded that both the note and mortgage sued on by the respondent Bank are Montana contracts. If not conceded, the record conclusively shows, that both the maker and the payee of the note and mortgage were bona fide residents of Butte, Montana. The note was executed there and was payable there. The mortgage was also executed and delivered at the same time and place as the note. But it described property in King county in this state, and was sent here for record. It is proved and not disputed that the rate of interest provided for in the note and mortgage was valid in the state of Montana, where the contract was made and where it was to be performed. Under these facts there can be no escape from the conclusion that the contract was a Montana contract, and was not usurious there. But appellants argue that, while the law of the place of the contract governs as to the interpretation and validity of the note, the law of the forum governs as to remedies for its enforcement. This position is no doubt correct. We said, in La Selle v. Woolery, 14 Wash. 70, 32 L.R.A. 73, 53 Am. St. Rep. 855, 44 Pac. 115: "The settled rule is that the law of the place where the contract was made must govern in determining the character, construction, and validity of such contract; while the law of the place where suit is instituted upon the contract governs as to 'the nature, extent, and form of the remedy.'"

Appellants further contend that the usury law of this state affects only the remedy, not the substance of such contracts; and we are cited to § 3671, Ballinger's Anno. Codes & Statutes (Pierce's Code, § 5706), in support thereof. This is true when applied to contracts executed or to be performed within the state, but it has no application to valid contracts made without the state, and which are governed by the law of another state as to their character, construction, and validity. The contract in this case being a valid and binding contract in the state of Montana, the mere fact that its payment was secured by a mortgage on property in this state does not change its character, or render it subject to the usury laws of this state. The mortgage is but the means of securing to the payee what the maker has agreed to pay at the place named in the note. De Wolf v. Johnson, 10 Wheat. 367, 6 L. ed. 343; Call v. Palmer, 116 U. S. 98, 29 L. ed. 559, 6 Sup. Ct. Rep. 301; Coghlan v. South Carolina R. Co. 142 U. S. 101, 35 L. ed. 951, 12 Sup. Ct. Rep. 150. The remedy for the foreclosure of the mortgage, being the practice of the courts, is governed, of course, by the laws of this state. La Selle v. Woolery, *supra*.

The amount due upon the note is determined by the substance of the note itself, and not by any remedy to enforce it. When the lower court found that the contract was a Montana contract, valid in that state, the terms of the contract determined the amount due, and will be enforced accordingly. It will be observed by examining the note hereinbefore set out that the maker promised to pay $2,500 three years after date, with interest at the rate of 2 per cent per month. No provision is made for any rate

of interest after maturity. The statute of Montana, as shown and admitted by the pleadings, provides that, "unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the rate of 8 per cent per annum after they become due on any instrument of writing," etc. Section 2585, Civil Code of Montana, as amended in 1899 (Laws 1899, p. 125). The trial court in this case computed interest, from the date of the note to the date of the decree, at 2 per cent per month, making a total after deducting the credit of $96, of $5,596.66, and found that amount to be due. An exception was taken to this finding, as follows: "Because the evidence is insufficient to support said finding, and the same is contrary to the evidence," and for other specified reasons. Respondent contends that this exception is not sufficient to raise the question now presented as to the amount of interest due. We think it is sufficient, under the provisions of § 5055, 2 Ballinger's Anno. Codes & Statutes. Appellants rely upon the decision of this court in Palmer v. Laberee, 23 Wash. 409, 63 Pac. 216. That was a case where the question arose as to the amount of interest which should be allowed upon a judgment reviving a prior judgment, and this court there held that interest should be allowed at the legal rate where the judgment revived did not recite the amount of interest it should draw. It will be seen that the exact point involved in this case was not before the court in that case; but, in discussing the question then before us, reasoning by analogy, we said: "It will be seen from Brewster v. Wakefield, 22 How. 118, 16 L. ed. 301, and Ludwick v. Huntzinger, 5 Watts & S. 51, that where a note is entirely silent as to interest after it is due, the creditor is entitled to interest by operation of law; and that until the note became payable the agreement of the parties regulated the allowance and the rate of interest, but after that the law interposed not only to allow, but to regulate, the rate of interest that should be allowed the creditor for and on account of the illegal detention of the debt." This statement of the rule is directly in point in the case now before us.

Counsel for respondent contends that, where there is no evidence to show a contrary intention, the law will presume that it was the intention of the party that the money should bear the rate specified in the note from its date until such time as a judgment might be entered thereon, and that this is in accord with the great weight of authority in this country; and many cases are cited to support this contention. It is unnecessary to review these authorities, because, where there is a statute upon the subject, the statute must control. As we have seen above, the note in question was made in Montana by bona fide residents of that state. It was payable there, and the parties to it must have contracted with reference to the law of that state as it existed at the time. The statute in force at the time, as quoted above, provided that interest is payable on all moneys at the rate of 8 per cent per annum after they become due, on any instrument in writing, unless there is an express contract in writing fixing a different rate. This statute seems clear and conclusive of the question. It refers especially to moneys after they become due, and fixes the rate of interest at 8 per cent per annum unless the writing fixes a different rate. No decisions of the courts of Montana have been called to our attention construing this section, and we have been unable to find any. We must therefore give it the plain meaning which it was evidently intended to have. If the parties had intended the note in question to draw interest at the rate of 2 per cent per month after maturity, it would have been an easy matter to have placed such intention beyond doubt by simply adding the words "until paid" after the words "2 per cent per month." They did not do so, and we must therefore conclude that the contract contained all of the agreement, and that the parties intended to let the law fix the rate of interest after maturity, if the note should not be paid when it became due. The lower court was therefore in error in computing interest at 2 per cent per month after maturity.

The last point made by appellants Doherty and Leehey is that the respondent is not the owner of the note, because it was sold at execution sale. This question was settled by us in the case of Bank v. Doherty, 37 Wash. 32, 79 Pac. 486.

The appellant Dutton contends that the court erred in finding his mortgage subsequent to the respondent's mortgage. This question depends upon the facts. There is some conflict in the evidence as to whether Mr. Dutton had actual notice of the condition of the sale of respondent's note and mortgage; but the circumstances surrounding the whole transaction lead us to believe that he had actual notice and knowledge of the whole transaction. He was not a party to it, and probably knew nothing about the proceedings until after the sale had taken place. But before he advanced his money and took his mortgage, we are satisfied that both Mr. Dutton and Mr. Pincus knew all about the sale and the purpose of it. We are further of the opinion that Mr. Dutton was bound by the constructive notice afforded by the *lis pendens* filed at the time

the original foreclosure action was begun. But actual notice that respondent's mortgage had not been regularly satisfied was sufficient.

The conclusion we have reached upon the question of interest necessitates a modification of the judgment entered at the trial. The court rendered judgment for $5,596.16 and $250 attorney's fees and costs, in favor of respondent Bank. The amount of the judgment should have been $4,662.33, and for $250 attorney's fees, and for costs. The judgment was therefore $934.83 in excess of what it should have been. No supersedeas bond was given on the appeal, and it now appears from the supplemental record on file in this court that the mortgaged property was sold under the decree and bid in by respondent for $5,500, and that the sale was confirmed on October 28, 1905, leaving a deficiency judgment in favor of respondent for $448.90. In view of these facts, it is ordered that the respondent satisfy the deficiency judgment and pay to the clerk of the court the sum of $445.93 within thirty days after the remittitur is sent down, which last named sum shall be credited upon the judgment in favor of appellant Dutton. If respondent shall not comply with this order as stated above, it is ordered that the judgment appealed from be vacated, and that a new judgment be entered in harmony with the views herein expressed, and a new sale of the mortgaged property had thereunder. Appellants shall recover costs of this appeal against respondent.

Crow, Fullerton, Hadley, and Dunbar, JJ., concur.

CONNECTICUT SUPREME COURT OF ERRORS.

GEORGE L. MARCH
v.
BRICKLAYERS' & PLASTERERS' UNION NO. 1 et al., Appts.

(— Conn. —, 63 Atl. 291.)

Labor union—extortion—money had and received.

Money paid by a brick manufacturer at the demand of a labor union, to prevent its members from refusing to handle his product because he had sold to unfair bosses, may be recovered back, since it was obtained by extortion.

(April 17, 1906.)

APPEAL by defendants from a judgment of the Court of Common Pleas for Hartford County in plaintiff's favor in an action brought to recover back money alleged to have been extorted by defendants from plaintiff. Affirmed.

Statement by **Prentice, J.:**

The plaintiff conducted a brickyard and manufactured and sold brick. The defendant union was a voluntary association composed of journeymen, bricklayers, and plasterers. The defendant Butler was a member of the union and its financial secretary and business agent. As business agent it was made his duty, among other things, to see that members of the union did no work in violation of its requirements, and to ascertain and report to the union all brick manufacturers who furnished brick to any "boss mason" who was proscribed by the union as "unfair" as being the employer of other than union bricklayers and plasterers, and generally to act as the agent of the union in securing obedience to its orders and compliance with its demands. The plaintiff was not a member of the union, nor an employer of members of it; neither was he under any contractual or other obligation to it save such obligation as one owes to other members of society. The defendant union had voted that its members would refuse to handle brick from any brickmaker who should furnish brick to "unfair" bosses. By authority of the union, notice of this action had been mailed to the plaintiff and to substantially all other brickmakers in the vicinity of Hartford. It had also been voted that the two secretaries prepare and cause to be printed cards having thereon the names of those "boss masons" who were by the union classed as "fair" and those classed as "unfair." These had been so prepared, accepted by the union, and distributed. The plaintiff received said notice and one of said cards was delivered to him by Butler. A few months subsequently the plaintiff sold and delivered brick to a "boss mason" who was classed as "unfair." Thereupon the union voted "to place damages of $100 against said March for violating agreement with Bricklayers' Union." There was no such agreement. Shortly afterward the plaintiff sold and began to deliver to one Flynn, a "fair" boss mason, brick for the construction of a building upon which the latter was doing the brickwork. After a few loads had been so delivered the defendant Butler, acting for the union in his

Case Note.—Recovery of money paid to labor union to avoid boycott.—In spite of the many labor troubles of recent years, and of the numerous cases wherein relief from boycotts has been sought by injunction, the question whether money paid to a labor union to avoid a boycott can be recovered has very seldom been adjudicated.

said capacity as business agent, visited this building and had a talk with the plaintiff and Flynn. The penalty imposed upon the plaintiff was then discussed, and Butler then either expressly said to the plaintiff and Flynn, or intended from what he did say that they should understand, and they did understand, that he, "Butler, acting for the union, and the union acting through him, could and would, through their control over Flynn's workmen, then had and to be exercised by Butler, prevent Flynn from using brick bought by him from March, by immediately stopping Flynn's workmen laying the brick, unless Flynn would agree to become surety for the payment by March to the union of the $100 demanded by it from him, as aforesaid," unless the union should at its next meeting afford the plaintiff some relief. To this Flynn agreed and the plaintiff continued to make deliveries. The plaintiff appeared at this meeting and was accorded a hearing. A motion "to reduce the fine" to $50 was lost, and Butler was instructed to collect it. The following day Butler met the plaintiff and Flynn, told them that the union held out for the $100, and added that they were going to have it. From what he said then "he intended that March and Flynn should understand and believe, and they did understand and believe, that Butler had instructions from the defendant union to stop the bricklayers who were working for Flynn from work for him upon said building, and to cause them to strike, unless March or Flynn at once paid the $100 demanded by the defendant union, and that he (Butler) could and would do as he represented that we was instructed to do." Flynn and March both protested against the payment, but, influenced by the aforesaid representations of Butler, Flynn, who was indebted to March for brick, paid Butler the $100 with the assent of March and charged the same to March on his account, and said money was paid, as aforesaid, to save greater loss threatened, as aforesaid, to the business of March and Flynn, and for that reason only. Butler paid over the money to the defendant union at its next meeting. Demands for the return of the money were made on the defendants and refused. The complainant seeks the recovery of the money so paid.

Mr. **Joseph P. Tuttle** for appellants.

Messrs. **Walter S. Schutz** and **Stanley W. Edwards**, for appellee:

Where money is illegally demanded by an agent, and paid under compulsion, he cannot exonerate himself from personal responsibility by paying the money over to his principal.

Huffcut, Agency, ¶ 204; 2 Clark & S.

As is stated in the opinion above, but one other case can be found in which the matter has ever come before the courts.

In that case, Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, it appeared that the plaintiff was engaged in the business of furnishing cut freestone for building purposes. The defendants and others were members of a Journeyman Freestone Cutters' Association, and were employed by the plaintiff to cut such stone. The said association voted that the plaintiff should pay to it the sum of $500 as a penalty for sending stone to another locality to be cut. Upon his refusal to do so, all his men left his shop in a body under the lead of two of the defendants. Because of the withdrawal of these men, and of the impossibility of filling their places, the plaintiff was compelled to stop his stone-cutting work; and, after holding out for several days, he was forced by the necessity of fulfilling his contracts to pay to the defendants, to the use of the association, the sum of $500, to recover which this action was brought. It was held that the plaintiff could recover. The court said: "We have no doubt that a conspiracy against a mechanic, who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him, which he is under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the illegal demand, is an illegal, if not a criminal, conspiracy; that the acts done under it are illegal; and that the money thus obtained may be recovered back; and, if the parties succeed in injuring his business, they are liable to pay all the damage thus done to him. It is a species of annoyance and extortion which the common law has never tolerated."

A question somewhat analogous in principle was presented to the New York city court in Fuerst v. Musical Mut. Protective Union, 95 N. Y. Supp. 155, in which it appeared that the defendant's president, at a meeting of the board of directors, threatened the plaintiff, a member of the defendant union, with suspension or expulsion if he did not pay a fine imposed upon him by the defendant for an alleged violation of its by-laws, which fine was an illegal one, and the plaintiff, after having exhausted all his remedies within the organization to have the fine rescinded, paid it under fear that the president's threat would become effective, and that he would thereby be deprived of his means of earning a livelihood; and the court held that such threat amounted to duress, and that the plaintiff could recover the money so paid by him.

Agency, pp. 1290–1291; Bocchino v. Cook, 67 N. J. L. 467, 51 Atl. 487; Bennett v. Ives, 30 Conn. 329; Ex parte Edwards, L. R. 13 Q. B. Div. 747; Larkin v. Hapgood, 56 Vt. 597; United States v. Pinover, 3 Fed. 305; Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373; Moore v. Shields, 121 Ind. 267, 23 N. E. 89; Ripley v. Gelston, 9 Johns. 201, 6 Am. Dec. 271.

An unlawful purpose will taint an action which, used for another end, might be justifiable.

Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; Quinn v. Leathem [1901] A. C. 495; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Moran v. Dunphy, 177 Mass. 485, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; 1 Eddy, Combinations, ¶¶ 521 et seq.

The defendants had no right to withdraw their support from the product of the plaintiff's yard in order to compel him to withdraw from business relations with third parties, for the purpose of injuring said third parties, when the business relations sought to be broken had no effect whatever on the character or reward of the defendants' services.

Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 803; Moores v. Bricklayers' Union, 10 Ohio Dec. Reprint, 665; Walker v. Cronin, 107 Mass. 555; State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; State v. Stockford, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769.

The defendants had no right to withdraw, or threaten to withdraw, their support from the product of the plaintiff's yard in order to extort money from the plaintiff, or penalize him for continuing lawful business relations with third parties.

State v. Glidden, *supra;* Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287.

The combining to injure the plaintiff's business without just cause is an unlawful means.

King v. Eccles, 1 Leach, C. L. 274; Mogul S. S. Co. v. McGregor [1892] A. C. 25; Quinn v. Leathem and Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. *supra;* Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; 1 Eddy, Combinations, ¶¶ 474, 479, 480; State v. Glidden and State v. Stockford, *supra;* Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Vegelahn v. Guntner, 167 Mass. 92, 35 L. R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Plant v. Woods, *supra;* Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; Casey v. Cincinnati Typographical Union No. 3, 12 L.R.A. 193, 45 Fed. 135; Cump v. Com. 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620.

The money was paid by the plaintiff under duress to avert a threatened and impending injury to his business, and was involuntary.

Joannin v. Ogilvie, 49 Minn. 564, 16 L. R.A. 376, 32 Am. St. Rep. 581, 52 N. W. 217; Scholey v. Mumford, 60 N. Y. 498; Robertson v. Frank Bros. Co. 132 U. S. 17, 33 L. ed. 236, 10 Sup. Ct. Rep. 5; Buckley v. New York, 30 App. Div. 463, 52 N. Y. Supp. 452; Cobb v. Charter, 32 Conn. 358, 87 Am. Dec. 178; Carey v. Prentice, 1 Root, 91; Astley v. Reynolds, 2 Strange, 915; Swift & C. & B. Co. v. United States, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; McPherson v. Cox, 86 N. Y. 472; Westlake v. St. Louis, 77 Mo. 47, 46 Am. Rep. 4; St. Louis Brewing Asso. v. St. Louis, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; Fitzgerald v. Fitzgerald & M. Constr. Co. 44 Neb. 463, 62 N. W. 899; Fargusson v. Winslow, 34 Minn. 384, 25 N. W. 942; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Lonergan v. Buford, 148 U. S. 581, 37 L. ed. 569, 13 Sup. Ct. Rep. 684; Keener, Quasi Contracts, p. 426.

Money wrongfully demanded and paid to avoid injury to business can be recovered as paid under compulsion.

Carew v. Rutherford and Bocchino v. Cook, *supra;* Horner v. State, 42 App. Div. 430, 59 N. Y. Supp. 96; Fout v. Giraldin, 64 Mo. App. 165; Vyne v. Glenn, 41 Mich. 112, 1 N. W. 997; Dana v. Kemble, 17 Pick. 545; Niedermeyer v. University of Missouri, 61 Mo. App. 654; Keener, Quasi Contracts, 430 *et seq.*

Prentice, J., delivered the opinion of the court:

The complainant alleges that the defendants conspired, combined, and confederated with each other and other persons to extort, demand, and obtain from the plaintiff the sum of $100; that, in pursuance of that conspiracy and combination, they threatened to injure the plaintiff in his property and business, unless said sum was paid; and that by reason of said conspiracy and combination, and by reason of said threats, intimidation, and coercion, and by such means alone, said sum was paid by the plaintiff to the defendants. It is found that the payment was made, that the combination between the members of the defendant union to secure that payment and Butler's agency for it existed, and that the money was paid through the operation of that combination. So far there is no contention here. The plaintiff further claims

that the combination for the purposes of its controversy with him, resulting in the payment by him, was an unlawful one. He claims that it was unlawful (1) because its object was unlawful; and (2) because the means to accomplish that object were unlawful. He also claims that, as the payment was one into which he was coerced through the operation of this unlawful conspiracy, he is entitled to recover it back. The defendants do not deny that a combination or confederation of men either for the accomplishment of an unlawful object or for the accomplishment of a lawful object by unlawful means is unlawful; neither do they deny that, if the combination between them which resulted in the payment in question was an unlawful one, the plaintiff is entitled to recover. The contention between the parties, therefore, becomes primarily resolved into one as to whether the conceded confederation of the defendants through which the payment was obtained was an unlawful one by reason of the unlawful character of either its object or the means employed. The plaintiff asserts the right to a judgment upon narrower grounds than those thus suggested, and notwithstanding a failure to establish an unlawful conspiracy. This claim, however, is subordinate to his main proposition, and need not be considered unless it shall appear that his principal contention, already stated, fails him. The disagreement between the plaintiff and the defendants as to the lawfulness of the object of the latter's combination is one which arises chiefly, if not entirely, out of a difference of view as to what is to be regarded as that object. The defendants say that the object was the ultimate object of the union, to wit, among other things, the promotion of the welfare of its members and the advancement of their rights and privileges as laboring men, or, if not that, the freeing of themselves from the competition of those not members of the union, or, if not that, and the object is to be brought into closer relation to the matters in controversy, the compelling of "unfair" bosses to become "fair." The plaintiff finds the object sought in the immediate injury attempted to be inflicted upon him,—the extortion of the $100 from him as the price of his freedom from harassment in the marketing of his product. These differences in the analysis of the situation disclosed by the record are more formal than vital. Their chief importance arises from the changed form which must be given to the discussion of the underlying questions involved and the different use of terms which must be made, according as one view or the other be adopted. For the purposes of our consideration, therefore, we may well assume, as did the court below, that the object sought by the defendants in what they confederated to do was some one of the more remote objects, as claimed by them, and that this object was a lawful one. This, of course, involves the transferring into the field of means that which would, in the other view, be regarded as an end, and the consideration of all that the defendants did in the accomplishment of its object as means to that accomplishment.

The question before us thus becomes narrowed down to the single inquiry as to whether or not the defendants in the pursuit of their object, whether it be regarded as their general welfare as laboring men, or the diminution of outside competition, or the enlargement of their field of opportunity by increasing the number of employers of union labor only, used unlawful means. This question suggests the possibility of a wide range of inquiry, involving the consideration of important legal principles which have been much discussed, and upon certain of which there has been some divergence of opinion. The facts of this case, however, are such as to require from us the application of no principles which have not been long and well established, and but few of them. The salient facts in the story spread upon the record are that this defendant association through their representative, the defendant Butler, demanded of the plaintiff the payment to them of a sum of money upon the threatened alternative that, if payment was refused, he would, by their action in refusing to handle his product in their work then in progress, be annoyed and harassed in the enjoyment of the benefit of the market for that product which he had obtained, and in all probability be wholly deprived of that market. The action thus threatened was within the power of the defendants to take. The consequences which would flow to the plaintiff from it, if taken, were such as might well excite in him a reasonable apprehension of serious injury. To the pressure thus brought to bear upon him he yielded and paid the sum exacted. There is nothing in the record to relieve this picture. It does not improve it to say that the defendants were seeking to enforce a penalty or to collect damages assessed. They had no right to inflict a penalty upon or assess damages against this man, who owed them no duty through association in the membership of the union, by contract or otherwise. The plaintiff owed them nothing. To overawe him into the payment of something by means of threats of injury in their power to inflict and of such a character as to naturally arouse a reasonable apprehension of serious consequences to him, in the event of his refusal,

was an act of the purest extortion, using that word in its widest meaning, by means of threats and intimidation, and in the plainest violation of our statute (Gen. Stat. 1902, § 1290), our decisions, and the universally accepted principles of the common law. State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; State v. Stockford, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769. The statement of what the defendants undertook to do easily discloses that this is not the ordinary case found in the books involving the exercise by trade, capital, or labor combinations of claimed powers in their struggles for success. These cases have not infrequently called for the determination of nice legal questions, and the application of doctrines which, while they might be pertinent to the present situation, are wholly unnecessary for the decision of the simpler question before us. The most elemental principles of justice and right which have by universal consent been adopted into the common law suffice for a conclusion that money cannot be lawfully exacted of a man in the manner here successful. We are aware of no case where, in the progress of a labor or trade controversy, a similar attempt to extort money as the price of forbearance from threatened injurious action has ever come before the courts, save that of Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, where the attempt is characterized as a species of annoyance and extortion which the common law has never tolerated.

It is attempted to justify the action of the union in its money demand upon the proposition that, as its members had the right to decline to handle the plaintiff's brick, they had the right to waive the exercise of that right upon such conditions as they might impose. The proposition is that money demanded and obtained as the price of forbearance from the commission of an act of injury, even when the commission of that act is held over the man to coerce and intimidate him into compliance with the demand, is lawfully obtained, if the threatened act was one which the threatener might lawfully do. Such a proposition could often times be used to justify the vilest blackmailer, and is palpably unsound in that it ignores certain elements which may be present to convert the proceeding into a wrong or a crime. 28 Am. & Eng. Enc. Law, 2d ed. p. 141.

It is further said that the action of the defendants was justified in the exercise of the rights of fair trade competition. If it be assumed that these journeymen, bricklayers, and this brick manufacturer, whose business touched each other only in that the latter sold brick to persons for whom the former worked, are to be regarded as trade competitors, so that the recognized doctrines applicable to such competitors are applicable to them, it yet remains that the means resorted to in this case would not be permitted.

There is no error.

All concur.

RÉSUMÉ

GIVING a brief and comprehensive view of the points of special interest and importance in this volume.

I. Public Matters and Relations.
II. Contractual and Commercial Relations.
III. Corporations and Associations.
IV. Domestic Relations.
V. Fiduciary Relations.
VI. Torts; Negligence; Nuisance.
VII. Property Rights; Wills.
VIII. Civil Remedies; Practice and Procedure.
IX. Criminal Law and Practice.

I. Public Matters and Relations.

See also *infra*, III., *Public Service Company*.

Eminent domain. The power of the legislature to confer the right of eminent domain upon a tunnel company for a tunnel to drain, ventilate, and aid in securing mineral from mines along its course is upheld on the ground that the use is public. 106. The right of an interurban electric street railroad, with respect to acquiring the rights of abutting owners in a highway, is held to be upon the same plane with commercial railroads generally. 202. See also *infra*, VII.

Interstate commerce. The right of a state to confiscate cigarettes imported for personal use is denied. 528.

Waters. The right of the legislature to create a public right of way along the banks and beds of streams for fishing purposes is denied under the constitutional provision as to taking property for public use without compensation. 872.

Highways. The right of a municipal corporation to place polling booths in streets is denied under statutory authority to designate a polling place in a public, orderly, and convenient portion of the precinct, or, if none can be found there, in an adjoining one. 571.

Franchise. A municipal declaration of the forfeiture of a street franchise is held not to have the effect of a judicial determination. 321.

Public buildings. A municipal contract as to the location of a public building in consideration of a donation is held void as against public policy. 539.

State hospital. Liability of a state hospital for the insane on account of torts committed by an inmate who is permitted to work in the institution is denied, although the statute provides that it may sue and be sued. 269.

Municipal corporations. The power of a municipality to contract debts for corporate purposes is held not to be implied. 746. A proceeding to punish the violation of a municipal police ordinance which is not a statutory offense is held to be a civil, and not a criminal, proceeding. 782. A municipality is held not liable for damages done by a horse kept for a fire department, which escapes through the negligence of its employees. 629. An ordinance excluding persons from a saloon during the hours of closing is held valid. 109.

Counties. The authority of a county to employ a tax ferret is denied in the absence of express legislative grant. 339.

Physicians. One who periodically appears at a hotel to treat patients is held to be practising medicine within the state, although he lives in another state, from which his medicines are forwarded. 1023.

Taxes. Notes, mortgages, and other evidences of indebtedness from residents of the state to a nonresident creditor are held not to be subject to succession taxes at the debtor's residence. 953.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Bills and notes. The holder of a note as collateral is held not to be a bona fide holder where the principal obligation is collectible. 1042. Failure to transmit a notice of dishonor on the next day after receiving it is held to be excusable if the mail on that day went at an unreasonably early hour, so that it was difficult to mail the notice in time for it. 132. Indorsement for accommodation before delivery of a note for interest due on outlawed notes, for which the indorser was jointly and severally liable, is held sufficient to remove the bar from him. 562.

Contracts. A telegram to a bidder on a public work, saying, "You are low bidder. Come on morning train," is held not to constitute an acceptance. 177. An oral agreement to increase or decrease royalty under a written oil lease is held not to be in violation of the statute of frauds. 980. Possession relied upon as part performance to take a contract for lands out of the statute of frauds, it is held, must be notorious, exclusive, continuous, and in pursuance of the contract. 957. A contract made on Sunday, the formalities of completing which are not finished until another day, is held illegal. 1151. An attorney's agreement for services is held not invalid because a part of his work was the securing of legislative action, and his fee was contingent. 213. A contract of a foreign corporation is held void where the steps requisite to a right to do business in the state have not been complied with, although there is a penalty for such failure. 688. See also *infra*, V.

Covenants. A lessor's covenant to pay for repairs or improvements is held to be personal, and not to run with the land. 466. A purchaser's knowledge of an encumbrance is held not to preclude an action for breach of covenant. 309.

Carriers. The right to reject passengers having contagious diseases is sustained, notwithstanding they have tickets. 103. The right to stipulate against liability in consideration of reduced fare is denied in case of negligence. 1081. The liability of a carrier for the loss of a drummer's baggage is sustained where the carrier knew it contained samples; but a statutory double liability is denied. 1035. Delivery of goods to one whom a carrier was merely directed to notify is held not to be justified, where they were shipped to the consignor's own order. 1056. Failure to procure a clearance of goods which the carrier undertook to transport in bond and clear at the port of arrival is held to make it liable for injury to the goods because of such detention. 1060. The insanity of a locomotive engineer, which causes the wreck of a car, is held not to be an act of God which will excuse the carrier. 898. For carrier's negligence, see *infra*, VII.

Ticket scalping. A statute prohibiting the sale of railroad transportation without a certificate of authority from the railroads is upheld. 480.

Sales. A sale of real estate by an executor to the surety on his bond, under an order of court obtained by fraud, is held to be void, though the purchaser was innocent. 820. A buyer's right to retain goods and defeat action for the price because the goods do not comply with the contract is denied. 1167.

Insurance. An agent's insertion of false answers in an application is held not to be binding on the insurer where the representations are warranted by the applicant, to be true, and the insurer had not ratified the agent's act. 607. A rejection by a benefit association is held not to be a declination or refusal of insurance within the meaning of an application for life insurance. 247. An attempt to change by will the beneficiary of a benefit certificate which is in effect payable to the heirs of the member is held ineffectual. 930. A beneficiary in a life policy is denied any right of action against the insurer for breach of contract with the applicant in respect to assessments, reserve fund, and classification. 870. Officers of subordinate societies are held to have no implied authority to waive any rules and regulations of the order. 421. A building in process of erection is held not to be within the provision of a policy with respect to vacancy. 1137. An agent's representations or knowledge are held ineffectual to change the provisions of a written policy, in the absence of fraud or mutual mistake. 758. The failure of an insurer to inquire as to title does not waive any condition as to title or ownership. 231. Failure of arbitration through no fault of the insurer is held not to relieve from a provision against action on the policy before the loss is settled by arbitration, where it is not shown that arbitration is impossible. 288. The surrender value of a debtor's life insurance policies payable to his wife and children is held not subject to a creditor's bill, where the policies, made in good faith, antedated the indebtedness, although they might become payable to him if he lived to the end of the term. 456. A modification of the obligation made between a mortgagee and a subsequent grantee who has assumed

the debt is held to release the mortgagor. 666. An executory contract to convey insured property, with payment of consideration, but without any transfer of title or possession, is held not to make any change in interest, title, or possession, within the meaning of a forfeiture clause. 654.

Telegraphs. The duty of a telegraph company to ascertain the identity or authority of the sender of a message is denied in the absence of facts to create suspicion. 181. The liability of a telegraph company to an undisclosed principal of the addressee is denied. 678.

III. Corporations and Associations.

Corporations. The punishment of a corporation for contempt of an injunction by a fine is sustained. 1001. For contract of foreign corporation, see *supra*, II.

Banks. The liability of directors of a bank for default or negligence of the cashier is held to be enforceable if they have failed to exercise reasonable supervision. 597. The liability of a bank director in inducing the bank to give unlawful credit to a person, and misrepresenting the facts as to the paper discounted, is denied if he did it, not as director, but as agent for the borrower. 279.

Building and loan associations. The power of the managers of such an association to transfer the contract of a borrowing member to another association is denied. 439. On an advance by one association to take up a loan in another on partly matured stock, the amount still due is the net amount, and not the face value of the loan, whatever may be the form of the bookkeeping. 98. A change of the plan of a building association, making a material departure from its original plan, is held to justify a dissolution of its contract with a member. 1047.

Religious societies. A member expelled from a church for the fraudulent purpose of diverting its property in violation of the trust is held entitled to equitable relief, although the rules allow the expulsion without trial. 1154.

Labor unions. Money paid on demand of the union to prevent a boycott is held recoverable on the ground that it was got by extortion. 1198.

Public-service company. A public-service corporation for supply of electricity is held not to be acting in a public capacity in locating its power house, so as to be absolved from liability for injuring neighboring property by smoke, noise, and escaping electricity. 87.

Partnership. Means of knowledge, without actual knowledge, of a change in a firm, is held insufficient to exonerate the retiring members from liability on a subsequent renewal of the firm note. 800. A parol partnership to deal in real estate, by which one is to pay for land, take the title, and then convey a half interest upon payment of half the price, is held void under the statute of frauds. 427. The statute permitting arrest for fraud is held applicable to suits between partners. 130.

IV. Domestic Relations.

Divorce. Wife's refusal to follow her husband on change of domicil is held to constitute desertion. 145. The probable accretions of wealth to the husband are held proper to be considered as a basis for alimony. 909.

Married woman's rights. An action for alienation of affections of a husband is held authorized by a statute permitting a wife to sue for injuries as if sole. 643. A wife's right to contract is sustained in Kansas without regard to any separate estate, trade, or business. 547.

Parent and child. The right of a parent to sue a child for support is denied where another child is furnishing the support already. 1159.

V. Fiduciary Relations.

Executors. Ancillary appointment of a foreign executor is held sufficient to support a pending suit brought by him to foreclose a mortgage. 657. See also *supra*, II., *Executors*.

Receivers. The power of a receiver of a corporation to sue in a foreign jurisdiction, even with leave of the court, is denied. 824.

Agency. Authority to employ a detective to investigate the affairs of a corporation is held not to be conferred by power of attorney, given by a stockholder, to do all that he can do relating to the stockholder's personal business and estate. 843. A contract signed by an agent of a company, to be binding only when signed by one or more of its officers, is held not to be binding without signature by an officer, although the com-

pany alleged that the agent had power to make it, and that it had been ratified. 431. An agent who, by mistake, pays his principal's money to a third person is held entitled to sue in his own name for the money. 363.

VI. TORTS; NEGLIGENCE; NUISANCE.

Picketing. Strikers and their union are held properly enjoined from congregating about their former employer's place of business, and endeavoring to keep customers away from him. 302.

Unfair competition. Fraudulent intent is held necessary to make unfair competition by the use of names so as to make the trade think the goods of one person are those of another. 960. The use of the same trade name by a competitor in the same locality is held to give the first user protection against it as unfair competition. 447.

Assault on patron of business. A saloon keeper is held not to be liable for a personal injury to a patron by the bartender and others, who put alcohol on his feet and set it afire. 649.

Libel and slander. An oral charge of insolvency, against a merchant, is held not actionable *per se*, unless the words were actually spoken in relation to his business. 973. A written charge of insolvency of a bank, which names an individual in the same connection, is held not to make a libel *per se* on him if it does not refer to him or his business except by the aid of innuendo. 977. A peculiar case of alleged libel by a laudatory article is held sufficient to require trial on the merits. 861. Stating that a woman is "a dirty, vile woman" is held not to impugn her virtue, and not to be actionable. 560. To accuse one of being a member of a labor union and a labor agitator is held not libelous *per se*. 1091. A communication to a peace officer to aid in detection of crime is held privileged only when made in good faith, and not if reckless or malicious. 149.

Negligence. Liability for negligence in handling an automobile on a highway so as to frighten a team of horses is sustained in an extensive discussion of the subject. 1130. Negligence in the discharge of firearms is considered in a case of a sudden and accidental discharge of a gun, where it was held not to be established. 119. A railroad company is held not bound to keep a turntable in such condition that trespassing children may not be injured by playing on it. 80. The fact that safety gates at a railroad crossing are open is held not to justify a traveler in attempting to cross without any precaution as to approaching trains. 521.

Carrier's negligence. One who places himself under the charge of a carrier is held to be "a passenger being transported," within the terms of a statute providing protection, when he has gone on the station platform awaiting a train within a reasonable time before it is to start. 254. A street railway is held to fulfil its duty to a passenger when it exercises the utmost skill, diligence, and foresight consistent with the practical conduct of its business. 122. Starting a street car before a passenger has reached his seat is held not necessarily negligence. 558. Whether the usual time of the stoppage of a train was sufficient for a passenger to alight is held to be a question for the jury. 140. One alighting from a street car, going behind it, and stepping onto another track, where he is struck by another car going in the opposite direction, is held to be negligent. 729. Injury to a passenger by a dog on a street car is held to make the carrier liable. 947. Allowing a street car to become overcrowded, so that people have to stand upon the steps and platform, is held to require such care in running the car as not to endanger them. 399.

Injury to servants. Improper treatment of a sailor's fractured leg is held not to make the vessel owner liable if he used his best judgment. 49. A telegram to put a car with a broken drawbar next the cabin car is held not to constitute negligence on the part of the owner, where the conductor improperly puts the car in front of the cabin car, instead of behind it, at the end of the train. 407. A servant to whom defects are plainly obvious is held to assume the risk of them, although they are due to the master's negligence. 848, 854, 856. Knowledge of defective conditions is held insufficient to make an assumption of the risk by an employee, if the danger is imperfectly appreciated. 990. Attempting dangerous work in obedience to orders is held not to involve an assumption of the risk if it was not fully appreciated. 837. But if the risk is obvious, the servant assumes it. 830, 832. The assurance of the safety of work is held insufficient to prevent assumption of the risk, if the servant is fully aware of it. 971. Failure to repair defects within a definite time is held to make a continuance of work thereafter amount to assumption of risk. 913. The failure of a master to establish and enforce a proper rule or method is held to make him liable for an injury to a servant, though the negligence of a fellow servant is also involved. 516. The duty of an employee in a steel mill to warn other employees when a heat is to be blown is held

to make the former a vice principal with respect to that matter. 1161. Liability of a master for failure to perform his common-law duty with respect to safety of a mine is held not to be escaped by his employing a mine boss as required by statute, who is specifically charged with the duty in question. 1180. The duty of a master to furnish safe appliances is held not entirely fulfilled, with respect to a broken chain which is part of an equipment for handling iron, by merely furnishing a competent smith with sufficient materials to make the repairs. 220.

Injury by employee. A general employee assisting a third person without the master's knowledge or consent, in making repairs on the premises, is held not to make the master liable. 651. Injury to a child invited by an employee to ride on a wagon, but who falls off, is held not to make the master liable. 804. Employing a detective to investigate facts is held not to make the employer liable for an arrest which the detective makes to aid his investigation. 282. The shooting of the owner of baggage by the agent in charge, who was angered by his abuse, is held not to make the employer liable. 485.

VII. PROPERTY RIGHTS; WILLS.

Liquor license. A license to sell intoxicating liquors, which is by statute transferable, is held to be an asset in case of a receivership. 626.

Abandonment. Whether or not logs left for many years upon a rollway had been abandoned so as to defeat title was held to be a question for the jury. 573.

Forfeiture. Forfeiture by statute of all concealed weapons taken from persons was held not to depend upon a conviction of carrying such weapons. 358.

Deeds. A grantor delivering a deed in escrow, to be delivered after his death to the grantee, is denied the right to revoke it. 816.

Adverse possession. A quitclaim deed is held to be good color of title for adverse possession. 776.

Vendor and purchaser. A marketable title to land is held to mean a title free from reasonable doubt. 1170.

Eminent domain. Notice of hearing on questions of damages or compensation is held necessary in eminent domain. 169. See also *supra*, I.

Administration. A statute authorizing administration on an absentee's property without his knowledge or consent, and without notice to him, is held unconstitutional. 944. A demonstrative legacy, if the fund is ample to satisfy it, is held to stand on the same footing as specific legacies with respect to abatement, if the residue of the estate is insufficient to pay debts. 922. The distributive share of real estate of an heir indebted to the estate of his ancestor is held not chargeable with such indebtedness. 180.

Tenancy. The owner of an office building is held not to be required to keep outer doors unlocked on Sunday to enable the removal of large pieces of furniture in case of fire. 565. Foundations and walls of a building of which different floors are leased to different tenants are held not to be in the landlord's possession, within the rule as to his liability for defects in portions remaining within his control. 1142. A contract to make a crop on another's land, who is to have title to it and keep a portion for use of land, team, etc., and from the remainder deduct for supplies and necessaries furnished, is held to make the crop owner an employee, and not a tenant. 608.

Mines. The possessory right of the locator of a mining claim before applying for a patent is held to go, upon his death, by descent from the locator, subject to probate jurisdiction, and the heirs do not take directly from the government, as its beneficiaries. 910. The owner of an interest in a mining claim, who has been excluded by a co-owner, is held entitled to adverse his application and maintain an action in support thereof. 1126. The landowner's interest in coal remaining in place, subject to a lease of the right to mine a certain amount each year, is held subject to a judgment lien. 207. A deed reserving the oil and gas privileges in the premises is held to constitute an exception, and not a reservation. 477.

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Wills. The election by a widow, for nine years, to accept the terms of her husband's will which dealt with certain land in her name as if it were his, which her heirs had acquiesced in for eight years after her death, was held to preclude her administrator from dealing with the land as hers to pay debts. 1065. A bequest of personalty to a son after he reaches a certain age, and, if he dies be-

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2. Defects in the record title of one in possession of real estate in good faith under color of title will not prevent his obtaining a title by adverse possession. Hall v. Waterman, 4: 776, 77 N. E. 142, 220 Ill. 569.

3. Ignorance on the part of the true owner of title to real estate does not prevent the acquisition of a title adverse to it. Hall v. Waterman, 4: 776, 77 N. E. 142, 220 Ill. 569.

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2. When a wife is granted a divorce for the fault of her husband she is entitled as alimony to enough of his estate, including earnings, to make an equivalent of the support to which she was entitled as his wife; and this should equal at least her dower interest in the estate. Muir v. Muir, 4: 909, 92 S. W. 314, — Ky. —.

3. A wife, upon obtaining a divorce, may be allowed as alimony a share in a possession of real estate held by the husband with the consent of the owner. Muir v. Muir, 4: 909, 92 S. W. 314, — Ky. —.

4. Probable accretions of wealth to the husband from any source may be considered in fixing the amount to be allowed the wife on granting her a divorce. Muir v. Muir, 4: 909, 92 S. W. 314, — Ky. —.

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1. A proceeding for violation of a municipal police ordinance which is not a public offense under the statutes is, for the purpose of determining the method of review, a civil, and not a criminal, proceeding, although a fine to be enforced by imprisonment is provided for the violation. Fortune v. Wilburton, 4: 782, 142 Fed. 114, — C. C. A. —.

What matters reviewable generally.

2. Upon a request to direct a verdict for defendant on the ground that it is not the proper party to the suit, a question of law arises, which may be reviewed by the appellate court if the ruling is not supported by the evidence. Chicago, B. & Q. R. Co. v. Weber, 4: 272, 76 N. E. 480, 219 Ill. 372.

3. A reservation by the trial court of the question whether a fine imposed on defendant for violation of an injunction can be paid to complainants in satisfaction of their damages and expenses is merely interlocutory, and not subject to review on appeal. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

4. A verdict directed on specific but untenable grounds cannot be affirmed on other grounds unless it is clear beyond doubt that the new grounds could not have been obviated if they had been called to the attention of the defeated party at the time the verdict was rendered. Bank of Havelock v. Western U. Teleg. Co. 4: 181, 141 Fed. 522, — C. C. A. —.

Review of facts.

5. A decision by the trial court that the oath to an information was administered by the clerk instead of his deputy is conclusive on appeal. State v. Forsha, 4: 576, 88 S. W. 746, 190 Mo. 296.

6. The question whether or not the record contains evidence tending to support the cause of action is preserved for review in the appellate court by tendering a peremptory instruction at the close of the evidence to return a verdict in defendant's favor. McCormick Harvesting Mach. Co. v. Zakzewski, 4: 848, 77 N. E. 147, 220 Ill. 522.

7. In determining a question of proximate cause, the appellate court cannot reject testimony of a witness that, at the time of the accident, a machine which caused the injury ran faster than ever before, as unworthy of belief. Tuckett v. American Steam & Hand Laundry, 4: 990, 84 Pac. 500, — Utah —.

Facts not shown by record.

8. One convicted of contempt cannot, on appeal, question the sufficiency of the recitals on which the orders are based because not supported by the record, in the absence of a certificate by the clerk showing that the complete record is before the court. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

Objections and exceptions.

9. The appellate court is not precluded from considering exceptions which have been made a matter of record by the signature and seal of the trial judge because the record proper has been blended with the bill of exceptions and the whole treated as a bill of exceptions. Davidson v. Fraser, 4: 1126, 84 Pac. 695, — Colo. —.

10. Error in allowing interest on a note at a greater amount than is authorized by statute is sufficiently questioned under § 5055, 2 Ballinger's Anno. Codes & Statutes, by an exception "that the evidence is insufficient to support the finding and that the same is contrary to the evidence." Bank v. Doherty, 4: 1191, 84 Pac. 872, — Wash. —.

11. Error in the acceptance of jurors cannot be preserved by the mere objection, "challenged for cause." State v. Forsha, 4: 576, 88 S. W. 746, 190 Mo. 296.

Questions not raised below.

12. An objection that, by filing a general denial and failing to plead the statute of frauds, the defendant waived any defense under the statute, cannot be raised for the first time in the supreme court. Baldwin v. Baldwin, 4: 957, 84 Pac. 568, — Kan. —.

13. The want of capacity of a voluntary association to maintain an action in its own name cannot be raised for the first time on appeal. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

Error waived or cured below.

14. Failure to specify, in the motion for new trial, the particular error complained of in the admission or rejection of evidence, constitutes a waiver thereof. Miller v. Nuckolls, 4: 149, 91 S. W. 759, — Ark. —.

15. Error in the remarks of the presiding judge to the jury is waived if not referred

to in the motion for new trial. Miller v. Nuckolls, 4: 149, 91 S. W. 759, — Ark. —.

16. Error in overruling a challenge for cause to a juror or on account of the remarks of counsel for the defendant in error in his opening statement below cannot be considered on appeal, where the record does not disclose that the court's attention was called to the alleged irregularities by motion for a new trial. Schwarzschild & S. Co. v. Weeks, 4: 515, 83 Pac. 406, — Kan.—.

17. The trial of issues tendered by a pleading as though they had been properly made, in the absence of any plea, answer, or replication which raises them, estops the parties from subsequently denying that the issues were duly made, and from taking any advantage of the lack of the plea, answer, or replication. Bank of Havelock v. Western U. Teleg. Co. 4: 181, 141 Fed. 522, — C. C. A. —.

18. The omission to assert in the pleadings the invalidity of a contract because contrary to the Sunday law does not preclude the raising of the objection at a later time in an action to enforce it. Jacobson v. Bentzler, 4: 1151, 107 N. W. 7, — Wis. —.

19. Error in denying motion for nonsuit at the close of plaintiff's evidence is cured by the introduction of evidence by defendant which supplies defects in plaintiff's proof. Lyon v. United Moderns, 4: 247, 83 Pac. 804, — Cal. —.

Grounds for reversal.

20. Giving an instruction which has no basis in the evidence is reversible error. State v. Smith, 4: 539, 106 N. W. 187, — Iowa, —.

21. It is reversible error to give an instruction presenting an hypothesis which has no foundation in the evidence adduced, unless the court can clearly see that it did not prejudice the exceptor. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

22. Charging that, if the evidence is believed, the jury must find that the allegations of the complaint are true, is reversible error where the action is for breach of contract, which is alleged to have been actuated by malice and bad faith, where there is no evidence to support such charge. Pullman Co. v. Krauss, 4: 103, 40 So. 398, — Ala. —.

23. The discretion of the court to be exercised in case of the attempted forfeiture of a street railway privilege in a street by the council of a town is a sound legal discretion, subject to review, and the appellate court will reverse the action of the trial court when, in its opinion, relief has been improperly denied. Wheeling & E. G. R. Co. v. Triadelphia, 4: 321, 52 S. E. 499, — W. Va. —.

24. That a verdict is against the weight of the evidence is no ground for reversal. Bennett v. Louisville R. Co. 4: 558, 90 S. W. 1052, — Ky. —.

25. That plaintiff's right to recover personal property was made to depend, by the court in its instruction, upon ownership rather than right of possession, is not reversible error, where the word "ownership" was used in the sense of right of possession, and it is improbable that the jury was misled. Log Owners' Booming Co. v. Hubbell, 4: 573, 97 N. W. 157, 135 Mich. 65.

26. Refusal of a general and abstract instruction is not reversible error. Spears v. People, 4: 402, 77 N. E. 112, 220 Ill. 72.

27. In the absence of a request in a murder trial for a definition of the words "in the heat of passion," the omission to give one is not a ground for reversal. State v. Buffington, 4: 154, 81 Pac. 405, 71 Kan. 804.

28. Permitting counsel to state to the jury, in an action for charging a girl with fornication, that one guilty of making such charge is not fit to live in the county, is not reversible error. Miller v. Nuckolls, 4: 149, 91 S. W. 759, — Ark. —.

29. That the court rebuked improper remarks by counsel to the jury in a quiet manner merely is not reversible error, where the objecting party offered no instructions requiring them to disregard the remarks. Miller v. Nuckolls, 4: 149, 91 S. W. 759, — Ark. —.

30. The refusal of a bill of review because of alleged newly discovered evidence will not be reversed on appeal unless there has been an abuse of the fair discretionary power with which the trial court is invested in the matter. Safe Deposit & T. Co. v. Gittings, 4: 865, 62 Atl. 1030, 102 Md. 456.

31. Submitting to the jury a form of verdict in a criminal case without instructing them it is to be used only in case they find defendant guilty is not reversible error, where other instructions plainly indicate that such is the fact. State v. Davis, 4: 1023, 92 S. W. 484, 194 Mo. 485.

32. A judgment sustained by the evidence will not be reversed on appeal. Siefker v. Paysee, 4: 119, 40 So. 306, 115 La. 953.

33. The defendant is not prejudiced by the court's failure to instruct as to the law upon a matter not available as a defense. Schwarzschild & S. Co. v. Weeks, 4: 515, 83 Pac. 406, — Kan. —.

34. A defeated party who has introduced at the trial all the legal evidence he offered, and has rested his case, is thereby estopped from denying that he can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in his favor, and if the bill of exceptions contains all the evidence, and it is clear beyond doubt that it could not sustain a verdict in his favor, an instruction by the court to return a verdict against him upon some other, but untenable, ground, is error without prejudice, and no ground for reversal. Bank of Havelock v. Western U. Teleg. Co. 4: 181, 141 Fed. 522, — C. C. A. —.

35. Although, upon petition for writ of error or appeal, the appellate court is re-

quired to grant the writ prayed for unless the decision is clearly right, it will not overrule a decision refusing an injunction unless error is manifest. Townsend v. Norfolk R. & Light Co. 4: 87, 52 S. E. 970, — Va. —.

Appeal bond.

36. That an appeal bond prepared on a printed form, the penalty of which is the minimum provided for an appeal merely, contains words making it a supersedeas bond also, will not vitiate it, where no attempt has been made to use it as such, but the latter words will be rejected as an inadvertence. Douglas v. Badger State Mine, 4: 196, 83 Pac. 178, — Wash. —.

ARBITRATION.

Provision for, in Insurance Policy, see INSURANCE, 22–25.

ARREST.

Exemplary Damages for Rough Treatment and Confinement in Cold Jail, see DAMAGES, 17.

1. The statute permitting arrest for fraud applies in an action by one partner against another when, by reason of the character of the transaction, or the general termination of the partnership dealings, an action at law will lie against one partner in favor of the other. Ledford v. Emerson, 4: 130, 52 S. E. 641, 140 N. C. 288.

2. The mere fact that one arrested for debt had filed his petition in bankruptcy before his arrest is not sufficient to show that the arrest was illegal, where the pendency of the proceedings does not appear. Gibson v. Holmes 4: 451, 62 Atl. 11, 78 Vt. 110.

NOTES.

Right to arrest partner in civil action or proceeding (Case Note). 130

ARSON.

An attempt to commit arson is made by employing and paying persons to do the act, furnishing them materials and a horse, showing them how to start the fire, and starting them on their way, although the persons employed do not in fact intend to carry out their agreement, and one is acting with the knowledge of the owner of the building, for the purpose of entrapping the others. State v. Taylor, 4: 417, 84 Pac. 82, — Or. —.

ASSAULT AND BATTERY.

Right to Punitive Damages for, see DAMAGES, 15, 16.

Mere Words as Provocation, see HOMICIDE, 3.

By Bartender on Guest, see MASTER AND SERVANT, 43.

ASSETS.

Of Insolvent's Estate, see RECEIVERS, 1.

ASSIGNMENT.

A right to recover damages for fraudulent representations may be assigned under a statute permitting assumpsit to be brought in such cases, and providing that the cause of action shall survive. Hicks v. Steel, 4: 279, 105 N. W. 767. — Mich. —.

ASSUMPSIT.

1. Money paid by a brick manufacturer at the demand of a labor union, to prevent its members from refusing to handle his product because he had sold to unfair bosses, may be recovered back, since it was obtained by extortion. March v. Bricklayers' & Plasterers' Union, 4: 1198, 63 Atl. 291, — Conn. —.

2. An action for money had and received may be maintained by one who has loaned money to a municipal corporation, which has been used by it for legitimate corporate purposes authorized by law, although the municipality had no power to borrow the money, and the note given therefor was void. Luther v. Wheeler, 4: 746, 52 S. E. 874, — S. C. —.

3. One whose property has been improved by the partial compliance by a municipality with its agreement to locate public buildings near it in consideration of a donation by him towards their cost cannot, upon the refusal of the municipality fully to comply with its agreement, recover back the amount paid by him as money had and received. Edwards v. Goldsboro, 4: 589, 53 S. E. 652, —N. C. —.

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Distinction between Assumption of Risk and Contributory Negligence, see NEGLIGENCE, 2.

ATTACHMENT.

1. A contract reading, "I have sold" my property for a certain price to a certain person, who has paid a sum to be forfeited provided the remainder of the purchase price is not paid before a certain future date, and providing that, upon such payment, a warranty deed will be made, does not amount to a sale, so as to constitute an equitable conversion and prevent the attachment of the land for a debt of an heir of the grantor after his decease. Sheehy v. Scott, 4: 365, 104 N. W. 1139, — Iowa, —.

2. The signing of a deed by an heir will not prevent the attachment of his interest in the estate if the deed has not been signed by the remaining heirs whose signatures are to be secured before delivery of the deed. Sheehy v. Scott. 4: 365, 104 N. W. 1139, — Iowa, —.

3. An equitable conversion effected by an election to exercise an option to buy real estate will not relate back to the date of the contract, so as to dissolve an attachment

levied on the land as that of the grantor prior to the election, and while the grantor retains the ownership. Sheehy v. Scott, 4: 365, 104 N. W. 1139, — Iowa, —.

ATTEMPT.

To Commit Arson, see ARSON.

NOTES.

What sufficient to constitute attempt to commit arson (Case Note). 417

ATTORNEYS.

Validity of Contract with Attorney to Procure Legislative Action, see CONTRACTS, 10, 11.

Vacating Judgment Entered on Motion of, see JUDGMENT, 6.

1. The legal presumption is that an attorney has authority to appear for the person for whom he assumes to act. Bacon v. Mitchell, 4: 244, 106 N. W. 129, — N. D. —.

2. Under his general authority, an attorney has the exclusive control of the remedy, and he may discontinue the action by a dismissal without prejudice, and his client is bound by his act. Bacon v. Mitchell, 4: 244, 106 N. W. 129, —N. D. —.

3. A suitor who does not disclaim the authority of an attorney who assumes to represent him in an action, when it is his duty to do so, may not do so afterwards. He cannot take the hazard of a trial, and, when unsuccessful, allege as ground for vacating the judgment that the attorney who conducted the trial had no authority. Bacon v. Mitchell, 4: 244, 106 N. W. 129, — N. D. —.

ATTORNEYS' FEES.

Right to Include, in Damages for Breach of Covenant, see DAMAGES, 7.

AUTOMOBILES.

1. One driving an automobile on a public highway is bound to take notice that it is likely to startle horses when driven toward them at a rapid rate. McIntyre v. Orner, 4: 1130, 76 N. E. 750, — Ind. —.

2. The driver of an automobile is bound to take notice of its effect upon horses which it is approaching on a highway, and, if they exhibit signs of fright, to slow up, stop the machine, or do whatever is reasonably required to relieve the persons in the carriage of their perilous situation. McIntyre v. Orner, 4: 1130, 76 N. E. 750, — Ind. —.

3. That the driver of an automobile successfully passed a team of horses on a highway when overtaking them from the rear does not justify his assuming that he can do so when meeting them, if, when 200 feet away, he sees that they are making violent efforts to break away. McIntyre v. Orner, 4: 1130, 76 N. E. 750, — Ind. —.

4. The necessity of constant observation of the road to avoid holes and guide his machine in safety does not justify the driver of an automobile in driving the machine at more than 15 miles an hour to within 15 or 20 feet of a team of horses which are badly frightened at its approach. McIntyre v. Orner, 4: 1130, 76 N. E. 750, — Ind. —.

BAGGAGE.

See CARRIERS, 13, 14.

BANKRUPTCY.

Effect of, on Right to Arrest for Debt, see ARREST, 2.

BANKS.

See also CHECKS.

Liability of directors.

1. A bank director cannot be held liable for breach of his duty as such in inducing the bank to extend credit to an individual beyond the statutory limit, and in making false representations as to paper presented for discount, where he was not at the time acting as director, but as agent for the borrower. Hicks v. Steel, 4: 279, 105 N. W. 767, — Mich. —.

2. The directors of a bank are not held, as a matter of law, to know all its affairs, or what its books and papers would show; and such knowledge cannot be imputed to them for the purpose of charging them with liability. Mason v. Moore, 4: 597, 76 N. E. 932, 73 Ohio St. 275.

3. The directors of a bank are authorized to appoint a cashier and confer upon him the usual powers pertaining to such an office, and to him may be properly confided the custody of the money, securities, and valuable papers of the bank, and the supervision of its books and accounts; and while this does not absolve the directors from the duty of reasonable supervision and the exercise of that degree of care which is exercised by ordinarily careful and prudent men acting under similar circumstances, yet they are not insurers of the fidelity of the cashier or other agents whom they have appointed, and where the directors act in good faith and with ordinary care they are not responsible for losses resulting from the wrongful acts or omissions of the cashier or other agents unless the loss is a consequence of their own neglect of duty. Mason v. Moore, 4: 597, 76 N. E. 932, 73 Ohio St. 275.

4. In an action against the directors of a national bank by one who purchases some of its stock, relying on the statements contained in its report to the Comptroller of the Currency as to its resources and liabilities, which report was attested by the directors and published as the statute directs, some of which statements are false, whereby the purchaser is damaged, it is not error for the court to charge the jury that "it must appear by a preponderance of the evidence that, at the time of the attesting and publication of said report, the directors so attesting this report, or who assented to and directed the publication of the same, did so knowing said report to be false, or under

such circumstances as will warrant the jury in finding, by a preponderance of the evidence, that such director, or directors, by the exercise of ordinary care and prudence, would have known that the said report was false in some one or more of the particulars set forth in the petition." Mason v. Moore, 4: 597, 76 N. E. 932, 73 Ohio St. 275.

NOTES.

Liability of bank director for breach of duty as such when he acts for himself or for a third person in the transaction (Case Note). 279

Liability of directors of bank for default or negligence of cashier (Case Note). 597

BENEVOLENT SOCIETIES.

Insurance by, see INSURANCE, 1, 3, 5, 6, 31–33.

BILLS AND NOTES.

Effect of Note for Interest Due on Outlawed Notes to Remove Bar, see LIMITATION OF ACTIONS, 2.

Payment to Mortgagee of Amount of Note Secured by Mortgage, see PAYMENT.

Liability of Retiring Members of Partnership on Firm Note, see PARTNERSHIP.

Pledge as Collateral Security; Cancelation for Fraud, see PLEDGE, 1.

1. The character of a debt represented by a note given without authority is not changed by renewals of the note. Luther v. Wheeler, 4: 746, 52 S. E. 874, — S. C. —.

2. The indorsement and transfer of a note void because issued by a municipal corporation for borrowed money is not sufficient to give it validity. Luther v. Wheeler, 4: 746, 52 S. E. 874, — S. C. —.

3. An indorsement of the name of the payee on the back of a promissory note under the words "assign and transfer" vests title in the assignee free from the equities existing between the parties to the instrument. Leahy v. Haworth, 4: 657, 141 Fed. 850, — C. C. A. —.

Fraud in procuring.

4. One induced by fraud to sign a promissory note which is represented to be merely a part of a contract of a different nature, which he intends to sign, and which is so concealed that its true character is not discovered, is not liable thereon,—at least to one not a bona fide holder,—in the absence of such negligence on his part as will estop him from asserting his defense. Hulett v. Marine Sav. Bank, 4: 1042, 106 N. W. 879, — Mich. —.

NOTES.

Bills and notes; time allowed for mailing check or notice of dishonor as affected by the hour at which the mail closes or departs (Case Note). 132

Is holder of note as collateral security entitled to the rights of a bona fide holder when principal obligation is collectible (Case Note). 1042

BONDS.

Forthcoming Bonds, see LEVY AND SEIZURE.

Appeal Bond, see APPEAL AND ERROR, 36.

BREACH OF PROMISE.

Damages for, see DAMAGES, 9.

Admissibility of Evidence of Attempted Compromise, see EVIDENCE, 26.

Admissibility of Evidence of Seduction in, see EVIDENCE, 27, 28.

Preventing Comments of Counsel in Action for, see TRIAL, 12.

BROKERS.

See TICKET BROKERS.

BUILDING AND LOAN ASSOCIATIONS.

Failure to Comply with Provisions as to Doing Business in State, see CORPORATIONS, 2.

Estoppel of One Permitting Void Deed, Executed in Proceedings to Foreclose Building and Loan Association Mortgage, to Remain on Record, to Assert Its Invalidity against Purchaser of Assets of Association, see ESTOPPEL, 2.

1. In case of an advance by one loan association to take up a loan in another upon stock which has partly matured, the net amount of the loan is the sum still due, and not the face value of the loan, although the latter amount is charged on the books of the association, and a credit as of an advance payment thereon given for the withdrawal value of the stock in the other association. Butson v. Home Sav. & T. Co. 4: 98, 105 N. W. 645, — Iowa, —.

2. That an action to foreclose a mortgage against a borrower from a building and loan association is brought by a receiver does not deprive the borrower of the benefit of a statute providing that, when such association seeks to enforce one of its contracts, no greater recovery can be had than the net amount of principal actually received, with interest at not to exceed a certain rate on the net amount of the loan. Butson v. Home Sav. & T. Co. 4: 98, 105 N. W. 645, — Iowa, —.

3. The character of a payment to a building and loan association as one in reduction of the loan is not changed by the fact that, as a matter of bookkeeping, the credit is not in fact applied upon the loan, but is entered upon some other account. Butson v. Home Sav. & T. Co. 4: 98, 105 N. W. 645, — Iowa, —.

4. A building and loan association contract of loan, stipulating for the payment of a monthly premium, limited to a certain number of payments, is not violative of the provision of W. Va. Code 1899, chap. 54, § 26, relating to the premium in such contracts. Burkheimer v. National Mut. Bldg.

& L. Asso. 4: 1047, 53 S. E. 372, — W. Va. —.

5. Suspension by a building and loan association of the payment of dues on its stock by its members for an unreasonable time, so as to work a material departure from its general plan and scheme of satisfying loans made to its members of the ultimate value of their shares of stock by maturing the stock, affords ground for dissolution of the contractual relations existing between it and a member to whom such loan has been made. Burkheimer v. National Mut. Bldg. & L. Asso. 4: 1047, 53 S. E. 372, — W. Va. —.

6. The board of managers of a building and loan association has no power to transfer to another association the contract of a borrowing stockholder. Cobe v. Lovan, 4: 439, 92 S. W. 93, 193 Mo. 235.

7. That the foreclosure of a building and loan association mortgage is ordered by its former president will not validate the proceeding if he is acting as agent of another association to which the former association has attempted to transfer its assets. Cobe v. Lovan, 4: 439, 92 S. W. 93, 193 Mo. 235.

8. A member of a building and loan association who has borrowed from it the ultimate value of the stock subscribed by him, and who has the right to sever his relations with the association by reason of the gross mismanagement of its affairs, and elects to do so, should be charged with the amount of the loan and legal interest thereon from the date on which he received the money, and be credited with the interest and premium paid until the date on which his right to withdraw accrued, and the value of his stock as of such date, as nearly as the same can be ascertained, making due deductions for his share of the expenses and losses sustained up to that date, and on the balance thus found to be due from him he should be charged with interest, and credited with all payments thereafter made by him, whether on account of dues, interest, or premium; and in applying credits before, on, and after said date, the rule governing partial payments should be observed and followed. Burkheimer v. National Mut. B. & L. Asso. 4: 1047, 53 S. E. 372, — W. Va. —.

9. A borrowing member of a loan association is not estopped from demanding a dissolution of the contractual relations existing between him and the association, which has suspended the payment of dues on its stock by its members for an unreasonable time, so as to work a material departure from its general plan of satisfying loans made to its members, by his having voted for an amendment to the by-laws of the association, conferring upon its directors power to suspend payment of dues. Burkheimer v. National Mut. Bldg. & L. Asso. 4: 1047, 53 S. E. 372, —W. Va. —.

NOTES.

Building association; transfer of amount from another association; principal of loan (Case Note). 98

Right of building association to transfer loan made to member (Case Note). 439

Change of plan of building and loan association; effect on contract (Case Note). 1047

CARRIERS.

See also ACT OF GOD.

Burden of Establishing that Act of God Responsible for Loss, see EVIDENCE, 14.

Damages for Breach of Contract, see DAMAGES, 5, 18.

Forbidding Sale of Railroad Tickets by Brokers, see COMMERCE, 1; CONSTITUTIONAL LAW, 4, 5, 7.

Presumption of Negligence from Injury to Passenger, see EVIDENCE, 4, 6, 13.

Sufficiency of Pleading as to Relation of Passenger and Carrier, see PLEADING, 2.

Statute Prohibiting Ticket Brokerage Business, see TICKET BROKERS.

Question for Jury Whether Carrier Might Have Known of Insanity of Engineer, see TRIAL, 23.

Who are common carriers.

1. A common carrier of goods which transports live stock is, as to the latter property, also a common carrier. Central of Georgia Ry. Co. v. Hall, 4: 898, 52 S. E. 679, 124 Ga. 322.

2. The ownership of the means of transportation is not necessary to constitute one a common carrier. J. H. Cownie Glove Co. v. Merchants' Dispatch Transp. Co. 4: 1060, 106 N. W. 749, — Iowa, —.

Duty and liability to passengers.

3. A street railway company is not an insurer of its passengers, nor bound to do everything that can be done to insure their safety, but it fulfils its obligations in that regard when it exercises the utmost skill, diligence, and foresight consistent with the practical conduct of the business in which it is engaged. Omaha Street R. Co. v. Boesen, 4: 122, 105 N. W. 303, — Neb. —.

4. A street car company which has so overcrowded a car that passengers are compelled to stand upon the steps and platform is bound to regulate the speed of the car so as not to endanger persons so situated. Alton Light & T. Co. v. Oller, 4: 399, 75 N. E. 419, 217 Ill. 15.

5. It is not negligence to start a street car before an incoming passenger has reached a seat, where there is nothing in his appearance to indicate that he needs unusual care and precaution for his protection. Bennett v. Louisville R. Co. 4: 558, 90 S. W. 1052, — Ky. —.

6. A street car company is liable for injuries inflicted upon a passenger by a dog permitted to be in a coach set apart for passengers. Westcott v. Seattle, R. & S. R. Co. 4: 947, 84 Pac. 588, — Wash. —.

7. A passenger is not bound to make

strict proof of the amount alleged to have been received by the carrier for his transportation, in an action to recover damages for negligently injuring him. Pittsburgh, C. C. & St. L. R. Co. v. Higgs, 4: 1081, 76 N. E. 299, 165 Ind. 694.

To whom such duty owed.

8. The duty which a railway company owes to a passenger, to exercise the highest degree of care for his safety which is reasonably practicable, does not cease until the passenger has reached his destination, and left the train. Chicago, R. I. & P. R. Co. v. Wimmer, 4: 140, 84 Pac. 378, — Kan. —.

9. In order to bring a person within the station house or upon the platform of a railroad station within the protection of the legal duties owing by a common carrier to its passengers, a person intending to become a passenger must go to the station at a reasonable time before the time fixed for the departure of the train upon which he intends to take passage, in a proper manner, and there, either by the purchase of a ticket or in some other manner, indicate to the carrier his intention to take passage, and thus place himself in the carrier's charge. Fremont, E. & M. Valley R. Co. v. Hagblad, 4: 254, 101 N. W. 1033, — Neb. —.

10. From the time a passenger places himself under the charge of the carrier, as he begins his journey, until he is afforded the opportunity to leave the premises of the carrier, at its termination, he is "a passenger being transported" within Cob. (Neb.) Ann. Stat. 1903, chap. 47, p. 2876, § 1039, unless, by some act not attributable to the carrier, the relation ceases. Fremont, E. & M. Valley R. Co. v. Hagblad, 4: 254, 101 N. W. 1033, — Neb. —.

11. A railroad company owes only ordinary care to persons impliedly invited upon its platform who are not passengers. Fremont, E. & M. Valley R. Co. v. Hagblad, 4: 254, 101 N. W. 1033, — Neb. —.

Stipulation against liability.

12. Carrying a passenger at a reduced fare does not entitle a railroad company to stipulate for an exemption from liability for negligently injuring him. Pittsburgh, C. C. & St. L. R. Co. v. Higgs, 4: 1081, 76 N. E. 299, 165 Ind. 694.

Baggage.

13. A railroad company which checks sample cases as baggage, knowing their nature, assumes liability for their loss as though they were baggage. New Orleans & N. E. R. Co. v. Shackleford, 4: 1035, 40 So. 427, 87 Miss. 610.

14. A statute imposing double liability upon a railroad company for baggage lost by its carelessness does not apply to sample cases transported as baggage. New Orleans &. N. E. R. Co. v. Shackleford, 4: 1035, 40 So. 427, 87 Miss. 610.

Sleeping car company.

15. To rescind a contract to carry a passenger on a sleeping car the company must tender back the money paid for the passage. Pullman Co. v. Krauss, 4: 103, 40 So. 398, — Ala. —.

16. A sleeping car company may refuse to admit to its car a person having a contagious disease, although he has purchased a ticket for passage thereon. Pullman Co. v. Krauss, 4: 103, 40 So. 398, — Ala. —.

17. A rule of a sleeping car company not to admit to its cars persons afflicted with contagious disease is reasonable. Pullman Co. v. Krauss, 4: 103, 40 So. 398, — Ala. —.

Duty and liability as to freight.

18. A carrier who fails to comply with its undertaking to transport goods from a foreign country and deliver them in bond at an inland port of entry, clearing them at the port of first arrival, by failure to procure such clearance, is liable for injury to the goods while detained at such port, not arising from inherent quality of, or defect in, the goods, the act of God, of the owner, or of the public enemy. J. H. Cownie Glove Co. v. Merchants' Dispatch Transp. Co. 4: 1060, 106 N. W. 749, — Iowa, —.

19. An order from the shipper of goods consigned to shipper's order, duly accepted by the carrier and noted on the original bill of lading by its agent, directing a diversion of the goods from one destination to another, is equivalent to a demand for delivery. Atchison, T. & S. F. R. Co. v. Schriver, 4: 1056, 84 Pac. 119, — Kan. —.

20. The general rule that an accession falls to the principal applies to sacks supplied by a dealer in flour to a manufacturer, to be used in the production of sacks of flour for the market; and the claim of a dealer to the sacks of a car load of sacks of flour which a carrier has received from the manufacturer for transportation according to the shipper's order will not justify the carrier in withholding delivery according to such order. Atchison, T. & S. F. R. Co. v. Schriver, 4: 1056, 84 Pac. 119, — Kan. —.

21. That a claimant of sacks in which a car load of flour has been shipped represents to the carrier that he expects to be able to arrive at an understanding with the shipper within a few days will not justify the carrier in withholding delivery according to the shipper's order. Atchison, T. & S. F. R. Co. v. Schriver, 4: 1056, 84 Pac. 119, — Kan. —.

22. After a shipper of goods consigned to shipper's order has elected to treat the property as converted on account of the carrier's wrongful neglect or refusal to deliver according to his order, and has notified the carrier of such election, he is no longer under obligation to defend suits relating to the property, or to aid the carrier in disposing of it. Atchison, T. & S. F. R. Co. v. Schriver, 4: 1057, 84 Pac. 119, — Kan. —.

23. It is the duty of a railway company which has received from the owner for carriage a quantity of goods consigned to shipper's order to deliver in accordance with such order, and only in accordance with such order; and a failure or refusal, without lawful excuse, so to deliver, will render

the carrier liable in conversion for the value of the goods. Atchison, T. & S. F. R. Co. v. Schriver, 4: 1056, 84 Pac. 119, — Kan. —.

24. The fact that a person to be notified of the arrival of goods consigned to shipper's order takes them from the carrier's possession without its knowledge or consent, and detains them in his own warehouse, will afford no justification for the carrier's failure to comply with an order from the shipper diverting the consignment. Atchison, T. & S. F. R. Co. v. Schriver, 4: 1056, 84 Pac. 119, — Kan. —.

Limiting liability.

25. A railway company, in its capacity as a common carrier, may, as a basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment, embracing an actual and bona fide agreement as to the value of the property to be transported, and in case of its loss, damage, or destruction the shipper will be bound by the agreed valuation; but a mere general limitation as to the value, expressed in a bill of lading and amounting to no more than an arbitrary preadjustment of the measure of damages, will not, though the shipper assent in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value. Central of Georgia Ry. Co. v. Hall, 4: 898, 52 S. E. 679, 124 Ga. 322.

26. While a common carrier cannot limit his legal liability by any notice given, either by publication, or by entry on receipts given, or tickets sold, he may, by special contract, relieve himself of his common-law liability as an insurer, and may contract against liability arising from certain losses which do not involve negligence on the part of himself or his servants; but he cannot, even by special contract, exempt himself from liability for loss of goods intrusted to him, where the loss arises from such negligence. Central of Georgia Ry. Co. v. Hall, 4: 898, 52 S. E. 679, 124 Ga. 322.

27. A carrier of live stock may, by special contract, so limit its liability for loss or damages that it will be liable only in the event that it is guilty of gross negligence. Central of Georgia Ry. Co. v. Hall, 4: 898, 52 S. E. 679, 124 Ga. 322.

NOTES.

Carrier; measure of diligence required toward passenger on street railway (Case Note). 122

Duty to passenger on overcrowded street car (Case Note). 399

Starting street car before passenger is seated (Case Note). 558

Injury to street car passenger who, upon alighting, passes around end of car, and is struck by car on other track (Case Note). 720

Right of passenger carrier to stipulate against liability in consideration of reduced fare (Case Note). 1081

Right of carrier to reject persons having contagious disease (Case Note). 103

Time allowed passenger to alight (Case Note). 140

Meaning of phrase "a passenger being transported," in statute defining duty and liability of carriers to passengers (Case Note). 254

Liability of carrier for injury to passenger by dog or other animal (Case Note). 947

Liability of carrier for loss of drummer's baggage (Case Note). 1035

Liability of carrier for property removed by, or delivered to, one whom it was directed to notify (Case Note). 1056

Liability for failure to forward bonded merchandise (Case Note). 1060

CARRYING WEAPONS.

Conviction of the offense of carrying concealed weapons is not necessary to work a forfeiture of them under a statute prescribing a punishment for such offense, and providing that all concealed weapons taken from persons violating this statute shall be forfeited to the county. McConathy v. Deck, 4: 358, 83 Pac. 135, — Colo. —.

CERTIORARI.

Only judicial action is reviewable by the writ of certiorari, under W. Va. Code 1899, chap. 110, §§ 2, 3, which does not alter the scope of the writ as it was by the common law, in respect to the nature of the proceedings reviewable by it. Wheeling & E. G. R. Co. v. Triadelphia, 4: 321, 52 S. E. 409, — W. Va. —.

CHARITIES.

NOTES.

Liability of eleemosynary institution maintained by state or municipality for personal tort of agent or servant (Case Note). 269

CHECKS.

Validity of Check Given on Sunday, see SUNDAY, 2.

1. Neither the payee nor his agent receiving a check drawn on a bank in another place is required to transmit it by the only, or last, mail of the day next after its receipt, if such mail closes or departs at an hour so early as to render it inconvenient for the holder to avail himself of it. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

2. The payee of a check, in the absence of any agreement to the contrary, and of any circumstances known to him, making it imprudent to do so, may indorse and deliver the check to a bank for collection, and while this does not extend the time within which it must be forwarded for presentment, yet the bank is not required to forward it on the next day after its receipt by the payee, if there be no reasonably convenient means of doing so, within the banking hours of that day. Lewis, H.

& Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

3. The drawer of a check sent to a distant place to be forwarded for presentation, by allowing his funds to remain in the drawee bank, and the payee, by accepting the check, evince belief in the solvency of the bank, and the former voluntarily takes the risk of its solvency during the reasonable period necessary for presentment of the check in the usual manner. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

4. The parties to a check drawn on a bank and sent to a distant place to be forwarded for presentation are deemed in law to have acted with knowledge of the usual diligent method of making such presentment through a bank at the place to which it is sent, and to have agreed to suffer any reasonable delay incident to such mode of presentment. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

5. The drawer, in delivering a check to an agent of the payee, having no authority to indorse it, at the place of business of the drawer, impliedly agrees to allow such additional time for presentment as may be necessary for the transmission of the check to the principal of the agent. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

6. A person receiving a check on a fund in the hands of a bank, for the amount of a demand against the drawer thereof, is bound to exercise reasonable diligence in making presentment thereof for payment, if he wishes to avoid risk of loss by insolvency of the drawee. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

7. If the payee of the check and the drawee reside, or have their places of business, in the same city or town, presentment must be made before the expiration of business hours of the day next after the day of the receipt thereof. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

8. If the person receiving a check and the bank on which it is drawn are in different places, it must be forwarded, for presentment, by mail or other usual mode of transmission, on the next day after the receipt thereof at the place in which the payee resides or does business, if reasonably and conveniently practicable; and, if it is not so practicable, then by the next mail, or other similar means of conveyance, leaving after said date. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

9. Failure to present a check does not bar recovery from the drawer, if the time intervening between delivery thereof and the failure of the bank is not sufficient for presentment by the exercise of such diligence as the law requires. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

CIGARETTES.

Right to Hold in Original Package, see COMMERCE, 2.

A statute making it unlawful to keep or own cigarettes does not apply to the act of smoking cigarettes, or of having them in possession for the sole purpose of smoking them,—at least where the title states that the act is to regulate, and, in certain cases, prohibit, the use of cigarettes; and the words "keep" and "own" are preceded by those governing the manufacture, sale, and giving away of such articles. State v. Lowry, 4: 528, 77 N. E. 728, — Ind. —.

COLLATERAL-INHERITANCE TAX.

See TAXES, 1.

COMMERCE.

1. Limiting the sale of railroad tickets to railroad companies and their duly authorized agents is not, although applicable to tickets of roads out of, as well as within, the state, an interference with interstate commerce. State v. Thompson, 4: 480, 84 Pac. 476, — Or. —.

2. A state cannot deny to a proper person the right to hold in the original packages cigarettes which he has imported from another state. State v. Lowry, 4: 528, 77 N. E. 728, — Ind. —.

NOTES.

Commerce; right of state to confiscate cigarettes imported for personal use (Case Note). 528

CONCEALED WEAPONS.

See CARRYING WEAPONS.

CONFLICT OF LAWS.

1. The statute of the state where the accident occurs, and not of that of decedent's domicil, governs the distribution of a fund collected without suit, for the wrongful killing of a person. Re Coe, 4: 814, 106 N. W. 743, — Iowa, —.

2. A contract valid by the laws of the state where it is made and to be performed is not rendered subject to the usury laws of another state by the fact that it is secured by mortgage on land there situated, and to whose courts it is necessary to resort to enforce the mortgage. Bank v. Doherty, 4: 1191, 84 Pac. 872, — Wash. —.

3. A cause of action upon a contract made in one state which has been barred by the statutes of another state while the defendant resided there, but is not barred by the laws of the state in which the contract was made, may be enforced in a territory under a statute providing that where the cause of action has arisen in another state between nonresidents of the territory, and, by the laws of the state where the cause of action arose, an action cannot be maintained, by reason of lapse of time, no action

can be maintained thereon in the territory. Doughty v. Funk, 4: 1029, 84 Pac. 484, — Okla. —.

NOTES.

Foreclosure of mortgage upon land in another state (Case Note). 986

Construction and effect of statute of forum admitting bar of statute of state or country in which cause of action arises or accrues (Case Note). 1029

Enforcement of mortgage on real property valid according to the law of the place where made and payable, but usurious according to the *lex fori et rei sitæ* (Case Note). 1191

CONSPIRACY.

To prevent persons from engaging in a lawful business is unlawful at common law, and conspiracy to accomplish it may be rendered unlawful by statute. State v. Duncan, 4: 1144, 63 Atl. 225, 78 Vt. 364.

CONSTITUTIONAL LAW.

Denial of Due Process by Striking out Depositions of Defendant in Divorce Suit for Failure to Comply with Order of Court, see CONTEMPT, 4.

Power to Regulate Sales of Intoxicating Liquors, see INTOXICATING LIQUORS, 1–4.

Taking private property without compensation.

1. The legislature cannot, without compensation, create a public right of way along the banks and beds of streams to enable the public to enjoy a right of fishery, even by providing an action for any damage done to property along the bank, where the Constitution prohibits the taking of private property for public use without compensation. Hartman v. Tresise, 4: 872, 84 Pac. 685, — Colo. —.

2. The legislature cannot give a public right of fishery in a nontidal, fresh-water stream flowing over private property where the Constitution prohibits the taking of private property for public use without compensation. Hartman v. Tresise, 4: 872, 84 Pac. 685, — Colo. —.

Taking property without due process.

3. A statute providing for the taking of an absentee's property and administering it when he is alive, without his knowledge or consent, and in a proceeding to which he is not a party, and of which he has no notice, is void as depriving him of his property without due process of law. Grandy v. Kennedy, 4: 944, 52 S. E. 635, 104 Va. 826.

4. The purchaser of a railroad ticket is not deprived of his property by forbidding him to sell it through ticket brokers. State v. Thompson, 4: 480, 84 Pac. 476, — Or. —.

Special privileges.

5. An unlawful grant of special privileges is not effected by a statute limiting the sale of railroad tickets to railroads and their duly authorized agents. State v. Thompson, 4: 480, 84 Pac. 476, — Or. —.

Impairing obligation of contract.

6. The assurance held out by the state to purchasers at tax sales by N. D. Rev. Laws 1890, as amended in 1891, that the tax-sale certificates and tax deeds issued to them would be prima facie evidence of the regularity of the tax proceedings, although relating to the remedy, constituted a substantial inducement to the purchase, entering into the contract with the state, and so materially affecting its value that it cannot be taken away by subsequent legislation without impairing its obligation. Blakemore v. Cooper, 4: 1074, 106 N. W. 566, — N. D. —.

7. A statute prohibiting the sale of railroad tickets through brokers does not impair the contract of the holder of a ticket purchased after the law took effect. State v. Thompson, 4: 480, 84 Pac. 476, — Or. —.

NOTES.

Constitutionality of statutes providing for administration of estate of absentee (Case Note). 944

Necessity of providing in statute for notice of hearing on question of damages or compensation in eminent domain proceedings (Case Note). 169

Change of law as to effect of tax certificates as evidence of title (Case Note). 1074

CONTAGIOUS DISEASES.

Right of Carrier to Reject Passengers Afflicted with, see CARRIERS, 16, 17.

CONTEMPT.

Punishment of Corporation for, see CORPORATIONS, 1.

1. A petition is not necessary for the punishment of one for violation of an injunction, and one filed cannot be objected to if it fully advised defendant of the charge against him. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

2. An order adjudging one guilty of contempt for violation of an injunction is not insufficient for failure to set out the particulars of the violation, if it refers to the petition and affidavits where such matters appear. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

3. The truthfulness of the averments of injury in a bill for injunction cannot be questioned in a proceeding for contempt for violation of the injunction. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

Punishment.

4. A court has no power to strike out and disregard depositions filed by a defendant in defense of a suit for divorce, for failure to pay money required of him to enable his wife to prosecute her suit and for temporary alimony, and pass final decree of divorce against him, since such decree is not

due process of law. Trough v. Trough, 4: 1185, 53 S. E. 630, — W. Va. —.

5. One thousand dollars is not an excessive fine to impose on a labor union for violation of an injunction restraining interference with the business of former employers of members on a strike, where the violation is flagrant and often repeated. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

NOTES.

Punishment of corporation for contempt (Case Note). 1001

CONTRACTS.

By Married Women, see HUSBAND AND WIFE, 2.
Conflict of Laws as to, see CONFLICT OF LAWS, 2.
Impairing Obligation of, see CONSTITUTIONAL LAW, 6, 7.
Right of Foreign Corporation to Enforce Contract Made before Complying with Statutory Requirements as to Doing Business, see CORPORATIONS, 3.
Damages for Breach of, see DAMAGES, 2–5.
Admissibility of Parol Evidence to Explain Written Contract, see EVIDENCE, 18–21.
Injunction to Restrain Execution of Void Contract by County, see INJUNCTION, 6.
Construction of Contract by Benefit Society, see INSURANCE, 3.
Sufficiency of Pleading to Show Binding Contract, see PLEADING, 11.
Specific Performance of, see SPECIFIC PERFORMANCE.

Meeting of minds; acceptance.

1. A telegram to a bidder for public work, "You are low bidder. Come on morning train," does not conclude a contract with him. Cedar Rapids Lumber Co. v. Fisher, 4: 177, 105 N. W. 595, — Iowa, —.

Unilateral contract.

2. A written contract entered into between a purchaser of certain goods and a person who signed for the seller, which contained a provision that the contract "shall only be considered binding on the seller when signed by one or more of its officers," is unilateral where it does not appear that it was ever so signed, or that there was any consideration for the promise of the purchaser except the contemplated mutual obligations to be assumed by the seller, and since the latter was not bound, neither is the purchaser, who may withdraw before the contract becomes mutually binding by acceptance in the manner agreed on. Atlanta Buggy Co. v. Hess Spring & Axle Co. 4: 431, 52 S. E. 613, 124 Ga. 338.

3. The fact that under one of two written contracts of sale which were unilateral in character, the vendee specified certain articles which he desired, and which were furnished, renders it binding on the parties to the extent only of the accepted articles. Atlanta Buggy Co. v. Hess Spring & Axle Co. 4: 431, 52 S. E. 613, 124 Ga. 338.

Promise to pay debt of another; privity.

4. If a person, for a consideration moving to him from another, agrees to pay that or any other person's debt to a third party, the law, at once, operating upon the acts of the immediate parties to the transaction, supplies the essentials of privity between such person and such third person, and establishes binding contractual relations between them, even though such third party was a stranger to and had no knowledge of the transaction. Fanning v. Murphy, 4: 666, 105 N. W. 1056 126 Wis. 538.

5. The contractual relations entered into between one who takes a conveyance of real estate, agreeing, as part consideration therefor, to pay the debt of his grantor or that of some other person to a third party, cannot be subsequently varied by any agreement between the immediate parties to the transaction, not consented to by the third party. Fanning v. Murphy, 4: 666, 105 N. W. 1056, 126 Wis. 538.

Ratification of agent's contract.

6. The authority of an agent to make a contract has reference to it as made, and a ratification confirms it as made. Neither anterior authority nor subsequent ratification would operate to change the terms of the written contract without the knowledge or consent of the other party, and adversely to it. Atlanta Buggy Co. v. Hess Spring & Axle Co. 4: 431, 52 S. E. 613, 124 Ga. 338.

Statute of frauds.

7. A parol contract by which two persons enter into a partnership to purchase real estate, one to furnish the money and take the title, and convey a half interest to the other upon receiving his share of the purchase price, is void under the statute of frauds. Scheuer v. Cochem, 4: 427, 105 N. W. 573, 126 Wis. 209.

8. Possession alone of land under a verbal contract, when delivered by the vendor to the vendee, is an act of part performance which will take the case out of the statute of frauds. Sprague v. Jessup, 4: 410, 83 Pac. 145, — Or. —.

9. The parties to an oil lease providing that, in consideration of the grant therein made the lessees will yield and pay to the lessor as royalty a certain share of "the oil produced and saved from the premises," may subsequently, for a consideration, increase or decrease the royalty by parol agreement, and such agreement is not within the statute of frauds. Nonamaker v. Amos, 4: 980, 76 N. E. 949, 73 Ohio St. 163.

Validity; public policy.

Contract to Locate Public Buildings at Certain Place, see ASSUMPSIT, 3.
Sunday Contracts, see SUNDAY.

10. A contract by an attorney to procure legislative action on behalf of a client will be enforced, unless it appears that it contemplates the use of unlawful or improper means, or that such means were employed

in pursuance thereof to attain the object for which the contract was made. Stroemer v. Van Orsdel, 4: 212, 103 N. W. 1053, — Neb. —.

11. A contract between an attorney and client for services to be rendered by the former is not necessarily invalid because a part of the services to be rendered is the procurement of legislative action, nor because such contract provides for a contingent fee. Stroemer v. Van Orsdel, 4: 212, 103 N. W. 1053, — Neb. —.

12. An issue as to the effect of the partial compliance by a municipal corporation with its contract upon the value of the land of one who donated money toward the expense of certain public buildings in consideration of an agreement by the municipality to locate them at a certain place is immaterial in an action to recover for breach of the agreement, since the contract is void as against public policy. Edwards v. Goldsboro, 4: 589, 53 S. E. 652, — N. C. —.

13. No recovery can be had for breach of a contract by a municipal corporation to locate public buildings at a certain place in consideration of a donation toward the expense, since the contract is void as against public policy. Edwards v. Goldsboro, 4: 589, 53 S. E. 652, — N. C. —.

Enforcement.

14. While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent on the enforcement of contracts which are lawful, and contravene none of its rules. Stroemer v. Van Orsdel, 4: 212, 103 N. W. 1053, — Neb. —.

NOTES.

Contract; illustrations of the distinction between a definite proposal or acceptance, and a mere preliminary step in the negotiation of a contract (Case Note). 177

Validity of contract to procure legislative action (Case Note). 213

Contract as to location of public buildings (Case Note). 589

Imposition of penalty as affecting validity of a contract made by a foreign corporation without complying with the statutory conditions of doing business (Case Note). 688

Parol modification of an original contract required to be in writing (Case Note). 980

Validity of contract partially made on Sunday and perfected on a secular day (Case Note). 1151

CONVERSION.

By Carrier; Effect of, to Relieve Shippers from Duty to Defend Suits Relating to Property, see CARRIERS, 22.

CORPORATIONS.

Personal Judgment against, Based upon Service by Publication, see JUDGMENT, 3.

Service by Publication upon Domestic Corporation, see WRIT AND PROCESS, 6.

Service of Process on Foreign Corporations, see WRIT AND PROCESS, 7, 8.

1. A corporation may be fined for the wilful violation of an injunction. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

Foreign.

2. Failure of a foreign building and loan association to comply with the provisions of West Virginia Code of 1899, chap. 54, §30, requiring its articles of association and by-laws to be recorded in the office of the secretary of state, does not preclude it from transacting business in the state. Burkheimer v. National Mut. Bldg. & L. Asso. 4: 1047, 53 S. E. 372, — W. Va. —.

3. A contract entered into by a foreign corporation within the state before complying with the statute forbidding it to transact business in the state without establishing a local office, an agent to receive service of process, and paying taxes, is void; and subsequent compliance with the terms of the statute will not enable the corporation to maintain an action on the contract, although the statute provides a penalty for failure to comply with it, and declares that no corporation failing to do so "can maintain any suit or action" in any of the courts of the state. Tri-State Amusement Co. v. Forest Park Highlands Amusement Co. 4: 688, 90 S. W. 1020, 192 Mo. 404.

COUNTIES.

Injunction against Execution of Void Contract by, see INJUNCTION, 6.

1. A county, in the absence of express legislative grant, has no power to enter into a contract for the employment of a tax ferret, even though the duty of discovering untaxed property has not been placed upon the public officials. Stevens v. Henry County, 4: 339, 75 N. E. 1024, 218 Ill. 468.

2. Statutory power to a county board of commissioners to make all contracts and do all other acts in relation to the property and concerns of the county necessary to its corporate powers does not include power to employ a tax ferret, where the statutes give such board no authority over the acts of the officials charged with the assessment and collection of taxes. Stevens v. Henry County, 4: 339, 75 N. E. 1024, 218 Ill. 468.

NOTES.

Authority of county to employ "tax ferfet" (Case Note). 339

COURTS.

1. The possessory right of the locator of a mining claim, who has not applied for a patent, does not, under the Federal law giving locators, their heirs and assigns, the right of possession, go directly to the heirs of the locator upon his death, as beneficiaries of the government, but they take by descent from the locator; so that the estate is subject to the jurisdiction of the probate

court. O'Connell v. Pinnacle Gold Mines Co. 4: 919, 140 Fed. 854, — C. C. A.—.

2. The statutory adaptation of the criminal procedure of circuit courts to a mayor's court is applicable only to criminal proceedings, and does not change the nature or character of any case that may be brought before such court. Fortune v. Wilburton, 4: 782, 142 Fed. 114, — C. C. A. —.

3. The absence of reported judgments and decisions sustaining an alleged liability under a given state of facts raises a strong presumption that no such liability exists. Western U. Teleg. Co. v. Schriver, 4: 678, 141 Fed. 538, — C. C. A. —.

NOTES.

Review by civil courts of expulsion of member of a religious society (Case Note). 1154

COVENANT.

Damages for Breach of, see DAMAGES, 6–8.

Relief by Equity from Forfeiture for Nonperformance of, see FORFEITURE, 2, 3.

In Lease, as to Repairs by Landlord; as Running with Reversion, see LANDLORD AND TENANT, 1, 2.

Knowledge by a purchaser of real estate of an unexpired lease of the property will not prevent his maintaining an action for breach of covenant because of such lease. Browne v. Taylor, 4: 309, 88 S. W. 933, — Tenn. —.

NOTES.

Effect of purchaser's knowledge of encumbrance in action for breach of covenant (Subject Note). 309

Covenant of lessor to pay for repairs or improvements as one running with land (Case Note). 466

CREDITORS' BILL.

To Reach Surrender Value of Debtor's Life Insurance Policies, see INSURANCE, 39.

CRIMINAL LAW.

As to Jury, see JURY.

Error in Permitting Proof of Former Convictions, see TRIAL, 7.

Self-crimination.

1. Failure to instruct a witness summoned before a grand jury as to his rights in regard to self-crimination will not nullify an indictment against him founded in part upon his own testimony. State v. Duncan, 4: 1144, 63 Atl. 225, 78 Vt. 364.

2. To render available the constitutional protection against being compelled to give incriminating evidence against one's self, to one summoned before the grand jury when not under arrest or suspected of crime, the privilege must be claimed, and it is not sufficient that the evidence is given involuntarily,—at least where the conditions and circumstances of the case are not such as to speak for the witness, and of themselves show compulsion. State v. Duncan, 4: 1144, 63 Atl. 225, 78 Vt. 364.

Former jeopardy.

3. Acquittal of a sales agent upon a charge of embezzlement and larceny in retaining funds collected from customers is no bar to a subsequent prosecution for forgery in making false notes of the customers, although the two indictments relate to the same transaction. Spears v. People, 4: 402, 77 N. E. 112, 220 Ill. 72.

Punishment.

Admissibility of Evidence of Former Conviction to Enhance, see EVIDENCE, 1.

4. To warrant the application of a statute authorizing additional punishment or one convicted of crime upon proof of former convictions, the identity of accused and the one against whom the former judgments were entered must be established by affirmative evidence; mere proof of identity of names not being sufficient. State v. Smith, 4: 539, 106 N. W. 187, — Iowa, —.

5. Failure of proof of identity of accused and those convicted in former prosecutions prevents the court from applying the statute authorizing additional punishment in case of successive convictions, but in case of a finding of guilt it can impose only the punishment provided for the offense for which accused is on trial. State v. Smith, 4: 539, 106 N. W. 187, — Iowa, —.

NOTES.

Acquittal of larceny as bar to prosecution for forgery in same transaction (Case Note). 402

Necessity of claiming constitutional protection against being compelled to give incriminating evidence (Case Note). 1144

CRIMINATION OF SELF.

See CRIMINAL LAW, 1, 2.

CROPPERS.

1. A milch cow and medical supplies may be found to be needed by one who has undertaken to make a crop on another's land, to enable him to perform his contract, within a provision permitting the landowner to deduct from his share of the crop the value of supplies furnished by him and needed to make the crop. Bourland v. McKnight, 4: 698, 96 S. W. 179, — Ark. —.

2. Under a contract by which one undertakes to make a crop on the land of another, who is to have title to it and keep a portion for the use of land, team, and tools, and from the proceeds of the remainder deduct the amount due him for supplies and necessaries furnished the cropper and turn the balance over to him, the cropper is only an employee, and has no title to any portion of the crop which he can mortgage as against the claim of the landowner for the value of cattle and medicines and services of a physician furnished to him. Bourland v. McKnight, 4: 698, 96 S. W. 179, — Ark. —.

3. One who has undertaken to make a crop on another's land for a share of it may mortgage his interest in it. Bourland v. McKnight, 4: 698, 96 S. W. 179, — Ark. —.

DAMAGES.

Recoverable against Employer for Malicious Adulteration of Milk by Servant, see DAMAGES, 13.

Claiming Greater Damages than Legally Entitled to, to Make Declaration Demurrable, see PLEADING, 14.

Simulating trademark.

1. One guilty of simulating another's trademark, and also of unfair trade in leading customers to believe that his product is that of the other, is liable not only for the profits realized from goods containing the fraudulent trademark, but also for the profits resulting from the wrongful acts committed in the unfair competition. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. 4: 960, 62 Atl. 499, 100 Me. 461.

Breach of contract generally.

2. Damages recoverable from a bidder for public work upon his refusal to comply with his contract cannot be fixed at the difference between his bid and the price at which the contract is awarded to a nonbidder, where the authorities have no power to award the contract to the latter. Cedar Rapids Lumber Co. v. Fisher, 4: 177, 105 N. W. 595, — Iowa, —.

3. A lessor cannot make the loss of rent a ground for special damages for failing to comply with a contract to supply furnishings for the leasehold within a specified time without showing a valid contract exempting the lessee from liability for the rent during the period of delay. American Theater Co. v. Siegel, Cooper, & Co. 4: 1167, 77 N. E. 588, 221 Ill. 145.

4. Under a contract for the purchase of a mining claim, which provides for periodic payments, which, together with any other sums which may have been paid, shall be forfeited to the seller as liquidated damages in case of the purchaser's breach of contract, no recovery can be had in case the purchaser surrenders possession for the value of development work which the purchaser agreed, but failed, to do on the property. K. P. Mining Co. v. Jacobson, 4: 755, 83 Pac. 728, — Utah, —.

Breach of carrier's contract.

5. One refused passage on a sleeping car, in violation of the company's contract to carry him, is entitled to recover at least the amount paid for his ticket. Pullman Co. v. Krauss, 4: 103, 40 So. 398, — Ala. —.

Breach of covenant.

6. The measure of damages for breach of covenant in a deed of real estate, consisting of an outstanding lease which prevents the grantee from obtaining immediate possession of the property, will not include the special damages resulting from inability to make a contemplated subdivision of the property, although the grantor had knowledge of such intended use of the property, where the subdivision could not have been perfected before the time for the expiration of the lease had possession been secured, because the connecting streets had not been opened to the property. Browne v. Taylor, 4: 309, 88 S. W. 933, — Tenn. —.

7. Counsel fees expended in a fruitless attempt to eject the tenant are not recoverable in an action for breach of covenant in a sale of real estate because of an unexpired lease of the property. Browne v. Taylor, 4: 309, 88 S. W. 933, — Tenn. —.

8. The rental value of the property during the time the purchaser is kept out of possession is the measure of damages for breach of covenant in a deed of real estate, consisting of an outstanding lease. Browne v. Taylor, 4: 309, 88 S. W. 933, — Tenn. —.

Breach of promise.

9. The courts cannot change a rule of law that has been in force for fifty years, that proof of seduction cannot be allowed to aggravate damages in an action for breach of promise of marriage. Wrynn v. Downey, 4: 615, 63 Atl. 401, — R. I. —.

For condemnation of property.

Error in Rejecting Evidence of Offers to Purchase Other Property in Neighborhood, see TRIAL, 6.

Correctness of Instructions as to, see TRIAL, 39, 40.

10. In the exercise of the right of eminent domain under the statute of Oklahoma, which provides for the appointment of commissioners to assess the injuries sustained by individuals because of the exercise of such right, which statute contains a provision with reference to the duties of such commissioners, as follows: "And they shall inspect said real property and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which said owner will sustain by such appropriation of his land,"— damages to be allowed are not limited to the real estate taken and injured, but may be such damages as the owner actually sustains to either his real or personal property by such appropriation of his land. Blincoe v. Choctaw, O. & W. R. Co. 4: 890, 83 Pac. 903, — Okla. —.

Failure to deliver telegram.

11. One who sends a message to another inquiring as to the price of pineapples of a specified quality, and who promptly receives a telegram from a third person quoting prices, in pursuance of which he purchases a car load of pineapples which prove to be of inferior quality, can only recover from the telegraph company which failed to deliver the message sent by him the cost of sending the telegram, or nominal damages, since the maxim *Causa proxima, non remota, spectatur* applies. Western U. Teleg. Co. v. Barlow, 4: 262, 40 So. 491, — Fla. —.

For street railroad in street.

12. The measure of damages to which a property owner is entitled for the con-

struction, in the adjoining highway, of an interurban street railroad, is the difference in value of the property free from and subject to the burden. Abbott v. Milwaukee Light, H. & T. Co. 4: 202, 106 N. W. 523, 126 Wis. 634.

Malicious adulteration of milk by servant.

13. Compensatory damages may be awarded against the employer where a servant, without authority, and purposely, to gratify his malice towards his employer, adulterates milk intrusted to him by the master for delivery, whereby damage to others directly and necessarily results. Stranahan Bros. Catering Co. v. Coit, 4: 506, 45 N. E. 634, 55 Ohio St. 398.

Interest on amount recovered.

14. Where a suit is brought for damages arising from the destruction of property, and there is a basis of calculation as to the value, interest is not recoverable *eo nomine*. But the jury may consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may, in their discretion, increase the amount of damages by adding to the value of the property destroyed a sum equal to the interest on such value; the entire sum found being returned as damages, and not exceeding the amount sued for. Central of Georgia Ry. Co. v. Hall, 4: 898, 52 S. E. 679, 124 Ga. 322.

Punitive or exemplary.

15. Punitive damages may be awarded for an unprovoked and malicious assault. Hanna v. Sweeney, 4: 907, 62 Atl. 785, 78 Conn. 492.

16. The punitive damages which may be awarded for a malicious assault and battery cannot exceed the expenses of the litigation in the suit less taxable costs. Hanna v. Sweeney, 4: 907, 62 Atl. 785, 78 Conn. 492.

17. A showing of illness resulting from unnecessarily rough treatment under a warrant of arrest, of a frail, sick man, and his confinement in a cold jail, will sustain a recovery of exemplary damages, although the extent of the actual damage in money is not shown. McConathy v. Deck, 4: 358, 83 Pac. 135, — Colo. —.

18. A carrier who fails to perform promptly his contract to transport the scenery and properties of a traveling show, knowing that their absence will prevent a performance, is liable for the value of the ordinary earnings of the properties during the time the owner is deprived of their use, less the expenses which he is saved by inability to exhibit; and the fact that such damages are not provided for in the shipping articles is immaterial. Weston v. Boston & M. R. 4: 569, 76 N. E. 1050, 190 Mass. 298.

19. The profit which the contract would have produced is the measure of damages for breach of a contract to take goods to be manufactured upon order. Gardner v. Deeds, 4: 740, 92 S. W. 518, — Tenn. —.

NOTES.

Right to recover against telegraph company the loss sustained upon a commercial transaction entered into in consequence of a breach of its duty (Case Note). 262

Measure of carrier's liability for preventing exhibition or show by breach of contract of carriage (Case Note). 569

Loss of profits as damages upon refusal of vendee to take articles manufactured for him (Case Note). 740

Damages; effect of provision for forfeiture of sums paid or retained under executory contract, to prevent recovery of any other damages after breach of contract (Case Note). 755

Injury to, or expense of removing, personalty, as element of damage for taking real estate (Case Note). 890

Expense of litigation as element, or as limit, of punitive or exemplary damages (Case Note). 907

DEATH.

Conflict of Laws as to Distribution of Fund Collected for Wrongful Killing, see CONFLICT OF LAWS, 1.

NOTES.

Law governing distribution of fund collected or recovered for negligent killing of a person (Case Note). 814

DEEDS.

1. A provision in a deed of real estate reserving to the grantors all the rights, privileges, and benefits secured under an oil and gas lease executed by the grantors with full power and right to renew or extend, change or modify the lease as fully and to the same extent as though the deed had not been executed, constitutes an exception, and not a reservation. The title to the oil and gas in the premises conveyed remains in the grantors. Moore v. Griffin, 4: 477, 83 Pac. 395, — Kan. —.

2. Absence of consideration for a deed delivered to a stranger, to be delivered to the grantee at the grantor's death, will not entitle the grantor to revoke the grant if it was accepted and complete before the attempted revocation. Grilley v. Atkins, 4: 816, 62 Atl. 337, 78 Conn. 380.

3. A deed delivered to a stranger with the intent to pass title to the grantee, with directions to deliver it to him at the grantor's death, upon the second delivery relates back and passes the title as of the date of the first delivery. Grilley v. Atkins, 4: 816, 62 Atl. 337, 78 Conn. 380.

4. A quitclaim grantee of a title held by a building and loan association under a mortgage which it purchased from another association does not take free from the equity of the mortgagor to set up the invalidity of the transfer. Cobe v. Lovan, 4: 439, 92 S. W. 93, 193 Mo. 235.

NOTES.

Deed; right of grantor to revoke deed delivered to stranger, to be delivered by him to grantee after grantor's death (Case Note). 816

DEFAULT.

Judgment by, see JUDGMENT, 7.

DEFINITIONS.

Legal Malice, see HOMICIDE, 1.

DEMURRER.

To Judgment, see JUDGMENT, 1.

DESCENT AND DISTRIBUTION.

NOTES.

Descent of unpatented mining claim (Case Note). 919

DETECTIVES.

Liability of One Employing Detective to Ascertain and Report Facts for Arrest Made by Him, see MASTER AND SERVANT, 42.

DIRECTORS.

Of Bank, see BANKS.

DISMISSAL.

NOTES.

Power of attorney to discontinue suit (Case Note). 244

DIVORCE.

Striking out Depositions filed by Defendant in, for Failure to Comply with Order of Court, see CONTEMPT, 4.

Admissibility, in Action for, of Confessions of Adultery, see EVIDENCE, 29.

Sufficiency of Bill in Action for, see PLEADING, 15.

1. Refusal by an English woman to accompany her husband upon his emigration to this country to better his condition in life, without other excuse than disinclination to leave her native land, is desertion which will entitle him to a divorce. Franklin v. Franklin, 4: 145, 77 N. E. 48, 190 Mass. 349.

2. Continued cohabitation does not condone the communication of syphilis by a man to his wife. Muir v. Muir, 4: 909, 92 S. W. 314, — Ky. —.

NOTES.

Refusal of wife to follow husband, on change of domicil, as desertion (Case Note). 145

Husband's prospects as basis for alimony (Case Note). 909

DURESS.

Recovering Back Money Paid under, see ASSUMPSIT, 1.

ELECTRICITY.

Liability of Corporation Generating, for Nuisance, see NUISANCES.

EMINENT DOMAIN.

Measure of Damages in, see DAMAGES, 10.

Estoppel to Question Validity of Proceedings, see ESTOPPEL, 1.

Error in Rejecting Evidence in Determining Amount of Damages, see TRIAL, 6.

Correctness of Instructions as to Damages in Case of, see TRIAL, 39, 40.

1. The legislature may confer the right of eminent domain upon a tunnel company organized to project a tunnel to drain, ventilate, and aid in securing the mineral from mines along its course, the use being public. Tanner v. Treasury Tunnel, Min. & Reduction Co. 4: 106, 83 Pac. 464, — Colo. —.

2. A statute providing for condemnation of a right of way for an irrigating ditch must provide for notice to the person whose land is to be taken of the hearing for fixing the damages, and it is not sufficient that notice is provided of the time for appointment of the appraisers. Sterritt v. Young, 4: 169, 82 Pac. 946, — Wyo. —.

3. An interurban electric street railroad, when attempting to acquire the rights of abutting owners in the highway, is upon the same plane with commercial railroads generally. Abbott v. Milwaukee Light, H. & T. Co. 4: 202, 106 N. W. 523, 126 Wis. 634.

NOTES.

Eminent domain; power to exercise for the purpose of securing right of way for mining tunnel (Case Note). 106

Interurban trolley road as additional burden (Case Note). 202

EQUITABLE CONVERSION.

See ATTACHMENT, 1, 3.

EQUITY.

Relief against Forfeiture, see FORFEITURE, 2, 3.

Aiding Member of Church Wrongfully Expelled, see RELIGIOUS SOCIETIES.

ESTOPPEL.

Of Member of Building and Loan Association to Complain of Amendment of By-laws, see BUILDING AND LOAN ASSOCIATIONS, 9.

Necessity of Specially Pleading, see PLEADING, 16.

To Deny that Issues on Trial were Duly Made, see APPEAL AND ERROR, 17.

1. One who has accepted the compensation awarded for a right of way over his property is estopped to question the validity of the proceedings by which it was ascertained. Sterritt v. Young, 4: 169, 82 Pac. 946, — Wyo. —.

2. One who permits a void deed, executed in proceedings to foreclose a building and loan association mortgage on his property, to remain of record, is not estopped to assert its invalidity against one

who purchases all the assets of the association for a lump sum without knowing the facts with reference to the particular claim, which is only an insignificant part of the assets transferred. Cobe v. Lovan, 4: 439, 92 S. W. 93, 193 Mo. 235.

3. Acceptance by a firm creditor of a dividend from the insolvent estate of a partner who purchased the interest of one who was a member of the firm at the time the debt was incurred does not estop the creditor from looking to the latter for payment. Gross v. Breckinridge Bank, 4: 800, 90 S. W. 5, — Ky. —.

EVIDENCE.

Correctness of Instruction as to Presumption of Malice in Case of Homicide, see TRIAL, 41.

1. Referring in the indictment to former convictions of one accused of crime as former judgments will not exclude evidence thereof, although the statute provides for the pleading and proof of former convictions to enhance punishment. State v. Smith, 4: 539, 106 N. W. 187, — Iowa, —.

Judicial notice.

2. Courts cannot take judicial notice of the business hours of any particular bank, but the courts judicially know that ordinarily banks in the cities and larger towns of the state do not open their doors for business at an hour earlier than 9 o'clock A. M. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

3. Though the courts cannot have judicial knowledge of the existence of any particular bank, or of any mode of business peculiar to a given bank, they will take judicial notice that, in all cities and towns of large population and extensive business, within their jurisdiction, banks exist, and of the facts that their operations are governed by reasonable rules and regulations, to which parties dealing with them, or in commercial paper, are deemed to have subjected themselves. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

Presumptions and burden of proof.

4. Proof of a collision between trains on a railroad makes a prima facie case in favor of an injured passenger, which the carrier must rebut by showing it could not have been avoided by the exercise of the highest practical care and diligence on its part. Pittsburgh, C. C. & St. L. R. Co. v. Higgs, 4: 1081, 76 N. E. 299, 165 Ind. 694.

5. A passenger in a carriage drawn by horses will not be presumed to be guilty of contributory negligence by failing to jump therefrom when discovering that the horses are frightened by an approaching automobile. McIntyre v. Orner, 4: 1130, 76 N. E. 750, — Ind. —.

6. A presumption of negligence arises from the fact of the derailment of a car whereby a passenger is injured, but when that presumption is met by evidence which makes it equally probable that the accident was not due to negligence on the part of the defendant, in the absence of other evidence tending to establish the affirmative of the issue, the defendant is entitled to a verdict. Omaha Street R. Co. v. Boesen, 4: 122, 105 N. W. 303, — Neb. —.

7. A railroad company is, in the absence of evidence, presumed to have done its duty in approaching a street crossing; and no recovery can be had for the death of a person killed at the crossing, until this presumption has been overcome. Hanna v. Philadelphia & R. R. Co. 4: 344, 62 Atl. 643, 213 Pa. 157.

8. One killed at a railroad crossing, and seen to have used due care in looking for trains as he approached the crossing until he passed beyond the sight of witnesses, is presumed to have done his duty, and not to have been guilty of contributory negligence at the point of crossing. Hanna v. Philadelphia & R. R. Co. 4: 344, 62 Atl. 643, 213 Pa. 157.

9. In an action to recover damages for the death of a person, caused by a collision with a train of defendant at the intersection of a street and the railroad track, where the uncontradicted evidence conclusively shows that when decedent was 50 feet distant from the railroad track a train could have been seen at a distance of 2,500 feet from such crossing, and where the testimony shows that the deceased looked and listened for the train at that point, the law conclusively presumes either that he did not look and listen, or that if he did look and listen, or both, he afterwards heedlessly disregarded the knowledge thus obtained, and negligently went into an obvious danger. Carlson v. Chicago & N. W. R. Co. 4: 349, 105 N. W. 555, — Minn. —.

10. The presumption that one who was killed while crossing a railway track looked and listened before attempting to cross it is destroyed where the plaintiff introduces direct and affirmative evidence as to exactly what occurred, and where it also appears from the undisputed evidence that, if the deceased had looked and listened before going upon the crossing, he must have seen and heard the train approaching. Carlson v. Chicago & N. W. R. Co. 4: 349, 105 N. W. 555, — Minn. —.

11. Because the natural instinct of self-preservation generally prompts men to acts of care and caution when approaching or in the presence of danger, there is, in the absence of credible evidence of the actual fact in any instance, a presumption of the exercise of due care and caution; but, like other presumptions of fact arising from the ordinary or usual conduct of men, rather than from what is invariable or universal, this presumption is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it, which may be shown by the testimony of eyewitnesses to his movements, or by evidence of the physical sur-

roundings and other conditions at the time. Wabash R. Co. v. De Tar, 4: 352, 141 Fed. 932, — C. C. A. —.

12. The presumption of the exercise of due care and caution on the part of one approaching a place of danger is essentially inferior in probative force and weight to credible evidence, either direct or circumstantial, explanatory of the actual occurrence, and, in those courts where the presumption underlies the rule that the burden of proving contributory negligence rests upon the defendant and must be maintained by a fair preponderance of the evidence, its force and influence are so largely embodied in the enforcement of that rule that it has little independent application, save as it rests upon a general, but not invariable, rule of human experience which may and should be considered in determining the credibility of evidence and the weight to be given to it when these matters are not otherwise entirely clear. Wabash R. Co. v. De Tar, 4: 352, 141 Fed. 932, — C. C. A. —.

13. In an action against a street railway company for damages for injuries sustained by one of its passengers, the burden of proof on the question of negligence does not shift to the defendant upon proof that the injuries resulted from a derailment of the car. Omaha Street R. Co. v. Boesen, 4: 122, 105 N. W. 303, — Neb. —.

14. In Georgia it is the general rule that, in order to avail himself of an act of God as an excuse, the burden is upon the common carrier to establish not only that the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto. Central of Georgia Ry. Co. v. Hall, 4: 898, 52 S. E. 679, 124 Ga. 322.

15. The burden of showing extenuating circumstances for shooting a person is upon the defendant. Daniel v. Petersburg R. Co. 4: 485, 23 S. E. 327, 117 N. C. 593.

Documentary.

16. A certified copy of docket entries in a judicial proceeding in another state, from which to make a record, is not admissible as evidence of the facts which it is claimed the record would establish. Gibson v. Holmes, 4: 451, 62 Atl. 11, 78 Vt. 110.

17. A copy of a lease of a railroad, duly certified, is admissible in evidence under a statute providing that the papers of the corporation may be proved by a copy thereof certified by the proper custodian. Chicago, B. & Q. R. Co. v. Weber, 4: 272, 76 N. E. 489, 219 Ill. 372.

Parol.

18. Parol evidence is admissible to show that, when a policy of insurance was issued on a building, it was in process of erection, and, therefore, could not be occupied, within the meaning of a clause making the policy void if the premises became vacant by removal of the occupant; since such evidence does not contradict the terms of the policy. Harris v. North American Ins. Co. 4: 1137, 77 N. E. 493, 190 Mass. 361.

19. The theory that proof of prior and contemporaneous negotiations and representations, though not admissible to vary the terms or legal effect of the written contract, may be received for the purpose of raising an estoppel *in pais* is a mere evasion of the salutary rule which protects written contracts from impeachment by loose collateral evidence, and, upon principle and authority, is not tenable. Connecticut F. Ins. Co. v. Buchanan, 4: 758, 141 Fed. 877, — C. C. A. —.

20. A contract in writing, if its terms are free from doubt and ambiguity, must be permitted to speak for itself, and cannot, by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; and this principle is applicable to contracts of insurance. Deming Invest. Co. v. Shawnee F. Ins. Co. 4: 607, 83 Pac. 918, — Okla. —.

21. In the absence of fraud or mutual mistake, no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations, as to the terms or legal effect of a resulting written contract, can be permitted to prevail, either in law or in equity, over the plain provisions and proper interretation of the contract. Connecticut F. Ins. Co. v. Buchanan, 4: 758, 141 Fed. 877, — C. C. A. —.

Opinions and conclusions.

22. Testimony as to the opinion of an attorney concerning the title to personal property in dispute is not admissible in an action to recover possession of it. Log Owners' Booming Co. v. Hubbell, 4: 573, 97 N. W. 157, 135 Mich. 65.

23. A physician, while testifying as an expert, is not permitted to testify to his conclusions of the permanency of an injury to his patient, based partially upon the history of the injury detailed to him by the patient or other person, and partially upon his own examination. Federal Betterment Co. v. Reeves, 4: 460, 84 Pac. 560, — Kan. —.

Declarations; res gestæ.

24. Declarations of a man crushed by cars, after he has reached the station and assistance has been summoned, as to how the accident happened are admissible as part of the res gestæ, if his friends are not present, and he is so badly hurt that he dies within thirty-six hours after the accident, so that the presumption would be violent that the statement was made for self-serving purposes. Star v. Ætna L. Ins. Co. 4: 636, 83 Pac. 113, — Wash. —.

Relevancy and materiality.

25. Evidence as to the laying by the town of pipes to supply with water a house insured when in process of erection is admissible in an action on the policy, in support of testimony by the owner as to representations made by him that the property would not be occupied until after the water was in. Harris v. North American Ins. Co. 4: 1137, 77 N. E. 493, 190 Mass. 361.

26. Evidence of an attempted compro-

mise is inadmissible in an action for breach of promise of marriage. Wrynn v. Downey, 4: 615, 63 Atl. 401, — R. I. —.

27. Evidence of seduction is not admissible to show either a contract of marriage or its breach. Wrynn v. Downey, 4: 615, 63 Atl. 401, — R. I. —.

In aggravation of damages.

28. Proof of seduction cannot be made in an action for breach of promise of marriage, in aggravation of damages. Wrynn v. Downey, 4: 615, 63 Atl. 401, — R. I. —.

Admissions.

29. Confessions of adultery, made in the country, cannot be given in evidence or considered in a suit for divorce for such offense. Trough v. Trough, 4: 1185, 53 S. E. 630, — W. Va. —.

NOTES.

Presumption of care on part of one killed at railroad crossing (Case Note). 344

Presumption of malice from killing (Case Note). 934

Identity of name as evidence of identity of person in criminal cases (Case not). 539

Right to prove seduction in aggravation of damages in breach of promise case (Case Note). 616

Duty of insured to negative death or accident from excepted cause (Case Note). 636

EXCHANGES.

One who purchases in the name of his partner a seat in a stock exchange has, notwithstanding knowledge on the part of the officers of the exchange of the facts, no equity to prevent the enforcement of a rule of the exchange that a seat may be sold for the debts of the member holding it in favor of other members. Zell v. Baltimore Stock Exchange, 4: 435, 62 Atl. 808, 102 Md. 489.

EXECUTION.

NOTES.

Right, in suit on forthcoming bond given by execution debtor or claimant, to question the legality of the levy or the authority of the officer making it (Case Note). 1020

EXECUTORS AND ADMINISTRATORS.

Statute Providing for Administration of Absentee's Property, see CONSTITUTIONAL LAW, 3.

As "Assigns" of Testator, within Meaning of Tax Laws, see TAXES, 2.

Appointment; qualification.

1. An oath faithfully to perform his duties is not necessary to the qualification of an executor, unless made so by statute. Leahy v. Haworth, 4: 657, 141 Fed. 850, — C. C. A. —.

Foreign; action by.

2. That a foreign executor has not secured an appointment from the local courts at the time he files a bill to foreclose a mortgage belonging to the estate is not fatal to the action, if he secures such appointment before trial. Leahy v. Haworth, 4: 657, 141 Fed. 850, — C. C. A. —.

Distribution.

3. The distributive share of the real estate of an heir debtor to the estate of his ancestor, is not chargeable with such indebtedness either as land or as the proceeds thereof in the hands of the administrator. Marvin v. Bowlby, 4: 189, 105 N. W. 751, — Mich. —.

Sale of property; fraud.

4. The administrator of a widow will not be permitted to sell land as belonging to her for the payment of debts, where, although it originally belonged to her, she, for a period of nine years, had acted upon her election to accept the terms of her husband's will, which dealt with the property as his, and her heirs had acquiesced in her election for eight years after her death. Hoggard v. Jordan, 4: 1065, 53 S. E. 220, 140 N. C. 610.

5. A sale of real estate belonging to the estate of a testator, made by an executor to the surety on his bond under an order of the probate court, procured through the fraud of the executor, may be set aside at the suit of a devisee, although the surety was ignorant of the dishonest conduct of his principal. Fincke v. Bundrick, 4: 820, 83 Pac. 403, — Kan. —.

NOTES.

Indebtedness of heir to estate as counterclaim or set-off against distributive share in proceeds of real estate (Case Note). 189

Effect of ancillary appointment after commencement of action by foreign executor or administrator (Case Note). 657

Validity of sale to surety on executor's bond (Case Note). 820

Order of abatement to pay debts, as between demonstrative legacies and specific legacies or devises (Case Note). 922

EXTORTION.

Recovering Back Money Obtained by, see ASSUMPSIT, 1.

FALSE IMPRISONMENT.

1. Plaintiff in a civil suit, who procures the arrest of defendant on mesne process, is a trespasser *ab initio* where, by direction of his attorney, the officer removes defendant to another county for safe-keeping, contrary to the provisions of the statute. Gibson v. Holmes, 4: 451, 62 Atl. 11, 78 Vt. 110.

2. A plaintiff who abandons a suit in which defendant has been arrested on mesne process, before it is entered in court, cannot justify under the writ in an action by defendant for false imprisonment. Gibson v. Holmes, 4: 451, 62 Atl. 11, 78 Vt. 110.

NOTES.

Abandonment of suit before entry as affecting justification under writ in defense of action for false imprisonment (Case Note). 451

FAMILY.

Within Meaning of Homestead Laws, see HOMESTEAD, 1.

FIRE DEPARTMENTS.
Municipal liability for acts or negligence of members of fire department (Case Note). 629

FIRES.
Liability of Saloon Keeper for Act of Bartender in Saturating Foot of Patron with Alcohol and Setting Fire to it, see MASTER AND SERVANT, 43.

FISHERIES.
Power of Legislature to Create Public Right of Fishery in Stream, see CONSTITUTIONAL LAW, 1, 2.

1. The owner of the bed of a natural, fresh-water, nontidal stream has the exclusive right of fishery therein. Hartman v. Tresise, 4: 872, 84 Pac. 685, — Colo. —.

2. A constitutional declaration that unappropriated water in natural streams is public property subject to appropriation does not confer a public right of fishery in streams flowing through private property. Hartman v. Tresise, 4: 872, 84 Pac. 685, — Colo. —.

FORFEITURE.
Of Street Railway Privilege in Street, see APPEAL AND ERROR, 23; STREET RAILWAYS, 4–6.
Of Weapons Carried in Violation of Law, see CARRYING WEAPONS.
Injunction against Forfeiture of Street Railway Franchise, see INJUNCTION, 5.
Of Logs, see LOGS, 3.

1. A forfeiture of a deposit made by a bidder for public work cannot be predicated upon a conference between him and the committee, at which he suggests a mistake in his bid, and asks leave to correct it, and the committee state a desire to change the specifications, where no demand is made upon him to comply with the terms of his bid. Cedar Rapids Lumber Co. v. Fisher, 4: 177, 105 N. W 595, — Iowa, —.

2. Equity will relieve from forfeitures for nonperformance of covenants other than those for the payment of money, arising out of accident, mistake, or surprise, and in the absence of wilful and deliberate refusal to perform, when no pecuniary injury has resulted to the covenantee and the wrong done is easily remediable; but such power of relief is discretionary, and will not be exercised unless the delinquent covenantor is able and willing immediately to perform the covenant. Wheeling & E. G. R. Co. v. Triadelphia, 4: 321, 52 S. E. 499, — W. Va. —.

3. Equity will not permit the enforcement of a forfeiture in an inequitable and oppressive manner, nor a perversion thereof to purposes other than those for which the power of forfeiture has been reserved. Wheeling & E. G. R. Co. v. Triadelphia, 4: 321, 52 S. E. 499, — W. Va. —.

NOTES.

Conviction as a condition of forfeiture of property (Case Note). 358

FORGERY.

That a sales agent who, after collecting money from a customer, forged his note and turned it in to enable himself to retain the money for his own accommodation, sufficiently shows intent to defraud to sustain a conviction of forgery, although he also intended to take up the note when it fell due. Spears v. People, 4: 402, 77 N. E. 112, 220 Ill. 72.

FORMER JEOPARDY.
See CRIMINAL LAW, 3.

FORTHCOMING BOND.
See LEVY AND SEIZURE.

FRAUD.
Assignment of Right to Recover Damages for, see ASSIGNMENT.
In Procuring Signature to Note, see BILLS AND NOTES, 4.
By Executor in Sale of Real Estate, see EXECUTORS AND ADMINISTRATORS, 5.
Effect of, to Prevent Barring of Action, see LIMITATION OF ACTIONS, 1.
Cancelation for, of Notes Held as Collateral Security, see PLEDGE AND COLLATERAL SECURITY, 1.

1. One who makes a false representation owes no duty of care to tell the truth to those to whom he does not communicate it, and to whom he does not anticipate that it will be conveyed, and a person of ordinary prudence and intelligence would not anticipate that it would be conveyed; and such parties have no cause of action against him for injuries they sustain in reliance upon it. Western U. Teleg. Co. v. Schriver, 4: 678, 141 Fed. 538, — C. C. A. —.

2. The rule that where one of two innocent parties must suffer from the fraud of a third, he who furnishes the means to commit it must bear the loss, is applicable to cases in which the party chargeable makes the third party his real or apparent agent, or in which he provides the means intentionally, or for a dishonest purpose, or negligently, or where he derives a benefit from the fraud of the third party. It does not usually apply where one innocently, for an honest purpose, and with reasonable care, furnishes to a third party the means by which he perpetrates a fraud from which he who provides the means derives no benefit. Western U. Teleg. Co. v. Schriver, 4: 678, 141 Fed. 538, — C. C. A. —.

NOTES.

Municipal declaration of forfeiture of street franchise or privilege for breach of conditions as a judicial determination (Case Note). 321

GARNISHMENT.

A verdict upon which no judgment

has been entered is not subject to garnishment. Cappelli v. Wood, 4: 624, 62 Atl. 978, — R. I. —.

NOTES.

Garnishment of verdict before judgment (Case Note). 624

GAS.
See MINES, 2.

GUEST.
Duty of Saloon Keeper toward, see SALOONS.

HIGHWAYS.
Use of Automobiles on, see AUTOMOBILES.
Nature of Action of Municipal Authorities in Revoking Privileges in, see MUNICIPAL CORPORATIONS, 1.

1. Authority to locate a voting booth in the traveled part of a highway is not conferred upon the public officers by a statute directing them to designate a polling place in a public, orderly, and convenient portion of the precinct, and, if no such place can be found within the precinct, then in an adjoining one. Haberlil v. Boston, 4: 571, 76 N. E. 907, 190 Mass. 358.

2. The location, without authority, of a voting booth in a public highway, may constitute a defect therein which will require the municipal corporation to exercise reasonable diligence to protect the public travel. Haberlil v. Boston, 4: 571, 76 N. E. 907, 190 Mass. 358.

NOTES.

Right of municipal corporation to place polling booth in street (Case Note). 571

Duty and liability of person operating automobile on public street or highway (Case Note). 1130

HOMESTEAD.
Right to Partition of, see PARTITION.

1. A mother and an adult son, who is incapable of caring for himself and receives support from her, merely doing chores about the house, constitute a family capable of claiming a homestead. Sheehy v. Scott, 4: 365, 104 N. W. 1139, — Iowa, —.

2. The heirs do not take the homestead of their ancestor free from his debts contracted prior to its acquisition, under a statute providing that the homestead of every pensioner, whether the head of a family or not, purchased with pension money, shall be exempt, and such exemption shall apply to debts contracted prior to its purchase, where, under the statutes, such exemption would not apply to homesteads in general. Beatty v. Wardell, 4: 544, 105 N. W. 357, — Iowa, —.

NOTES.

What constitutes a "family" under the homestead and exemption laws (Subject Note). 365

Right of heirs to exemption of homestead from ancestor's debts contracted prior to its acquisition by him (Case Note). 544

HOMICIDE.
Burden of Showing Extenuating Circumstances for, see EVIDENCE, 15.
Question for Jury Whether Malice Existed in Case of, see TRIAL, 24.
Correctness of Instructions in Trial for, See TRIAL, 36, 41, 42,
Contradicting or Discrediting Witnesses on Trial for, see WITNESSES, 2-4.

1. Legal malice is the intent unlawfully to take human life in cases where the law neither mitigates nor justifies the killing. Mann v. State, 4: 934, 53 S. E. 324, 124 Ga. 760.

2. The mere attempt to flee from the scene of a homicide before the fatal shot is fired will not absolve from responsibility one who aided, abetted, and encouraged its commission to the extent of commanding the one who committed it to shoot deceased. State v. Forsha, 4: 576, 88 S. W. 746, 190 Mo. 296.

Provocation; abusive words.

3. Mere words, however abusive and insulting, will not justify an assault, nor constitute a sufficient provocation to reduce to manslaughter what would otherwise be murder. State v. Buffington, 4: 154, 81 Pac. 465, 71 Kan. 804.

4. Abusive language to a carrier's agent, by a passenger who is angry at a charge for storage on his baggage, cannot justify or excuse the act of the agent in shooting him when he is going out of the office. Daniel v. Petersburg R. Co. 4: 485, 23 S. E. 327, 117 N. C. 592.

NOTES.

Insulting words or conduct as a provocation to homicide (Subject Note). 154

Withdrawal from participation in homicide, which will relieve from criminality (Subject Note). 576

HUSBAND AND WIFE.
For Alimony, see ALIMONY.
For Divorce, see DIVORCE.

1. Under a statute permitting a married woman to maintain actions for injuries in the same manner as if sole, she may maintain an action for the alienation from her of the affections of her husband. Nolin v. Pearson, 4: 643, 77 N. E. 890, — Mass. —.

2. In Kansas, coverture affords no ground for declaring invalid a married woman's contract, even although she possesses no separate estate or separate trade or business. Harrington v. Lowe, 4: 547, 84 Pac. 570, — Kan —.

3. The execution by a man of a second mortgage upon his land, in which his wife does not join, does not defeat her right to redeem, under her unassigned right of dower, from a first mortgage in which she

joined. Hays v. Cretin, 4: 1039, 62 Atl. 1028, 102 Md. 695.

4. A widow, in redeeming from a first mortgage on her deceased husband's property in which she joined, is not bound to pay a second mortgage and an open account held by the purchaser at the execution sale against her husband for which she was not liable. Hays v. Cretin, 4: 1039, 62 Atl. 1028, 102 Md. 695.

NOTES.

Ownership of separate estate, trade, or business as a condition of married woman's right to contract (Case Note). 547

Right of wife, under modern married women's acts, to sue for alienation of the affections of her husband (Case Note). 643

INCRIMINATION.

See CRIMINAL LAW, 1, 2.

INDICTMENT, INFORMATION, AND COMPLAINT.

The verification of an information is not invalidated by the omission of the seal of the court to the jurat. State v. Forsha, 4: 576, 88 S. W. 746, 190 Mo. 296.

INFANTS.

Liability of Master for Injury to Child Permitted by Servant to Ride upon Wagon, see MASTER AND SERVANT, 39.

Negligence Causing Injury to, see NEGLIGENCE, 4, 5.

INJUNCTION.

Punishment for Violation of, see CONTEMPT, 1–3, 5.

Right to Fine Corporation for Violation of, see CORPORATIONS, 1.

Against strikers.

1. Equity may enjoin a labor union, the members of which are on a strike, from preventing the employment of other persons in their places by force, threats, intimidation, and picketing. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

2. Striking employees and the union to which they belong, and which is aiding them, may be enjoined from congregating about the entrance to the place of business of their former employer and endeavoring to persuade his customers to withhold their patronage from him. Jensen v. Cooks' & Waiters' Union, 4: 302, 81 Pac. 1069, 39 Wash. 531.

To protect trademark.

3. It is essential that the owner of a trademark who applies for an injunction to restrain a competitor from injuring his property by making false representations should not, in his trademark or his advertisements and business, be himself guilty of any false or misleading representations; but not every exaggerated recommendation of one's own goods is to be regarded as such a false representation as will lead a court of equity to withhold relief, but rather such materially fraudulent statements as to the character, quality, and make of the goods as tend, if untrue, to deceive the public to its injury. Regent Shoe Mfg. Co. v. Haaker, 4: 447, 106 N. W. 595, — Neb. —.

Against interference with bridge.

4. Equity will grant relief in an action brought by a village to enjoin interference with a bridge by one threatening to remove the railing of the bridge for the purpose of connecting the floor of the structure with the platform leading to a building which he has erected for saloon purposes, where the complaint alleges the corporate capacity of the plaintiff, and that the defendant's threatened acts will create a nuisance and endanger the health of the inhabitants of the village, and will result in damage to the property of the town, or may be the means of causes of action for damage against the village. Sand Point v. Doyle, 4: 810, 83 Pac. 598, — Idaho, —.

To prevent removal of street railway tracks.

5. After the repeal by the council of a town, pursuant to notice, of an ordinance granting a street railway privilege in a street, the railway company may, by injunction, prevent the town authorities from removing or disturbing its track, if no cause of forfeiture exists, or the circumstances shown are such as to call for the exercise of equity jurisdiction to relieve from forfeiture. Wheeling & E. G. R. Co. v. Triadelphia, 4: 321, 52 S. E. 499, — W. Va. —.

Against void county contract.

6. A citizen and taxpayer of a county may maintain a bill to enjoin the execution of a void contract by the county to employ a person to search for property omitted from the tax lists for a percentage of the amount recovered. Stevens v. Henry County, 4: 399, 75 N. E. 1024, 218 Ill. 468.

Violation of.

7. One against whom an injunction is issued cannot ignore it on the ground that it is broader in its terms than the bill justifies. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

8. Defect of parties plaintiff will not deprive a court of jurisdiction to hear an application for injunction, or justify defendant in ignoring an injunction which is granted. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

NOTES.

Injunction against saloon because of character of locality (Case Note). 810

Necessity of fraudulent intent to justify injunction against unfair competition (Case Note). 960

INNKEEPERS.

Saloon Keeper as, see SALOONS.

INSOLVENCY.

NOTES.

Liquor license as asset (Case Note). 623

INSURANCE.

1. The retention of a mutual benefit certificate payable to the "legal representatives" of the member, which, because of lack of authority in the society to provide otherwise, must be construed as heirs, after the amendment of the charter so as to permit a payment to assigns, without any attempt to change the beneficiary according to the rules of the order and the execution of a will in favor of an assign, will not deprive the heirs of the right to the fund on the theory that the amendment restored to the words "legal representatives" their primary meaning. Re Harton, 4: 939, 62 Atl. 1058, 213 Pa. 499.

Construction of policy.

Admissibility of Parol Evidence to Explain Policy, see EVIDENCE, 18, 20.

2. One applying for insurance on a "dwelling house" which he states is in process of erection complies with his undertaking if, when occupied, the building is used for that purpose. Harris v. North American Ins. Co. 4: 1137, 77 N. E. 493, 190 Mass. 361.

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5. A beneficial association issuing death benefit certificates is not within the meaning of a question in an insurance application as to whether or not applicant has ever been rejected by any company. Lyon v. United Moderns, 4: 247, 83 Pac. 804, — Cal. —.

6. A provision in a mutual benefit certificate that the amount should be paid within a certain time after satisfactory proof of the validity of the claim does not require proof of the validity of the certificate. Lyon v. United Moderns, 4: 247, 83 Pac. 804, — Cal. —.

Representations; materiality.

7. The materiality of representations made in an application for fire insurance becomes unimportant where, by the express terms of the application, it is made a part of the contract of insurance, and the representations contained therein are warranted by the applicant, and it is provided that the policy shall be void if any of the representations are not true, for, under such stipulations, in a suit to recover loss occasioned by the destruction by fire of the property insured, the insurance company is relieved from showing, and the insured is estopped from denying, that they were material to the contract. Deming Invest. Co. v. Shawnee F. Ins. Co. 4: 607, 83 Pac. 918, — Okla. —.

Conditions generally; notice; reasonableness.

8. The insured, by accepting a fire insurance policy, is charged with notice of its contents, and is bound by its conditions. Re Millers' & M. Ins. Co. 4: 231, 106 N. W. 485, — Minn. —.

9. In an application for fire insurance, made for the purpose of informing the insurance company of the facts with reference to the property sought to be insured, and to furnish it information upon which it is to act in accepting or refusing the risk, and wherein the applicant warrants his answers to be true, a stipulation in an application and policy that, if any of the statements made in the application by the applicant are untrue, the policy shall be void, is a reasonable stipulation. Deming Invest. Co. v. Shawnee F. Ins. Co. 4: 607, 83 Pac. 918, — Okla. —.

Conditions as to title.

10. A provision in a fire insurance policy that it shall be void if the subject of insurance be a building standing on ground not owned by the insured in fee simple applies to the conditions existing at the date of the policy, and not to future changes in title. Re Millers' & M. Ins. Co. 4: 231, 106 N. W. 485, — Minn. —.

11. It is incumbent upon an applicant for fire insurance to disclose the nature of his title. Re Millers' & M. Ins. Co. 4: 231, 106 N. W. 485, — Minn. —.

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13. A contract of fire insurance is entire, and the increase of moral hazard due to the fact that the insured does not own the land upon which the insured building stands affects not only the building, but the entire property, in case of its destruction by fire. Re Millers' & M. Ins. Co. 4: 231, 106 N. W. 485, — Minn. —.

14. No change has taken place in the interest, title, or possession of the holder of a fire insurance policy where, at the time of the loss, the insured owns the title of the subject of the insurance, although he has made an executory contract to convey the property, and the consideration has been fully paid, when no transfer, either of the title or possession, has been actually made. Garner v. Milwaukee M. Ins. Co. 4: 654, 84 Pac. 717, — Kan. —.

15. The word "interest," in a forfeiture clause of an insurance policy, which provides that the policy shall become void "if any change shall take place in the interest, title, or possession of the subject of insurance," has application only where the insured owns and insures an interest less than title, and has no application where the insured owns the title. Garner v. Milwaukee Mechanics' Ins. Co. 4: 654, 84 Pac. 717, — Kan. —.

joined. Hays v. Cretin, 4: 1039, 62 Atl. 1028, 102 Md. 695.

4. A widow, in redeeming from a first mortgage on her deceased husband's property in which she joined, is not bound to pay a second mortgage and an open account held by the purchaser at the execution sale against her husband for which she was not liable. Hays v. Cretin, 4: 1039, 62 Atl. 1028, 102 Md. 695.

NOTES.

Ownership of separate estate, trade, or business as a condition of married woman's right to contract (Case Note). 547

Right of wife, under modern married women's acts, to sue for alienation of the affections of her husband (Case Note). 643

INCRIMINATION.

See CRIMINAL LAW, 1, 2.

INDICTMENT, INFORMATION, AND COMPLAINT.

The verification of an information is not invalidated by the omission of the seal of the court to the jurat. State v. Forsha, 4: 576, 88 S. W. 746, 190 Mo. 296.

INFANTS.

Liability of Master for Injury to Child Permitted by Servant to Ride upon Wagon, see MASTER AND SERVANT, 39.

Negligence Causing Injury to, see NEGLIGENCE, 4, 5.

INJUNCTION.

Punishment for Violation of, see CONTEMPT, 1-3, 5.

Right to Fine Corporation for Violation of, see CORPORATIONS, 1.

Against strikers.

1. Equity may enjoin a labor union, the members of which are on a strike, from preventing the employment of other persons in their places by force, threats, intimidation, and picketing. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

2. Striking employees and the union to which they belong, and which is aiding them, may be enjoined from congregating about the entrance to the place of business of their former employer and endeavoring to persuade his customers to withhold their patronage from him. Jensen v. Cooks' & Waiters' Union, 4: 302, 81 Pac. 1069, 39 Wash. 531.

To protect trademark.

3. It is essential that the owner of a trademark who applies for an injunction to restrain a competitor from injuring his property by making false representations should not, in his trademark or his advertisements and business, be himself guilty of any false or misleading representations; but not every exaggerated recommendation of one's own goods is to be regarded as such a false representation as will lead a court of equity to withhold relief, but rather such materially fraudulent statements as to the character, quality, and make of the goods as tend, if untrue, to deceive the public to its injury. Regent Shoe Mfg. Co. v. Haaker, 4: 447, 106 N. W. 595, — Neb. —.

Against interference with bridge.

4. Equity will grant relief in an action brought by a village to enjoin interference with a bridge by one threatening to remove the railing of the bridge for the purpose of connecting the floor of the structure with the platform leading to a building which he has erected for saloon purposes, where the complaint alleges the corporate capacity of the plaintiff, and that the defendant's threatened acts will create a nuisance and endanger the health of the inhabitants of the village, and will result in damage to the property of the town, or may be the means of causes of action for damage against the village. Sand Point v. Doyle, 4: 810, 83 Pac. 598, — Idaho, —.

To prevent removal of street railway tracks.

5. After the repeal by the council of a town, pursuant to notice, of an ordinance granting a street railway privilege in a street, the railway company may, by injunction, prevent the town authorities from removing or disturbing its track, if no cause of forfeiture exists, or the circumstances shown are such as to call for the exercise of equity jurisdiction to relieve from forfeiture. Wheeling & E. G. R. Co. v. Triadelphia, 4: 321, 52 S. E. 499, — W. Va. —.

Against void county contract.

6. A citizen and taxpayer of a county may maintain a bill to enjoin the execution of a void contract by the county to employ a person to search for property omitted from the tax lists for a percentage of the amount recovered. Stevens v. Henry County, 4: 399, 75 N. E. 1024, 218 Ill. 468.

Violation of.

7. One against whom an injunction is issued cannot ignore it on the ground that it is broader in its terms than the bill justifies. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

8. Defect of parties plaintiff will not deprive a court of jurisdiction to hear an application for injunction, or justify defendant in ignoring an injunction which is granted. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

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Nonoccupancy or change in use.

16. A provision in an insurance policy rendering it void in case the premises become vacant by the removal of the owner or occupant has no application to a policy issued on a building in process of erection, which, because not fully fitted for occupancy, is never occupied prior to the fire. Harris v. North American Ins. Co. 4: 1137, 77 N. E. 493, 190 Mass. 361.

17. The removal from a building in process of construction of mechanics who have been in possession under a permit from the insurance company does not create a forfeiture under a clause of the policy making it void in case the premises become vacant by the removal of the owner or occupant, since the permit for their presence refers to the clause relating to increase of risk, and is not a waiver of the provision against vacancy. Harris v. North American Ins. Co. 4: 1137, 77 N. E. 493, 190 Mass. 361.

18. The terms of an insurance policy rendering it void in case of vacancy of a building cannot be changed by implied waiver in the issuance of a policy on a building known to be unoccupied, since the provision refers to a possible future, and not a present, use of the property. Harris v. North American Ins. Co. 4: 1137, 77 N. E. 493, 190 Mass. 361.

19. A building in process of construction is not within the meaning of an instruction by an insurance company to its agent not to insure unoccupied buildings. Harris v. North American Ins. Co. 4: 1137, 77 N. E. 493, 190 Mass. 361.

20. Conditions in fire insurance policies that they shall be void if the use of the insured building be changed or if it become vacant or unoccupied are broken and no recovery can be had in an action on the policies where, at the time of the loss, the building was used for the temporary storage of the library and a portion of the household effects of a teacher formerly living therein, but its use for school purposes had been suspended for an indefinite period, although a lease contemplating the establishment of a new school of the same character had been negotiated, but the tenant had not arrived or taken possession. Connecticut F. Ins. Co. v. Buchanan, 4: 758, 141 Fed. 877, — C. C. A. —.

21. Fire insurance policies contemplate the use and occupancy of the insured property as a normal school and dwelling and make the same a condition to the acceptance and continuance of the risk, where one of the policies insures the premises as a "normal school and dwelling" and the other insures it "occupied, and only while occupied, as a normal school and dwelling," both policies further providing that they shall be void in case of change of use or occupants except change of occupants without increase of hazard, or if the building become vacant or unoccupied. Connecticut F. Ins. Co. v. Buchanan, 4: 758, 141 Fed. 877, — C. C. A. —.

Arbitration.

22. A provision for arbitration in a standard insurance policy the form of which has been approved by the legislature cannot be declared void as against public policy. Grady v. Home F. & M. Ins. Co. 4: 288, 63 Atl. 173, — R. I. —.

23. Failure of arbitration through no fault of the insurance company does not abrogate a provision in the policy that no action shall be brought until the amount of the loss has been settled by arbitrators, and there is nothing to show that arbitration has become impossible. Grady v. Home F. & M. Ins. Co. 4: 288, 63 Atl. 173, — R. I. —.

24. Arbitration as to the amount of the loss is a condition precedent to an action on an insurance policy, where the policy expressly provides that no action shall be sustainable until after full compliance with all conditions, one of which is that in case of dispute the amount of loss shall be fixed by arbitration. Grady v. Home F. & M. Ins. Co. 4: 288, 63 Atl. 173, — R. I. —.

25. Noncompliance with a condition in an insurance policy as to arbitration is waived by the insurer by failure to raise the question in an action on the policy, so that refusal to direct a verdict in its favor is not error, although the provision had not been waived or complied with prior to the trial. Harris v. North American Ins. Co. 4: 1137, 77 N. E. 493, 190 Mass. 361.

Waiver generally.

26. An insurance company cannot take advantage of a condition in its policy to avoid payment of a loss when the facts which, by its terms, invalidate the policy, were known to it or its agent when it issued the policy; but this rule has no application when the facts were not known, since what is not known cannot be waived. Re Millers' & M. Ins. Co. 4: 231, 106 N. W. 485, — Minn. —.

Waiver by agents.

27. An agent for a fire insurance company, whose powers are strictly defined and limited by the express terms of the contract of insurance, cannot act so as to bind his company beyond the scope of his authority. Deming Invest. Co. v. Shawnee F. Ins. Co. 4: 607, 83 Pac. 918, — Okla. —.

28. If a waiver of the stipulations and conditions contained in a policy of fire insurance relied upon is the act and conduct of an agent of the insurance company, it must be shown that the agent had express authority from the company to make the waiver, or that the company subsequently, with the knowledge of the facts, ratified the unauthorized action of the agent. Deming Invest. Co. v. Shawnee F. Ins. Co. 4: 607, 83 Pac. 918, — Okla. —.

29. An insurance agent having no power expressly to waive the provisions of a policy rendering it void in case the premises become vacant cannot surrender the contractual right of his employer by issuing a policy on vacant property. Harris v. North American Ins. Co. 4: 1137, 77 N. E. 493, 190 Mass. 361.

interest in the coal remaining in place, of a landowner who has leased at a certain yearly rental the right to mine a specified amount of coal from the land each year, the contract to terminate when the coal shall all have been removed or the conditions of the lease are broken, and excess payments in any year to entitle the lessee to take out a corresponding additional amount of coal at any time within six years; and the sale thereunder will carry the incidental right to the rent or royalty under the lease. Coolbaugh v. Lehigh & W. B. Coal Co. 4: 207, 62 Atl. 94, 213 Pa. 28.

Conclusiveness.

5. A claim of one as heir at law to real estate is cut off by a judgment against him in an action to quiet title, in which the title is put in issue, and he might have presented such claim but did not. Remilliard v. Authier, 4: 295, 105 N. W. 626, — S. D. —.

Relief against; redemption.

Alleging, as Ground for Vacating, that Attorney Conducting Trial Had No Authority, see ATTORNEYS, 3.

6. An attorney's mistake of judgment as to the law, or his ignorance of facts which he ought to have known, is not sufficient ground for vacating a judgment of dismissal, entered upon his motion. Bacon v. Mitchell, 4: 244, 106 N. W. 129, — N. D. —.

7. It is an abuse of discretion for a trial court to refuse to open a default and permit the filing of an answer, where defendant's attorneys, living a long distance from the place of trial, presented a motion to make the complaint more definite, accompanied by an argument, and relied upon plaintiff's counsel to notify them of the result of the motion, which was not done, so that the default was incurred, immediately after which an affidavit of meritorious defense and excusable neglect and an answer were tendered. Douglas v. Badger State Mine, 4: 196, 83 Pac. 178, — Wash. —.

8. Ten days is too short a time to allow for redemption from a judgment foreclosing a land contract, where the amount involved is large, and a substantial payment was made when the contract was entered into; and the vendor has remained in possession of the property. Dickson v. Loehr, 4: 986, 106 N. W. 793, 126 Wis. 641.

NOTES.

Judgment; reliance upon receiving notice from opposing counsel as excuse for default (Case Note). 196

Conclusiveness of judgment in actions of the nature of ejectment, as to claim of title, previously acquired, not in issue (Case Note). 295

JURY.

That a juror has formed and expressed an opinion as to the guilt of accused from rumors and newspaper reports does not disqualify him if he states that he can give accused a fair and impartial trial upon the testimony introduced. State v. Forsha, 4: 576, 88 S. W. 746, 190 Mo. 296.

JUSTICE OF THE PEACE.

A justice of the peace does not lose jurisdiction of a criminal case submitted to him without a jury by taking it under advisement, where the statute does not prescribe the time within which his judgment must be rendered. State v. Davis, 4: 1023, 92 S. W. 484, 194 Mo. 485.

LABOR ORGANIZATIONS.

See also PICKETING.

Injunction against, see INJUNCTION, 1, 2.

A labor union cannot escape liability for the acts of its members which are the direct result of a strike which it has inaugurated, on the ground that its officers advised the members to be orderly and obey the law. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

LACHES.

Mere failure for fifteen years to apply for a legacy will not bar a right to recover it, where claimant had no knowledge of his rights until shortly before action brought, the interested parties are all living, no evidence has been lost, there is no uncertainty as to the amount due, or presumption of payment, and the one who has received the money from the administrator has given a refunding bond. Grandy v. Kennedy, 4: 944, 52 S. E. 635, 104 Va. 826.

LANDLORD AND TENANT.

Covenant in lease; binding effect on assignee.

1. A covenant in a lease whereby the lessor expressly stipulates that he will not be bound to make repairs, alterations, additions, or improvements upon the leased premises, but agrees that the lessee, at his option, may make such of them as shall be necessary, and that he will reimburse him therefor to an amount named, is a personal obligation on the part of the original lessor, and does not run with the reversion so as to bind an assignee thereof. Willcox v. Kehoe, 4: 466, 52 S. E. 896, 124 Ga. 484.

2. One who buys land subject to a lease containing a covenant whereby the lessor expressly stipulates that the lessee, at his option, may make necessary repairs, alterations, additions, or improvements upon the leased premises, and that he will reimburse him therefor, is not bound for the breach of the purely personal covenant of his predecessor, made prior to the sale to him. Willcox v. Kehoe, 4: 466, 52 S. E. 896, 124 Ga. 484.

Duty as to condition of premises.

3. The duty of the owner of an office building to keep in proper condition the common portions retained in his possession does not extend to keeping outer doors unlocked on Sunday to enable tenants to remove large pieces of furniture in case of fire. Whitcomb v. Mason, 4: 565, 62 Atl. 749, 102 Md. 275.

tended to prevail until judgment should be entered on the contract. Bank v. Doherty, 4: 1191, 84 Pac. 872, — Wash. —.

INTERFERENCE WITH OCCUPATION.

See PLEADING, 5, 6.

INTERURBAN STREET RAILWAY.

As Additional Servitude on Highway, see EMINENT DOMAIN, 3.

INTOXICATING LIQUORS.

Liability of Saloon Keeper for Injury to Guest, see MASTER AND SERVANT, 43; SALOONS.

Assigning License as Collateral Security, see PLEDGE AND COLLATERAL SECURITY, 2.

License to Sell as Assets to Which Receiver of Licensee Entitled, see RECEIVERS, 1.

Prohibition and regulation.

Sufficiency of Title to Ordinance Regulating, see MUNICIPAL CORPORATIONS, 2.

1. The control of the liquor business is within the police power of the state, and restrictions which might lawfully be imposed upon it might be obnoxious as an illegal restraint of trade when applied to other pursuits or avocations. State v. Calloway, 4: 109, 84 Pac. 27, — Idaho, —.

2. The power to prohibit the sale of intoxicating liquors in the interest of the public safety, welfare, good order, and happiness of the people during certain prescribed periods by the proper legislative body is no longer an open question. State v. Calloway, 4: 109, 84 Pac. 27, — Idaho, —.

3. The right to sell liquor is not an inherent right of the citizen, and to prohibit him from keeping open his place of business from 12 o'clock midnight to 6 o'clock in the morning, and from 12 o'clock Saturday nights until 6 o'clock the following Monday morning, does not deprive him of property without due process of law, but is a restraint which in no wise contemplates a destruction of his business, but places it within the bounds therein named, and is simply a regulation and restraint. State v. Calloway, 4: 109, 84 Pac. 27, — Idaho, —.

4. An ordinance regulating the hours in which intoxicating liquors shall be sold is not objectionable as class legislation where it is equally applicable to all dealers in intoxicating liquors, whether at wholesale or retail, nor does it infringe any right, privilege, or immunity secured to the citizen by the Federal Constitution or that of the state of Idaho. State v. Calloway, 4: 109, 84 Pac. 27, — Idaho, —.

5. A provision in an ordinance regulating the sale of intoxicating liquors, that no proprietor of a place where such liquors are sold shall permit any person or persons other than himself or family to enter the premises during the hours when the sale of liquors is prohibited, is a reasonable regulation, within the power of the common council to enact, and not contrary to the Constitution or general laws of the state of Idaho. State v. Calloway, 4: 109, 84 Pac. 27, — Idaho, —.

6. Under an ordinance forbidding a saloon keeper from permitting any person or persons other than himself and family to enter his place of business during the hours when the sale of liquors is prohibited, the offense is committed by admitting a prohibited person into the building during prohibited hours, and it is immaterial for what purposes the proprietor admits him. State v. Calloway, 4: 109, 84 Pac. 27, — Idaho, —.

7. A city council has power and authority to enact ordinances and make reasonable regulations for the sale of intoxicating liquors, both at retail and wholesale, under a charter provision granting to the city the right to license, tax, regulate, and restrain barkeepers, saloon keepers, and dealers in spirituous or malt liquors, and places where such liquors are kept for sale or in any manner disposed of. State v. Calloway, 4: 109, 84 Pac. 27, — Idaho, —.

8. A municipal ordinance regulating the hours in which intoxicating liquors shall be sold and for Sunday closing, and providing for a penalty for the sale thereof during prohibited hours, is not repugnant to the general laws of the state of Idaho. State v. Calloway, 4: 109, 84 Pac. 27, — Idaho, —.

NOTES.

Validity of ordinance excluding persons from saloon during hours of closing (Case Note). 109

JUDGMENT.

1. On demurrer to a bill generally and specially for the want of jurisdiction, the judgment sustaining the demurrer solely on the ground of want of jurisdiction should be limited accordingly, since a decree of dismissal of the bill concludes the plaintiff on the merits. Fowler v. Osgood, 4: 824, 141 Fed. 20, — C. C. A. —.

Non obstante veredicto.

2. In an action by a passenger against a railway company to recover for injuries which it is claimed were caused by the negligence of the company in starting its train without giving him sufficient time to get off in safety, where the jury find generally for the plaintiff, a special finding by the jury that the train stopped the usual and ordinary length of time will not warrant the court in rendering judgment for the railway company *non obstante veredicto*. Chicago, R. I. & P. R. Co. v. Wimmer, 4: 140, 84 Pac. 378, — Kan. —.

Validity; service by publication.

3. A personal judgment against a domestic corporation, based upon service by publication, as provided in Fla. Rev. Stat. 1892, § 1024, is not void. Clearwater Mercantile Co. v. Roberts, J. & R. Shoe Co. 4: 117, 40 So. 436, — Fla. —.

Lien.

4. The lien of a judgment will reach the

& Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

3. The drawer of a check sent to a distant place to be forwarded for presentation, by allowing his funds to remain in the drawee bank, and the payee, by accepting the check, evince belief in the solvency of the bank, and the former voluntarily takes the risk of its solvency during the reasonable period necessary for presentment of the check in the usual manner. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

4. The parties to a check drawn on a bank and sent to a distant place to be forwarded for presentation are deemed in law to have acted with knowledge of the usual diligent method of making such presentment through a bank at the place to which it is sent, and to have agreed to suffer any reasonable delay incident to such mode of presentment. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

5. The drawer, in delivering a check to an agent of the payee, having no authority to indorse it, at the place of business of the drawer, impliedly agrees to allow such additional time for presentment as may be necessary for the transmission of the check to the principal of the agent. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

6. A person receiving a check on a fund in the hands of a bank, for the amount of a demand against the drawer thereof, is bound to exercise reasonable diligence in making presentment thereof for payment, if he wishes to avoid risk of loss by insolvency of the drawee. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

7. If the payee of the check and the drawee reside, or have their places of business, in the same city or town, presentment must be made before the expiration of business hours of the day next after the day of the receipt thereof. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

8. If the person receiving a check and the bank on which it is drawn are in different places, it must be forwarded, for presentment, by mail or other usual mode of transmission, on the next day after the receipt thereof at the place in which the payee resides or does business, if reasonably and conveniently practicable; and, if it is not so practicable, then by the next mail, or other similar means of conveyance, leaving after said date. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

9. Failure to present a check does not bar recovery from the drawer, if the time intervening between delivery thereof and the failure of the bank is not sufficient for presentment by the exercise of such diligence as the law requires. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

CIGARETTES.

Right to Hold in Original Package, see COMMERCE, 2.

A statute making it unlawful to keep or own cigarettes does not apply to the act of smoking cigarettes, or of having them in possession for the sole purpose of smoking them,—at least where the title states that the act is to regulate, and, in certain cases, prohibit, the use of cigarettes; and the words "keep" and "own" are preceded by those governing the manufacture, sale, and giving away of such articles. State v. Lowry, 4: 528, 77 N. E. 728, — Ind. —.

COLLATERAL-INHERITANCE TAX.

See TAXES, 1.

COMMERCE.

1. Limiting the sale of railroad tickets to railroad companies and their duly authorized agents is not, although applicable to tickets of roads out of, as well as within, the state, an interference with interstate commerce. State v. Thompson, 4: 480, 84 Pac. 476, — Or. —.

2. A state cannot deny to a proper person the right to hold in the original packages cigarettes which he has imported from another state. State v. Lowry, 4: 528, 77 N. E. 728, — Ind. —.

NOTES.

Commerce; right of state to confiscate cigarettes imported for personal use (Case Note). 528

CONCEALED WEAPONS.

See CARRYING WEAPONS.

CONFLICT OF LAWS.

1. The statute of the state where the accident occurs, and not of that of decedent's domicil, governs the distribution of a fund collected without suit, for the wrongful killing of a person. Re Coe, 4: 814, 106 N. W. 743, — Iowa, —.

2. A contract valid by the laws of the state where it is made and to be performed is not rendered subject to the usury laws of another state by the fact that it is secured by mortgage on land there situated, and to whose courts it is necessary to resort to enforce the mortgage. Bank v. Doherty, 4: 1191, 84 Pac. 872, — Wash. —.

3. A cause of action upon a contract made in one state which has been barred by the statutes of another state while the defendant resided there, but is not barred by the laws of the state in which the contract was made, may be enforced in a territory under a statute providing that where the cause of action has arisen in another state between nonresidents of the territory, and, by the laws of the state where the cause of action arose, an action cannot be maintained, by reason of lapse of time, no action

can be maintained thereon in the territory. Doughty v. Funk, 4: 1029, 84 Pac. 484, — Okla. —.

NOTES.

Foreclosure of mortgage upon land in another state (Case Note). 986

Construction and effect of statute of forum admitting bar of statute of state or country in which cause of action arises or accrues (Case Note). 1029

Enforcement of mortgage on real property valid according to the law of the place where made and payable, but usurious according to the *lex fori et rei sitæ* (Case Note). 1191

CONSPIRACY.

To prevent persons from engaging in a lawful business is unlawful at common law, and conspiracy to accomplish it may be rendered unlawful by statute. State v. Duncan, 4: 1144, 63 Atl. 225, 78 Vt. 364.

CONSTITUTIONAL LAW.

Denial of Due Process by Striking out Depositions of Defendant in Divorce Suit for Failure to Comply with Order of Court, see CONTEMPT, 4.

Power to Regulate Sales of Intoxicating Liquors, see INTOXICATING LIQUORS, 1–4.

Taking private property without compensation.

1. The legislature cannot, without compensation, create a public right of way along the banks and beds of streams to enable the public to enjoy a right of fishery, even by providing an action for any damage done to property along the bank, where the Constitution prohibits the taking of private property for public use without compensation. Hartman v. Tresise, 4: 872, 84 Pac. 685, — Colo. —.

2. The legislature cannot give a public right of fishery in a nontidal, fresh-water stream flowing over private property where the Constitution prohibits the taking of private property for public use without compensation. Hartman v. Tresise, 4: 872, 84 Pac. 685, — Colo. —.

Taking property without due process.

3. A statute providing for the taking of an absentee's property and administering it when he is alive, without his knowledge or consent, and in a proceeding to which he is not a party, and of which he has no notice, is void as depriving him of his property without due process of law. Grandy v. Kennedy, 4: 944, 52 S. E. 635, 104 Va. 826.

4. The purchaser of a railroad ticket is not deprived of his property by forbidding him to sell it through ticket brokers. State v. Thompson, 4: 480, 84 Pac. 476, — Or. —.

Special privileges.

5. An unlawful grant of special privileges is not effected by a statute limiting the sale of railroad tickets to railroads and their duly authorized agents. State v. Thompson, 4: 480, 84 Pac. 476, — Or. —.

Impairing obligation of contract.

6. The assurance held out by the state to purchasers at tax sales by N. D. Rev. Laws 1890, as amended in 1891, that the tax-sale certificates and tax deeds issued to them would be prima facie evidence of the regularity of the tax proceedings, although relating to the remedy, constituted a substantial inducement to the purchase, entering into the contract with the state, and so materially affecting its value that it cannot be taken away by subsequent legislation without impairing its obligation. Blakemore v. Cooper, 4: 1074, 106 N. W. 566, — N. D. —.

7. A statute prohibiting the sale of railroad tickets through brokers does not impair the contract of the holder of a ticket purchased after the law took effect. State v. Thompson, 4: 480, 84 Pac. 476, — Or. —.

NOTES.

Constitutionality of statutes providing for administration of estate of absentee (Case Note). 944

Necessity of providing in statute for notice of hearing on question of damages or compensation in eminent domain proceedings (Case Note). 169

Change of law as to effect of tax certificates as evidence of title (Case Note). 1074

CONTAGIOUS DISEASES.

Right of Carrier to Reject Passengers Afflicted with, see CARRIERS, 16, 17.

CONTEMPT.

Punishment of Corporation for, see CORPORATIONS, 1.

1. A petition is not necessary for the punishment of one for violation of an injunction, and one filed cannot be objected to if it fully advised defendant of the charge against him. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

2. An order adjudging one guilty of contempt for violation of an injunction is not insufficient for failure to set out the particulars of the violation, if it refers to the petition and affidavits where such matters appear. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

3. The truthfulness of the averments of injury in a bill for injunction cannot be questioned in a proceeding for contempt for violation of the injunction. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

Punishment.

4. A court has no power to strike out and disregard depositions filed by a defendant in defense of a suit for divorce, for failure to pay money required of him to enable his wife to prosecute her suit and for temporary alimony, and pass final decree of divorce against him, since such decree is not

due process of law. Trough v. Trough, 4: 1185, 53 S. E. 630, — W. Va. —.

5. One thousand dollars is not an excessive fine to impose on a labor union for violation of an injunction restraining interference with the business of former employers of members on a strike, where the violation is flagrant and often repeated. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

NOTES.

Punishment of corporation for contempt (Case Note). 1001

CONTRACTS.

By Married Women, see HUSBAND AND WIFE, 2.
Conflict of Laws as to, see CONFLICT OF LAWS, 2.
Impairing Obligation of, see CONSTITUTIONAL LAW, 6, 7.
Right of Foreign Corporation to Enforce Contract Made before Complying with Statutory Requirements as to Doing Business, see CORPORATIONS, 3.
Damages for Breach of, see DAMAGES, 2–5.
Admissibility of Parol Evidence to Explain Written Contract, see EVIDENCE, 18–21.
Injunction to Restrain Execution of Void Contract by County, see INJUNCTION, 6.
Construction of Contract by Benefit Society, see INSURANCE, 3.
Sufficiency of Pleading to Show Binding Contract, see PLEADING, 11.
Specific Performance of, see SPECIFIC PERFORMANCE.

Meeting of minds; acceptance.

1. A telegram to a bidder for public work, "You are low bidder. Come on morning train," does not conclude a contract with him. Cedar Rapids Lumber Co. v. Fisher, 4: 177, 105 N. W. 595, — Iowa, —.

Unilateral contract.

2. A written contract entered into between a purchaser of certain goods and a person who signed for the seller, which contained a provision that the contract "shall only be considered binding on the seller when signed by one or more of its officers," is unilateral where it does not appear that it was ever so signed, or that there was any consideration for the promise of the purchaser except the contemplated mutual obligations to be assumed by the seller, and since the latter was not bound, neither is the purchaser, who may withdraw before the contract becomes mutually binding by acceptance in the manner agreed on. Atlanta Buggy Co. v. Hess Spring & Axle Co. 4: 431, 52 S. E. 613, 124 Ga. 338.

3. The fact that under one of two written contracts of sale which were unilateral in character, the vendee specified certain articles which he desired, and which were furnished, renders it binding on the parties to the extent only of the accepted articles. Atlanta Buggy Co. v. Hess Spring & Axle Co. 4: 431, 52 S. E. 613, 124 Ga. 338.

Promise to pay debt of another; privity.

4. If a person, for a consideration moving to him from another, agrees to pay that or any other person's debt to a third party, the law, at once, operating upon the acts of the immediate parties to the transaction, supplies the essentials of privity between such person and such third person, and establishes binding contractual relations between them, even though such third party was a stranger to and had no knowledge of the transaction. Fanning v. Murphy, 4: 666, 105 N. W. 1056 126 Wis. 538.

5. The contractual relations entered into between one who takes a conveyance of real estate, agreeing, as part consideration therefor, to pay the debt of his grantor or that of some other person to a third party, cannot be subsequently varied by any agreement between the immediate parties to the transaction, not consented to by the third party. Fanning v. Murphy, 4: 666, 105 N. W. 1056, 126 Wis. 538.

Ratification of agent's contract.

6. The authority of an agent to make a contract has reference to it as made, and a ratification confirms it as made. Neither anterior authority nor subsequent ratification would operate to change the terms of the written contract without the knowledge or consent of the other party, and adversely to it. Atlanta Buggy Co. v. Hess Spring & Axle Co. 4: 431, 52 S. E. 613, 124 Ga. 338.

Statute of frauds.

7. A parol contract by which two persons enter into a partnership to purchase real estate, one to furnish the money and take the title, and convey a half interest to the other upon receiving his share of the purchase price, is void under the statute of frauds. Scheuer v. Cochem, 4: 427, 105 N. W. 573, 126 Wis. 209.

8. Possession alone of land under a verbal contract, when delivered by the vendor to the vendee, is an act of part performance which will take the case out of the statute of frauds. Sprague v. Jessup, 4: 410, 83 Pac. 145, — Or. —.

9. The parties to an oil lease providing that, in consideration of the grant therein made the lessees will yield and pay to the lessor as royalty a certain share of "the oil produced and saved from the premises," may subsequently, for a consideration, increase or decrease the royalty by parol agreement, and such agreement is not within the statute of frauds. Nonamaker v. Amos, 4: 980, 76 N. E. 949, 73 Ohio St. 163.

Validity; public policy.

Contract to Locate Public Buildings at Certain Place, see ASSUMPSIT, 3.
Sunday Contracts, see SUNDAY.

10. A contract by an attorney to procure legislative action on behalf of a client will be enforced, unless it appears that it contemplates the use of unlawful or improper means, or that such means were employed

in pursuance thereof to attain the object for which the contract was made. Stroemer v. Van Orsdel, 4: 212, 103 N. W. 1053, — Neb. —.

11. A contract between an attorney and client for services to be rendered by the former is not necessarily invalid because a part of the services to be rendered is the procurement of legislative action, nor because such contract provides for a contingent fee. Stroemer v. Van Orsdel, 4: 212, 103 N. W. 1053, — Neb. —.

12. An issue as to the effect of the partial compliance by a municipal corporation with its contract upon the value of the land of one who donated money toward the expense of certain public buildings in consideration of an agreement by the municipality to locate them at a certain place is immaterial in an action to recover for breach of the agreement, since the contract is void as against public policy. Edwards v. Goldsboro, 4: 589, 53 S. E. 652, — N. C. —.

13. No recovery can be had for breach of a contract by a municipal corporation to locate public buildings at a certain place in consideration of a donation toward the expense, since the contract is void as against public policy. Edwards v. Goldsboro, 4: 589, 53 S. E. 652, — N. C. —.

Enforcement.

14. While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent on the enforcement of contracts which are lawful, and contravene none of its rules. Stroemer v. Van Orsdel, 4: 212, 103 N. W. 1053, — Neb. —.

NOTES.

Contract; illustrations of the distinction between a definite proposal or acceptance, and a mere preliminary step in the negotiation of a contract (Case Note). 177

Validity of contract to procure legislative action (Case Note). 213

Contract as to location of public buildings (Case Note). 589

Imposition of penalty as affecting validity of a contract made by a foreign corporation without complying with the statutory conditions of doing business (Case Note). 688

Parol modification of an original contract required to be in writing (Case Note). 980

Validity of contract partially made on Sunday and perfected on a secular day (Case Note). 1151

CONVERSION.

By Carrier; Effect of, to Relieve Shippers from Duty to Defend Suits Relating to Property, see CARRIERS, 22.

CORPORATIONS.

Personal Judgment against, Based upon Service by Publication, see JUDGMENT, 3.

Service by Publication upon Domestic Corporation, see WRIT AND PROCESS, 6.

Service of Process on Foreign Corporations, see WRIT AND PROCESS, 7, 8.

1. A corporation may be fined for the wilful violation of an injunction. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

Foreign.

2. Failure of a foreign building and loan association to comply with the provisions of West Virginia Code of 1899, chap. 54, §,30, requiring its articles of association and by-laws to be recorded in the office of the secretary of state, does not preclude it from transacting business in the state. Burkheimer v. National Mut. Bldg. & L. Asso. 4: 1047, 53 S. E. 372, — W. Va. —.

3. A contract entered into by a foreign corporation within the state before complying with the statute forbidding it to transact business in the state without establishing a local office, an agent to receive service of process, and paying taxes, is void; and subsequent compliance with the terms of the statute will not enable the corporation to maintain an action on the contract, although the statute provides a penalty for failure to comply with it, and declares that no corporation failing to do so "can maintain any suit or action" in any of the courts of the state. Tri-State Amusement Co. v. Forest Park Highlands Amusement Co. 4: 688, 90 S. W. 1020, 192 Mo. 404.

COUNTIES.

Injunction against Execution of Void Contract by, see INJUNCTION, 6.

1. A county, in the absence of express legislative grant, has no power to enter into a contract for the employment of a tax ferret, even though the duty of discovering untaxed property has not been placed upon the public officials. Stevens v. Henry County, 4: 339, 75 N. E. 1024, 218 Ill. 468.

2. Statutory power to a county board of commissioners to make all contracts and do all other acts in relation to the property and concerns of the county necessary to its corporate powers does not include power to employ a tax ferret, where the statutes give such board no authority over the acts of the officials charged with the assessment and collection of taxes. Stevens v. Henry County, 4: 339, 75 N. E. 1024, 218 Ill. 468.

NOTES.

Authority of county to employ "tax ferfet" (Case Note). 339

COURTS.

1. The possessory right of the locator of a mining claim, who has not applied for a patent, does not, under the Federal law giving locators, their heirs and assigns, the right of possession, go directly to the heirs of the locator upon his death, as beneficiaries of the government, but they take by descent from the locator; so that the estate is subject to the jurisdiction of the probate

court. O'Connell v. Pinnacle Gold Mines Co. 4: 919, 140 Fed. 854, — C. C. A.—.

2. The statutory adaptation of the criminal procedure of circuit courts to a mayor's court is applicable only to criminal proceedings, and does not change the nature or character of any case that may be brought before such court. Fortune v. Wilburton, 4: 782, 142 Fed. 114, — C. C. A. —.

3. The absence of reported judgments and decisions sustaining an alleged liability under a given state of facts raises a strong presumption that no such liability exists. Western U. Teleg. Co. v. Schriver, 4: 678, 141 Fed. 538, — C. C. A. —.

NOTES.

Review by civil courts of expulsion of member of a religious society (Case Note). 1154

COVENANT.

Damages for Breach of, see DAMAGES, 6–8.

Relief by Equity from Forfeiture for Nonperformance of, see FORFEITURE, 2, 3.

In Lease, as to Repairs by Landlord; as Running with Reversion, see LANDLORD AND TENANT, 1, 2.

Knowledge by a purchaser of real estate of an unexpired lease of the property will not prevent his maintaining an action for breach of covenant because of such lease. Browne v. Taylor, 4: 309, 88 S. W. 933, — Tenn. —.

NOTES.

Effect of purchaser's knowledge of encumbrance in action for breach of covenant (Subject Note). 309

Covenant of lessor to pay for repairs or improvements as one running with land (Case Note). 466

CREDITORS' BILL.

To Reach Surrender Value of Debtor's Life Insurance Policies, see INSURANCE, 39.

CRIMINAL LAW.

As to Jury, see JURY.

Error in Permitting Proof of Former Convictions, see TRIAL, 7.

Self-crimination.

1. Failure to instruct a witness summoned before a grand jury as to his rights in regard to self-crimination will not nullify an indictment against him founded in part upon his own testimony. State v. Duncan, 4: 1144, 63 Atl. 225, 78 Vt. 364.

2. To render available the constitutional protection against being compelled to give incriminating evidence against one's self, to one summoned before the grand jury when not under arrest or suspected of crime, the privilege must be claimed, and it is not sufficient that the evidence is given involuntarily,—at least where the conditions and circumstances of the case are not such as to speak for the witness, and of themselves show compulsion. State v. Duncan, 4: 1144, 63 Atl. 225, 78 Vt. 364.

Former jeopardy.

3. Acquittal of a sales agent upon a charge of embezzlement and larceny in retaining funds collected from customers is no bar to a subsequent prosecution for forgery in making false notes of the customers, although the two indictments relate to the same transaction. Spears v. People, 4: 402, 77 N. E. 112, 220 Ill. 72.

Punishment.

Admissibility of Evidence of Former Conviction to Enhance, see EVIDENCE, 1.

4. To warrant the application of a statute authorizing additional punishment of one convicted of crime upon proof of former convictions, the identity of accused and the one against whom the former judgments were entered must be established by affirmative evidence; mere proof of identity of names not being sufficient. State v. Smith, 4: 539, 106 N. W. 187, — Iowa, —.

5. Failure of proof of identity of accused and those convicted in former prosecutions prevents the court from applying the statute authorizing additional punishment in case of successive convictions, but in case of a finding of guilt it can impose only the punishment provided for the offense for which accused is on trial. State v. Smith, 4: 539, 106 N. W. 187, — Iowa, —.

NOTES.

Acquittal of larceny as bar to prosecution for forgery in same transaction (Case Note). 402

Necessity of claiming constitutional protection against being compelled to give incriminating evidence (Case Note). 1144

CRIMINATION OF SELF.

See CRIMINAL LAW, 1, 2.

CROPPERS.

1. A milch cow and medical supplies may be found to be needed by one who has undertaken to make a crop on another's land, to enable him to perform his contract, within a provision permitting the landowner to deduct from his share of the crop the value of supplies furnished by him and needed to make the crop. Bourland v. McKnight, 4: 698, 96 S. W. 179, — Ark. —.

2. Under a contract by which one undertakes to make a crop on the land of another, who is to have title to it and keep a portion for the use of land, team, and tools, and from the proceeds of the remainder deduct the amount due him for supplies and necessaries furnished the cropper and turn the balance over to him, the cropper is only an employee, and has no title to any portion of the crop which he can mortgage as against the claim of the landowner for the value of cattle and medicines and services of a physician furnished to him. Bourland v. McKnight, 4: 698, 96 S. W. 179, — Ark. —.

3. One who has undertaken to make a crop on another's land for a share of it may mortgage his interest in it. Bourland v. McKnight, 4: 698, 96 S. W. 179, — Ark. —.

DAMAGES.

Recoverable against Employer for Malicious Adulteration of Milk by Servant, see DAMAGES, 13.

Claiming Greater Damages than Legally Entitled to, to Make Declaration Demurrable, see PLEADING, 14.

Simulating trademark.

1. One guilty of simulating another's trademark, and also of unfair trade in leading customers to believe that his product is that of the other, is liable not only for the profits realized from goods containing the fraudulent trademark, but also for the profits resulting from the wrongful acts committed in the unfair competition. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. 4: 960, 62 Atl. 499, 100 Me. 461.

Breach of contract generally.

2. Damages recoverable from a bidder for public work upon his refusal to comply with his contract cannot be fixed at the difference between his bid and the price at which the contract is awarded to a nonbidder, where the authorities have no power to award the contract to the latter. Cedar Rapids Lumber Co. v. Fisher, 4: 177, 105 N. W. 595, — Iowa, —.

3. A lessor cannot make the loss of rent a ground for special damages for failing to comply with a contract to supply furnishings for the leasehold within a specified time without showing a valid contract exempting the lessee from liability for the rent during the period of delay. American Theater Co. v. Siegel, Cooper, & Co. 4: 1167, 77 N. E. 588, 221 Ill. 145.

4. Under a contract for the purchase of a mining claim, which provides for periodic payments, which, together with any other sums which may have been paid, shall be forfeited to the seller as liquidated damages in case of the purchaser's breach of contract, no recovery can be had in case the purchaser surrenders possession for the value of development work which the purchaser agreed, but failed, to do on the property. K. P. Mining Co. v. Jacobson, 4: 755, 83 Pac. 728, — Utah, —.

Breach of carrier's contract.

5. One refused passage on a sleeping car, in violation of the company's contract to carry him, is entitled to recover at least the amount paid for his ticket. Pullman Co. v. Krauss, 4: 103, 40 So. 398, — Ala. —.

Breach of covenant.

6. The measure of damages for breach of covenant in a deed of real estate, consisting of an outstanding lease which prevents the grantee from obtaining immediate possession of the property, will not include the special damages resulting from inability to make a contemplated subdivision of the property, although the grantor had knowledge of such intended use of the property, where the subdivision could not have been perfected before the time for the expiration of the lease had possession been secured, because the connecting streets had not been opened to the property. Browne v. Taylor, 4: 309, 88 S. W. 933, — Tenn. —.

7. Counsel fees expended in a fruitless attempt to eject the tenant are not recoverable in an action for breach of covenant in a sale of real estate because of an unexpired lease of the property. Browne v. Taylor, 4: 309, 88 S. W. 933, — Tenn. —.

8. The rental value of the property during the time the purchaser is kept out of possession is the measure of damages for breach of covenant in a deed of real estate, consisting of an outstanding lease. Browne v. Taylor, 4: 309, 88 S. W. 933, — Tenn. —.

Breach of promise.

9. The courts cannot change a rule of law that has been in force for fifty years, that proof of seduction cannot be allowed to aggravate damages in an action for breach of promise of marriage. Wrynn v. Downey, 4: 615, 63 Atl. 401, — R. I. —.

For condemnation of property.

Error in Rejecting Evidence of Offers to Purchase Other Property in Neighborhood, see TRIAL, 6.

Correctness of Instructions as to, see TRIAL, 39, 40.

10. In the exercise of the right of eminent domain under the statute of Oklahoma, which provides for the appointment of commissioners to assess the injuries sustained by individuals because of the exercise of such right, which statute contains a provision with reference to the duties of such commissioners, as follows: "And they shall inspect said real property and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which said owner will sustain by such appropriation of his land,"— damages to be allowed are not limited to the real estate taken and injured, but may be such damages as the owner actually sustains to either his real or personal property by such appropriation of his land. Blincoe v. Choctaw, O. & W. R. Co. 4: 890, 83 Pac. 903, — Okla. —.

Failure to deliver telegram.

11. One who sends a message to another inquiring as to the price of pineapples of a specified quality, and who promptly receives a telegram from a third person quoting prices, in pursuance of which he purchases a car load of pineapples which prove to be of inferior quality, can only recover from the telegraph company which failed to deliver the message sent by him the cost of sending the telegram, or nominal damages, since the maxim *Causa proxima, non remota, spectatur* applies. Western U. Teleg. Co. v. Barlow, 4: 262, 40 So. 491, — Fla. —.

For street railroad in street.

12. The measure of damages to which a property owner is entitled for the con-

NEGLIGENCE.

In Driving Automobile, see AUTOMOBILES.
In Starting Street Car before Passenger has Reached Seat, see CARRIERS, 5.
As to Proximate Cause, see PROXIMATE CAUSE.
Presumption of Contributory Negligence, see EVIDENCE, 5, 8.
Presumption of, from Injury to Passenger, see EVIDENCE, 4.
Presumption of Due Care in Approaching Danger, see EVIDENCE, 11, 12.
Sufficiency of Averments as to, see PLEADING, 1.
In Failing to Sound Bell or Whistle at Railroad Crossing, see RAILROADS, 3.
In Crossing Railroad Track, see RAILROADS, 2.
Of Saloon Keeper toward Guest, see SALOONS.
Liability of State Hospital for, see STATE INSTITUTIONS.
Of Person Injured by Street Car, see STREET RAILWAYS, 7.
Correctness of Instruction as to Contributory Negligence, see TRIAL, 38.

1. A duty of care, owing by the party who occasions the loss to him who suffers it, is an indispensable element of actionable negligence. The breach of such a duty, owing to others, is immaterial. Western U. Teleg. Co. v. Schriver, 4: 678, 141 Fed. 538, — C. C. A. —.

2. While assumption of risk and contributory negligence rest upon different grounds and are distinct and independent defenses, they are not necessarily incompatible, but may, and sometimes do, arise out of the same facts, as where the danger is not only known or obvious, but injury therefrom is so imminent that no person of ordinary prudence would assume the risk. Chicago G. W. R. Co. v. Crotty, 4: 832, 141 Fed. 913, — C. C. A. —.

3. To render one liable for personal injuries inflicted upon another with whom he was hunting, by the sudden and unexpected discharge of a gun, he must be chargeable with gross negligence. Siefker v. Paysee, 4: 119, 40 So. 366, 115 La. 953.

Injuries to children.

4. A railroad company owes no duty to children trespassing on its property to keep its turntable in such condition that they cannot be injured by playing on it. Pannill v. Potomac, F. & P. R. Co. 4: 80, 53 S. E. 113, — Va. —.

5. A wagon constructed for hauling stone, with a low bed below the axles, is not so attractive and dangerous to children that the owner must take special precautions to avoid injury to such as attempt to ride upon it. Foster-Herbert Cut Stone Co. v. Pugh, 4: 804, 91 S. W. 199, — Tenn. —.

NOTES.

Liability of railroad companies for injury to children playing on turntables (Case Note). 80

Negligence; civil liability for injury by negligent discharge of firearms (Case Note). 113

NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES.

NEW TRIAL.

A motion for new trial cannot be employed as a means of preparing for the appellate court matters occurring during the trial, to which objection was not made at the time. Whitcomb v. Mason, 4: 565, 62 Atl. 749, 102 Md. 275.

NOISE.

See also NUISANCES.
Injunction against, see INJUNCTION, 4.

NUISANCES.

A corporation organized for the generation of electricity under legislative authority for public service is not, in locating its power house, acting in its public capacity, so as to be absolved from liability for injuring neighboring property by the smoke, noise, and escaping electricity incident to its business. Townsend v. Norfolk R. & Light Co. 4: 87, 52 S. E. 970, — Va. —.

OFFICERS.

Power of Municipal Officers to Borrow Money, see MUNICIPAL CORPORATIONS, 3, 4.
Trespass by Officer in Removing Person Arrested on Mesne Process to Another County, see WRIT AND PROCESS, 2.
Right of Officer Failing to Make Due Returns of Writ to Justify under it, see WRIT AND PROCESS, 3.

OIL.

See MINES, 2.

OPTION.

To Purchase Mining Claim, see MINES, 3.

PARENT AND CHILD.

An aged parent who is being supported by one child with no threat of the withdrawal of the support cannot maintain an action against another child for support, under a statute making it the duty of a child to support its parent who is unable to maintain himself. Duffy v. Yordi, 4: 1159, 84 Pac. 838, — Cal. —.

NOTES.

Right of parent to sue child for support (Case Note). 1159

PARTITION.

1. A wife to whom an undivided half interest in homestead premises has been deeded by the husband pursuant to an amicable settlement of divorce proceedings is

not entitled, after subsequently leaving the husband for alleged justifiable reasons, to a partition of the premises, which are still occupied by the husband as a homestead. Grace v. Grace, 4: 786, 104 N. W. 969, — Minn. —.

2. Neither husband nor wife can dispose, by sale or conveyance, of a homestead right, without the express consent of the other, and what neither is able to do directly, neither will be permitted to do indirectly by sale on partition. Grace v. Grace, 4: 786, 104 N. W. 969, — Minn. —.

PARTNERSHIP.

Right of One Partner to Cause Arrest of Other for Fraud, see ARREST, 1.

Validity of Parol Partnership to Deal in Real Estate, see CONTRACTS, 7.

Acceptance by Firm Creditor of Dividend from Insolvent Estate of Partner Who has Purchased Interest of Copartner, to Estop Creditor from Looking to Latter for Payment, see ESTOPPEL, 3.

Means of knowledge, on the part of bank officers, of a change in the membership of a firm whose note is held by the bank at the time of a renewal thereof, is not sufficient to exonerate the retiring members from liability thereon if they had not in fact received such knowledge. Gross v. Breckenridge Bank, 4: 800, 90 S. W. 5, — Ky. —.

NOTES.

Validity of parol partnership to deal in real property (Case Note). 427

Partition of homestead (Subject Note). 786

Necessity of actual notice of retirement of member of firm to relieve retiring member from liability on obligation renewed after his retirement (Case Note). 800

PATRONS.

Duty of Saloon Keeper toward, see SALOONS.

PAYMENTS.

Payment to the mortgagee of the amount of the negotiable note secured by the mortgage is at the risk of the mortgagor, unless he requires a surrender of note and mortgage; so that in case the note has been negotiated, and the money does not reach the true owner, the mortgagor will be required to make a second payment. Leahy v. Haworth, 4: 657, 141 Fed. 850, — C. C. A. —.

PENSION.

Exemption of Homestead Purchased with Pension Money, see HOMESTEAD, 2.

PHYSICIANS AND SURGEONS.

Libel by Publication of Laudatory Article Concerning, see PLEADING, 4.

1. A physician is practising medicine within the state, within the meaning of a registry law, where he periodically appears at a hotel within the state and for compensation sees and prescribes for patients, although he lives in another state, where his prescriptions are filled and forwarded by express to the patient. State v. Davis, 4: 1023, 92 S. W. 484, 194 Mo. 485.

2. One who had many years previously been engaged in the practice of medicine within a state, which he subsequently left, is not, upon returning to the state, deprived of a vested right by being required to comply with the registration law as a condition to resuming such practice,—especially where his former practice had not been conducted in accordance with the laws of the state. State v. Davis, 4: 1023, 92 S. W. 484, 194 Mo. 485.

NOTES.

What constitutes practising medicine within the state (Case Note). 1023

PICKETING.

Injunction against, see INJUNCTION, 1, 2.

To follow one because he has taken employment at a particular place, to spy after him, to stop him and warn him, to put him in fear, to intimidate him or coerce him, are alike unlawful. Franklin Union No. 4 v. People, 4: 1001, 77 N. E. 176, 220 Ill. 355.

NOTES.

Picketing (Case Note). 302

PLEADING.

Estoppel to Deny Sufficiency of, see APPEAL AND ERROR, 17.

Manner of Raising and Settling Question as to Right to Recover Damages under, see TRIAL, 2.

Declaration or complaint.

1. Averments that the plaintiff, while standing on the platform at defendant's railway station, was struck by an engine and cars run and operated upon the defendant's railroad track, fail to disclose any facts which constitute negligence on the part of the defendant as a matter of law, irrespective of statute, and do not state a cause of action if based upon the common-law liability of defendant. Fremont, E. & M. Valley R. Co. v. Hagblad, 4: 254, 101 N. W. 1033, — Neb. —.

2. In an action based upon the statutory duty of a railroad company to a passenger who has not actually taken passage upon a train, where the existence of the relation of carrier and passenger is at issue, an averment that the plaintiff was a passenger pleads a mere conclusion of law, and is not sufficient to show that he is one of the class of persons to whom a remedy is afforded by the statute. Fremont, E. & M. Valley R. Co. v. Hagblad, 4: 254, 101 N. W. 1033, — Neb. —.

3. A petition alleging that the plaintiff purchased a ticket from the defendant

railroad company, without averring that the defendant agreed to carry him between the points specified in the ticket in consideration of the sum paid therefor, and which fails to charge a breach of contract, does not set forth an action *ex contractu*. Fremont, E. & M. Valley R. Co. v. Hagblad, 4: 254, 101 N. W. 1033, — Neb. —.

4. An exception of no cause of action should not be sustained, but there should be a trial on the merits, in a suit for libel brought by a physician belonging to a society condemning advertising in the public press as unethical, who charges the publication of an article regarding an imaginary and fabulous case which, while ostensibly praising him, was calculated to bring him into ridicule and contempt, and to place him on a level with advertising quacks. Martin v. Nicholson Pub. Co. 4: 861, 40 So. 376, 115 La. 979.

5. A cause of action for unlawful interference with plaintiff's occupation is not shown by an allegation that defendant communicated to intending employers the fact that plaintiff belonged to a labor organization and was a labor agitator, in the absence of anything to show that there was any connection between the statements and the failure to secure employment. Wabash R. Co. v. Young, 4: 1091, 69 N. E. 1003, 162 Ind. 102.

6. A complaint does not show such a malicious interference with plaintiff's business as to state a cause of action at common law which states that, in response to inquiries by an intended employer, a former employer made statements which, for all that appears from the complaint, were true; although it is also shown that plaintiff did not secure the position. Wabash R. Co. v. Young, 4: 1091, 69 N. E. 1003, 162 Ind. 102.

7. An amendment of a complaint to establish an interest in a mining claim is not a departure because it designates the interest for the first time as that of a cotenant. Davidson v. Fraser, 4: 1126, 84 Pac. 695, — Colo. —.

8. A general averment in an action by one against his former employer, that he prevented plaintiff from obtaining employment and caused him to be discharged from positions secured, states no cause of action, since it is too general. Wabash R. Co. v. Young, 4: 1091, 69 N. E. 1003, 162 Ind. 102.

9. An allegation in a bill, which, by reason of its vagueness and uncertainty, fails to show materiality of its subject-matter, need not be answered. Burkheimer v. National Mut. Bldg. & L. Asso. 4: 1048, 53 S. E. 372, — W. Va. —.

Amendment.

10. An amendment of a complaint to establish an interest in a mining claim is not objectionable because limited to the ground embraced in a conflict between two claims, whereas the original embraced the part which did not conflict, notwithstanding the averments are appropriate to support an adverse between hostile claims, whereas plaintiff relies on having been excluded from an interest in the premises as a cotenant. Davidson v. Fraser, 4: 1126, 84 Pac. 695, — Colo. —.

11. In an action by a company brought against its vendee for breach of a contract of sale which provided that it should only be considered binding on the seller when signed by one or more of its officers, an amendment to the complaint, alleging that the person who signed the contract with the vendee was the agent of the company, with full power to represent it in making the contract, and binding it thereto, and that the contract he made was fully ratified by the company, and accepted by it as binding on it, does not show that the contract was or ever became one whereby one party became bound to sell, and the other to buy, the specified property. Atlanta Buggy Co. v. Hess Spring & Axle Co. 4: 431, 52 S. E. 613, 124 Ga. 338.

Demurrer.

12. A complaint stating any cause of action that will put the defendant on his defense of the alleged wrongful act is not subject to demurrer. Sand Point v. Doyle, 4: 810, 83 Pac. 598, — Idaho —.

13. In an action by a servant to recover damages for personal injuries a demurrer is properly sustained to the petition where it appears that the servant voluntarily assumed to perform for his master duties so perilous as to subject him to imminent danger to life and limb and no facts are alleged which support the charge that the master was responsible for the resulting injury. Griffith v. Lexington T. R. Co. 4: 854, 53 S. E. 97, 124 Ga. 553.

14. The mere fact that a declaration, or count thereof, may set up elements that do not enter into the measure of damages, or greater damages than the case made legally entitles the plaintiff to recover, if any damages whatever may be recovered thereunder, though such damages be only nominal, does not make the declaration demurrable. Western U. Teleg. Co. v. Barlow, 4: 262, 40 So. 491, — Fla. —.

15. A bill for divorce charging both adultery and desertion, one offense calling for full divorce and the other for partial divorce, is not subject to a general demurrer, although the allegations charging adultery fail to name a *particeps criminis* or to give time, place, and circumstance. Trough v. Trough, 4: 1185, 53 S. E. 630, — W. Va. —.

Estoppel must be specially pleaded.

16. All acts, representations, and conduct relied on as an estoppel should be specially pleaded before evidence to establish the same can be received. Deming Invest. Co. v. Shawnee F. Ins. Co. 4: 607, 83 Pac. 918, — Okla. —.

NOTES.

Power to punish disobedience to orders in case by striking pleadings (Case Note) 1185

PLEDGE AND COLLATERAL SECURITY.
See also MORTGAGE, 2, 3.

1. A bank holding notes as collateral security cannot prevent their cancelation for fraud in their inception where it cannot suffer therefrom because the principal obligation is collectible. Hulett v. Marine Sav. Bank, 4: 1042, 106 N. W. 879, — Mich. —.

2. A contract assigning a liquor license as collateral security is not valid as against creditors where it is neither executed, acknowledged, filed, nor recorded, as required by law, and the license is left in possession of the assignor. Deggender v. Seattle Brewing & M. Co. 4: 626, 83 Pac. 898, — Wash. —.

POWER OF ATTORNEY.
See PRINCIPAL AND AGENT.

PRECEDENTS.
Presumption from Absence of, see COURTS, 3.

PRINCIPAL AND AGENT.
As to Agents of Insurance Companies, see INSURANCE, 27–30.
Agent's Right to Maintain Action, see ACTION OR SUIT.
Ratification of Agent's Contract, see CONTRACTS, 6.

Authority to employ a detective to investigate the affairs of a corporation is not conferred by a power of attorney executed by one of its stockholders to manage and control all the business relating to his personal estate, to dispose of personalty, lease realty, and collect debts, sign checks, and execute and deliver all other papers that "I myself could execute relating to my personal business and my personal estate." Thiel Detective Service Co. v. McClure, 4: 843, 142 Fed. 952, — C. C. A. —.

NOTES.

Right of agent to recover money erroneously paid to third person (Case Note). 363
Power of principal to ratify unauthorized contract of agent so as to raise cause of action in his own favor against the adverse party (Case Note). 431
Implied powers under power of attorney to transact business (Case Note). 843

PRINCIPAL AND SURETY.

1. A creditor entitled to resort to a principal debtor and a surety for the discharge of his claim owes no duty to the latter of active vigilance to collect the debt of the principal. The law imposes the duty of activity in such circumstances on the surety, rather than on the creditor. Fanning v. Murphy 4: 666, 105 N. W. 1056, 126 Wis. 538.

Surety's right to subrogation.

2. At all times after the maturity of an indebtedness, for the payment of which there is a principal and sureties, any one of the latter may pay off the same for his protection, and enforce his rights of subrogation and contribution. Fanning v. Murphy, 4: 656, 105 N. W. 1056, 126 Wis. 538.

3. If a surety, for his protection, pays off the debt for which he is liable, but does so in the form of a purchase, taking an assignment of the securities to himself, or to some third person for his use, having in mind, however, only the better protection of his rights of subrogation and contribution, the transaction amounts to a payment as to such rights. Fanning v. Murphy, 4: 666, 105 N. W. 1056, 126 Wis. 538.

4. A surety who, after the default of the principal debtor, pays the indebtedness for his own protection, without being coerced into doing so, makes such payment under compulsion within the rule that it is essential to the preservation of a surety's rights against his cosurety that he should pay the indebtedness under compulsion. Fanning v. Murphy, 4: 666, 105 N. W. 1056, 126 Wis. 538.

Discharge of surety.

5. It is essential to a valid extension of the time of payment of an indebtedness so as to discharge a surety that the transaction should involve all the essentials of a binding contract, effectually tying the hands of the creditor as regards enforcing payment of the debt until the expiration of the agreed time. There must be a reasonably definite time agreed upon and an agreed equivalent rendered for the extension and that equivalent must be a consideration. A mere request for the extension of the due date of a debt at the contract rate of interest, and consent thereto, are not sufficient. Fanning v. Murphy, 4: 666, 105 N. W. 1056, 126 Wis. 538.

6. Any valid extension of the time of payment of the debt at the request of the principal debtor without the consent of the surety discharges the latter. Fanning v. Murphy, 4: 666, 105 N. W. 1056, 126 Wis. 538.

7. A grantee of real estate who agrees, as part consideration for the conveyance, to pay the debt of his grantor, or that of some other person, to a third party, is the principal debtor as regards his immediate promisee, and the third party as well, so that any agreement made between the second promisor and the original promisee prejudicial to the original promisor, operates to discharge the latter the same as in any case of an agreement between the principal debtor and the creditor where there is a surety. Fanning v. Murphy, 4: 666, 105 N. W. 1056, 126 Wis. 538.

PROXIMATE CAUSE.
Where Negligence of Both Master and Fellow Servant Contributes to Injury, see MASTER AND SERVANT, 16.

1. Negligence is the proximate cause of an injury when it appears that "the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Schwarz-

schild & S. Co. v. Weeks, 4: 515, 83 Pac. 406, — Kan. —.

2. An injury that could not have been foreseen or reasonably anticipated as the probable consequence of negligence is not actionable. Western U. Teleg. Co. v. Schriver, 4: 678, 141 Fed. 538, — C. C. A. —.

3. An injury that is not the natural consequence of an act of negligence and that would not have resulted from it but for the interposition of some new, independent cause that could not have been anticipated, is not actionable. Western U. Teleg. Co. v. Schriver, 4: 678, 141 Fed. 538, — C. C. A. —.

PUBLIC BUILDING.

Validity of Contract to Locate at Certain Place, see ASSUMPSIT, 3.

QUIETING TITLE.

See JUDGMENT, 5.

QUITCLAIM DEED.

See ADVERSE POSSESSION, 4; DEEDS, 4.

RAILROADS.

As to Injuries to Employees on, see MASTER AND SERVANT.

Presumption of Care or Negligence of One Approaching Crossing, see EVIDENCE, 8, 9.

Presumption that Company Complied with Duty in Approaching Street Crossing, see EVIDENCE, 7.

Duty to Keep Turntable in Safe Condition for Trespassing Children, see NEGLIGENCE, 4.

Agent of Lessee as Agent of Lessor for Receiving Process, see WRIT AND PROCESS, 5.

1. A railroad company is not bound by declarations on a time-table put out by its lessee, where it is not shown to have had any knowledge of it, or to have authorized it in any way. Chicago, B. & Q. R. Co. v. Weber, 4: 272, 76 N. E. 489, 219 Ill. 372.

2. That safety gates where a railroad crosses a highway are open is not such an absolute assurance of safety that a traveler on the highway can proceed to cross the tracks without any precaution as to the possible approach of trains. Koch v. Southern California R. Co. 4: 521, 84 Pac. 176, — Cal. —.

3. Negligence of railroad employees in failing to whistle or ring a bell at a crossing is no excuse for negligence on the part of a person about to cross in failing to use his senses. Carlson v. Chicago & N. W. R Co. 4: 349, 105 N. W. 555, — Minn. —

4. That the train which killed one driving across a track at a crossing was an extra did not relieve either party to the collision from the duty of the exercise of care Carlson v. Chicago & N. W. R. Co. 4: 349, 105 N. W. 555, — Minn. —.

NOTES.

Duty of traveler going upon railroad crossing when gates are open (Case Note). 521

REAL PROPERTY.

NOTES.

Effect upon remote grantee of reservation or exception of mineral rights (Case Note). 477

Conveyance of fee by devise to one and his or her child or children (Case Note). 948

RECEIVERS.

1. A license to sell intoxicating liquors, which, under the terms of the statute, is transferable, and therefore has a money value, is an asset of the estate of the licensee to which a receiver for the benefit of his creditors is entitled. Deggender v. Seattle Brewing & M. Co. 4: 626, 83 Pac. 898, — Wash. —.

2. A receiver in chancery of an insolvent corporation, appointed by the United States circuit court sitting in one state, has no legal status to maintain a suit in another state for the recovery of a fund alleged to be held in trust for the benefit of creditors of the estate by a resident of the latter state, although the receiver is authorized to bring such suit by the court appointing him, and even though leave to institute the suit was granted by the court of the state in which it was brought, and the bill alleges that there are no creditors of the insolvent corporation in such state. Fowler v. Osgood, 4: 824, 141 Fed. 20, — C. C. A. —.

NOTES.

Power of receiver to sue out of jurisdiction of appointment (Case Note). 824

RELIGIOUS SOCIETIES.

Equity will aid a member of a church expelled for the fraudulent purpose of devoting the church property to purposes entirely foreign to that of the church organization, to preserve the trust property, notwithstanding the rules of the organization permit the expulsion of members without formal trial. Hendryx v. People's United Church, 4: 1154, 84 Pac. 1123, — Wash. —.

REPLEVIN.

Demand for possession is not necessary before bringing replevin against one who has bought personal property with notice of a defect in the title. Log Owners' Booming Co. v. Hubbell, 4: 573, 97 N. W. 157, 135 Mich. 65.

RESUME.

Giving a brief and comprehensive view of the points of special interest and importance in this volume. 1203

REVENUE LAWS.

Construction of, see STATUTES, 3.

REVIEW.

1. The trial court may grant a bill to review, because of newly discovered evidence, a decree which it has entered by the direction of the appellate court, in a case taken to the latter court for review. Safe Deposit & T. Co. v. Gittings, 4: 865, 62 Atl. 1030, 102 Md. 456.

2. Facts known to, but not remembered by, defendant in a suit, by reason of which a decree is rendered against him, cannot be the ground for a bill of review on behalf of his executors on the ground of newly discovered evidence. Safe Deposit & T. Co. v. Gittings, 4: 865, 62 Atl. 1030, 102 Md. 456.

NOTES.

Bill of review because of newly discovered evidence, after affirmance or reversal by appellate court (Case Note). 865

SALE.

Damages for Breach of Contract to Take Goods to be Manufactured, see DAMAGES, 19.

1. A purchaser of machinery cannot recoup against the purchase price the amount which he has been compelled to pay for personal injuries to a servant because the machinery did not fulfil its warranty. Edge Moor Iron Co. v. Brown Hoisting Mach. Co. 4: 858, 62 Atl. 1054, — Del. —.

2. One who has contracted to manufacture articles upon order according to specifications to be designated is not, in order to recover damages for breach of the contract, bound to proceed with the manufacture in the absence of order or specifications. Gardner v. Deeds, 4: 740, 92 S. W. 518, — Tenn. —.

3. One who receives and retains property bought under a contract cannot defeat an action for the price by showing that it did not exactly correspond with the requirements of the contract. America Theater Co. v. Siegel, Cooper, & Co. 4: 1167, 77 N. E. 588, 221 Ill. 145.

NOTES.

Right of buyer to retain goods and defeat action for price on discovering that goods do not comply with requirements of contract (Case Note.) 1167

SALOONS.

Liability of Saloon Keeper for Injury to Guest by Bartender, see MASTER AND SERVANT, 43.

The duty toward patrons of an innkeeper or passenger carrier does not rest upon a saloon keeper. Anderson v. Diaz, 4: 649, 92 S. W. 861, — Ark. —.

NOTES.

Liability, at common law, of a saloon keeper for personal injury to patron (Case Note). 649

SEAMEN.

1. The owner of a vessel is not liable to an injured seaman for expenditures made by others on his behalf which he is under no obligation to reimburse, in endeavoring to obviate the result of erroneous treatment by the master, after the cure had been effected, so far as the ordinary medical means extended. The Kenilworth, 4: 49, 144 Fed. 376, — C. C. A. —.

2. The owner of a vessel is not liable for the result of improper treatment of a sailor's fractured leg if the master concluded, in the exercise of his best judgment, that no fracture existed, which conclusion, under the circumstances, was not unreasonable, and the treatment afforded would have been neither negligent nor improper had the conclusion been correct. The Kenilworth, 4: 49, 144 Fed. 376, — C. C. A. —.

SEDUCTION.

Right to Consider, in Aggravation of Damages for Breach of Promise, see DAMAGES, 9.

Admissibility of Evidence of, in Breach of Promise Case, see EVIDENCE, 27, 28.

SET-OFF AND COUNTERCLAIM.

NOTES.

Recoupment, in an action for purchase price of machine, of damages on account of personal injuries due to defective construction (Case Note). 858

SHELLEY'S CASE.

See WILLS, 6.

SHIPPING.

See SEAMEN.

SLEEPING-CAR COMPANY.

Damages for Breach of Contract by, see DAMAGES, 5.

See also CARRIERS, 15–17.

SMOKE.

See NUISANCES.

SPECIFIC PERFORMANCE.

1. The mere fact that one of the parties who entered into a parol agreement to purchase real estate, who is to receive title to his share when he pays his portion of the purchase money, receives some rent collected by the other and makes some repairs, does not show such possession as will take the contract out of the statute of frauds and enable equity to decree its specific performance. Scheuer v. Cochem, 4: 427, 105 N. W. 573, 126 Wis. 209.

2. Specific performance of a parol agreement to convey lands will not be enforced unless the facts relied upon be established by clear and satisfactory proof. Baldwin v. Baldwin, 4: 957, 84 Pac. 568, — Kan. —.

3. In an action to enforce a parol agreement to convey lands, where possession is relied upon as part performance, to take the case out of the statute of frauds, the possession must be notorious, exclusive,

and continuous in character, and in pursuance of the contract. Baldwin v. Baldwin, 4: 957, 84 Pac. 568, — Kan. —.

4. The mere denial of a contract by one against whom it is sought to be enforced will not prevent its specific enforcement if the court is satisfied of the truth of the allegations of the complaint. Sprague v. Jessup, 4:410, 83 Pac. 145, — Or. —.

NOTES.

Specific performance; effect of defendant's denial of contract (Case Note). 410

STATE INSTITUTIONS.

A state hospital established to care for insane persons is not liable for torts committed by a person under its care who is permitted to assist in the work of the institution, notwithstanding the statute provides that it may sue and be sued. Leavell v. Western Ky. Asylum for Insane, 4: 269, 91 S. W. 671, — Ky. —.

STATUTE OF FRAUDS.

See CONTRACTS, 7-9; SPECIFIC PERFORMANCE, 1.

STATUTES.

Making it Unlawful to Keep or Own Cigarettes, see CIGARETTES.
Relating to Redemption from Tax Sale, see TAXES, 6, 7.
Construction of Statute Restricting Sale of Railroad Tickets, see TICKET BROKERS, 2.

1. A title, "An Act for the Protection of Discharged Employees," will not cover a provision for the protection of those who have voluntarily left their employment. Wabash R. Co. v. Young, 4: 1091, 69 N. E. 1003, 162 Ind. 102.

2. The rule that the judicial construction which has been given to a statute adopted from another state is deemed to be a part of it will not prevail if such construction would contravene the well-established policy prevailing on the subject in the adopting state. Smith v. Dayton Coal & I. Co. 4: 1180, 92 S. W. 62, — Tenn. —.

3. The general rule of construction applicable to repeals and revisions of revenue laws is that they are to have a prospective operation only, unless the intent of the legislature to the contrary clearly appears. Blakemore v. Cooper, 4:1074, 106 N. W. 566, — N. D. —.

STOCK EXCHANGES.

See EXCHANGES.

STREET RAILWAYS.

As Carriers, see CARRIERS, 3-6.

Right in streets; forfeiture.

Measure of Damages Recoverable by Abutting Owner for Construction of, in Highway, see DAMAGES, 12.
As Additional Servitude on Highway, see EMINENT DOMAIN, 3.
Injunction against Forfeiture of Franchise of, see INJUNCTION, 5.
Review of Decision of Municipal Court as to Forfeiture of Privilege of, see APPEAL AND ERROR, 23.

1. An ordinance, passed by the council of a town, granting to a street railway company the right to lay its track and operate its railway in the streets of the town, and accepted by the railway company, constitutes a contract between the town and such company, vesting title to such right or easement in it, unless the ordinance contains conditions precedent, compliance with which is requisite to the vesting of title. Wheeling & E. G. R. Co. v. Triadelphia, 4: 321, 52 S. E. 499, — W. Va. —.

2. Consent of the board of commissioners of a county to the operation of a street railway on and over a certain road within the county does not confer authority upon the railway company holding such permit to construct and operate its railway on and over such portion of the road as lies within the limits of a town in the county without the consent of the authorities of the town. Wheeling & E. G. R. Co. v. Triadelphia, 4: 321, 52 S. E. 499, — W. Va. — .

3. A street-railway license or privilege in a street may be forfeited for failure to lay planks of prescribed dimensions along the rails of its track in front of improved property, if the ordinance expressly gives the right to forfeit it for such cause. Wheeling & E. G. R. Co. v. Triadelphia, 4: 321, 52 S. E. 499, — W Va. —.

4. A declaration of forfeiture of a street railway privilege in a street by the council of a town, effected by repeal of the ordinance by which the privilege was granted, pursuant to a reservation of power so to do, for cause and after notice, has not the force and effect of a judicial determination of the existence of cause for forfeiture, and does not preclude a resort to the courts by the railway company for vindication of its rights. Wheeling & E. G. R. Co. v. Triadelphia, 4: 321, 52 S. E. 499,—W. Va. —.

5. The right granted by ordinance to a street railway company to lay its track and operate its railway in the streets of a town may be forfeited and lost by failure to comply with subsequent conditions, and, if the ordinance expressly provides for forfeiture as the penalty of noncompliance with conditions specified in it, substantial performance of the contract as a whole constitutes no answer to a proceeding to forfeit for failure to comply with such conditions, however slight their relative importance may be. The question of materiality is, in such case, withdrawn from the courts by the stipulations of the contract. Wheeling & E. G. R. Co. v. Triadelphia, 4: 321, 52 S. E. 499, — W. Va. —.

6. In exercising the right to declare the forfeiture of a street railway privilege in a street under an ordinance of a municipal corporation prescribing notice and specifica-

tion of cause as a necessary preliminary step, the officers of such corporation must deal fairly, openly, and frankly with the party whose rights they attempt to take away, and abstain from such conduct as will work a surprise upon him. In order to be inequitable and oppressive their conduct need not be actually fraudulent, and if it is oppressive or lacking in fairness equity will grant relief, however honest and sincere the parties attempting to forfeit may have been. Wheeling & E. G. R. Co. v. Triadelphia, 4: 321, 52 S. E. 499, — W. Va. —.

Injury to pedestrian.

7. One alighting from a street car, who passes behind it and into the path of cars traveling in the opposite direction, getting so close to a car approaching thereon, without exercising any care to determine whether or not such car is approaching, that a collision is inevitable, is guilty of such negligence that he cannot recover for injuries caused by such collision, although the car is negligently operated. Hornstein v. United Railways Co. 4: 729, 92 S. W. 884, 195 Mo. 440.

STRIKES.

See INJUNCTION, 1, 2; PICKETING.

SUBROGATION.

Surety's Right to, see PRINCIPAL AND SURETY, 2–4.

SUNDAY.

1. A loan of money on Sunday is void, and not subject to ratification on a subsequent day. Jacobson v. Bentzler, 4: 1151, 107 N. W. 7, — Wis. —.

2. A transaction consisting of a lending of money, represented by a check, on real-estate security, which takes place on Sunday, is not relieved from the operation of the Sunday law by the fact that the check is not collected, or the deed acknowledged, recorded, and transmitted to the lender until a subsequent day. Jacobson v. Bentzler, 4: 1151, 107 N. W. 7, — Wis. —.

TAXES.

Statute Changing Rule that Tax Sale Certificates in Deeds shall be Prima Facie Evidence of Regularity of Proceedings, see CONSTITUTIONAL LAW, 6.

Situs.

1. Certificates of deposit, notes, mortgages, and other evidences of indebtedness of residents of a state, held at the time of his death by the creditor at his domicil in another state, are not subject to the jurisdiction of the former state, within the meaning of its statute imposing a tax on collateral inheritances. Gilbertson v. Oliver, 4: 953, 105 N. W. 1002, — Iowa, —.

Tax sales; notice.

2. Executors are the "assigns" of their testator within the meaning of N. D. Laws 1891, chap. 100, p. 271, § 110, which authorizes the issuance of a tax deed to "the purchaser, his heirs or assigns." Blakemore v. Cooper, 4: 1074, 106 N. W. 566, — N. D. —.

3. A published notice of a tax sale is not insufficient because, under the general heading, giving the name of the addition in which the property to be sold is situated, and before the owner's name and the lot and block, are inserted subheads designating subdivisions of blocks, which, upon their face, do not apply to the property in question. Blakemore v. Cooper, 4: 1074, 106 N. W. 566, — N. D. —.

4. A notice of tax sale published in a newspaper, legally designated and otherwise qualified to make such publication, is not illegal because of the failure of the owner or manager to file with the county auditor an affidavit setting forth its qualifications, as required by § 2, chap. 120, p. 346, N. D. Laws 1890. Blakemore v. Cooper, 4: 1074, 106 N. W. 566, — N. D. —.

Redemption from tax sale.

5. The provisions of chapter 132, p. 376, N. D. Laws 1890, which required the service of notice in order to terminate the right of redemption from a tax sale, are still in force as to sales made under that chapter; and deeds issued without such notice are void. Blakemore v. Cooper, 4: 1074, 106 N. W. 566, — N. D. —.

6. The provisions of the North Dakota Revised Codes of 1895, and of chapter 120, p. 256, N. D. Laws 1897, and of chapter 166, p. 221, Laws 1901, relating to redemption from tax sales, are prospective, and do not apply to certificates issued under former statutes. Blakemore v. Cooper, 4: 1074, 106 N. W. 566, — N. D. —.

7. The right to redeem from a tax sale made under N. D. Laws 1890, chap. 132, p. 376, was a "right accrued," and was perpetuated as it existed under that act, including the provisions for terminating and exercising the right, by the saving provisions contained in § 2686, N. D. Rev. Codes 1895, that no right accrued shall be affected by the provisions of the Code, notwithstanding the repeal of the 1890 revenue laws by N. D. Rev. Codes 1895. Blakemore v. Cooper, 4: 1074, 106 N. W. 566, — N. D. —.

NOTES.

Liability of debt due from resident to nonresident to succession tax (Case Note). 953

TAX FERRET.

Power of County to Employ, see COUNTIES.

TELEGRAPHS.

Damages for Failure to Deliver Message, see DAMAGES, 11.

Acceptance of Contract by, see CONTRACTS, 1.

To whom care in sending message is due.

1. A telegraph company owes the duty to exercise ordinary care to receive and transmit genuine messages correctly to senders, to addressees, and to those who appear in the telegrams to be beneficiaries thereof, because injury to them may be

reasonably anticipated as the probable consequence of negligence. It owes a like duty to the undisclosed principals of senders, because the law charges it with knowledge that these principals are in privity with it, through contracts made by the senders, and injury to them from its negligence may be reasonably anticipated. Western U. Teleg. Co. v. Schriver, 4: 678, 141 Fed. 538, — C. C. A. —.

2. A telegraph company owes no duty to the undisclosed principal of the addressee of a telegram to exercise reasonable care to receive and transmit authorized messages only, because injury to him cannot be reasonably anticipated as the consequence of the lack of such care, and because such injury is the effect of an independent, intervening cause,—the act of the addressee, Western U. Teleg. Co. v. Schriver, 4: 678, 141 Fed. 538, — C. C. A. —.

Spurious message.

3. A spurious telegram purporting to be signed by a bank, and stating that it will pay the draft of a certain person for a specified amount, is not so indefinite that reliance and action may not lawfully be based upon it by the addressee. Bank of Havelock v. Western U. Teleg. Co. 4: 181, 141 Fed. 522, — C. C. A. —.

4. When facts or circumstances calculated to awaken inquiry or arouse suspicion in the mind of a person of ordinary prudence and intelligence regarding the authority of a person to send a message which he presents for transmission come to the notice of a telegraph company or of its acting operator, the exercise of reasonable care to transmit genuine and authorized messages only requires the party who receives the notice either to investigate and ascertain the authority of the sender before transmitting the message, or to communicate the facts and circumstances and the inquiry or suspicion to the addressee at or before its delivery. Bank of Havelock v. Western U. Teleg. Co. 4: 181, 141 Fed. 522, — C. C. A. —.

5. In the absence of notice of facts or circumstances which would awaken inquiry and arouse suspicion in the mind of a person of ordinary prudence and intelligence in a like situation regarding the authority to send it, of the party who presents a message for transmission, the exercise by a telegraph company and its operators of reasonable care to receive and transmit genuine and authorized messages only does not require them to investigate or ascertain the identity, or authority to send it, of the person who tenders a message for transmission, whether that message is in writing, or is spoken directly to the operator, or is communicated to him by telephone. Bank of Havelock v. Western U. Teleg. Co. 4: 181, 141 Fed. 522, — C. C. A. —.

6. An action against a telegraph company by the undisclosed principal of the addressee of a telegram, to recover damages resulting from the delivery of a false telegram, is an action of tort for a false representation in the nature of a false warranty, caused by the breach of the duty to exercise reasonable care to receive and transmit authorized messages only, and not an action on a contract. Western U. Teleg. Co. v. Schriver, 4: 678, 141 Fed. 538, — C. C. A. —.

NOTES.

Telegraph; duty of company to ascertain identity or authority of sender of message (Case Note). 181

Liability of telegraph company to undisclosed principal of sendee (Case Note). 678

TICKET BROKERS.

See also COMMERCE, 1; CONSTITUTIONAL LAW, 4, 5, 7.

1. The legislature may lawfully prohibit the transaction of a railroad-ticket brokerage business for the protection of travelers from fraud. State v. Thompson, 4: 480, 84 Pac. 476, — Or. —.

2. A statute prohibiting the sale of railroad transportation by persons having no certificate of authority, which must be provided by the railroads to their duly authorized agents, prohibits the transaction of ticket brokerage business. State v. Thompson, 4: 480, 84 Pac. 476, — Or. —.

NOTES.

Anti-ticket-scalping law (Case Note). 480

TRADEMARK.

Damages for Simulating, see DAMAGES, 1.

Injunction to Protect, see INJUNCTION, 3.

1. A valid trademark may be secured in a combination of the name of the place where the goods are manufactured with that of the manufacturer. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. 4: 960, 62 Atl. 499, 100 Me. 461.

2. The adoption by a corporation of the name "Auburn-Lynn Shoe Company" is an infringement of the property rights of another corporation doing business in the same place, which has adopted the name "Auburn-Lynn" as a trademark for shoes manufactured by it, without proof of fraudulent intent on the part of the former. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. 4: 960, 62 Atl. 499, 100 Me. 461.

TRADE NAME.

1. A mercantile company which has acquired a trade name in a particular locality is entitled to protection against unfair competition in its particular line of business by the use by a competitor of a name of such similar import as probably to deceive the public in such a manner as to work a fraud on the good will of such trade name. Regent Shoe Mfg. Co. v. Haaker, 4: 447, 106 N. W. 595, — Neb. —.

2. It is an infringement on a legally ac-

quired trade name to use in the same locality and in the same line of business another name of such similar import that the ordinary attention of persons or customers would not disclose the difference between the two names. Regent Shoe Mfg. Co. v. Haaker, 4: 447, 106 N. W. 595, — Neb. —.

3. To constitute an infringement on a trade name, it is necessary that the two places of business be in actual competition with each other; and where one of the concerns is engaged exclusively in retailing boots, shoes, and rubbers, and the other in the manufacture and wholesale jobbing of such goods, there is no such competition as will warrant an order restraining the latter at the suit of the former, although the names of the firms are of similar import, and although the retail firm had legally acquired its trade name before the organization of the wholesale company. Regent Shoe Mfg. Co. v. Haaker, 4: 447, 106 N. W. 595, — Neb. —.

4. Fraudulent intent is necessary to constitute unfair competition by the use of names in such a manner as to convey to the trade the impression that the goods of one manufacturer are those of another. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. 4: 960, 62 Atl. 499, 100 Me. 461.

5. Unfair competition in trade by the use of names in such a manner as to induce the trade to believe that the goods of one manufacturer are those of another is not avoided by merely substituting one name for another on the old trade literature so as not to obliterate the old name, but convey the impression of succession to the rights connected with it. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. 4: 960, 62 Atl. 499, 100 Me. 461.

NOTES.

Use of same trade name by wholesale and retail concerns dealing in same goods (Case Note). 447

TRESPASS.

In Removing Defendant Arrested on Mesne Process to Another County, see FALSE IMPRISONMENT, 1: WRIT AND PROCESS, 2.

TRIAL.

1. In a proceeding to determine adverse claims to real estate, instituted by one claiming under tax sale certificates and tax deeds, the issues are purely equitable, and the case is properly tried to the court without a jury, under N. D. Rev. Codes 1899, § 5630. Blakemore v. Cooper, 4: 1074, 106 N. W. 566, — N. D. —.

2. Questions as to the right to recover damages under the allegations of a declaration are properly raised and settled by objections to the testimony at the trial, or by instructions to the jury as to the law applicable to the points raised, or may be cause for reforming the declaration, under § 1043, Neb. Rev. Stat. 1892, when calculated to embarrass the fair trial of the case. Fremont, E. & M. Valley R. Co. v. Hagblad, 4: 254, 101 N. W. 1033, — Neb. —.

Reception and rejection of evidence.

3. An offer of evidence, not appearing in any way to be relevant and material, is properly rejected. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

4. It is not error to refuse to strike out testimony to which no objection is made at the time it is given. State v. Forsha, 4: 576, 88 S. W. 746, 190 Mo. 296.

5. The exclusion of testimony that one accused of homicide was not actuated by anything witness said or did is not error, where he has been permitted to detail all the facts; since it is a mere conclusion which it is the province of the jury to reach. State v. Forsha, 4: 576, 88 S. W. 746, 190 Mo. 296.

6. It is not error in the trial court, where a question of damages under the law of eminent domain is being tried, to reject evidence of offers to purchase other property in the neighborhood of the land in question, about the time condemnation proceedings were instituted. Blincoe v. Choctaw, O. & W. R. Co. 4: 890, 83 Pac. 903, — Okla. —.

7. Permitting proof of former convictions on the trial of one accused of crime before identifying the person convicted with the accused is not error, since the order of proof is within the discretion of the court. State v. Smith, 4: 539, 106 N. W. 187, — Iowa, —.

8. The testimony of a defendant who rests his case in chief without taking the stand, and offers himself as a witness after the state's evidence is in, is properly confined to rebuttal of the rebuttal evidence introduced by the state. State v. Forsha, 4: 576, 88 S. W. 746, 190 Mo. 296.

Comments and arguments of counsel.

9. On the trial of an action brought against a railroad company for loss alleged to have arisen from negligence, where defendant, in its answer, denied the negligence, and some two years thereafter, pending the trial of the case, amended its pleadings by setting up that the engineer in charge of its engine became suddenly insane at the time of the transaction complained of, and that it was thereby relieved from liability, counsel for the plaintiff can legitimately comment upon the time when this amendment was made and this defense set up. Central of Georgia Ry. Co. v. Hall, 4: 898, 52 S. E. 679, 124 Ga. 322.

10. It is not error to permit opposing counsel to read, and comment to the jury upon, interrogatories which the court has intimated that it intends to submit to them. McIntyre v. Orner, 4: 1130, 76 N. E. 750, — Ind. —.

11. A client cannot complain of prejudice in the action of the court in fining his counsel because of his failure to obey

the admonitions of the court as to the use of objectionable argument to the jury. Spears v. People, 4: 402, 77 N. E. 112, 220 Ill. 72.

12. Preventing counsel in an action for breach of promise of marriage from commenting, in his argument to the jury, upon the fact that a similar action had been brought by another woman against defendant, is not an abuse of discretion on the part of the trial court. Wrynn v. Downey, 4: 615, 63 Atl. 401, — R. I. —.

Questions for court or jury.

13. If the controlling facts in a case are fully stated, and of such a character as to exclude all reasonable and possible modifying inferences from the other circumstances of the case, the court may inform the jury whether or not they are sufficient in law to entitle plaintiff to recover. McIntyre v. Orner, 4: 1130, 76 N. E. 750, — Ind. —.

14. The question whether or not an employee assumed the risk of an injury from following the direction of his master need not be submitted to the jury, where the facts are admitted and the undertaking was so obviously dangerous that no prudent man would have undertaken it. Lindsey v. Hollerback & M. Contract Co. 4: 830, 92 S. W. 294, — Ky. —.

15. A nonsuit is properly granted in an action by an employee to recover damages for personal injuries sustained while operating a defective machine, as to the condition of which he had complained in the morning to the superintendent, who promised to repair it at noon, but did not do so, since the promise to repair is so definite and specific as to the time of performance that there is no question for the jury. Andrecsik v. New Jersey Tube Co. 4: 913, 63 Atl. 719, — N. J. —.

16. Where the time within which a master promised to repair a defective machine is clearly specified there is no question for the jury of a reasonable time for the performance. Andrecsik v. New Jersey Tube Co. 4: 913, 63 Atl. 719, — N. J. —.

17. The evidence does not justify the submission of the question of fraud on the part of the shipper to the jury in an action to recover for the death of a horse which was being transported, where the animal was, with others, openly shipped in such a way as to indicate that they were not common animals shipped in carload lots, and without any misrepresentation, concealment, or artifice, and the agent relied upon the making of a contract by which the horse was "released," but which was not binding under the law. Central of Georgia Ry. Co. v. Hall, 4: 898, 52 S. E. 679, 124 Ga. 322.

18. Where there is an issue of fact as to whether there was an actual bona fide valuation of the property transported by a carrier or a mere arbitrary effort to limit liability, the question is one for the jury; but where the written contract of affreightment shows that it falls within the latter description, and there is no issue of fact on that subject, it is proper for the court to construe the contract. Central of Georgia Ry. Co. v. Hall, 4: 898, 52 S. E. 679, 124 Ga. 322.

19. Whether the mail departs at such an unreasonably early hour in the day as to excuse a person receiving a check on a fund in the hands of a bank in another place from forwarding the check on the day after its receipt by such mail depends upon all the circumstances of the transaction and the situation of the parties, and where the facts are free from controversy and doubt, it is a question of law for the court. Lewis, H. & Co. v. Montgomery Supply Co. 4: 132, 52 S. E. 1017, — W. Va. —.

20. The court cannot take from the jury an action by a servant to recover from his employer for injuries due to the act of another servant, unless the evidence proves conclusively that the relation of fellow service existed between the two employees. Illinois Steel Co. v. Ziemkowski, 4: 1161, 77 N. E. 190, 220 Ill. 324.

21. Whether a stop by a train of about a minute at a station allowed reasonably sufficient time to a passenger to enable him to alight with safety is a question for the jury to determine under the circumstances in evidence. Chicago, R. I. & P. R. Co. v. Wimmer, 4: 140, 84 Pac. 378, — Kan. —.

22. Whether a master who promised generally or inferentially to repair a defective machine failed to do so within a reasonable time may be a question for the jury. Andrecsik v. New Jersey Tube Co. 4: 913, 63 Atl. 719, — N. J. —.

23. In an action to recover damages for the death of a horse being transported under a special contract by which the common-law liability of the common carrier was so modified that the carrier was liable for injuries arising only from fraud or gross negligence, the carrier may defend by pleading and proving that its engineer upon the train on which the animal was shipped suddenly became insane and caused the engine to collide with the train; and it will be for the jury to say whether the carrier did not know or could not, by the exercise of proper care, have known of it, and whether it exercised due diligence in view of the situation and circumstances disclosed by the evidence. Central of Georgia Ry. Co. v. Hall, 4: 898, 52 S. E. 679, 124 Ga. 322.

24. In the trial of one indicted for murder, where the evidence adduced to establish the homicide presents two conflicting theories of fact, one based upon circumstances indicating malice and the other upon warranted inferences which negative its existence, then it becomes a question of fact, to be decided by the jury, as to which one of these inconsistent theories is in accord with the real truth of the occurrence. Mann v. State, 4: 934, 53 S. E. 324, 124 Ga. 760.

25. Whether or not a person is negligent in entering an overcrowded car to become a passenger at the direction of the conductor is a question for the jury.

Alton Light & T. Co. v. Oller, 4: 399, 75 N. E. 419, 217 Ill. 15.

26. Whether or not logs left for many years upon a rollway had been abandoned, so that title to them was lost, is a question for the jury. Log Owners' Booming Co. v. Hubbell, 4: 573, 97 N. W. 157, 135 Mich. 65.

27. Whether a carrier's agent is acting within the line of his employment or not in shooting a person who has used abusive language to him concerning storage charges on baggage is a question for the jury. Daniel v. Petersburg R. Co. 4: 485, 23 S. E. 327, 117 N. C. 592.

28. A pile of slippery lumber 6 or 7 feet high and only 3 or 4 feet wide, without any crosspieces, which falls upon and injures an employee, cannot be said, as a matter of law, not to be defective so as to render the working place unsafe. McCormick Harvesting Mach. Co. v. Zakzewski, 4: 848, 77 N. E. 147, 220 Ill. 522.

29. Under a contract by which one undertakes to make a crop on another's land for a certain portion of it after paying for supplies furnished to enable him to make it, it is a question for the jury whether or not supplies furnished were needed to make the crop. Bourland v. McKnight, 4: 698, 96 S. W. 179, — Ark. —.

Instructions.

30. A judge may state to the jury his memory of the evidence. Haskell v. Cape Ann Anchor Works, 4: 220, 59 N. E. 1113, 178 Mass. 485.

31. An instruction which ignores an issue which there is evidence to support is properly denied. Alton Light & T. Co. v. Oller, 4: 399, 75 N. E. 419, 217 Ill. 15.

32. An instruction is properly refused which assumes a fact which, under the evidence, is an issue for the jury to decide. Lyon v. United Moderns, 4: 247, 83 Pac. 804, — Cal. —.

33. A court, in charging a jury, is not bound to cover all the questions or phases in a case in one instruction. Pittsburgh, C. C. & St. L. R. Co. v. Higgs, 4: 1081, 76 N. E. 299, 165 Ind. 694.

34. An instruction permitting the jury to find for plaintiff in a slander case for charging a woman with fornication, if they find that defendant used such words as amount to charging plaintiff with fornication, without limiting them to those set out in the complaint, is not misleading if the evidence shows the use of no words except those set out. Miller v. Nuckolls, 4: 149, 91 S. W. 759, — Ark. —.

35. An instruction that "the defendant is a competent witness in his own behalf, and that they have a right to consider his evidence, and are to give it such faith and credit as they may believe it entitled to receive," when considered in connection with other instructions given, did not imply that any consideration of defendant's evidence was optional with the jury. State v. Buffington, 4: 154, 81 Pac. 465, 71 Kan. 804.

36. An instruction in a murder trial that "if the jury believe from the evidence that at the time of the shooting in question the deceased made an attack upon the defendant with a chair, under such circumstances as to create in the mind of a reasonably and ordinarily prudent man a belief that he was in danger of being killed or of receiving great bodily harm immediately; and if the jury further believe from the evidence that the defendant at the time did honestly believe that he was in imminent danger of receiving great bodily harm, and in good faith shot to protect himself therefrom; and if you further believe that the defendant, acting in good faith, did not fire any more shots than he had a reasonable right to believe, under the circumstances in which he was placed, was necessary to protect himself or his wife from death or great bodily harm, then you should find the defendant not guilty,"—is pertinent and correct. State v. Buffington, 4: 154, 81 Pac. 465, 71 Kan. 804.

37. An instruction covering several propositions of law is properly refused where the court adopts the better practice of giving each important proposition in a single instruction, and arranging all in logical order. State v. Buffington, 4: 154, 81 Pac. 465, 71 Kan. 804.

38. Instructing the jury that one put in sudden peril by another's negligence is not guilty of contributory negligence if he acts as a prudent person "might" act under the circumstances is not erroneous if used in connection with language requiring that he act "naturally" and in a manner "expected of ordinarily cautious persons." McIntyre v. Orner, 4: 1130, 76 N. E. 750, — Ind. —.

39. An instruction in a condemnation proceeding that the law does not permit the jury to fix speculative, boom, or fancy values upon the property sought to be taken, but that they should determine the reasonable market salable value of the property as if the owner were offering to sell on usual terms to a purchaser, is not erroneous because of the use of the word "boom," Blincoe v. Choctaw, O. & W. R. Co. 4: 890, 83 Pac. 993, — Okla. —.

40. In a condemnation proceeding an instruction that the jury, in determining the reasonable market value of the property sought to be taken, have a right to exercise their own judgment, based upon their inspection and observation of the premises, together with all the other evidence, is not erroneous. Blincoe v. Choctaw, O. & W. R. Co. 4: 890, 83 Pac. 903, — Okla. —.

41. It is proper to charge the jury in a trial for murder that the law presumes every homicide to be malicious until the contrary appears from circumstances of alleviation, of excuse, or justification, and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the jury, unless they appear from

the evidence produced against him. Mann v. State, 4: 934, 53 S. E. 324, 124 Ga. 760.

42. An instruction in a trial for murder that the jury cannot act upon their private or personal knowledge of the question at issue, but must try the case upon the evidence and the law applicable thereto, using the argument of counsel to assist in understanding the law as applicable to the evidence, is not too restrictive of the use which the jury may make of the argument of counsel. Mann v. State, 4: 934, 53 S. E. 324, 124 Ga. 760.

Findings.

43. Under a statute requiring the judge to state in his decision separately the facts found by him and his conclusions of law thereon, such findings should cover singly and in concise language the pleaded facts without any addition by way of argument or recitation of evidence. Fanning v. Murphy, 4: 666, 105 N. W. 1056, 126 Wis. 538.

TRUSTS.

See also WILLS, 5–8.

NOTES.

Stock exchange; resulting trust in favor of one who purchases seat in name of another (Case Note). 435

TURNTABLES.

Injuries to Children Playing on, see NEGLIGENCE, 4.

UNFAIR COMPETITION.

See DAMAGES, 1; TRADE NAME.

USURY.

Conflict of Laws as to, see CONFLICT OF LAWS, 2.

VENDOR AND PURCHASER.

What Constitutes Sale So as to Prevent Attachment of Land for Debt of Heir of Grantor, see ATTACHMENT, 1, 2.

Time Allowed for Redemption from Judgment Foreclosing Land Contract, see JUDGMENT, 8.

1. The foreclosure of a land contract cannot be prevented by one who has never been ready and willing to perform, on the ground that the vendor had no title to a small part of the property which he had contracted to convey, where there was nothing to show that the vendor was not at all times ready and willing to furnish such title. Dickson v. Loehr, 4: 986, 106 N. W. 793, 126 Wis. 641.

Vendee's right to marketable title.

2. A purchaser will not be compelled to take a title when there is a defect in the record title which can be cured only by resorting to parol evidence. Howe v. Coates, 4: 1170, 107 N. W. 397, — Minn. —.

3. A title open to reasonable doubt is not marketable, and the court cannot make it so by passing upon an objection depending upon a disputed question of fact, or a doubtful question of law, in the absence of the party in whom the outstanding right or claim is vested. Howe v. Coates, 4: 1170, 107 N. W. 397, — Minn. —.

4. A title to real estate is not marketable when so defective as to affect the value of the land or interfere with its sale. Howe v. Coates, 4: 1170, 107 N. W. 397, — Minn. —.

5. A contract to purchase real estate, which provides that the vendors shall furnish an abstract of title within 15 days, which the vendee is to examine, and that in case he finds the title or the record title defective, unmerchantable, or encumbered, he is to notify the vendors thereof within a reasonable time, and, as near as may be, within 15 days, after which the vendors shall cure such defects as speedily as possible, and, at all events, before a certain date, and that upon their failure to do so the vendee may, on written notice, terminate the agreement, and which further provides that if the vendee fails to consummate the purchase he shall forfeit a designated sum which he has paid,—calls for a title of record merchantable and unencumbered, and does not intend that the money shall be forfeited if the vendor fails to furnish such a title and the vendee thereafter gives notice that he elects to terminate the contract. Howe v. Coates, 4: 1170, 107 N. W. 397, — Minn. —.

NOTES.

Vendor and purchaser; what is a marketable title (Case Note). 1170

WATERS.

As to Fisheries, see FISHERIES.

NOTES.

Right of way on shore (Subject Note). 872

WILLS.

As to Effect of Lapse of Time of Right to Recover Legacy, see LACHES.

1. A bequest of a certain amount, with power to select all or any part of it in notes belonging to the testator, becomes, upon the exercise of the power of selection, specific. O'Day v. O'Day, 4: 922, 91 S. W. 921, 193 Mo. 62.

2. The blending of real and personal estate in the residuary clause of a will is of itself sufficient to charge the residuary real estate with the payment of legacies. O'Day v. O'Day, 4: 922, 91 S. W. 921, 193 Mo. 62.

3. A provision in a will that, in case of the death before majority of either of two of testator's children, his share should go to the other, is not defeated by a provision vesting the control of such shares in trustees, with the expressed desire that the real estate should not be disposed of unless absolutely necessary; since such provision does not confer a power of sale. O'Day v. O'Day, 4: 922, 91 S. W. 921, 193 Mo. 62.

4. A devise after the death of a life tenant, of testator's property to his children,

naming them, "and their children forever," will vest the fee in the first takers, the word "children" being given the effect of "heirs," where another construction would result in partial intestacy, and postpone the vesting of the estate contrary to the policy of the law. Strawbridge v. Strawbridge, 4: 948, 77 N. E. 78, 220 Ill. 61.

Gifts in trust.

5. A devise of land to trustees for a period of years, at the expiration of which it gives it to testator's heirs, vests a present estate in the heirs, subject to the chattel interest of the term. Hall v. Waterman, 4: 776, 77 N. E. 142, 220 Ill. 569.

6. A provision in a will vesting a fund in a trustee with directions to pay the income to testator's son until he attains a certain age, when the fund shall become his absolutely, that in case the son dies before reaching such age "it shall go to his heirs," does not, under the rule in Shelley's Case, vest the title in the son so as to defeat the testator's intention since that rule when applied by analogy to gifts of personalty must yield to the expressed intention of the testator; but the provision will be regarded as one of purchase or substitution. Bennett v. Bennett, 4: 470, 75 N. E. 339, 217 Ill. 434.

7. A bequest to a trustee of a fund to be invested and the income paid to testator's son until he reaches a certain age, when the fund shall become his absolutely, does not vest the title in the son until he reaches the prescribed age; and the fact that the fund is at once segregated from the estate and devoted to the particular trust will not defeat the intention of the testator. Bennett v. Bennett, 4: 470, 75 N. E. 339, 217 Ill. 434.

8. Refusal of a trustee to accept the trust will not vest a legacy in the beneficiary if the entire beneficial interest was not in him according to the terms of the will. Bennett v. Bennett, 4:470, 75 N. E. 339, 217 Ill. 434.

Contribution between legatees and devisees.

9. Where a testator directs the payment of his debts, and then makes specific devises and bequests among the natural subjects of his bounty, undertaking to make them as equal as practicable, the court should not, in case the estate proves insufficient to pay the debts and satisfy the devises and bequests in full, make a distinction between the recipients of testator's bounty, but all should be required to contribute ratably so as to preserve the equality. O'Day v. O'Day, 4: 922, 91 S. W. 921, 193 Mo. 62.

10. If the fund out of which a demonstrative legacy is to be paid is ample to satisfy it, it will stand on the same footing as specific legacies, with respect to abatement in case the residue of the estate is not sufficient to pay the debts. O'Day v. O'Day, 4: 922, 91 S. W. 921, 193 Mo. 62.

NOTES.

Effect of provision in bequest of personalty that, upon the death of the first taker, the property shall go to his "heirs," to create an absolute title in him (Case Note). 470

When beneficiary deemed to have elected to take under a will assuming to dispose of his property (Case Note). 1065

WITNESSES.

Restricting Testimony of Defendant Offering Himself as Witness, see TRIAL, 8.

1. Persons familiar with the facts are competent to testify that at the time of an accident on a railroad the road was being operated by a lessee. Chicago, B. & Q. R. Co. v. Weber, 4: 272, 76 N. E. 489, 219 Ill. 372.

Contradicting and discrediting.

2. After the accused in a murder trial has testified in his own behalf he may, on cross-examination, be asked questions as to his past life and conduct which would tend to impair his credibility as a witness. State v. Buffington, 4: 154, 81 Pac. 465, 71 Kan. 804.

3. The principal actor in a homicide charged to have been committed by the concerted action of several strikers, who is called as a witness for one of them, may be contradicted by testimony that, in reply to a statement in his presence that the strikers could not win by violence, he stated that that was the only way to win, as tending to refute the theory of self-defense, although made in the absence of accused after the homicide. State v. Forsha, 4: 576, 88 S. W. 746, 190 Mo. 296.

4. One jointly accused of murder with one on trial, who is called as a witness on his behalf, who admits, on cross-examination, that he has pleaded guilty to a charge of common assault, may be shown by the record to have pleaded guilty to an assault with intent to kill, as tending to affect his credibility. State v. Forsha, 4: 576, 88 S. W. 746, 190 Mo. 296.

5. A witness is not to be discredited because of a discrepancy as to a wholly immaterial matter. Mann v. State, 4: 934, 53 S. E. 324, 124 Ga. 760.

Impeaching evidence of deceased witness.

6. On a subsequent trial the evidence of a deceased witness, taken at a second trial, cannot be impeached by showing that some of his statements on the witness stand at the first trial are inconsistent therewith, where, upon the second trial, his attention was not directed to such statements, and he was given no opportunity to explain the alleged discrepancies. Omaha Street R. Co. v. Boesen, 4: 122, 105 N. W. 303, — Neb. —.

WRIT AND PROCESS.

1. To make return of a writ "according to law," as directed by its terms, the officer must state substantially all his doings within the scope of proper execution of it. Gibson v. Holmes, 4: 451, 62 Atl. 11, 78 Vt. 110.

2. An officer who, without authority of

plaintiff, upon arresting one on mesne process in a civil action, takes him to another county for safe-keeping, when the statute provides for his confinement in the county where arrested, is a trespasser *ab initio*, notwithstanding the writ follows the ancient general form. Gibson v. Holmes, 4: 451, 62 Atl. 11, 78 Vt. 110.

3. An officer who does not make due return of a writ as commanded by its terms cannot justify under it, unless defendant has waived such return. Gibson v. Holmes, 4: 451, 62 Atl. 11, 78 Vt. 110.

4. A justice has no jurisdiction to permit the amendment of a return to a writ in an action which was abandoned before being entered in court. Gibson v. Holmes, 4: 451, 62 Atl. 11, 78 Vt. 110.

Who is agent to receive service.

See also *infra*, 9.

5. The servants or agents of the lessee of a railroad are not the agents of the lessor for the purpose of receiving service of process in actions for personal injuries. Chicago, B. & Q. R. Co. v. Weber, 4: 272, 76 N. E. 489, 219 Ill. 372.

Service by publication on domestic corporation.

Validity of Personal Judgment against Corporation Based on, see JUDGMENT, 3.

6. Service by publication upon a domestic corporation which has failed to provide officers or agents upon whom other service may be had constitutes "due process of law." Clearwater Mercantile Co. v. Roberts, J. & R. Shoe Co. 4: 117, 40 So. 436, — Fla. —.

Service on foreign corporation.

7. The various methods provided by the Kansas statute for obtaining service of process on foreign corporations are cumulative. Federal Betterment Co. v. Reeves, 4: 460, 84 Pac. 560, — Kan. —.

8. One who has exclusive supervision and control of some department of the corporation's business, the management of which requires of such person the exercise of independent judgment and discretion, and the exercise of such authority that it may be fairly said that service of summons upon him will result in notice to the corporation, is a "managing agent," within the meaning of the statute providing for the service of summons upon a managing agent of a foreign corporation. Federal Betterment Co. v. Reeves, 4: 460, 84 Pac. 560, — Kan. —.

NOTES.

Writ; validity of statutes authorizing constructive or substituted service on domestic corporation (Case Note). 117

Service of process on servant or agent of lessee of railroad corporation (Case Note). 272

Who is managing agent of foreign corporation for purposes of service of process (Case Note). 460

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